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THE
ENGLISH REPORTS

VOLUME IV

HOUSE OF LORDS

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PREFATORY NOTE



IN the original paging of 2 Bligh, after page 466, the numbers of pages 463 to 466 were erroneously repeated. After page 478, the mistake was rectified by the omission of the numbers of pages 479 to 482 inclusive. In 3 Bligh, N.S., the numbers of pages 159 and 160 do not appear, and those of pages 175 and 176 are repeated after page 176. The original pagination has been left unaltered.

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SCOTLAND.

APPEAL FROM THE COURT OF SESSION (FIRST DIVISION).

LADY ESSEX KER, and LADY MARY KER,—*Appellants*; JOHN WAUCHOPE, Esq. Writer to the Signet; the Rev. CHARLES BAILLIE; Sir WILLIAM SCOTT, of Ancrum, Baronet; and Sir HENRY HAY M'DOUGALL, Baronet,—*Respondents* [Feb. 17, May 3, 1819].

[Commented on in *In re Vardou's Trusts* 1884, 28 Ch.D. 124, at p. 131; *In re Chesham* 1886, 31 Ch.D. 466, at p. 473; *Dundas v. Dundas* 1830, 4 Wils and Sh. 160, at p. 465; *Brcadalbane's Trustees v. Buckingham (Duchess of)* 1810, 2 Dunlop 731, at p. 744; *Harvey's Trustees v. Harvey's Trustees* 1862, 1 Macph. 345, at p. 353; *McFarlane's Trustees v. Oliver* 1882, 9 Rettie 1138, at pp. 1142, 1156; *Hewit's Trustees v. Lawson* 1891, 18 Rettie 793, at p. 799. See also *Raouliffe (Lord) v. Parkyn* 1818, 6 Dow 149.]

A. by a testament made on death-bed, bequeaths all his real and personal estates in trust to be sold. The interest of the residue he directed to be paid to B. and C. his heirs-at-law and next of kin, during their lives, etc. The principal of the residue he gave to D. etc. B. and C. reduce the death-bed disposition. The Court held that they could not claim the life-interest given to them, either under the testamentary instrument or as next of kin, for default of disposition. But that the deed not being ab-[2]solutely void, according to the law of Scotland, was properly admitted in evidence against them to shew the testator's intention, and that D. etc. the residuary legatees, must be compensated out of the life-interest, given to B. and C. for the disappointment occasioned by their act.

John, the late Duke of Roxburgh, by a testamentary disposition, dated the 4th of October, 1790, conveyed his whole unentailed real estate, and his personal estate, to himself, and his heirs whomsoever of his body, whom failing, to the Appellants equally between them and the heirs of their bodies; and failing either of them, to the survivor and the heirs of her body; whom failing, to his heirs of tailzie succeeding to the Earldom and estate of Roxburgh, under burthen of the payment of his debts and funeral expenses, and of all legacies which he might bequeath. On the 5th of November, 1803, the Duke executed another deed, whereby, without revoking the former for the better settlement of his affairs, in the event of his death, agreeably to the instructions given, or to be given by him, in relation thereto, he granted and disposed to the Respondent, John Wauchope, and to James Dundas, Clerks to the Signet, his whole unentailed real estate, (describing particularly all the lands and heritages he held in fee simple,) together with his personal estate, in trust, for the uses, ends, and purposes specified in the following words:—"To the end that my lands, houses, and other heritages, before conveyed, now belonging, or which shall belong to me at my death, may be sold, either in whole or in part, at the discretion of [3] my trustees; and that the produce and prices thereof may be applied to the purposes after-mentioned:—In the first place, for the payment of my death-bed and funeral

expenses, and of the expenses of management and executing this trust: Secondly, for and in payment of all the just and lawful debts, which shall be owing by me at my death: Thirdly, for payment and satisfaction of all obligations, legacies, annuities, donations, or other bequests granted, or to be granted, by me to any person or persons whatsoever, by any bond, deed, missive, memorandum, codicil, or other writing whatsoever, expressive of my will and intention, executed at any time of my life, and even upon death-bed: And lastly, the whole residue, remainder, and surplus, of my said estate and effects, shall be conveyed and made over or applied and employed by my said trustees or trustee acting for the time, to and in favour of such person or persons, or for such uses and purposes, as I have directed, or shall direct, by any deed, missive, memorandum, or other writing, executed, or to be executed, by me to that effect." The trust disposition also, in the events of the trustees not accepting or declining to execute the trust, makes the following provision:—"Then, and in either of these cases, the lands and other heritages and debts, and sums of money, and other *subjects* and effects, hereby disposed, shall fall and belong to such person or persons, and be applied to such uses and purposes as I have directed, or shall by any deed, [4] missive, memorandum, codicil, or other writing of the date hereof, or of any other date or dates, direct and appoint: and failing such appointment, then to the person or persons whom I shall appoint to be my residuary legatee or legatees." By a subsequent clause, the trust-deed nominates the trustees, and failing them, the residuary legatees, to be the Duke's executors and administrators of his estate and effects, excluding all others his nearest of kin and executors from these offices. By a writing executed at the same time with the last-mentioned trust-deed, the Duke declared, "That in the event of his sudden death, or in the event that he should be prevented from executing a deed of instructions, it was his will, that the deed which he formerly made in favour of the Appellants, should be carried into effect so far as regarded them."

In the beginning of March, 1804, the Duke fell sick with the complaint of which he died. On the 19th of the same month, he executed an instrument, by which he directed the Respondent, John Wauchope, and James Dundas, as trustees named in the settlement of the 5th of November, 1803, to sell and dispose of his whole (un-entailed) real estate in Scotland, and his house in St. James's-square, London, and from the produce thereof, and of his personal estate, after payment of certain annuities and legacies in the deed specified, and of his debts, funeral charges, and expenses of management, he authorized them to invest the whole residue and remainder of the property thereby bequeathed, [5] in the public funds, or upon real security, in Scotland, and he thereby "directed his trustees to pay annually the dividends and interest, equally between the Appellants; and failing either of them, to the survivor, during their lives, or that of the survivor; and upon the death of the survivor, to pay over the residue to Sir John Scott, (father of the Respondent, Sir William Scott,) and the Respondents Charles Baillie Hamilton, and Sir Henry Hay McDougall, and their executors and assignees, in the proportions therein specified." The Duke died without issue upon the day on which this last mentioned instrument was executed, leaving the Appellants his heirs-at-law and sole next of kin. Immediately after his death, the Appellants brought an action in the Court of Session, to reduce this deed; and obtained a judgment, by which it was found, that being executed on death-bed, it was inept, so far as it conveyed lands; in consequence of which, the deed was set aside, and the Appellants' right to the lands, as heirs-at-law, established upon appeal to the House of Lords. [5 Pat. 547.]

After a lapse of some years, the Respondent Wauchope, who alone had accepted and acted in the trust, brought an action of multiple-poinning, for the purpose of ascertaining, judicially, the respective rights of the parties claiming adverse interests in the trust-fund remaining in his hands. When the cause was brought before the Lord Ordinary, he ordered the parties to state their respective claims in writing. The Appellants claimed a life-interest in the residuary personal estate in the precise terms of the trust-deed: or [6] if the Court should be of opinion, that, having rejected and annulled that deed in one respect, they could not avail themselves of any of its provisions, then, in the character of the Duke's *next of kin*, they claimed the profits of the residue of his property during their lives, and the life of the survivor, as a subject not disposed of by his will. On the other hand, the Respond-

ents, Hamilton and McDougall and Sir J. Scott, insisted, that they were not only entitled to the capital of the funds after the death of the Appellants, and the survivor of them, but that they were entitled to the profits during the lives of the Appellants: upon the ground that the Appellants having reprobated the deed so far as it contemplated the disposal of land in Scotland, could take no benefit under that deed.

Upon these respective statements of claims, the Lord Ordinary, having heard Counsel, pronounced an interlocutor, by which, after reciting, to the effect before stated, the substance of the deeds dated the 14th of October, 1790, the 5th of November, 1803, with the writing or signed declaration of the same date, and the principal deed in question of the 19th of March, 1804; and after finding as facts the signature and execution of these several instruments, the action brought by the Appellants, and the consequent reduction of the deed made on death-bed, in so far as it related to the whole of the heritable subjects, expressed to be conveyed by it, which were descendible to the Appellants as heirs *alioqui successuræ*, under the titles thereof, which stood in the person of John, Duke of Roxburgh; the in-[7]-terlocutor proceeds to find, "that the Appellants having thus challenged and reduced the death-bed deed, in so far as it affected the heritage, cannot avail themselves of that deed, by claiming the life-rent of the moveables under it;" and finally, it is found and declared, "That although by the terms of the settlement, the residuary legatees are entitled to claim the residue of the effects vested in the trustees, after the death of Ladies Essex and Mary Ker, (the Appellants,) and the survivor of them; yet, that the life-rent of these subjects *does not belong* to the Ladies Ker as the Duke's executors, he having appointed the trustees his executors, and having appointed the whole residue of his fortune to be paid at a certain period to the residuary legatees, and therefore, the Ladies Ker can have no legal claim to the life-rent of these effects, except by this settlement, (the trust-deed of the 19th of March, 1804,) which they cannot approbate and reprobate; therefore, repels the claim of Ladies Essex and Mary Ker, to the life-rent of the subjects in *medio*, and *decerns*; but before further answer as to the claim of the residuary legatees, appoints them to be heard on the question, Whether by the terms of the Duke's settlement, as the residue is declared not to be payable until after the death of his sisters, they are entitled to demand payment thereof immediately?"

Against this interlocutor the Appellants gave in a representation, by which, in addition to their former arguments, they contended, that John, Duke of Roxburgh, was domiciled in England; and that [8] his moveable succession must, therefore, be regulated by the law of England; which, as they represented, acknowledged no such principle as that applied to the case by the Lord Ordinary. Upon considering this representation, with answers, his Lordship pronounced the following interlocutor.

"The Lord Ordinary having considered the representation, and the answers thereto, together with the whole process, in respect that the plea now maintained, as drawn from the English law, which it is said does not admit of the doctrine of approbate and reprobate, does not apply to this case, supposing the fact as to the law of England to be as there stated; seeing that John, Duke of Roxburgh, being a Scottish nobleman, and his whole landed property being in Scotland, and that being the place of his residence for the greater part of the year, his domicile must be held to have been in Scotland, notwithstanding his having, during the sitting of Parliament, an occasional residence in London, where he died; and in respect the pursuers *only claim* the life-rent in question of the residue of the Duke's fortune, *by virtue of the deed* of 1801, which they have actually challenged, and set aside in part, refuses the representation, and adheres to the interlocutor complained of."

The Appellants submitted these interlocutors to the review of the first division of the Court. But the Court adhered to the interlocutor of the Lord Ordinary. By another petition to the same division, the Appellants reclaimed against the in-[9]-terlocutor of the Court; but the prayer was refused, and the Court adhered to their former interlocutor. Against these several interlocutors, the present appeal was presented.

For the Appellants—Mr. Wetherell and Mr. Abercrombie. The doctrine of *approbate and reprobate* is not clear in application or principle. It has been treated as a result of *homologation*: as where a party has adopted an instrument and taken some benefit under it, he cannot afterwards question its validity; he must co-operate,

if necessary, to effectuate all the provisions of that instrument. In *Gainer v. Cunningham* (Fac. Coll. Jan. 17, 1758) the decision turned upon very special circumstances. The case in question is different. According to the doctrine as it appears in the text writers on the law of Scotland—a party, an heir-at-law, as in this case, may avail himself of a deed in his favour, and at the same time challenge another deed of the same grantor, which, if duly executed, would deprive him of some legal right. The objection is admitted to be legal, when the instruments are on separate papers. If they happen to be united, then it is said, the party cannot *approve* and *reprobate*. Such distinctions in a system of law are singular. A case of this nature occurred in the year 1784. (Not reported.) One Gordon made a will of his personal estate in favour of his heir-at-law: a few days after, he made an entail of his landed property in favour of the same person, but laying him under restrictions. The will and the entail referred to each other; and were indisputably meant as one settlement of the whole property of the testator [10] and entailor. The heir-at-law took the personal estate under the will, and having afterwards challenged the deed of entail as executed on death-bed, it was contended, that he could not approve and reprobate the same instrument, and that the two being executed *unico contentu*, were to be considered in that light. The judgment of the court was, that the heir, notwithstanding his having taken the personal estate under the will, might set aside the separate deed of entail. It was accordingly set aside, and he enjoyed both real and personal estate; the one as heir-at-law, without restriction, the other according to the terms of the will. This decision, if it proceeded upon a rational principle, would not have been different, although the deed of entail had been attached or annexed to the will, or formed part of it. The propensity of the courts below to extend this doctrine of *approve* and *reprobate*, has been checked by this House, in the decisions upon *Wilson v. Henderson* (Mar. 29, 1802), and *Crawford v. Coutts* (Mar. 14, 1806). A deed made upon death-bed is not absolutely void, because the heir may waive his right, or his right may not be affected, in which case he is barred. But this deed, so far as it conveyed the inheritance, was challenged and reduced before the question of election was raised. Is the right of heirs at law to give way to presumed intention? if so, where is the ground of presumption? The testator, when he framed or approved of the instrument, was capable of understanding the effect of his own acts; and if he intended to make his bequest conditional, he would have inserted an express condition. Suppose the deed to have [11] been so reprobated by the Appellants, that they can take nothing under it, then the life interest in the residue is not disposed of. It cannot fall into the residue for the benefit of the Respondents. They are not residuary legatees, but legatees in remainder of a residue. The executors cannot take it, they are mere trustees. To whom then can it go, but to the Appellants as next of kin? The deed is reduced, and cannot be read against them. *Hearle v. Greenbank* (2 Atk. 714), *Sheddon v. Goodrich* (8 Ves. 497).

For the Respondents—the Solicitor-General Sir R. Gifford, and Mr. C. Warren. The principle of law which forbids a person to take a benefit from one part while he denies effect to another part of the same deed, is founded in natural equity, and confirmed by authority and practice. Every provision of a testamentary settlement operates as a condition (Ersk. Inst. b. 3. t. 9. s. 10). To defeat the provision, or to refuse the performance of the condition, excludes the recusant from the benefit of the will. The law will not admit of opposite and incompatible pretensions. The courts both of England and Scotland have adopted the maxim of the Roman law: "*Absurdum videtur licere eidem partim comprobare judicium defuncti, partim evertere.*" Decisions grounded upon this principle have frequently occurred in the tribunals of Scotland: *Anderson v. Bruce*, Morr. Dict. p. 607, 21 Dec. 1680—*Paterson v. Spreuil*, Kame's Remarkable Decisions, vol. ii. p. 114—*Cunningham v. Gainer*, Jan. 15, 1758. Morr. Dict. p. 617—*Gibson v. McBean*, Id. 620—*Martin v. Martin*. The case of *Loudon* [12] lately decided in the Court of Session, illustrates and enforces the doctrine. The decision took place* under the following circumstances:—"George Loudon, who had been for some time resident, and died in Jamaica, had sent home £2000 sterling, of which £1000 was lent out upon heritable security. He executed a will in the English form, by which, *inter alia*, he

* 1811, Jan. 29, May 23, Dec. 10.—The case [is] not reported.

directed his executors, so soon as Robert Loudon, his nephew, should attain the age of 21, to invest the sum of £5000 sterling in security upon property in Great Britain, for his use during the term of his natural life; and after his death, to the use of the heirs of his body; and he directed that the sum of £2000 which he had remitted to Great Britain, as above mentioned, might be applied in part payment of the said sum of £5000 sterling. He further directed his executors to invest the sum of £1500 sterling in good security, the interest or profits of which were to be paid to his brother William Loudon, during his life-time, and after his death, the principal was given to his children. The testator also appointed his nephew Robert Loudon his residuary legatee. William Loudon was the testator's heir-at-law. For several years he continued to draw the interest of the £1500 given to him in life-rent, but having obtained information of the heritable bond for £1000 he contended that it was not carried by his brother's testament, but [13] fell to him as his heir-at-law. This claim was met on the part of Robert Loudon the nephew, by the doctrine of approbate and reprobate; and he further maintained, that William Loudon had homologated the settlement by taking benefit under it, having drawn for several years the interest of the £1500.—Lord Newton, Ordinary, found that the heir-at-law had not done any thing sufficient to infer homologation, unless it could have been established that he had full knowledge of the contents of the settlement at the time when the alleged acts of homologation were done. He sustained, however, the plea of approbate and reprobate to its full extent: For he found in the same interlocutor, 'that he (William Loudon), is not entitled both to approbate the will by accepting the bequest of the interest of £1500 and to reprobate it by challenging the conveyance of the above £1000 according to the purpose of the will; therefore ordains him to declare his option within ten days, whether he will take the interest of the £1500 provided to him and his family by the will, or claim the £1000 lent out on heritable security, but destined by the testator for answering the purposes of his will.'" This judgment was confirmed by two successive interlocutors of the court. The Appellants having challenged and reduced the death-bed disposition, so far as the heritage is bequeathed by it, those acts amount to an abandonment of the life-interest in the personalty created in their favour by the deed. That interest consequently, and of ne-[14]cessity, falls to the enjoyment of the Respondents. If it can be supposed that these acts do not amount to an election, then it remains to be determined by the Appellants, whether they will take the life-interest in the mixed fund given by the testamentary instrument, and give up the unentailed real estate, or insist upon their legal right to the inheritance, and abandon the life-interest in the personalty. The Appellants must elect: They cannot *approbate and reprobate*. This is not a case like those cited for the Respondents. The bequests are contained in one, not in two instruments. The law is different where the instruments are distinct; and this is a question of positive law, not of expedience or morality. It is argued upon the authority of *Bearle v. Greenbank* (3 Atk. 711), and *Sheddon v. Goodrich* (8 Ves. 497), that the testamentary instrument as to land not having been legally executed, cannot be read to shew any intention upon the subject. Those cases may be distinguished from the present. In *Boughton v. Boughton* (2 Ves. Sen. p. 12), it was decided by Lord Hardwicke, that a will not executed according to the *statute* (29 Car. 2), though void as to real estate, might be read to raise a case of election against the heir; because the condition was annexed to the gift of the personalty. In the case of copyhold, where no surrender has been made, although it cannot pass by a will, and no condition is expressed, yet, where the testator has given a legacy to the heir, and the copyhold to a stranger, the Court compels an election: *Pettward v. Prescott* (7 Ves. 541). The distinctions made in these conflicting cases are not satisfactory, and do not seem [15] to rest upon intelligible principles. The question was much discussed in the case of *Thelluson v. Woodford*,* where the doctrine of election prevailed.

The law of England may be doubtful on the point, but the law of Scotland, is clear and decisive. The case of *Cunningham v. Gainer* is an express decision upon the subject. In that case the testament was executed upon death-bed; yet the Court

* 13 Ves. 211, where most of the cases *pro* and *con*, to be found in the Books of Report, are cited.

suffered it to be read, and in their judgment proceeded upon the principle of approve and reprobate. There was no appeal against that judgment. It has established the law upon the question. It has guided the courts ever since.

In the case of *Brodie v. Barry* (2 V. and B. 127. There was no condition expressed), Sir William Grant, the late Master of the Rolls, expressing his doubts of the soundness of the distinction between express and implied conditions, decided that a will duly executed in the English form, by which estates in Scotland were devised to trustees, together with estates in England and personal property, might be read to raise a case of election against the heir, to whom a legacy was given by the will. In *Crawford v. Coutts*, there were two instruments, the latter executed on death-bed, containing a revocation of the former. No benefit was given to the heir by the invalid instrument, and he stood upon his independent right. The doctrine of *approve and reprobate* did not come in question, and the case [16] is altogether inapplicable. In *Wilson v. Henderson*, the will contained no provision as to lands, and the death-bed disposition was a separate instrument.

The other cases, cited for the Appellants in the court below, contain no principle which can bear upon the present question. In some of those cases, such as *Weir v. the Laird of Lee* (Morr. Dict. p. 605), and *Sir P. Home v. E. of Home* (*ibid.* 612), it was decided that a party might produce in evidence an admission or statement of fact made in one part of a deed, without being bound to admit the truth of every other part of the same deed. In other cases adduced, of a different class, as those of *Gray and Somerville v. Abernethy* (Morr. Dict. p. 609), and *Fee v. Traill* (*ibid.* 616), where reservations had been unwarrantably made in conveyances by persons bound to execute them simply, it was found that parties intitled might avail themselves of the full benefit of the conveyances, refusing to acknowledge or effectuate the reservations. How do these decisions affect the doctrine of election?

But the Appellants if they cannot avoid election, resort to a new device; they would take the real estate as heirs, and the life interest in the residue of the personality as next of kin. They argue that if they cannot have that interest under the will, there is no disposition of the life interest. They cannot claim it as next of kin. In fact, there is no intestacy. By a clause in the trust disposition of 1803, all *the subjects* thereby disposed are given, in default of appointment, to the person or persons whom the disponent should appoint to be [17] his *residuary legatee or legatees*. If he has not disposed of the life-interest in the personality, it falls, by virtue of that clause, into the residue, upon the refusal of the Appellants to perform the implied condition of the will: as it would in case of their death, and the Respondents take it under appointment. Lastly, if the life-interest does not fall into the residue, it is a fund out of which the Respondents must be compensated for the disappointment occasioned by the acts of the Appellants. *Welby v. Welby* (2 Ves. and Bea. p. 90).*

Mr. Wetherell in reply. In this case the question of election is not raised against the heirs; because the death-bed disposition being an invalid instrument cannot be read to shew any intention [18] as to the land. The principle of the decisions in *Hearle v. Greenbank*, and *Sheddon v. Goodrich*, is founded in universal law,—it must extend to cases in Scotland.

The Judgment of the Court below is at all events defective in one respect. There

* The report of the judgment pronounced in that case, by Sir W. Grant, contains the following passage:—"That an heir, to whom an estate is devised in fee, may be put to an election, although, by the rule of law, a devise in fee to an heir is inoperative, I should have thought perfectly clear, independently of Lord Cowper's decision in the case in *Gilbert* (Anon. *Gilb. Eq. Rep.* 15); for, if the will is in other respects so framed as to raise a case of election, then, not only is the estate given to the heir under an implied condition, that he shall confirm the whole of the will, but in contemplation of equity the testator means, in case the condition shall not be complied with, to give the disappointed devisees out of the estate, over which he had a power, a benefit correspondent to that of which they are deprived by such non-compliance. So, that the devise is read, as if it were to the heir absolutely, if he confirm the will: if not, then in trust for the disappointed devisees as to so much of the estate given to him, as shall be equal in value to the estates intended for them."

has been no decision upon the question reserved, as to the life-interest in the personality. The Judges of the Court of Session have pronounced that the Appellants are not to have it. But they have not said who is to have that interest which yet remains to be disposed of. The consideration of that difficulty might have altered or affected their judgment.

The Lord Chancellor,—after stating the principal facts of the case as the foundation of the Judgment, which he recommended for the adoption of the House, proceeded to this effect:

In this Case, according to the pleadings in the Court below, the Respondents, Hamilton, Scott, and McDougall, claim an immediate interest in the proceeds of the residuary fund of the personal estate. The Appellants make an adverse claim to the same subject, either under the deed of trust, or as next of kin, for default of disposition. From the language of the interlocutor, "*that the life rents do not belong to the Appellants, as the Duke had made the trustees his executors, and had appointed the whole residue of his fortune to be paid to the residuary legatees*," it does not clearly appear, whether the Lord Ordinary meant to negative the claim of the Appellants as [19] next of kin. It is very true, that the Duke had appointed the trustees his executors, and had appointed the residue of his fortune to be paid to the residuary legatees; but that was not to take place until the death of the survivor of the Appellants. The conclusion, "*that, therefore, the Ladies Ker can have no legal claim to the life-rent of these effects, except by this settlement which they cannot approbate and reprobate, therefore repels this claim of Ladies Esser and Mary Ker to the life-rent of the subjects in medio*," does not seem to be a complete judicial decision, nor a necessary conclusion from the premises.* Having repelled their claims, and having stated that the trustees were executors, the Lord Ordinary goes on to make a reservation upon certain questions which have not yet received the decision of the Court below. The question was, Whether the residuary legatees were, or were not, to have immediate payment of the residue? If the Appellants could not claim the life interest [20] under the settlement, it must follow of course either that they had a right to claim it as next of kin, or if they were not at liberty to bring forward that claim, the profits of the residue must either belong to the trustees and executors, during the lives of the Appellants and the survivor, or it must accumulate during that period, and be paid over to the parties who, at the death of the survivor, were appointed to take the capital. If we are to understand the decision of the Court below according to the last of these suppositions, as the interest and all accumulation of interest, must go to the Respondents, or their representatives, there would be no reason why they should not take the interest immediately, as well as the capital, at the death of the survivor of the Appellants. There is, however, no express declaration to this effect in this Judgment of the Lord Ordinary; unless, (as it is probable) he meant to decide, that there being a testamentary disposition under which the Appellants could not claim as legatees, they could not claim in any other right; and then reserving the question how this interest was to be disposed of, and when it was to be paid. In the second interlocutor of the Lord Ordinary, it is said, "The pursuers only claim the life-rent in question of the residue of the Duke's fortune, by virtue of the deed of 1801;" whereas, the claim made in the pleadings is not only by virtue of the deed of 1801, but also as the next of kin of the Duke. The interlocutor in this respect, therefore, is not quite correct, unless it can be said, that as the life-interest in the residue was given [21] to them

* The passage of the interlocutor to which these observations apply runs thus:—"Finds, etc., that the life-rent of the subjects does not belong to the Ladies Ker as the Duke's *executors*, he having appointed, etc. Therefore, etc." These words, if considered without reference to the words of the subsequent interlocutor, might be considered as a finding that the Appellants were not entitled as *next of kin*. For "the appellation of executors is sometimes applied *designative* to those who are barely entitled to the moveable succession of the deceased *ab intestato*, and have a right to claim the office of executors if they think fit." Erskine's Inst. B. 3. Tit. 9. sect. 1. So in the same author, B. 2. Tit. 2. sect. 3.—"*Next of kin, or executors*," are coupled as synonymous denominations. In like manner the subject of moveable succession is called *executory*. Id. B. 3. Tit. 9. sect. 1.

by the Deed of 1804, and all other persons were excluded by the effect of the provisions of that deed, the result of that exclusion, and the intestacy which ensued upon their incapacity to take as legatees, devolved the life-interest upon them, as a consequence of the bequest in the deed, and the circumstances attending it. In such a sense only can the claim of the Appellants be said to be made by virtue of the deed of 1804 only. In the petition to the first division of the Court of Session, reclaiming against these interlocutors of the Lord Ordinary, the claim as next of kin is distinctly brought forward again. The result of the discussions before the Lord Ordinary, and before the Court of Session, seems to me upon the whole to be a decision, that the Appellants had no title to the life-interest in the residue, either under the deed of 1804, or in the character of next of kin to the testator; but I do not perceive, that the Court of Session has disposed of the reservation which is contained in the interlocutor of the 17th of January, 1815, which appoints the question to be heard, whether the residuary legatees could take any thing till after the death of the survivor of Ladies Essex and Mary Ker, upon the general question raised in the pleadings.

I do not undertake a minute discussion of the arguments urged in this case; it will be sufficient to state the fundamental principle which ought to guide our decision. The deed in question, upon this appeal, is in the nature of a testament. It is equally settled in the law of Scotland, as of England, that no person can accept and reject the same instrument. If a testator gives his estate to A., and gives A.'s [22] estate to B.; Courts of Equity hold it to be against conscience, that A. should take the estate bequeathed to him, and at the same time refuse to effectuate the implied condition contained in the will of the testator. The Court will not permit him to take that which cannot be his, but by virtue of the disposition of the will; and at the same time to keep what by the same will is given, or intended to be given, to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift. I have not overlooked the distinction which has been pressed on the consideration of the House. It is said, if a will be made which is attested by three witnesses, and which, therefore, according to the statute is a good will, to pass land; and, in the same will, a case of election is proposed, there the will being duly executed according to the statute, if the devisee will take the land of the devisor, according to the disposition, he shall not refuse to comply with the implied condition of making good the will in certain respects, where it cannot have effect under the will, without his assent and co-operation: that is the simplest case of election. But in a case like the present, where the will has made the land personal estate; and, in one part of that will, the land, is disposed of, and in another part, the personal estate: if the will is not executed according to the statute, it is no will of land: but, as a bequest of personalty does not require attestation, the will is good to that extent. What then is to be done as to the case of election? It is said, that because, as a will of land, it is abso-[23]-lutely void, it is exactly the same as if it contained nothing as to land; that it cannot be read to shew an intention; and, therefore, cannot be viewed as an instrument proposing election. The distinctions upon this head of law appear to be rather unsubstantial. It has been held, that although a will containing dispositions of land be not duly executed according to the statute; yet, if in the same will, personalty is given upon condition that the legatee convey the land: in such case, in as much as the disposition of the personalty cannot be read, without reading at the same time the condition upon which it is given, the gift and the condition are inseparable; and the case of election is raised, because the testator in the disposition, not of land, but of personalty, expresses and directs what is to be done. These are undoubtedly thin distinctions; and a judge having to deal with them finds a difficulty in stating to his own mind, satisfactory principles on which they may be grounded. This was the opinion of a Judge (Sir W. Grant, late Master of the Rolls) who has lately, to the regret of the profession and the public, retired from his judicial labours. I doubt whether the Court in which he so long administered justice will ever see a judge of greater ability and integrity. The opinion to which I allude is expressed in a recent case (*Brodie v. Barry*), where the Judge, having disburthened his mind of his sentiments as an individual, observes in conclusion, that whatever might have been the foundation of the distinction, he found it established, and therefore, in his judicial character, he could not, with propriety, travel [24] beyond this question—Is the distinction

applicable to the decision of the case before the Court! In such a conclusion, and upon similar grounds, I acquiesce: for long professional experience has convinced me that it is more beneficial to the community to adhere to imperfect or ineligible rules of law, which have been long established, than that each succeeding Judge should be at liberty, upon his own notions of expedience, to improve and unsettle the law. The distinction which I am now considering was promulgated by Lord Hardwicke, a Judge profound in legal knowledge. Since his time, men have enjoyed their property upon that established doctrine, and the traditional experience of the Courts does not furnish a wiser maxim than that which is contained in the short precept, *stare decisis*. I therefore shall only consider the question whether the doctrine of election is applicable to the case before the House. In *Brodie v. Barry*, the late Master of the Rolls applied the doctrine to the case of property in Scotland, as Lord Hardwicke had before done in the case of *Gainer v. Cunningham*.* I have looked at the decree and the proofs as recorded in that case, and it appears to me from the result, that Lord Hardwicke was of opinion, that a Scotch instrument, though not good to make an effectual title to Scotch land, might be read to raise a question of election. There is a ground which may be represented as a solid ground to take a Scotch case out of the [25] distinction, which I have admitted to exist in English cases. A deed made upon death-bed is not absolutely void by the law of Scotland. In many cases it will regulate the title, notwithstanding the objection which the heir may raise against it. Until reduced to a nullity, it is only voidable, and may be read for the purpose of ascertaining the intention of the testator. I do not think it necessary to examine and discuss all the cases upon this subject. It may be sufficient to state my opinion that, according to the law of Scotland (perhaps more directly than in our law), the doctrine of election was properly applied to this case. According to this decision, if the Appellants set up their title as next of kin, an election would be made, but it would be made in a manner perfectly nugatory, if they are left at liberty to disappoint the intentions of the testator, as to the real estate; to abandon their rights under the deed, and to claim, in the character of next of kin, the life-interest in the personal estate which is not disposed of by the deed. But as the Appellants have in fact, to a certain extent, annulled the deed by judicial process, their election is thereby made to take nothing under that repudiated instrument. A question then arises, what is to become of the life-interest, which the Appellants cannot take, either as legatees, or as next of kin? In our courts we have engrafted upon this primary doctrine of election, the equity as it may be termed of *compensation*. Suppose a testator gives his estate to A. and directs that the estate of A., or any part of it, should be given to B. If the devisee will not comply with the provision of the will, the Courts [26] of Equity hold that another condition is to be implied, as arising out of the will, and the conduct of the devisee; that inasmuch as the testator meant that his heir-at-law should not take his estate which he gives A., in consideration of his giving his estate to B.; if A. refuses to comply with the will, B. shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him. Under these circumstances it does not appear to me that there is any ground for advising your Lordships, either to affect this interlocutor, as far as regards the question of approbation and reprobation of the deed, or as far as in construction it negatives the title of the Appellants as next of kin. It may be necessary to correct the language contained in this interlocutor, so as to show unequivocally what points are determined. The latter point the Court has not yet determined, namely, whether the Respondents are, or are not, entitled to take their compensation, until the death of the survivor of the Appellants: the Court below having given no opinion, it is impossible that we should give any opinion upon that point. It is for their determination, in the first instance. The cause must, in point of form, be remitted, with a view to have that question decided. It appears to me very easy of solution. There are certain persons who, according to the expression and principles of our law, have a vested remainder in the capital. They have also, by way of compensation, a title to the life-interest, preceding that remainder in the fund. Having, therefore, the [27] whole interest, I do not understand upon what ground it can be

* This case is not to be found in any of the books of English Reports. A note of it, extracted from the Register's Book, will be found at the end of this case.

argued, that there ought to be an accumulation of the profits, until the decease of the survivor of the Appellants. If the Appellants have no right, and the Respondents have all the right, in the subject of litigation, why is it not to be applied immediately by way of compensation, upon the ground, that, the condition of the gift being rejected, the life estate did not form a part of the disposition?

The Case cited in the foregoing arguments and judgment under the name of *Gainer v. Cunyngham*, appears in the Register's Book, under the following date and title.

Tuesday, the 31st day of July, 1750, between Mary Cunyngham, widow of Robert Cunyngham, Esq. deceased, and Susannah Cunyngham, an infant by the said Mary, her mother and next friend—Plaintiffs. Daniel Cunyngham, Esq., William Coleman the elder, Esq., William McDowall, and Drewry Ottley the elder, Esqrs., and Elizabeth Cunyngham—Defendants.

The Cause was originally heard on the 13th of April, 1749. The pleadings are shortly abridged from the abstract in the Register's Book. The bill states: That Robert Cunyngham, the Plaintiff Mary's late husband, being resident at Edinburgh, in Scotland, did, by a deed of disposition or gift of his own hand writing, dated the 17th day of July, 1741, in consideration of the friendship he had for the Plaintiff Mary, assign and make over unto her, by the name of Mary Gainer, all his lands of Craig, in Scotland, and his whole moveable estate therein particularly described, upon condition that the said Mary should be a tender nurse to him during his life, and take care of his family affairs; and also that she should not [28] at any time then after cohabit with Captain James Dalrymple, or be in his company, unless by accident; with a power for the said testator to revoke the said deed: and under these provisions the said Mary was to enjoy the said premises after the said testator's death, for her own life, and afterwards he gave the said premises unto the Plaintiff Susannah, by the name of Susannah Cunyngham, his god-daughter, an infant, under the care of the Plaintiff Mary, and the heirs of her body for ever; remainder to his sons Daniel and Charles Cunyngham, Esqrs. and their heirs for ever, and in the disposition and assignment, he obliges himself, his heirs, and successors, who should inherit his estate at Cayon, in the island of Saint Christopher's, to clear the lands above mentioned of all debts, and to warrant and defend his said assignation, to be good, valid, and sufficient to the Plaintiff Mary, during her natural life, and after her decease to the Plaintiff Susannah, and the heirs of her body for ever, and thereby directed the said deed to be registered in the Books of Session, and appointed a proctor for that purpose. That the said deed was in every particular duly executed and completed according to the law of Scotland, and the said Robert Cunyngham did on the 27th day of October, 1748, duly make and publish his last will and testament, written in his own hand; and thereby directed, that his lands and houses in Basseterre Town should be affixed to his plantation at Cayon, in the said island, and never to be separated therefrom, and he gave his said plantation and lands in Basseterre Town, and all the stock thereon, let to his son Daniel Cunyngham, the Defendant, at £2500 a year, unto William McDowall, of Castle Semple, in the Shire of Renfrew, Esq., Drewry Ottley, of Saint Christopher's, Esq., and the Defendant Coleman, and their heirs, upon trust for the payment of his funeral expenses, *debts, and legacies*, therein particularly mentioned. And upon further trust for the said Defendant, Daniel Cunyngham, for life, with power for him to charge by his will the said premises with the double of such sums as he had or should receive as his wife's fortune, remainder after his said son Daniel's death [29] to his heirs male or female of his body, with divers limitations over upon conditions therein specified. And then amongst many legacies particularly set forth in the will, given to his children, grandchildren, and relations, the said testator gave to the Plaintiff Mary, by the description of his dear wife, Mary Gainer, which he had theretofore concealed, *all his lands, plate, household furniture, linen, and whatsoever he then had, or should have in Scotland*, at his death, for her life, for her maintenance; and for the maintenance and education of his daughter Susannah Cunyngham, and the heirs of her body; remainder to his said son Daniel Cunyngham, and his heirs for ever; and further bequeathed to his said wife £200 a year for her life, to be paid quarterly, and all such money as Major James

Dalrymple owed the said Testator, and thereby declared that the said provision was to be in full of her dower. And further directed, that all the produce of his plantation at Cayon, the necessary charges excepted, should be from time to time shipped on such ships as the Defendant William Coleman, his heirs and assigns, should direct; and consigned unto him and them, until the said Testator's funeral charges, *debts, and legacies* should be paid; and gave him and them power out of the said produce, as the same should be remitted to him and them, *to pay the said debts and legacies in Great Britain*, with interest, agreeable to his said will, without any order from his said executor, or any other person or persons who should then after come to inherit the said plantation; and the better to secure such consignments to the said Coleman, his heirs and assigns, until such debts and legacies were paid, the said Testator directed, that his said son, Daniel Cunyngham, and all others who should inherit the said plantation, should every year send an account to the said Testator's trustees, of the whole produce thereof, and how applied, and if his son, or others, should misapply the same, and not consign it to the said Coleman, his heirs and assigns, then it should be in their or one of their power, with the consent of one or more of the said Testator's Trustees, to put an overseer upon the said plantation, to manage the same, and [30] to send the produce thereof to the said Coleman, his heirs and assigns, and declared his said son, Daniel, executor of his said will. That the said Testator in his life-time owed several sums of money to divers persons, particularly to Elizabeth Kennedy, £1100 carrying interest at five pounds per cent., which was secured as a mortgage upon his said lands at Craig, in Scotland, and to the said trustee, William McDowall, £ , and to the said trustee, William Coleman, £ . And the Plaintiff hoped she should have had quiet possession of the said lands and effects in Scotland conveyed to her by the said disposition, and that the said trustees would have cleared the same of all debts affecting the same out of the said Testator's estate at Saint Christopher's, and would have paid the annuity of £200 during the Plaintiff's life, according to the directions in the said will. But Elizabeth Cunyngham, at the instigation of the Defendants, or some of them, immediately upon the death of the said Testator, entered into, and seized upon all the said lands and personal estate in Scotland, and put the Plaintiff to great expense in commencing and prosecuting several suits in that kingdom, which were determined in the Plaintiff's favour, and her right to the possession of the said lands and personal estate established; from which determination of the Lords of Council and Session, in order further to distress the Plaintiff, the said Elizabeth Cunyngham appealed to the Lords Spiritual and Temporal in Parliament. But the said Elizabeth Cunyngham, the day before the said appeal was to have come on, withdrew her petition of appeal, by which means the Plaintiff was put to a very great expense in preparing for her defence. That the said Daniel Cunyngham, as executor to the said will, had been cited into the Prerogative Court of Canterbury, to accept or refuse the probate of the said will; but in order to give the Plaintiffs all the vexation, and put them to all the expense he was able, had not to that time declared whether he would accept or renounce the same. And the Plaintiff Mary had frequently applied to the said trustees and executors, to pay to her the annuity of £200, as the same became due, [31] according to the direction of the said will, from the rents and profits of the said estates in Saint Christopher's, remitted to them; and from that fund to pay off and discharge the funeral expenses and incumbrances on the said Scotch estate; which they refused to do; and did spirit up and procure the said Kennedy, and several other creditors of the said Testator, to commence suits in Scotland against the Plaintiff, on purpose to load the said Scotch estate. And the said trustees McDowall and Coleman, had commenced suits in Scotland for very large debts, which they pretended to be due to them from the said Testator, in order to load the said Scotch estate, so given to the Plaintiffs; notwithstanding the whole plantation estate, amounting to £2500 a year sterling, is paid into their hands; and although they were directed by the said will to disencumber the said Scotch estate,* by the produce of the Saint Christopher's estate. That the said trustees and executors had procured and spirited up one John Gibbs, who performed the

* This does not appear as a specific direction in the will. The words are general "to pay debts in Great Britain." See page 29.

Testator's funeral, to bring actions in Scotland, for the expenses of such funeral; and by keeping her from the possession of the Scotch estate and moveables; and by procuring and stirring up suits against that estate and moveables; and by neglecting to pay her any part of the said annuities, had brought her and her infant daughter, the Plaintiff Susannah, into the utmost distress; and when the Plaintiff was by the means aforesaid, destitute of all money and assistance, the said Daniel Cunyngham had the conscience to apply to the Plaintiff, by his agent, and proposed that if she would quit all her right and title for herself and child to the said lands and moveables in Scotland, which the Plaintiff charged were well worth £10,000, and to the annuity of £200, he would in lieu thereof secure to her for her life £100 a year, and £600 in money: otherwise he would take care (be the expense ever so great to him) that Plaintiff should never [32] receive the least benefit from the said deed of gift and will. The Bill then prayed, that the Defendants might be compelled to accept or refuse the said trust: and to set forth an account of the trust estate, and the produce thereof which had come to their or either of their hands, and how they had applied the same: and that they might be compelled by the rents and produce, or if necessary, by mortgage or sale of the said plantation estate, to disencumber and clear the Scotch lands and moveables, and pay the Plaintiff Mary all the arrears of her £200 a year, and the growing payments thereof, as they should become due: and that in the mean time, if necessary, an overseer, or receiver, might be appointed on the said plantation estate: and that the said disposition, conveyance, and deed of gift, made in favour of the Plaintiffs, might be confirmed; and the said Testator's will established against the said Daniel Cunyngham, the heir-at-law, or that the Plaintiff Mary might have her dower.

The Defendants not having appeared at the hearing, a decree *nisi* was pronounced, and afterwards made absolute.

But upon the petition of the Defendants Cunyngham, Ottley, and Coleman, the cause was re-heard.

The Defendant Cunyngham, by his answer, set forth that Robert Cunyngham, his father, signed the deed, dated the 17th day of July, 1741; but he insisted that the same was not only void and insufficient in point of form, by reason of several defects in the execution thereof, but was also not completed in point of substance, so as to render the same binding and effectual, according to the laws of Scotland; and the said Robert Cunyngham continued, as the Defendant believed, seized of the premises till his death. And insisted, that Plaintiffs ought not to avail themselves of the said deed, as an effectual conveyance of the said lands and premises to them, in the manner therein expressed, either against the Defendant or against the creditors of the said Robert Cunyngham, who have notwithstanding the same, a good right to resort to the said lands for the satisfaction of their demands. And in regard the said deed purported [33] to affect the said lands lying wholly in Scotland, and no part thereof in this kingdom, hoped the Court would leave the validity or insufficiency thereof, to be determined by the laws of Scotland, where the same was made, and where the said Robert Cunyngham, and the Plaintiffs, both resided at the time when the same was made. That the Plaintiff Mary, about the time when the said Deed of gift bears date, and for some time before, was by the Testator considered as the lawful wife of Captain Dalrymple, and was never acknowledged by the Testator in his lifetime as his wife, save by the said pretended will: but that he always called her by the name of Dalrymple, by which name, both the children and all the servants in the family always called her. That Robert Cunyngham, the Testator, was long before the marriage pretended between him and the Plaintiff, married to another woman (as the Defendant believed) who was still living. That the Plaintiff Mary, on being summoned before the clergy and ministers of the Church of Scotland, declared that the Plaintiff Susannah was the child of, and begot by, the said Captain James Dalrymple, her husband. That the Testator, notwithstanding his marriage, some time before his death, lived and conversed with the Plaintiff Mary in a criminal way; but was looked upon and esteemed not to have been married to her. That his father, the Testator, was about the 7th day of January, 1742, being about nine months before his death, seized with a lethargick disorder, which totally deprived him of his senses for several days; and though he afterwards grew better, and was able to get about again, yet he never recovered the perfect use of his understanding, but con-

tinued from that time in a state of dotage and unsound mind to his death, and was not capable of making a will. That from his first seizure to his death, he was not of sound mind or understanding, so as to be capable of making a will; and that he was so totally under the power of the Plaintiff, that she could prevail on him to do any thing. That it appeared by the said will, that the legacies thereby left, amounted to the sum of £8950, and the annuities thereby bequeathed, computing the same at [34] ten years' purchase, amount to the sum of £3000. And the said Testator being indebted at his death in arrear, the sum of £10,000, legacies, annuities, and debts, amounting together to near the sum of £20,000 will, if the said pretended will be established, more than exhaust all the funds and estates, real or personal, which he left at his decease; so that the Defendant, the executor therein named, and the only surviving son of the said father, and who never disoblighd him, and had then a wife and three children, to all of whom his said father in his life-time expressed the greatest affection, and who (on the face of the said will was intended to take a very beneficial interest under the same) would be entirely deprived of any provision from his said father, though the greatest part of the said estate in the West Indies came to him in right of his wife, the Defendant's late mother. And the said Defendant insisted, that, by the laws of Scotland, no lands or real estate whatsoever, are deviseable by will, but must be conveyed in the life-time of the party conveying by deed of gift. And therefore, in case the said pretended will had been duly executed by his said father, and he had the full enjoyment of his senses at the time of the execution thereof, yet the bequest therein to the Plaintiff, of all his lands and other things he had in Scotland at his decease, was a void devise; and he submitted that the Court should leave the Plaintiff to resort to such remedy in relation to the said estate in Scotland, as well under the said Deed of gift, as under the said will to which they should be entitled by the laws of Scotland, and which they should be able to obtain in that kingdom, without the interruption of this Court. That the Plaintiffs brought two several actions in the Courts of Scotland, one for the recovery of the goods, and the other for the recovery of the possession of the house and premises in Scotland. That the Lords of Session in the first of the said actions refused the Plaintiff access to the said moveable estate, till such time as the Defendant should return to Great Britain; and in the mean time ordered the same to be sold, and the money arising thereby, to be paid into the hands of the [35] Sheriff for such person as should appear to have the best right thereto; but in the other of the said actions pronounced sentence in favour of the Plaintiffs, from which last-mentioned sentence, the Defendant, Elizabeth Cunyngham, in his absence, appealed to the Lords Spiritual and Temporal in Parliament. And the said Defendant saith, he having arrived in this kingdom from the West Indies before the said appeal came on, the said Defendant, Elizabeth Cunyngham had no further concern therein; and the Defendant having discovered that his father was greatly indebted at his death, and that several of his creditors had brought actions in Scotland, for the recovery of their demands out of the said estate; and that such demands would exhaust his estate and effects, the Defendant suffered the said appeal to drop. He admitted that he had been cited into the Prerogative Court, to accept or refuse the probate of the will; but being advised the same was not valid, on account of the incapacity of his father at the time when he made his will, he had declined to prove the same. That the Plaintiff Mary had applied to the Defendants McDowall and Coleman, to pay her said Annuity of £200, given to her by the said will, from the produce of the said estate in Saint Christopher's, and from that fund to pay off and discharge the funeral expenses and incumbrances on the Scotch estate, which they had refused to do on account of the invalidity of the said will. But he denied that he had spirited up or procured the said Elizabeth Kennedy to commence any suit against the Plaintiff, on purpose to load the said Scotch estate. He further answered, that he had ever since his father's death in his own right, and not as executor under the said will, been in possession of all his said father's plantation and effects in the West Indies; and that the consignments of the produce thereof, had since his death, from time to time been made to the Defendant Coleman, and that he had usually employed him as his factor, to dispose of such consignments for his use. And he insisted, that for the reasons in his answer assigned, the Plaintiffs were not entitled to have any account from him, or any other of the Defendants, of the Plantations of his said father: but in case [36] the Court should

be of opinion that the Plaintiffs were entitled to such account, he submitted to be examined upon interrogatories touching the same. The said Defendant William Coleman the elder, by his answer stated, that the produce of the said estates in the West Indies, described in the will as let to the Defendant Daniel Cunyngham for the sum of £2500, was for several years before the Testator's death, consigned to the Defendant, to be disposed of here according to the general usage between planter and merchant. That for many years before, and to the time of the said Testator's death, there was a great intercourse of dealing between him and the Defendant on the account of the produce of his estate in the West Indies; and during that time, the Defendant disbursed several considerable sums of money for the said Testator. That by an account stated between the said Robert Cunyngham and the Defendant, on the 18th of August, 1731, and signed by them, there was owing from the said Robert Cunyngham to the Defendant, the sum of £4050; for securing which, together with such further sum as the Defendant should advance to or for the said Testator, a mortgage in fee of the plantation at Cayon was executed to the Defendant, and also a bond to the same effect. That the debt so due to the Defendant was increased by subsequent advances, and being very large, he had given directions to have the proper action brought in Scotland for the recovery of the same out of the said estate there; and he believed that such action had been accordingly brought, not to load the said Scotch estate, which he denied, but that all proper measures for securing so very large a debt might not be neglected; and the rather for that, by reason of the open and declared war with France and Spain, the Defendant's security on the said estates in Saint Christopher's, was become of less value than when originally made. That the produce of the said estates in Saint Christopher's had been consigned to the Defendant Cunyngham, in his own right as heir-at-law; and no part of the produce had come to his hands as trustee under the will. He desired to be at liberty to suspend his election, whether he would accept or refuse the trust till the will should be established; and insisted that [37] he was not compellable to set forth any account of the said plantation, or of the rents and profits thereof received by him, or how the same had been disposed of. But if the Court should be of opinion, that he ought to set forth such account, he submitted to be examined upon interrogatories in relation thereto.

Whereupon, and upon debate of the matter, and hearing the will of the said Testator, Robert Cunyngham, dated the 27th of October, 1743, the prayer of the Plaintiffs' bill; the answer of the said Defendant, William Coleman the elder; the answer of the said Defendant, Daniel Cunyngham; a letter from the said Defendant, William Coleman the elder, to the said Testator, Robert Cunyngham, dated the 5th of November, 1743; a letter from the said Testator, Robert Cunyngham, to the said Defendant, William Coleman the elder, and Company, dated the 20th of October, 1743; a letter from the said Defendant, Daniel Cunyngham, to Robert Wallis, dated the 7th of February, 1744; another letter from the said Defendant, Daniel Cunyngham, to the said Robert Wallis, dated the 6th of May, 1745, the decree dated the 13th of April, 1749, and the proofs taken in the cause, read.

His Lordship ordered, that the said decree be varied, and be as follows:—Declare that the said Testator Robert Cunyngham's will ought to be established, and the Trusts thereof performed; (and the court ordered and decreed the same accordingly;) and that it be referred to the said Master to take an account of what is due to the Plaintiff, Mary Cunyngham, for the arrears of the annuity of £200 a year, given her by the said Testator's will; and the said Master is also to take an account of the said Testator's debts and incumbrances, affecting his moveables and real estate in Scotland, and of all other his debts, funeral expences, and legacies, and compute interest, on such of them as carry interest; and the said Plaintiff, Mary, is to stand in the place of such creditors, who have received, or shall hereafter receive, satisfaction for their debts, out of the said moveables, and real estate in Scotland, for such sums of money as the said creditors have received, or shall receive therefrom. And it is [38] further ordered, that the said Defendants, Daniel Cunyngham, and William Coleman the elder, do come to an account before the said Master, for the rents, profits, and produce of the said Testator's plantation in St. Christopher's, called Cayon Plantation; and of the lands, and houses, in Basseterre Town, affixed, or annexed thereto by the will, with the appurtenances received by the said Defendants,

Cunyngham and Coleman, or either of them, or by any other person or persons, by their, or either of their order, or for their, or either of their use. In the taking of which account, all parties are to have all just allowances; and the said Master is to make an allowance of interest, accrued on the said mortgage made by the said Testator in his life-time, of the said Cayon Plantation, to the said Defendant Coleman, and out of what shall be coming on such account, of the rents, profits, and produce, of the said Testator's said plantation, called Cayon Plantation, and lands, and houses, in Bassetterre Town, affixed, or annexed thereto as aforesaid, with the appurtenances, the several debts and incumbrances of the said testator, affecting his moveables and real estate in Scotland, are to be paid and satisfied. And it is further ordered, that the said Plaintiff, Mary Cunyngham, be paid thereout such of the said debts and incumbrances, as have been or shall be paid out of the said testator's said moveables and real estate in Scotland; and also such costs and damages as the said Plaintiff, Mary Cunyngham, has been put unto or sustained by reason of any action or suits brought by the said creditor's relating thereto, to be settled by the said Master, and also what shall be found due to her for the arrears of her said annuity of £200 a year. And it is further ordered, that the said Defendants do pay and apply what shall be found due from them respectively on the said account accordingly; and also out of the rents and profits and produce of the said plantation, called Cayon Plantation, and the said lands and houses in Bassetterre Town to be received, the said Plaintiff, Mary Cunyngham, is to be paid her said annuity of £200 a year, as the same shall become due according to the directions of the said Testator's will; and after satisfaction of the said testator's debts, etc. it is ordered that the said Defendant Cole-[39]-man do make his election before the said Master, whether he will continue to act in the trust under the will, and postpone the payment of his own incumbrance on the estate before-mentioned pursuant to the said testator's will: and if he shall elect so to do, it is further ordered, that the said Defendant, Daniel Cunyngham, do from time to time consign and send over the profits and produce of, etc. to the said Defendant Coleman, to be applied by him according to the said testator's will, and this decree. But if the said Defendant Coleman shall elect, not to continue to act in the said trust, and to postpone the satisfaction of his said incumbrances on the said estate, pursuant to the said will, it is further ordered, that in that case, it be referred to the said Master, to appoint a proper person in London, to whom the said Defendant, Daniel Cunyngham, shall consign and send over the profits and produce of the plantation, lands, and houses, before-mentioned, to be disposed of and applied, according to the directions of the said testator's will, and this decree. And the said Defendant Cunyngham, is accordingly, from time to time, to consign and send over the said profits and produce to such person so to be appointed.*

The principal question between the material parties to the suit in the Court of Chancery appears again, in 1758, to have become the subject of litigation in the Court of Session in Scotland. An abstract of the facts, and the judgment in the case, is given by Lord Kaims, in his *Decisions*, vol. iii. p. 25, in the following terms:—

[40] A person possessed of one estate in the island of St. Christopher's, and another in Scotland, executed a testament upon his death-bed in Scotland; by which he bequeathed to his son the estate in St. Christopher's, with the burthen of his debts; and by another clause, he bequeathed the estate in Scotland to his wife, and her heirs. A creditor of the defunct's having adjudged the estate in Scotland, the relief brought a suit in Chancery, against the son, and other trustees, for having the Scotch estate relieved of the debts out of the produce of that in St. Christopher's. The will was established by the Chancellor's decree, and the Scotch estate ordained to be relieved of the debts. The relief having claimed the lands conform to the testament, it was

* This decree contains no direction, that D. Cunyngham should elect, either to take the Cayon estate under the will, subject to the charges, and leave the Scotch estate discharged of debts, to the Plaintiffs; or otherwise, that the Plaintiffs should be compensated out of the larger estate, for the value of the Scotch property if taken by D. Cunyngham. It seems that the Court of Chancery in England, and the Court or Session in Scotland, considered the acts done by the Defendant Cunyngham, or the matter of his answer, as amounting to an election.

pleaded for the son, in a multiplepoinding, brought by the tenants, that the legacy was void, as the lands could not, by our law, be conveyed by a testamentary deed. Answered for the relict, that as the testament had been found valid by the law of England to convey the estate in St. Christopher's in favour of the son, who was residuary legatee of that estate, and had a lucrative succession, he was thereby barred from challenging the settlement made in the same deed of the Scotch estate. The Lords found, that the son could not quarrel the conveyance by legacy of the Scotch estate; and preferred the relict.*

On the 5th of May, 1819, the judgments of the Court below were varied by a declaration that the Appellants could have no claim to a life-interest [41] in the personalty, either as next of kin or in any other way; subject to that variation they were affirmed. And the cause was remitted for judgment upon the question whether, as by the terms of the Duke's settlement the residue is declared not to be payable till after the death of his sisters, the residuary legatees are intitled to demand payment thereof immediately.†

[42]

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

PATON,—Appellant; BREBNER and another.—Respondents [April 7, 1819].

A lessee becoming purchaser takes upon himself the covenants or warranties of the lessor.

A. and B. having a lease for years of lands "with the privilege of taking water from an adjoining river, for the purpose of driving machinery, etc." which

* The question of election has occurred most frequently upon the wills of persons who had been domiciled in privileged places, where the old customary laws of distribution prevail, as London, York, etc. Upon the general doctrine of Election and Compensation, in addition to the cases cited in the argument, see *Noys v. Mordaunt*, 2 Vern. Rep. 581, and the cases collected in Mr. Raithby's Note. See also *Cary v. Askew*, 2 Cox's C. C. 241; *Forrester v. Cotton*, 2 Eden's C. C. 532; *Vnett v. Wilkes*, Id. 187; *Arnold v. Kempsford*, Id. 256; *E. of Northumberland v. M. of Granby*, Id. 189; and *Green v. Green*, 2 Meriv. 86.

† In the law which regulates *Election* and *Compensation*, and the doctrine of *Approbate* and *Reprobate*, the distinction between the cases where the bequests, gifts, or limitations are contained in one instrument, and where they are several, has been the subject of strong observation in the arguments of the principal case. Upon this question it is to be remarked that a similar principle is acknowledged, in applying what is called the Rule in *Shelley's Case*. If there be in a will or deed a limitation to A. for life, directly or resulting by implication, and in the same instrument a limitation to the heirs of A. the two limitations, by the operation of the rule above-mentioned, give an immediate executed estate of inheritance to the ancestor; but it is otherwise where the two limitations are in different instruments, although the one refer to the other, as where lands were given by deed to A. for life, and by a will a remainder in the said lands was given to the heirs of the body of A., although the estate for life given by the deed was recited in the will, it was held that they did not unite so as to give an estate tail to A. but that the heirs of his body took by purchase. *Fonnereau v. Fonnereau*, Doug. Rep. 470. Yet there is one case, *Hayes v. Foorde*, 2 Black. Rep. 698, in which the two limitations being on separate and distinct papers, viz. a will referring to a schedule which was annexed, both instruments having been published at the same time, with the same solemnities and attestation, and the jury by their special verdict (upon which the case was argued) having found as a fact that the schedule was part of the will, the Court considered them as several parts of the same instrument, and held the rule in *Shelley's Case* to be applicable. The grounds upon which these similar rules in different branches of law have been adopted, would be found, upon investigation, to differ perhaps materially. But the limits of a note do not admit of such an inquiry.

lease and privilege were warranted to the lessees, they enter into a contract with the lessor, in which it is expressed, "that the lessor agrees to grant a feu-charter of the lands under lease, with all the right members, privileges, and appurtenances thereunto belonging, or which ever have been competent to the heritor of the said lands to claim and enjoy. It being the intention of the parties thereto, that all rights and privileges of or belonging to the said lands formerly leased, should be feudally conveyed by the lessor to the lessees, etc." It was insisted by the lessees, that under this contract they were intitled to have a feu-charter executed according to the words of the lease. But the House of Lords reversing the judgment of the Court of Sessions, decided, that the feu-charter must follow the words of the contract; and Eldon, Chancellor, in moving from the judgment, intimated his opinion that the privilege of taking water from the river, *was not included in the words, or legal import of the contract.*

The Appellant in this case was proprietor of an estate called Grandhome, on the northern bank of the river Don, near the city of Aberdeen. The Respondents were at first lessees, and afterwards pending the leases, purchasers under feu-contracts of lands forming part of the estate of Grandhome, with certain rights and privileges [43] which in the feu-contracts were expressed in words differing from those inserted in the leases.

The question between the parties to the appeal was, whether the feu-contracts (or agreements for sale and purchase) were to be carried into execution by inserting in the feu-charter (or deed of conveyance) the words respecting privileges, as expressed in the leases, or those which appeared in the feu-contracts.

On the 20th of February,* 1792, articles of lease, between John Paton, (the Appellant) on the one part, and Messrs. Brebner, and Hadden, (the Respondents) and Thomas Leys, (a partner of the Respondents, since deceased,) on the other part, were drawn up and signed by the parties.

By the first article, "the said John Paton sets and lets in tack to the saids Alexander Brebner, James Hadden, and Thomas Leys, and to their heirs and assignees, for the space of 99 years, from and after the term of Whitsunday in the year 1793, for payment of the yearly rent, and upon the other conditions underwritten, all and whole the haugh of Mains of Grandhome, consisting of, etc."

By the second article it is agreed, "that the said tacksmen and their foresaids shall have the *privilege and liberty of taking in water from the river Don for the purpose of driving machinery and other uses, and of cutting canals through* [44] the said grounds, as they shall judge necessary; with the privilege of all roads to the bridge of Don and Aberdeen, and such right to a passage-boat across the said river Don, opposite to their grounds, as the said John Paton may have to give; together with the privilege of quarrying stones, to be used for any purposes which the said tacksmen shall think proper upon the grounds hereby set, on such parts of the hill of Grandhome as shall not happen to be planted or improved, also in any other quarries on said estate already opened or to be opened by the heritor, or by others having his authority; and that the said John Paton, either as proprietor of the lands hereby set, or as an heritor of the cruives, shall allow, as far as he can, the said tacksmen to discharge their water on any part of the said haugh they may see proper; and whatever trees the said tacksmen shall plant, that they shall have liberty to cut or dispose of the same during the lease."

By the third article, it is agreed between the parties, "that the said tacksmen shall have liberty at any time betwixt the date hereof and the said term of Whitsunday 1793 years, to cut a canal through the said grounds for the purpose of introducing water, upon allowing to the present tenant the amount of whatever damage he shall be found to have sustained thereby, as the same shall be ascertained by two arbiters, to be mutually chosen, with liberty to them, if they should happen to differ, to choose an oversman for finally determining the same; and farther, if [45] the said tacksmen shall think proper, in the mean time, to erect any houses upon any part of the grounds above described hereby set, that they shall have liberty to do so, upon their indemnifying the present tenant of the damage which

* The instruments out of which the question arises, are long and numerous. The material parts of them, forming the basis of the judgment given in the House of Lords, are extracted and inserted in the text.

he may also thereby sustain, as the same shall be ascertained in like manner by proper judges, to be mutually chosen by the parties."

By the fourth article, "the saids Alexander Brebner, James Hadden, and Thomas Leys, agreed, etc. to pay to the said John Paton, etc. for the lands set to them as above, at the rate of £3 sterling for each acre thereof, but with a deduction therefrom yearly of £7 17s. 6d. sterling, on account of the barren ground comprehended therein; and also with a deduction from said rent of £1 11s. 6d. sterling yearly, for each acre of the foresaid pieces of ground called the Devil's Hillock and the Lowing-ill Hillock, the said sum of £3 per acre, to be in full for rent, multure, and every thing else exigible by the heritor, and to be payable at Martinmas and Whitsunday, after shearing each crop, by equal portions, with interest thereafter till paid, and a fifth part more of liquidate penalty in case of faillie; and also, they became bound to build, upon their own expence, a sufficient march-dike of stones, as far as the head or west end of Downie's Hillock, and to uphold the same during this lease."

By the fifth article, it is agreed, "that the said tacksmen shall be obliged to erect and make out [46] a bleachfield or manufactory upon the said haugh; but, on account of the expensive buildings which they must thereby erect, the heritor to be obliged to pay or allow for such buildings as may be standing on the grounds so set at the issue of this lease, the value thereof to the extent of £500 sterling, including mason, smith, slater, glazier, and wright work, according as the same shall be ascertained by skilful persons to be mutually chosen by the heritor and tacksmen; but that the said tacksmen shall have right to remove whatever machinery they may see proper."

By the sixth article, it is agreed, "that the said tacksmen shall be obliged to carry all the grindable grain which may grow on the lands so set to them, and which they may have occasion to grind, to the mill of Grandhome, and to pay the miller for his trouble in grinding the same the one-and-fortieth peck; and if the mill is frequented by the said tenants, they are to join in supporting the same and the dam-dike, as the other tenants, in proportion to their ground."

By the seventh article, it is agreed, "that the tenants of Mains of Grandhome and Denstown, and the heritor for his own use, shall have the use of the road through the haugh of Rappahanna for all purposes whatsoever; but that the other tenants shall only have right to use it as a foot-road; but if the present road shall interfere with their operations, the said tacksmen shall have full liberty to turn the said road to the lower part of the haugh."

[47] By the eighth article, it is provided that, "if, in using any of the aforesaid quarries, the said tacksmen shall happen to go into inclosures or improved grounds, that they shall be obliged to make good to those concerned any damage which may be occasioned thereby."

By the ninth article, "the said John Paton reserves to himself and his foresaids a right to allow stones to be carried to the cruives along the haugh of Rappahanna as formerly; and if the heritors of the cruives shall have occasion to build more houses for the accommodation of their fishings, the said John Paton thereby reserves for that purpose, from the lands thereby set, a space of ground equal to what they at present occupy, adjoining thereto, and that without any diminution from the rent above-mentioned; and the heritors of the cruives are to have liberty of laying down stones as formerly along the river, on their making an acknowledgment therefore to the said tacksmen, as they now do to the present tenant."

Under a provision contained in the preceding articles, and in pursuance of the contract, a lease was executed, bearing date the 31st of March, 1797, by which "it is contracted, finally ended, and mutually covenanted and agreed upon, between John Paton, Esq. of Grandhome, heritable proprietor of the lands after-mentioned, on the one part, and Alexander Brebner, James Hadden, and Thomas Leys, all merchants in Aberdeen, on the other part, in manner and to the effect following: That is to say, Whereas [48] by articles and conditions of lease entered into and executed between the said parties, of date the 20th day of February, 1792, the said John Paton, etc. And whereas, in consequence, and upon the faith of the foresaid articles and conditions of lease, the saids Alexander Brebner, James Hadden, and Thomas Leys, have, at a very great expence, cut a canal through the grounds set to them, as above, and

that they have thereby introduced water from the river Don, for the purposes of the manufactory and machinery already erected, or that may hereafter be erected, upon the premises, and that they have also erected various buildings, and made sundry other considerable improvements upon the foresaid lands: And whereas both the said parties are now desirous, in further implement of the foresaid articles and conditions of lease, to enter into the tack under-written by way of amplification and extension of the foresaid articles and conditions of lease, and for ascertaining the precise rent or tack-duty to be payable by the tacksmen above-named, and their foresaids, to the said John Paton and his above-written; but always without hurt or prejudice of the before-mentioned articles and conditions of lease, and only in further corroboration thereof by the said parties respectively: Therefore the said John Paton, for him, his heirs and successors whomsoever, on the one part, hereby not only ratifies, homologates, and approves of the articles and conditions of lease above deduced, in the hail heads, articles [49] clauses, and conditions thereof, prestable or binding upon him as proprietor of the said land, with all that has followed thereon, excepting only in as far as is now precisely fixed and determinately ascertained by these presents; but also, by these presents, in further implement and extension of the same, on his part, of new sets, and in tack and assedation lets to the saids Alexander Brebner, James Hadden, and Thomas Leys, and to their heirs and assignees, for the space of ninety-six years, etc. all and whole the foresaid haugh of Mains of Grandhome, consisting of, etc. together with the whole *liberties and privileges* of favour of the said tacksmen, *particularly specified in the articles and conditions of lease* above-mentioned, to which reference is hereby had for that purpose, and which shall remain as effectual and binding upon the said John Paton and his foresaids as if the same had been again herein particularly enumerated and expressed, etc. But excepting always from this lease that piece of ground feued off by the said John Paton to the heritors or proprietors of the cruive fishings upon the Don, as the same has been lately inclosed. Which tack, with and under the reservations and declarations above written, the said John Paton binds and obliges himself, his heirs and successors, to warrant to the saids Alexander Brebner, James Hadden, and Thomas Leys, and their foresaids, at all hands, and against all deadly, as law will. And, on the other part, the saids Alexander Brebner, James Hadden, [50] and Thomas Leys, not only hereby ratify, homologate, and approve of the articles and conditions of lease above-mentioned, in the hail heads, articles, clauses, and conditions thereof binding and prestable upon them, with all that has followed thereon, excepting only in as far as are now precisely fixed and determinately ascertained by these presents; but also, in consideration of said lease, and privileges thereby granted to them, bind and oblige themselves, etc. to make payment to the said John Paton, etc. of the sum of £202 8s. 3d. sterling, and that in full of rent, multures, or services, for the subjects and privileges so let to them, etc. yearly, in the name of tack-duty."

By an agreement entered into between the Appellant and Respondents, dated 3d and 9th February, 1810, reciting the effect of the leases theretofore made, and still subsisting, it is agreed, "That the said John Paton shall forthwith establish, and make out a good and satisfactory title in his own person, as heritable proprietor of the lands therein-before specified; and, moreover, upon the request of the said Alexander Brebner and James Hadden, (Thomas Leys being dead), in consideration of the purchase-money, and subject to the annual feu-duty therein after to be mentioned, by sufficient and proper conveyances in the law, but at the cost and charge of the said Alexander Brebner and James Hadden, he, the said John Paton, shall and will grant one or more feu-charters to and in favour of the said Alexander Brebner [51] and James Hadden, their heirs, executors, and assigns, or as they shall direct, over and upon all the lands therein before-mentioned and referred to, comprising Old Grandhome, Grandhome Haugh, Downie's Hillock, Chapel Park of Mains of Grandhome, and others, by whatsoever names or descriptions known, which are comprised in the leases theretofore granted to the said Thomas Leys, Alexander Brebner, and James Hadden, jointly, and in the lease granted to the said James Hadden individually, with the small addition since made thereto, and for which lands they now pay a rent of £315 5s. 10½d. in the whole, *with all the rights, members, privileges, and appurtenances thereunto belonging, or which ever have been competent to the heritor of the said lands to claim and enjoy*; it being the intention of the parties thereto, that

all rights and privileges of, or belonging to, the said lands formerly leased to the said Thomas Leys, Alexander Brebner, and James Hadden, jointly, and to the said James Hadden individually, for a limited period, (including also the aforesaid three additional acres) shall now be feudally and for ever conveyed by the said John Paton to the said Alexander Brebner and James Hadden, their heirs, executors, and assigns, or as they shall direct; in consideration whereof, the said Alexander Brebner and James Hadden hereby agree to pay to the said John Paton, his heirs, executors, or assigns, the sum of £5000 sterling money, at the term of Whitsunday next ensuing the date thereof; and more-[52]-over, to pay to the said John Paton, his heirs, executors, or assigns, the sum of £345 5s. 10½d. yearly, as a feu-duty for ever of and upon the several premises herein before described. And it is hereby further agreed, by and between the said parties, that if, on or before the 1st day of April, 1810, the said Alexander Brebner and James Hadden, or their heirs, executors, or assigns shall be inclined to purchase up and redeem the said annual feu-duty, it shall be competent to them, and they shall have an option so to do, upon paying a consideration therefor, equal to 25 years amount of the said annual feu-duty."

By a tack, dated the 26th of October, 1797, it is contracted, ended, and agreed betwixt John Paton of Grandhome, heritable proprietor of the lands, and others under-written, on the one part, and Alexander Brebner, Thomas Leys, and James Hadden, merchants in Aberdeen, on the other part, in manner following, that is to say, whereas the said Alexander Brebner, Thomas Leys, and James Hadden, have fixed on the grounds hereinafter described, as affording an eligible situation for the erection of machinery fitted for manufacturing purposes, and have in that view *agreed with the said John Paton for the lease under-written, and for the liberty and privilege of taking water from the river Don by a canal or cut for serving such machinery*, and for other purposes connected with any manufactory or manufactories to be [53] erected by them on the grounds after-mentioned. Therefore, and for completing the said agreement, the said John Paton hath set, and by these presents for him, his heirs and successors, whomsoever, but with and under the conditions, declarations, limitations, and reservations under-written, and for payment of the rents and others after specified, sets and in tack and assedation lets to the saids Alexander Brebner, Thomas Leys, and James Hadden, equally among them, and to their heirs, assignees, or subtenants, for the space of one hundred and twenty-nine years, from, etc. all and whole the crofts of land called the Crofts of Craighaar of Grandhome, etc. together with that patch of planted ground lying betwixt the said crofts and the river Don; and also, etc. Moreover, the said John Paton hath given and granted, and by these presents for him and his foresaids, gives, grants, and lets to the saids Alexander Brebner, Thomas Leys, and James Hadden, equally among them and their above-written, for the space and term of one hundred and twenty-nine years above-mentioned, from and after the said term of the commencement hereof, the *full right, privilege, and liberty of taking off water from the river Don*, and of digging, making, embanking, and maintaining a canal, cut, or water-draught, communicating with and conveying water from the said river at or near, etc. together also with the sole and exclusive use, benefit, right, and privilege to the tacksmen above-named and their foresaids, of the said canal or water-draught, and of all and [54] every fall or falls of water which they shall think proper to make and be able to establish along the course of the same, within the limits of the lands set to them as above for the purpose of any manufactory or manufactories they may think proper to erect and carry on upon the premises at any time or times during the term of years above-written; and with full power, etc. as also, in regard it will be necessary for the tacksmen above-named to build, at a considerable expence, various houses for the purpose of their intended manufactories, on the grounds above set to them, of which expence it is reasonable that they should be indemnified at the issue of this lease to a certain extent, the said John Paton therefore binds and obliges himself and his above-written at that period, to pay to the said tacksmen and their foresaids the value of such houses as they may then have or leave standing thereon, according to the appreciation of persons of skill, to be mutually named by the parties at the time, in which valuation is to be included stones, brick, timber, slate, tyle, iron, glass, plaister, and lead work: but the proprietor shall not be obliged to pay for such buildings or materials to a higher amount than £1500 sterling: and the tacksmen shall be at

liberty to remove their machinery and implements of manufacture of all kinds, wherewith it is hereby declared the proprietor is to have no concern, the same being understood to be the absolute property of the tacksmen, etc. for which causes, and on the other part, Alexander Brebner, etc. [55] bind themselves, etc. to make payment and satisfaction to the said John Paton, etc. of the yearly rents, duties, and consideration money under-written, that is to say, of the sum of £13 sterling in full of rent, miltures, and services, for the crofts of Craighaar and whole, etc.—Item, of the sum of £100 money foresaid in the name of *rent or consideration money* for the *grant or privilege of taking water from the river Don*, and of making, using, and maintaining the foresaid intended canal or water-draught, with the benefit and use of the fall or falls of water to be obtained thereby for the purposes before expressed, and other privileges before enumerated connected therewith, etc.”

By an instrument, dated the 19th and 23d of May, 1810,* “it is contracted between John Paton, etc. and A. Brebner, etc. that John Paton, in consideration of the feu-duties, sums of money, and other prestations after specified, hath sold, and in feu-farm and heritage disposed to the said Alexander Brebner and James Hadden, equally between them, and their heirs and assignees whomsoever, all and whole those parts of the lands and estate of Grandhome called Persleys, with the whole other possessions, waterfalls, quarries, *privileges, and pertinents of the same, as at present enjoyed by and under lease or* [56] *leases to the partner or partners* of the company trade carried on at Aberdeen and Persley, under the firm of Milne, Cruden, and Company, etc. Moreover, the said John Paton sells and disposes to the said Alexander Brebner and James Hadden, and their foresaids, (subject to the feu-duty after-mentioned) all and whole these crofts of land called the Crofts of Craighaar of Grandhome, with the whole other grounds, waterfalls, *privileges, and pertinents specified and described in a lease thereof*, bearing date the 26th day of October, 1797, etc. But *reserving* always to the said John Paton, his heirs and successors, *the right of fishing in the river Don*, opposite to and along the whole of the lands above mentioned, etc.”

After the signing of the agreements, the Respondents paid £5500 to the Appellant, on account of the purchase money, for which the agent of the Appellant gave a receipt in the following terms: “For a feu-right to be granted in their favor by Mr. Paton, on the lands of, etc. in the terms of two agreements, entered into between them dated, etc.” The Respondents, from the respective dates of the leases until the signing of the contracts of sale, had been in possession of the premises as lessees. They had erected machinery at a great cost, and had exercised the right of drawing water from the river, with the other rights granted under the leases. Shortly after the signature of the contracts, the Respondents called upon the Appellant to fulfil the contracts by executing a feu-charter. Thereupon [57] differences arose between the parties, as to the terms in which those contracts ought to be carried into execution. The Appellant proposed to grant a charter in the terms of the agreement which he had signed. The Respondents insisted that the charter should comprehend the clauses contained in the leases to them, and to Milne, Cruden, respectively, and Co. with absolute warrandice of all the rights granted by the leases to use the water of the Don, as rights and privileges warranted to belong to the lands. The clauses by the Respondents proposed to be inserted were as follows:—“That John Paton, etc. in consideration, etc. in feu-farm disposes, etc. to A. Brebner, etc. all the lands of Grandhome, (the lands in the first agreement) etc. *together with the privilege and liberty of taking in water from the river Don*, for the purpose of driving machinery and other uses, and of cutting canals, etc. As also that piece of ground, etc. (under lease to Milne, Cruden, and Co. being the lands in the second agreement) together with the privilege, etc. of taking off water from the river Don, and digging, etc. a canal, etc. and conveying water from the said river, etc. for serving machinery,” etc.

After a long negotiation carried on to adjust these differences, a feu-charter was drawn up by the Appellant's agent, containing the clauses contended for by the Respondents. The only matter in difference then remaining to be settled, as the Respondents represented, was, whether a clause of irritancy *ob non solutum canonem*,

* In extracting the above instruments, it should have been noticed that the leases have respectively clauses of absolute warrandice.

should be inserted in the charter, the Appellant claiming [58] and the Respondents resisting the introduction of such a clause. The differences being brought to this point, the matter was referred, upon a case drawn up and signed by the parties, to Mr. Cathcart, now one of the Lords of Session, who gave his award against the Appellant.*

The Appellant having finally refused to execute a feu-charter, containing the clauses proposed by the Respondents, an action for implement of the agreements was commenced in the Court of Session. The summons (after setting forth the agreements, the draft of a feu-charter, the negotiations, the single point to which the differences were reduced, the case reciting that fact, signed by the Appellant, and the award) concludes by praying, that "the said John Paton should be decerned and ordained, by decree of the Lords [59] of Council and Session, to execute and deliver a feu-charter in favour of the pursuers, in terms of the foresaid draft thereof, and relative description of marches, both herewith produced and referred to, *salvo justo calculo*, as to the feu duties specified in the clause of *reddendo* thereof. That he should produce a legal and sufficient feudal title in his person, to the said lands and others foresaid, for establishing his right to grant the said feu-charter in favour of the pursuers, and that he should be decerned to purge all real incumbrances affecting the said lands and others, and to convey the same unincumbered to the pursuers."

The defences to the action consisted of three points:

1st. It is admitted by the defender that he entered into the obligations contained in the two agreements; but that these agreements contain no obligation whatever upon the defender to admit or introduce into the feu-charter the clauses contained in the draft of the feu-charter produced, whereby it is proposed to bind the defender specially to grant to the pursuers power and liberty to take water from the river Don, for the purpose of serving the machineries and manufactories already established and to be established by them, and also to grant absolute warrandice of these privileges and liberties of taking the water, because he might expose himself to future actions of damages at their instance, to a far greater extent than the whole price he was to receive for the feus in question. That [60] the pursuers having made a cut of great extent, for the purpose of taking a great quantity of water from the river Don, to serve their machinery and manufactures, they have been opposed and judicially interdicted from proceeding farther, by the proprietors of the salmon-fishings in the river Don, and the question is still in dependence.

2dly. The special conclusion of the summons being, that the defender "should be decerned to grant feu-charters, not in terms of the feu-agreements previously entered into, but in terms of a scroll or draft of a feu-charter produced and founded on by the pursuers," this conclusion of the action is utterly untenable. His intention in the feu-agreements having been to put the pursuers precisely in his own place, as proprietor of the lands to be feued, with all the privileges belonging to such right of property; but more than this he never agreed, nor can be bound in law to grant.

3dly. The defender never, at any time, agreed to dispoise or convey to the pursuers, the liberty and privilege of taking water at pleasure from the Don, which, as an individual heritor on the banks of that river, he had perhaps no right to grant

* By the pleadings in the court below, and in the printed case presented to the House of Lords, it was alleged by the Respondent, that the Appellant had finally settled and approved the feu-charter, with the exception stated in the text, and had given up his objection to execute the charter with a clause, giving the right to take water from the Don. This allegation was contradicted by the Appellant, who averred that he had annexed to the case submitted to Mr. Cathcart, a writing, or letter, in which he desired that the question as to the privilege of taking water from the Don, might be considered and *decided by the arbitrator*. But this collateral question as to the case submitted to arbitration, and the effect of the award, does not seem to have been much discussed in the court below, nor to have been considered as a material ingredient in the formation of the judgment of the Lord Ordinary, or the Court of Session. It was necessary to state in the text the facts as they appear upon the pleading in the court below, because the Lord Chancellor, in moving the judgment in the House of Lords, adverts to this branch of the matters in dispute between the parties.

and which it would be most imprudent and dangerous in him to warrant to the pursuers. The defender never attested, or meant to attest, that part of the case laid before Mr. Cathcart, which stated that all parties were agreed upon the whole clauses contained in the proposed scroll, or draft, of a feu-charter, except the clause of conventional irritancy *ob non solutum canonem*; on the contrary, [61] at the very time when the defender returned to Dr. Daunev the case to be laid before Mr. Cathcart, he accompanied it by a holograph writing in these terms: "As Mr. Cathcart will have the agreement and copy of the feu-charter all before him, he will see exactly my situation, might I not have his opinion by itself on that head, *as to my being obliged to warrant all these powers of taking in water from the river. It was what I had no idea of at the time I entered into these agreements; as, by selling the property, I thought I placed the purchaser exactly in the place I was in before.*"

The action was brought to hearing before Lord Alloway, as Ordinary, on the 9th of February, 1811, when his Lordship pronounced the following interlocutor: "The Lord Ordinary, having heard parties' procurators on the libel, and grounds of defence, appoints the defender, within fourteen days, to prepare and lodge in the process the draught of a feu-charter, containing all the clauses and obligations which he considers himself bound and is willing to grant to the pursuers, in reference to the whole subjects in question."

After this, Mr. Paton put into process two separate draughts of feu-charters, or contracts, the one applicable to the subjects contained in the first feu-agreement, and the other relative to the subjects in the second agreement. The Respondents were allowed to be heard in objection to these proposed deeds, and the Lord Ordinary afterwards pronounced the following interlocutor: "The Lord Ordinary, having considered the original [62] agreements betwixt the parties, and the draft of the feu-contracts produced in implement of these agreements, the minute given in by the pursuers, as containing objections to the feu-contracts produced by the defender, and answers thereto, together with the whole process,—finds, that two specific agreements, etc. finds, that the first feu-contract should proceed *narrativè*, by reciting *verbatim* the whole of the agreement entered into betwixt the pursuers and defender upon the 3d and 9th February, 1810, and state, that in implement of that agreement, the present feu-contract has been entered into betwixt the parties: finds, that the feu-contract should then contain an exact description of the subjects contained in the leases specially referred to in the agreement; and if the parties are agreed that a more minute and particular description of any part of the subjects should be inserted, it may, with their mutual consent, be inserted in this part of the deed; but if they do not agree, then the very words used in the description of the subjects in the leases should be adopted, *and the feu-contract shall dispoise and confer all the rights and privileges contained in the leases as to those subjects contained in the leases*; and with regard to the additional space of land contained in the agreement, but not included in the former leases therein referred to, finds, that this land must be conveyed, with all the rights, members, privileges, and appurtenances thereunto belonging, or which ever have been competent to the heritors of the said lands to claim and enjoy: [63] finds, that the second feu-contract* shall also recite the precise terms of the second agreement entered into by the parties upon the 19th and 23d May, 1810, and that it shall in like manner narrate the whole of that agreement; and also, that the description of the subjects feued shall contain the whole subjects under lease to Milne, Cruden, and Company; and that with regard to the additional subjects thereby feued, they shall be conveyed in terms of the agreement, together with all the rights, privileges, and appurtenances thereto belonging, or which ever have been competent to the heritors of the said lands to claim and enjoy: finds, that the defender is not entitled to insert any reservation with regard to the lands feued, as to his right of cutting and quarrying stones: finds, that the clause introduced by the pursuers as to the roads ought to be adopted: finds, that with regard to the crofts of Craighaar, there is no difference betwixt the parties, as the defender consents that the clause proposed shall apply to them in terms of the lease thereof: finds, that the great anxiety of the parties seems to arise

* This appellation, which occurs throughout this interlocutor, is more correctly expressed in the former interlocutor by the term *feu-charter*.

from the different views which they entertain of the effect of the clauses contained in the leases, and whether the proprietor under the leases had warranted any other than a legal use of the water, or those rights and privileges which the proprietor upon the bank of a river is entitled to exercise: finds, that, however beneficial it might be to both parties to be acquainted with their precise rights, and the guarantee undertaken under the [64] existing leases referred to, yet as there is no declaratory action to that effect, the Lord Ordinary has not the means of determining that question: appoints each of the parties to prepare a feu-contract upon each of the agreements, in terms of this interlocutor, as the Lord Ordinary, in case of their differing with regard to the arrangement of the clauses, will remit to some conveyancer of eminence, to report upon the proposed deeds."

Against this interlocutor Mr. Paton complained by representation to the Lord Ordinary, and twice reclaimed by petition to the whole Court. But the Courts respectively refused the prayers of the petitioner, and adhered without variation to the interlocutor pronounced. Whereupon Mr. Paton, the defender in the Court below, presented his appeal to parliament.

For the Appellants—Mr. Wetherell and Mr. Heald. For the Respondents—the Solicitor General and Mr. Lumsden.*

The Lord Chancellor. The question arising out of this case may be presented accurately, by stating, that it was, whether the Lord Ordinary in an interlocutor of the 2d of June, 1814, had rightly construed the feu-contract in question, when in his interlocutor he directed that it should be carried into execution in these words: "And the feu-contract shall dispoise and confer all the rights and privileges contained in the leases as [65] to those subjects contained in the leases." The subsequent interlocutors of the Court of Session appear to me simply to affirm what the Lord Ordinary had so directed to be done, and therefore it is only necessary to consider the effect of his interlocutor to arrive at a decision of the present question.

The summons, according to the literal effect of it, is a summons calling upon the Appellant to execute a draft which had been drawn, pursuant to the award of Mr. Cathcart; and it called upon him also to produce *a legal and sufficient feudal title in his person*, to the "*said lands and others foresaid*." The meaning of this must be, that he was to produce a legal and sufficient feudal title in his person, to the *lands and others foresaid privileges* which are now claimed. It was *impossible he should* ever produce a feudal title to appurtenances and privileges which do not belong to the lands. In such case, his obligation would rest only in covenant or agreement.

It struck me that it would have been very important to consider whether the Respondents could succeed at all, unless they succeeded in obtaining a decree from the Court of Session, calling upon the Appellant to execute that draft. To answer the difficulty, it was urged, that the party against whom this summons was levied, had waived the right of raising such a question: because he finally rested his defence upon the ground that he was required by the Respondents to grant certain privileges which were not within the terms or the intent of his contract. And it was farther argued, that if this Court should be [66] of opinion, that, according to the true intent of the contract, the Appellant could not be required to execute such a feu, the case ought to be remitted to the Court of Session, upon the question arising out of the reference to Mr. Cathcart and his award: Because he, as an arbitrator, chosen by the parties, and upon a case settled and signed, had directed that the Appellant should execute a feu-charter according to the draft produced in process. Upon that question I am of opinion, that if the Respondents, knowing the circumstances, present their appeal here, insisting that the Appellant has waived his objection to the form of the interlocutor, as being inconsistent with the conclusion of the summons, they cannot revert to the question upon the award; and then assuming, that the Appellant has in fact waived the technical objection, the parties by their own acts have narrowed the matter of controversy, and the judgment of the House is confined to this point, what is the feu, which, according to the previous contract, the one was bound to execute, and the other to accept without reference to the award?

* The most material of the arguments at the bar are noticed in the judgment. The reasons for and against the appeal are to be found in the printed cases.

This suit is in substance or effect, (allowing for dissimilarities between English and Scotch proceedings), in the nature of a suit in a court of equity in England, for the specific performance of a contract. In such a suit, if it turns out that the Defendant cannot make a title to that which he has agreed to convey, the Court will not compel him to convey something less, with indemnity against the risk of eviction. The purchaser [67] is left to seek his remedy at law, in damages for the breach of the agreement.* In the case now under consideration, the summons prays that the Appellant may make a feudal title to the lands [68] *and others*. Supposing the word *others* to mean liberties: if he could make a feudal title to all the liberties in question in this cause, it would be exactly like a case in the English Courts, where the Defendant can make a title, and where he would be ordered specifically to perform his agreement.

In a case like the present, where no title can be made, it is the practice, I presume, of the Court of Session to direct, (as they seem to have done in this case), that the vendor shall make a title as far as he can: and for all that is defective: for all such parts of the contract as he cannot specifically perform, they compel him to enter into warrandice, and render himself liable in damages. The question has been argued at the bar, and is discussed in the printed papers before the House, whether that is the course which the Court of Session ought to have taken. In the view which I take of the case, it is not necessary to decide that question.

Before I advert to the several instruments upon which this question occurs, I will state what I conceive to be the settled doctrine of English law upon the subject now in discussion. If a lease be made of a house or an estate, the lessor having no title,—and the instrument by which the lease is made contain nothing more than words of demise, with a general covenant that the lessee shall enjoy the premises, that is as long as the relation of lessor and lessee continues.—In such a case, the lessee does not usually look into the lessor's title, but he takes a covenant which binds the lessor, that he shall have the enjoyment of the thing [69] demised. But if that lessee afterwards becomes the purchaser of the inheritance of the estate, the consequence is, that having assumed the character of vendee, it becomes his duty to call upon the vendor to show that he can make a title to the inheritance: and, as vendee, he subjects himself to the necessity of using diligence to investigate that title which he takes or refuses, as he may be advised. With respect to covenants, he can have

* In the English Courts of Equity, the general rule is, that a vendor shall not be compelled to give an indemnity. *Balmanno v. Lumley*, 1 Ves. and Bea. 221. The purchaser has no remedy for defect of title, but by action at law for the damage he has suffered by the non-performance of the contract. But in a case where the subject was a church lease, and the contract in effect, as construed by the Chancellor, was, that C. and his representatives should use their utmost endeavours to obtain renewals before expiration, so as to give an interest for 63 years to the vendee; and the right and interest, by such means of renewal, was to be secured to the vendee according to the contract by a covenant, binding all the real and personal assets which C. should leave at his death: and it proved, that the bulk of C.'s property was bound up by an entail, and therefore the covenant which the vendee obtained could only bind such unentailed property as C. should leave to his heir. Eldon, C. directed, that if the difference between the interest described in the particulars of sale, and that which the vendor had to give, which was in fact the difference in value between the covenants before-mentioned, could be ascertained, the purchaser should have a compensation to that amount, by abatement from the purchase money; or if the difference could not be valued, that he should have *an indemnity*. An inquiry was directed before a Master in Chancery, to ascertain such difference in value; and if he should be unable to do so, then he was directed to settle such security by way of *indemnity*, as, under all the circumstances of the title, it should appear just and reasonable that the defendant should execute, to indemnify the purchaser and those claiming under him, in case he or they should be evicted, molested, disturbed, or prevented, by reason that a title cannot be made according to the representation of the title in the particular, for the same enjoyment as if the vendor could have made good the representation, and the contract had been carried into execution accordingly. See *Milligan v. Cooke*, 16 Ves. p. 1.

nothing more from that very person who, as lessor, had entered into an absolute covenant, if I may so express it, for his enjoying the premises in the relation of lessee. He can have no covenants, except such as belong to the title and interest vested in the individual who, ceasing to be lessor, takes upon himself the new character of vendor. If he claims his estate under a will, the vendor covenants only against the acts of his deviser and himself. If he claims by descent, his covenant is adapted to that species of title; but in as much as he, and those under whom he claims, had taken the title at the hazard of limited covenants, he transmits the estate and title with such limited covenants from himself; and the relation of vendor and vendee, when acquired by conveyance of the inheritance, puts an end to the covenants, though ever so large and general, which existed between lessor and lessee.

I do not presume to say, that there may not be special agreements, which might entitle the vendee to call for much larger covenants than those to which he is entitled under ordinary contracts: but, according to the established principles of the [70] law, unless there be such explicit terms in the contract, giving more than ordinary covenants, he is not entitled, in his relation of vendee, to covenants so express as those which he had in his relation of lessee. Here, the relation originally was that of lessor and lessee; it was afterwards to be changed into the new relation of vendor and vendee, in consideration of a certain sum, and also a feu-duty; but in the contract, there is an express liberty given to the vendee, within a certain time to extinguish that feu-duty, by becoming the purchaser, at the additional gross sum of 25 years' purchase; and therefore the feu contract is to be considered, not merely as a contract, in which the vendor was to receive the gross sum of £5500, and likewise to be paid a feu-duty; but as a contract in which the person who was to take that feu might, within a limited time, elect not to pay the feu-duty thenceforward, but by the payment of an additional sum, calculated upon the feu-duty, to become the purchaser. The question is, whether, supposing that option not to be acted upon, it is to be taken as settled, that he granted this most extensive warranty which is contended for by these Respondents. Because, if there was to be that warranty, after the purchase was made out and out, it is impossible, in my opinion, to contend that there was not to be that warranty while the feu-duty was payable.—It must be in both cases, or not at all.

With respect to the first instrument, the articles bearing date the 20th of February, 1792, it is to be observed, that they were reduced into a formal [71] tack in March, 1797; and that the notion of the purchase of the feu-duty did not take place till February, in the year 1810. In the mean time, according to the allegations of the printed papers, there had been an expenditure upon the premises, in matters of machinery for carrying on the business of the Respondents, of about £100,000; and the water had, with little or no interruption, except in a particular case, been enjoyed as far as the necessity of that machinery required, from the time that they first took the water out of the river Don, till the time when the feu-contract was entered into, in February 1810; a circumstance which shews, that they had had the use of the water to the extent of the supply that was necessary for machinery, which had cost, as they allege, no less than £100,000, with no other interruption than the slight interruption to which I have alluded. The fact of that use, so little interrupted, is not immaterial, in considering the probability how far a purchaser in 1810 of that which he had possessed under lease ever since 1792, would or would not be inclined to give up a large and extensive warranty, if it be the real effect of the agreement of 1792 that he was to have that extensive warranty.

Upon inspection of the *agreement of 1792*, it is to be observed, that the whole of the first article is confined in its terms to the agreement to set and let in tack the lands; there is not in this first article a single word about privileges or appurtenances, *or others*; the words which are usually engrossed in the formal conveyance; yet [72] no lawyer can doubt, that, if this first article was to be specifically performed, and a tack set of those lands accordingly, the scroll of tacks, if regularly drawn out in implement of that article, would have conveyed with those lands for the term all the privileges, and so forth, which, (to use a term we frequently employ on these occasions) *belonged to the lands*. Although no mention whatever is made

of the privileges which belong to the land, upon an agreement to make a tack, the privileges belonging to the land are included by operation of law, and ought to be expressed in the tack.

The second article applies to privileges which cannot belong to lands, lying very near the river Don. That the owner of these lands might be intitled to certain uses of the river, as privileges belonging to the situation, is not difficult to believe; but that he should have as privileges belonging to the lands, such a privilege as the second article professes to confer, appears to me incredible. The words used in that article are so large, that, upon repeated questions addressed to the Bar, no person has been able to state the precise meaning of them.

In the printed papers, (which I have read very carefully) as well as at the Bar, it has been contended, that this article has not the extensive sense in which the Respondents construe it; but more extensive words I think cannot be used. Where the Appellant means to restrict his grant within the limits of his power, he does so in words, for in granting a right to a passage boat [73] to cross the river opposite to the grounds, he expresses his intention to give that only, as far as he has it to give. Such a restrictive precaution he does not apply to "the privilege and liberty of taking in water from the river Don;" but he says, expressly, "that they shall have the liberty of taking in water from the river Don, for the purpose of driving machinery and other uses, and of cutting canals through the said grounds, as they shall judge necessary."

"Again, as to the privilege of quarrying stones, to be used on such parts of the hill of Grandhome as shall not happen to be planted or improved;" that is a privilege which cannot possibly belong to the land. The privilege of quarrying on my estate could not belong to land, part of my estate demised by lease: it could not be a privilege inherent or belonging to the lands so demised. The right of cutting a canal through the grounds, which is given by a subsequent article, is another liberty which could not possibly be inherent in the lands demised.

Upon that part of the articles by which it is agreed, that the lands demised shall be paid for at a certain rate per acre, much observation is made in the papers; and it has been suggested also at the Bar, with respect to the instrument relating to the lands first demised, that a money payment is to be made for the land of so much for each acre, and that therefore it is distinguishable from that other instrument (the tack dated 26th Oct. 1797, by which other lands, etc. were demised) which has been made the subject of comment, in which a sum is expressly given for the liberty of taking the water. But [74] those observations and arguments are founded in too much nicety of distinction. Can it be supposed, that because this £3 per acre is to be given for the land only, the parties did not mean that as a compensation for all that the one was to grant, and the other to enjoy under the agreement and the lease, which was to follow. Although there is no separation between the different parts of this £3 sterling for the land, and the liberties to be granted, it would be extravagant to say that the lessee did not contemplate the advantage he was to receive from the whole he had stipulated to enjoy under that lease. At the same time, it does not appear to me ultimately to make any difference in the construction of the instruments, or the decision of this case.

There is much argument in the papers on both sides, with respect to the effect of the clause in the articles, which provides for the building of the bleach field, and the price to be given for it at the end of the term. On the one hand it is contended, that, as the Appellant is to pay only £500 at the end of this term for all he was to take, he had a valuable consideration to look to, if he continued to be the lessor to the end of the term, which he would not have, if he was to be considered as feuing in perpetuity. On the other hand it is answered, that the lessees might strip or denude these buildings of all the machinery in them, and leave only the naked walls. Undoubtedly the difference of consideration is very great between the walls with the machinery, and the walls only, without the machinery.

[75] In more than one of these articles allusion is made to certain cruives; and rights are reserved by the Appellant, with a view to their maintenance. The cruives, I suppose, were fishing cruives in this river, of which it is contended these articles are so improvident as to entitle the lessees utterly to destroy the value. Under these circumstances, a question would arise, whether the agreement, even

according to the articles, must not be construed as giving so much of the water of the Don as to leave the cruives for the fisheries uninjured.

According to my construction of this agreement, the Appellant had exceeded his powers: he had agreed somehow or other to secure, whether by covenant or warranty, or otherwise, "the privilege and liberty of taking in water from the river Don, for the purpose of driving machinery, and other uses, and of cutting canals through the grounds, as the Respondents should judge necessary;" a most improvident agreement to warrant a privilege which perhaps he could not secure, and for the failure of which he must be answerable in damages, if the Respondents were disturbed in their enjoyment. If, under these circumstances, the inheritance had been purchased by the lessee, no doubt such a purchase might have been so managed, as to prevent a merger of the lease: but, in the absence of special provision, there would have been a merger of the lease, and the lessee having become the purchaser, would in law have taken upon himself all the obligations by which the former owner of the [76] inheritance had bound himself to his lessee; in other words the *quondam* lessee, in his new character of purchaser, would be the person to warrant to himself the liberties and privileges which the former lessor had agreed to assure to him, as long as the old relation of lessor and lessee continued. Undoubtedly the vendor might have conceded the advantage which by law he derived from the new relation of vendor and vendee; and, as the purchase was a matter of option, the vendor might have warranted, at the risk of any damages which could be recovered against him, those liberties and privileges which he as lessor had agreed to give the Respondents as lessees. But, according to our law, and in all laws which rest on principle, such a contract between vendor and vendee must be expressed in terms which are free from all doubt or ambiguity. The terms of a contract so special must indicate, unequivocally, what was the intention of the parties.

In the case before us, it must be remembered, that the contract provided an option for the Respondents, either to pay a feu-duty in perpetuity, or that they might redeem the duties at so many years' purchase, within a given time after the feu-contract was executed, and yet the special contract is supposed to be this, that after vesting the inheritance in the vendee for ever, the vendor was for ever to continue liable for all the damages which might be incurred by the vendee, in the exercise of the privileges and liberties in question. That a man may make such a covenant I do not [77] deny: but when the question is, whether he has made it; the terms of the contract should leave no room for doubt.

In the tack made in the year 1797 (31st March, relating to the lands first leased), the demise is of the lands, "with the privilege and liberty to the said tacksmen and their foresaids, of taking in water from the river Don, for the purpose of driving machinery and other uses, and of cutting canals through the said grounds, as they shall judge necessary." Upon this lease there can be no doubt, and improvident as it was for the Appellant as lessor to enter into such a warranty as he did in this lease, yet if that is clear upon the terms of the instrument, he must abide by his contract. Now in this lease, to remove all doubt as to the privileges and liberties intended to be granted, they insert these special words, "together with the whole liberties and privileges in favour of the said tacksmen," (not *belonging to the lands*, but) "particularly specified in the articles and conditions of lease above-mentioned, to which reference is hereby had for that purpose, and which shall remain as effectual and as binding upon the said John Paton and his foresaids, as if the same had been again herein particularly enumerated and expressed." In this instance, there is a contract specifically executed, according to terms which leave no doubt, and it is a contract between the same parties, who had, or might have had, that transaction in their memory. If, upon framing the feu-contract, it had been expressly stipulated, that the Appellant was to warrant or feu the privileges and [78] liberties, (not merely belonging to the land, but the liberties and privileges) *particularly specified in the articles or conditions of lease*, as though they had been there particularly enumerated, or all the privileges and liberties *mentioned in the tack itself*, as if they had been in the feu-contract particularly enumerated, no doubt could have risen. In the opinion of my Lord Alloway, (an opinion which deserves our respect,) as well as that of the Court of Session, the words, *privileges belonging*

to the lands, have not so extensive a meaning as the Respondents suppose and argue. Can the words, "*privileges and liberties belonging to the lands*," appearing in a feu-contract, be applied not only to what was in the instrument, but to what was not in the instrument? In a case where it is of necessity that the claimant should shew the plainest and most unambiguous terms, can he have more than privileges which belong to the lands, where he stipulates in terms which are admitted to describe *primâ facie*, nothing but privileges which do belong to the lands?

It is not immaterial to observe, that in another part of the instrument now under consideration, the Respondents are bound "to implement, perform, and fulfil the whole other obligations, prestations, and conditions, incumbent upon them as tacksmen, contained in the foresaid articles and conditions of tack." I refer to that part of the case, because these are articles of tack, which grant not only privileges beyond those which belong to the lands, but they are articles of tack which contain a great many reservations to [79] the owner, with respect to his enjoyment of the lands leased, and other estates belonging to him. If he has entered into a feu-contract, which puts an end to those reservations, he must abide by the consequences of a feu-contract so drawn up. I do not say that he has done so, but the words of the instrument are to be weighed, and the parties must abide by what they have expressed, although it be contrary to what they meant.

By the feu-contract (3d and 9th Feb. 1810), after the recital of the leases, grants, and agreements, and a description of the premises, it is agreed, that the Appellant shall establish and make out a good and satisfactory title in his own person, as heritable proprietor of the lands aforesaid, which would bring an obligation upon him to make out a good title to those lands, as heritable proprietor of them, and such title would carry with it a good title to all the privileges belonging to the lands. But how he is to make a good title to privileges not belonging to the lands, I do not comprehend. He may warrant the privileges, and *agree* to make a title to them, but if they do not belong to him, how is he to fulfil such an obligation specifically?

The parties to this contract had before them the tack and the articles of agreement; which articles of agreement enumerated all those privileges which are now the subject of litigation; and in a separate article from that which would have carried the privileges incident or belonging to the land. In the contract which followed (the lease dated 31st March, 1797), the Respondents had expressly, in one part of it, (in order to remove all doubt), provided that [80] they were to have all the privileges, liberties, etc. etc. which were mentioned in the articles specified in that contract, and that as largely and specifically as if they were therein particularly enumerated. Is it consistent with this conduct, that when they were making a feu-contract upon the lands comprised in the leases, now in question, and when they used only the words "*privileges belonging to the lands*," that they could have intended to affect the relation of proprietor and vendee with the same obligations which by contract attached upon the relation of lessor and lessee. If such had been the intention, they had only to repeat, *totidem verbis*, the words to be found in the tack which followed upon the articles; and such a special contract, when carried into execution, would have comprised reservations with respect to the estate, the subject of the tack, which were beneficial to the Appellant, as owner of the land.

I do not forget the words which are added, "with all the rights, members, privileges and appurtenances thereunto belonging, or which ever have been competent to the heritor of the lands to claim and enjoy." If it has been competent to the heritor of the lands to claim and enjoy the privilege of drawing water from the Don, it is a privilege thereto belonging; and if the Respondent takes the feu-charter in the very terms in which this feu-contract is expressed, he will have that privilege. On the other hand, if the privilege of drawing the water is not a privilege belonging to the lands, or not a privilege which it was ever competent to the heritor of the lands *qua* heritor of the lands to [81] claim and enjoy, you have not that privilege, unless those words enable you to claim a privilege not competent to the heritor of the land to claim and enjoy. As to the additional words expressing that it is "the intention of the parties, that all rights and privileges of or belonging to *the lands formerly leased* to Leys, Brebner, and Hadden, etc. shall now be finally and for ever conveyed by Paton to Brebner and Hadden, their

heirs, and executors, and assigns, or as they shall direct," it is said that they mean not the *lands* formerly leased, but the *rights and privileges formerly leased*; and in order to shew that this does not mean the lands formerly leased, but the rights and privileges formerly leased, we are referred to the words in former contracts between the parties, in order to gather from them the construction of these words in the feu-contract. Considering the words in question in this point of view, I observe, that in the year 1792, the parties agreed by articles that a tack should be made. In the year 1797 a tack was accordingly executed. In order to avoid all question, they included in that tack by special words all the liberties and privileges granted in those articles. It was quite unnecessary upon this transaction in the year 1797, to consider, whether these were rights and privileges belonging to the lands or not, for the parties had agreed, as lessor and lessee, that the lessee should have those privileges, whether he could have them by way of tack, by way of agreement, or only in compensation for damages. When they came to make this feu-contract, the inference I draw from the ab-[82]-sence of these special words, and of the reference to the lease and articles, is, that they had agreed not to insert those words, although they were lying before them. The natural import of the words is this.—If these are rights and privileges belonging to the lands, and which, as the heritor, I can grant, you will have them:—If they are rights and privileges which I cannot give to you as vendor of the estate, without entering into those special covenants, then you will not have them. We will not determine whether they are of the one nature or the other, if they are of such a nature that they can be said to belong to the lands leased, you have them:—If they are not of such a nature as to belong to the lands leased, but your rights are to depend upon a personal covenant, that is not what I mean to give: and therefore, instead of using those words which I find in the articles and in the tack, I will use more cautious and restrictive words.

Such appears to me to be the right construction of the instrument, and I think the words used do not include the privilege claimed. I am the more confirmed in that opinion when I consider that part of this instrument by which the Respondents have an option to redeem the annual feu-duty, and purchase the inheritance upon paying a consideration about equal to a sum of £12,300. Under these circumstances it is supposed that the Appellant entered into a contract to deliver over the inheritance of the lands to the Respondents, with a covenant, binding him to all eternity to secure to the new owners the use of [83] the water of the Don, not only for the purpose of machinery, upon which they state that they had laid out £100,000 prior to this feu-contract, but for *other* purposes, and to such unlimited extent as they might think proper to employ that water for machinery, and for other purposes which, to this moment, have neither been defined nor ascertained. According to the literal import of the articles and the tack, the Respondents are to exercise uncontrolled power over the river, under the guarantee of the Appellant, and at his risk.

To the objection that this is an extravagant warranty, which it is hardly credible a man parting with the inheritance of lands should agree to give, it is answered, that he did warrant the same privilege for 99 years. That is undoubtedly an improvident undertaking, but nothing like the improvidence of a guarantee of such a privilege in perpetuity. On the other hand, when the Respondents became the heritors of the lands, it is not unreasonable to suppose, that having purchased the inheritance, they took upon themselves the bargain and warranty of their lessor. He had by agreement bound himself by warranty for 99 years; and from the year 1792 to 1797, the Respondents, under that agreement and the lease which followed, had taken water for the supply of their extensive machinery, without disturbance, except in a trifling instance. But upon the new contract for purchase of the inheritance, the question is, Whether the Respondents by the specialties of their contract, have precluded the application of that rule which governs such transactions be-[84]-tween the vendor and vendee of an inheritance, that the vendee takes upon himself the relation of the vendor with respect to lessees, and as to claims which the vendor had created, unless the terms of the agreement expressly shut out the application of such a rule to his case.

As to the other feu-contract (May 19 and 23, 1810, ante, p. 55), if that by express

terms binds the Appellant to perpetual warranty, upon which I give no opinion, are we to say that, because one agreement operates by express terms, the same construction is to be put upon the other agreement which has no such terms, and where the parties think proper to use precisely the same terms, with respect to the premises which never were in lease,* as with respect to those which were?

The case does not require any judgment to be given upon the construction of the feu-contract. The only question now at issue is, How it shall be carried into execution? That will be most properly done by transferring to the proposed feu-charter the very terms respecting rights and privileges which were used, and are to be found in the contract. The question, what are the rights and privileges which pass under the terms contained in the feu-charter, may then become the subject of actions of *declaratur*; and the Court of Session, sitting as a Court of Equity, must consider [85] whether they will be justified in the conclusion that the recital appears to be for the purpose of ascertaining what rights and privileges are to be conveyed, and that the rights and privileges in question are such as do not belong to the lands; or whether they can safely determine, from the words which are to be found in this feu-contract, that it was the intention of the parties to include in their agreement not only the rights and privileges which belong to the lands, but the rights and privileges which are claimed. If the parties do not come to some compromise upon that question, the conveyance must be submitted to the Court of Session, to consider and decide, whether the great privilege which is the subject of dispute does pass by it or not. In my opinion, it does not pass. But the opinion thus given is extra-judicial. It cannot interfere with the rights of the parties to agitate that question. If hereafter the Court shall say, this is a liberty and privilege belonging to the lands, the Appellant must abide by that decision, because he has agreed to grant the liberties and privileges belonging to the lands; and even supposing it not to be a right and privilege belonging to the lands, yet, if upon consideration of the special words of the recital, it can be inferred that the Appellant has bound himself by agreement, he must, in that case, also convey the rights and privileges, which come within the terms of his agreement, though not belonging to the lands.

Whenever the question shall arise as to the right construction of the conveyance so executed, it will be matter of consideration on the one hand, [86] how far it was the intention of the Appellant to part with an inheritance affected by the same terms and conditions, which affected that estate under the lease; or on the other hand to withhold what was granted by the lease.

With respect to the medium of proof assumed in the Court below, it may be remarked as singular, that although the two agreements were separated in the progress, yet one of them was admitted as evidence to assist in the construction of the other; and the judicial conclusion is, that because *the one* agreement has words which in the judgment of the Court conveyed, or meant to convey, certain rights, therefore *the other* agreement must be considered to have embodied in it the same intention, although different words are used.

It appears to me upon the whole, that if the interlocutor of the Lord Ordinary is altered by striking out the words in italics,† and by declaring that, instead of those words in italics being inserted, this conveyance ought to be made in the very terms of the feu-contract, that alteration will be sufficient, and that is an alteration which the rights of the parties require.

April 7, 1819.—The judgment of the House was given according to the suggestion of the Lord Chancellor, with the alterations proposed by him as above stated.

* This observation relates to a grant of three acres of land, not before in lease, which are included in the agreement of the 3d and 9th of February, 1810. In abstracting the deeds which form the ground-work of the case, this material passage was omitted, partly from inadvertence and partly from the desire of curtailment.

† The words are, "and the feu-contract shall dispose and confer all the rights and privileges contained in the leases, as to those subjects contained in the leases."

[87] SCOTLAND. APPEAL FROM THE COURT OF SESSION

TASKER.—*Appellant*; CUNNINGHAME, and others.—*Respondents*
[7th July 1819].

[Mews' Dig. xiii. 1212.]

A determination made by an agent duly authorised or acknowledged not to sail upon the voyage insured, but upon a different voyage, is an abandonment, and discharges the underwriters.

Correspondents at Cadiz, of ship-owners in England, having received directions to ballast and freight a ship for the Clyde, suggest a slight variance as to the port of destination, which the owners adopt by insuring the ship and cargo for a voyage, including the port named and fixed by their agents. Soon afterwards, the agents at Cadiz informed the owners that, owing to a change of circumstances, and with the advice and concurrence of the captain, they have determined not to send the ship according to their former suggestion (*i.e.* upon the voyage insured), but direct to Newfoundland. Eight days after this new determination, the ship is stranded in the bay of Cadiz, and burnt by the French army. The several letters containing intelligence of the new alteration of the voyage and of the loss of the ship, arrived in England, and were received by the owners upon the same day.

The House of Lords reversing the judgments of the Court below, decided, that the correspondents at Cadiz were the agents of the Respondents; that the voyage insured was abandoned by their determination to send the ship on a different voyage, and therefore that the underwriters were not liable for the loss. The consequence of this decision being that the owners were bound to refund to the underwriters, with interest, monies which had been paid by them before they were apprised of the facts.

The Respondents, who were engaged in the Newfoundland trade, expecting one of their vessels, called the *Henrietta*, to arrive with a cargo of fish, at Cadiz, in the beginning of the year [88] 1810, directed Messrs. Lynch and Co. their agents at that place, as soon as the cargo should be discharged, to ballast the vessel with salt, and to endeavour to procure freight *for her to Clyde*. The vessel arrived at Cadiz about the time expected, but the French army having taken possession of the salt-pans in that neighbourhood, it was not in the power of Lynch and Co. to comply with the Respondents' instructions. Under these circumstances, they resolved, with the approbation of the ship-master, to dispatch the vessel *for Liverpool*, in place of Clyde. Of this change in the destination of the vessel, Messrs. Lynch and Co. advised the Respondents, by a letter dated the 16th of January, 1810. By a letter dated the 10th of February, from the same persons to the Respondents, the cause of this variation is assigned in the following terms: "I have, at last, sold the *Elizabeth's* cargo, at 3 $\frac{3}{4}$ per quintal, etc. As to the *Henrietta's*, I could not get a purchaser for the whole, so that begun to retail it at five dollars, at which I hope to run the whole off shortly. As the French have got possession of all the salt-pans in the neighbourhood, I cannot ship any salt in these vessels, so that will set them up for Liverpool (where can get salt) with a prospect of getting full freight without much delay."

It was necessary that a cargo of salt should be sent out to Newfoundland early in the spring, for the supply of the fishery, and salt could only be procured at the port of Liverpool. Messrs. Lynch's letter, acquainting the Respondents with their in-[89]-tentions, was written while the fish cargo was yet on board. After the receipt of it, and upon the 12th of March, the Respondents effected a policy of insurance upon the voyage *at and from Cadiz to her port of discharge in St. George's Channel*, including Clyde, which was underwritten by the Appellant to the extent of £100.

Circumstances afterwards occurred which induced Messrs. Lynch and the ship-master again to alter the destination of the vessel. The sale and delivery of the cargo had been protracted so long, as to give reason to apprehend that, if the vessel proceeded to Liverpool to load salt, the supply of that article would not reach New-

foundland at the proper season in spring; and, in the mean time, the French had retired from the salt-pans at Cadiz, so that a cargo of salt could readily be obtained there.

Messrs. Lynch and Co. therefore, after consulting with the master of the *Henrietta*, and with the master of another vessel belonging to the Respondents, deemed it for the interest of the Respondents to dispatch the *Henrietta* direct to *Newfoundland*; and as it was necessary to give immediate information to the Respondents, of this change in the destination of the vessel, to the end that they might effect insurance on the *new voyage*, they, on the 28th February, 1810, wrote to the Respondents in the following terms: "In consequence of the unprecedented want of small craft, nay, the general confusion that has prevailed since the French appeared in this neighbourhood, the delivery of the Elizabeth's cargo has been [90] delayed until now; and as it is likely the *Henrietta* will be detained from the same causes, until the end of the month, *Captain Collins* has, after consulting with Captain Fields, determined to return direct to *St. John's*, with a cargo of salt, now to be had at double price, which let serve for your Government." Eight days after the date of this letter, while the vessel was lying at Cadiz, she was driven on shore in a storm, and burnt by the French. The letter of the 28th of February, and another letter conveying the intelligence of the loss, were received by the Respondents on the same day, viz. upon the 21st of April, 1810.

In these circumstances the Respondents did not communicate to the Appellant, or the other underwriters, the letter which they had received from Lynch and Co. respecting the projected alteration of the voyage, but obtained payment from them for a total loss. The fact having afterwards come to the knowledge of the underwriters, they applied, by letter, to the Respondents for repetition (repayment) of the money so paid to them, which being refused, the Appellant brought an action before the High Court of Admiralty, in which he concluded, that "the said Cunningham, Stevenson, and Co. and John Bell, merchant, in Glasgow, an individual partner of the said company, should be deemed and ordained, by decree and sentence of the Judge of our said High Court of Admiralty, to make payment, conjunctly and severally, to the complainer, of the sum of £91 10s. sterling, toge-[91]-ther with the due and lawful interest of the said sum, from and since the 11th day of October, 1810, and while payment, and also for expenses."

After various proceedings in the suit, the Judge Admiral pronounced the following interlocutor.—"May 13, 1813, The Judge Admiral having advised the libel, the defences, answers, and whole writings produced, finds, that the defenders were concerned in the ship *Henrietta*, commanded by Captain Collins, expected at Cadiz, with a cargo of fish, about January 1810; and that they gave orders in 1809, to Lynch and Co. their agents at Cadiz, to load the *Henrietta* with a cargo for Britain, as soon as her cargo of fish could be discharged: finds, that the defenders received letters from Lynch and Co. notifying that said vessel was to be loaded for Liverpool, in consequence of which the defenders insured her at and from Cadiz to Great Britain, and of course, the voyage then intended was *bonâ fide* insured: finds, that by the same post they received from Lynch and Co. a letter, dated the 28th of February, and another dated the 12th of March, both in the year 1810, the former announcing an intention in Captain Collins not to sail for Britain, but for Newfoundland, and the other intimating the total loss of the *Henrietta*, while still in the Bay of Cadiz, and when a small part of her loading only had been delivered, and, of course, before she was in a state to sail on any voyage: finds, that as the projected voyage to New-[92]foundland might have been countermanded by the defenders, or even as Captain Collins might again have altered his intentions, without any such orders, and the voyage insured might have been commenced, if the vessel had not been lost in the bay of Cadiz, there is no evidence of an actual abandonment by the defenders, nor even by their captain, of the voyage insured, nor of *mala fides*, in any respect, and, therefore, sustains the defences, assoilzies the defenders, and finds them entitled to expenses."

The Appellant having brought this judgment under review of the Court of Session by process of suspension and reduction, and the cause having come before Lord Pitmilley, Ordinary, his Lordship, after various proceedings, pronounced the following interlocutor:—"The Lord Ordinary having considered the memorial of the sus-

pender, with the memorial of the defenders in the conjoined actions, and whole process; in respect the resolution taken by the defenders' shipmaster, Captain Collins, to return direct to St. John's, instead of proceeding on the voyage insured, as communicated to the defenders by their agent, Mr. Lynch, in his letter of 28th February, 1810, was *not consented to, or judged of by the defenders*, the owners, and insurers of the vessel; and *no step whatever* was taken between the date of the letter referred to, and the total loss of the cargo (eight days thereafter), to carry the captain's resolution into effect, very small [93] part only of the former cargo having been landed, and no preparations having been made for a new voyage in the intermediate period; finds, that the circumstances founded on by the pursuer, do not amount to an abandonment of the voyage insured. Finds, therefore, that it is unnecessary to allow a proof of the pursuer's allegation, that where a particular voyage has been insured, and afterwards abandoned, the underwriter is not entitled to the premium. In the reduction sustains the defences, and assolizies the defenders, and in the suspension finds the letters orderly proceeded, and decerns."

A representation was made by the Appellant; but the Lord Ordinary, by interlocutor, dated the 28th of February, 1815, adhered to his former decision.

Against these interlocutors the Appellant reclaimed by two successive petitions to the second division of the court; but the court being of opinion, that there was no evidence that the voyage to Britain was abandoned, the Lords, by two successive interlocutors, dated respectively the 17th of January, and the 16th of February, 1816, adhered to the interlocutors complained of.

From these several interlocutors of the Judge Admiral, the Lord Ordinary, and the Second Division of the Court of Session, the Appellant presented his appeal to the House of Peers.

For the Appellants, *the Solicitor General* and *Mr. Adam*.—In this case there was a substitution [94] of one voyage for another, made by persons having authority as agents by law and usage, and recognized by the Respondents. By the determination of the agent the voyage was altered, and the liability of the underwriters ceased. This is totally different from a case of intended deviation, where a loss happens before the ship arrives at the point of intended deviation. There can be no such deviation from a voyage which never was intended. Here the voyage insured was abandoned, and another was substituted. The abandonment once made operates immediately to release the underwriters. *Chitty v. Selwyn*, 2 Atk.* [359] No step taken towards the voyage is necessary. Intention is sufficient to constitute a new voyage. The voyage insured rested [95] merely in intention. Suppose the letter announcing the alteration had arrived before the intelligence of the loss, and an insurance had been made on the intended new voyage, the liability upon the original insurance would not have continued. *Way v. Modigliani*, 2 T. R. 30.

After the determination to abandon the voyage insured, the underwriters could not have recovered the premium. *Long v. Allen*, B. R. Easter, 25 Geo. 3. That is the law and usage in Scotland, as well as England. The Respondents acknowledge the fact. It is alleged, and they have not denied it. But as the premium is the consideration for the insurance, if the right to the premium fails, the right to the indemnity must also fail.

* In *Chitty v. Selwyn*, the only matter decided was, that a commission should issue to examine witnesses abroad, and an injunction until, etc. But Lord Hardwicke C. *obiter* said, "When a ship is insured at and from a place, and it arrives at that place, as long as the ship is preparing for the voyage upon which it is insured, the insurer is liable. But if all thoughts of the voyage are laid aside, and the ship lies there five, six, or seven years, with the owner's privity, it shall never be said that the insurer is liable."

In *Way v. Modigliani*, the ship had actually proceeded on a different voyage. But there is a case, *Woodbridge v. Boydell*, Doug. Rep. 16, where, (according to the judgment of Buller, J. in the above case) "It was held, that if a ship insured for one voyage sail upon another, and the track in the outset of the voyage is the same, and she be taken before she arrive at the dividing point of the two voyages, the policy is discharged." There it was no more than intention. If she had arrived at the dividing point, the original voyage, according to the original intention, might have been resumed, yet the right under the policy would not have revived.

The Appellant having paid the loss, when ignorant of the facts, the money is by law recoverable.

For the Respondents—*Mr. Scarlett* and *Mr. Wetherell*. The policy in this case attached from the moment when the ship moored at Cadiz. Where a policy once attaches, no intention to deviate or alter the voyage can affect the policy, if a loss happens before any act is done towards effectuating the intention. Intention, unaccompanied by an act, is in its nature mutable. Suppose the agents had afterwards, and before the cargo was discharged, announced a further intention to revert to the voyage insured: the owners in the mean time having effected a policy on or before the 12th of March, would the momentary intention have destroyed the policy? Policies continue binding so long as no act is done to com-[96]mence a new risk. In *Way v. Modigliani*, the policy was to take effect from a given day, before which the ship had sailed on a different voyage, and the risk never commenced. The case of *Long v. Allen*,* rightly considered, is in favour of the Respondents. The policy in that case being upon a voyage *at* and from Jamaica, the risk commenced by virtue of the word "*at*." If the ship had been lost at Jamaica, the underwriters would have been liable; and therefore, on principle, they would on such a policy have been entitled to recover the whole premium. But the evidence of usage prevailed: an usage that, where the voyage is altered, $\frac{1}{2}$ per cent of the premium is to be retained. If the policy had not been *at* and from, etc. the underwriters would not have been entitled to any part of the premium. There is not a case to be found in the Reports, nor a principle in the text-writers to support the notion that a policy which has once attached can be dis-[97]charged, but by actual deviation, or some act done to alter the risk, some act as contradistinguished from intention. In *Chitty v. Selwyn*, the ship was detained longer than was necessary to accomplish the voyage first insured. That was equivalent to an act. The underwriters were discharged by unreasonable delay. In that case, if the loss had happened before the discharge of the cargo, or before the time of necessary detention had elapsed, the underwriters would have remained liable. In our case, the cargo had not been delivered. If the ship had discharged her cargo, and taken new freight, that would have been an act sufficient to alter the voyage; but mere intention is insufficient. Call it determination, it is the same thing, if not carried into effect. Suppose the intention had not been communicated, but had rested in the mind of the agent, could that alter the voyage? But if it is not altered by the mere uncommunicated determination, how does the communication aid the case? Intention, determination, and communication are of the same nature: they are not acts.

The two letters having been received on the same day, the owner could have made no insurance upon the new risk, which would have been a great hardship. If the mere intention of a captain or agent can alter the risk and the voyage insured, an owner could never know whether he had effected a valid insurance. Such an intention, if carried into effect without the approbation of the owners, would be barratry in the captain. *Earle v. Rowcroft*, 8 East, 126.

[38] *The Solicitor-General* in reply.—To constitute barratry, the act of the captain must be fraudulent. Here it was for the benefit of the owners. Determination by persons duly authorised is sufficient to alter the voyage—subsequent acts are only proof of the intention. If the owners had insured the new voyage, the new underwriters would have been liable, yet this would not have been an act in any other sense than as the determination of the authorized agent is an act.

The Lord Chancellor.—The want of consent on the part of the owners cannot be

* In *Long v. Allen*, the action was for a return of premium. The jury gave a special verdict, finding an usage, upon which the Court grounded their judgment when the case was argued. The finding of usage superseded the necessity of the question of apportionment. But Lord Mansfield observed, "The law is clear, that if the risk be commenced, there shall be no return of premium. Hence questions arise of distinct risks insured by one policy or instrument. My opinion has been to divide the risks. I am aware, that there are great difficulties in the way of apportionments, and therefore the Court has sometimes leaned against them." See *Mayer v. Grayson*, Park on Insurance, p. 588, 7th edit.

In the case now reported, the insurance was *at* and from Cadiz, etc.; but the destination was altered and the ship lost before the policy was underwritten.

suffered to stand as a reason for the interlocutor, pronounced by the Lord Ordinary, if the judgment itself could be affirmed. That no step was taken between the date of the letter, announcing the new voyage and the loss of the cargo; that a small part only of the former cargo was discharged, and no preparations made for the new voyage, are facts assumed in the Court below, as the ground of judgment. But there is no trace in the proceedings of any proof of these facts. It seems by the course of argument adopted in the cases, as if these facts were to be taken for granted. In the proceedings before the Judge Admiral, and in the letters of suspension, it is alleged that there was an arrangement as to the price of salt to be taken at Cadiz, and the means of taking it. But there is no proof to support those allegations.

Upon the question of barratry it is material to consider the instructions given, and how far, according to a literal construction, they sanction what was done by the parties acting under them. [99] By a passage in the letter of the 10th of February, it appears that the agents then had an opinion that the vessel would be very speedily unloaded. By the following passage of that letter, they intimate their intention of sending the vessel to Liverpool, and the owners adopt that determination by insuring accordingly for the Channel, comprehending Clyde. The Captain also apprises his owners of the same determination, and by an expression to be found in the letter of the 28th of February, it appears, that upon the new determination which the agents and captain had adopted again to alter the voyage, notice was communicated to their employers for the purpose of guiding them as to the insurance which it would be necessary to effect.

I do not at present enter upon the discussion of the difference between intention and determination. If the matter upon the evidence can be supposed to rest in mere intention, the interlocutor must be altered so far as it assumes actual consent of the owners to be necessary. For it appears throughout the correspondence, that the captain and the agents had taken upon themselves to direct or alter the destination of the ship, with the acquiescence at least of the owners. The risk here insured was not merely on the voyage, but *at* and *from* the port of Cadiz, etc. Upon such policies difficult questions arise as to the commencement of the risk, and the return of premium. But where the voyage has been abandoned before the commencement of the risk, it is impossible to contend that the premium could be claimed. What amounts to abandonment is a different question. [100] When a ship is insured *at* and *from* a given port, the probable continuance of the ship in that port is in the contemplation of the parties to the contract. If the owners, or persons having authority from them, change their intention, and the ship is delayed in that port for the purpose of altering the voyage and taking in a different cargo, the underwriters run an additional risk if such a change of intention is not to affect the contract. The substantial question in this case is, whether any declaration is to be found in the correspondence that the voyage insured was in fact abandoned. I will not, at present, advise the House to proceed to the decision of a question upon which very nice distinctions have been taken. The judgment may be for a few days deferred, and in the mean time I will confer with a judge, whose attention has been much occupied with these subjects.

Lord Chancellor.—The interlocutor in this case, is in substance, that the assured is entitled to recover against the underwriters for a loss of the ship. The question arises upon a policy of insurance effected by the Respondents, on the ship *Henrietta*, *at and from* Cadiz. The Respondents, on the 24th of November, 1809, wrote to their correspondents at Cadiz, Messrs. T. and H. Lynch and Co. a letter containing instructions respecting the *Henrietta*. Lynch and Co., by their answer, dated the 16th of January, for a cause explained in a subsequent letter, suggest that the destination of the vessel on its homeward voyage should be varied. By a letter dated the 10th of February, [101] they inform the Respondents that "as the French have got possession of all the salt-pans in the neighbourhood of Cadiz, they will set up the vessels (one of which is the *Henrietta*) for Liverpool," where salt may be procured. The captain also, by a letter of the 11th of February, informs his owners, the Respondents, that, for the reason before assigned, the agents mean to load the vessel for Liverpool. It appears, therefore, that the agents advise their principals that they do not intend to follow their instructions. These two letters * of the 10th and 11th of February

* The Lord Chancellor read the letters in moving judgment; but as the letter of

reached Port Glasgow the 9th of March. On the 12th of March the Respondents effect a policy of insurance upon the vessel, adopting this variance in the destination. The insurance is effected on the vessel, "at and from Cadiz to her port of discharge in St. George's Channel, etc." comprehending Clyde. Without adverting to the cases of apportionment, it is clear, that though a ship is insured *at and from* a certain port, it is insured with a view to the probable continuance of the vessel at that port, and the voyage on which it is to be employed. For, according to the voyage, the continuance and delay in port may differ. Upon the 28th of February, these same agents dispatched another letter to the Respondents, whereby, after noticing the delay which, contrary to their expectations, had already taken place, and the further delay in the delivery of the cargo, [102] which was likely to ensue, they add this important passage:—"Captain C. has determined to return direct to St. John's with a cargo of salt, now to be had at double the usual price, *which let serve for your government.*" By a letter dated the 12th of March, and which came to hand on the same day as the letter of the 28th of February, the Respondents received advice of the loss of the ship insured. The interlocutor of the Lord Ordinary contains a declaration which is now given up as untenable, viz. that the owners had not consented to the alteration of the voyage. As the letter announcing the change came to hand after the loss of the ship, they could not give actual consent. But the agents and captain had, on a former occasion, made alterations respecting the voyage, and the owners acquiesced in, and acted upon their advice and determination. The owners had therefore undoubtedly constituted their agents, with authority to alter the destination of the ship. It is alleged that a small part only of the cargo was delivered before the loss; and it is contended, that as there was nothing to alter the voyage, but intention which might have been again varied, and as there was no progress made in unloading the cargo, nor any other act done towards a change of voyage; this is to be considered as resting in mere intention, and that the loss must be considered as a loss under the policy. Undoubtedly a mere meditated change does not affect a policy. But circumstances are to be taken as evidence of a determination, and what better evidence can we have, than that those who were authorised had determined to change the [103] voyage. In my opinion the voyage was abandoned; and I have the highest authority in Westminster Hall to confirm that opinion. Suppose they had gone upon the second voyage, and the ship had been lost after insurance for that voyage, on which of the two policies could they have claimed and recovered? Certainly not on the first. Upon the letters of the agents and the captain, it must clearly be considered an abandonment.

The Lords found (7th July, 1819), that the voyage ought to be considered as having been abandoned before the loss of the vessel,—and the interlocutors were reversed.

*** Upon the question, when a risk commences under the word "*at*," the case of *Lambert v. Liddiard*, 5 Taunt. 480, makes the nearest approach to the case reported. In *Lambert v. Liddiard*, it was held that the risk had commenced upon the ground that the ship had *prepared for the voyage*, by inquiring for a cargo. Where the contract is, that the beginning of the adventure shall be "immediately *from* and after the arrival of "the ship *at*," etc.; or "*from* the departure," the difficulty is removed. In the common case where it is "*at and from*," etc. without any special words to restrict the meaning of the word "*at*," the beginning to load the cargo, or preparing for the voyage, seem to be the principal circumstances to determine the commencement of the risk. In the case above reported, it may be material to note, that a very small proportion of the cargo brought into the port of Cadiz had been discharged when the ship was lost; and that the owners had received from the underwriters on that cargo the amount of their loss, upon the ground that the risk was not at an end when the loss happened. Upon the question of abandonment, the case of *Driscoll v. Borill*, 1 Bos. and Pul. 313, is the nearest to (but far short of) the case reported. For in that case the captain had written a letter, asking advice of the broker; but he had reserved his determination, and afterwards sailed upon a voyage which, in the opinion of the Court, was within the terms of the original policy.

the agents has already been given in the statement of the facts of the case, it is not here repeated. The letter of the captain was to the same effect.

[104]

ENGLAND.

APPEAL FROM THE HIGH COURT OF CHANCERY.

JACKSON,—*Appellant*; INNES and others.—*Respondents* [10th July, 1819.]

[Mews' Dig. x. 1399: Discussed and explained in *Dawson v. Bank of Whitehaven* 1877, 6 Ch.D. 218 and see S.C. 4 Ch.D. 639, at p. 648; *Jones v. Davies* 1878, 8 Ch.D. 205, at p. 214; *Plomley v. Felton* 1888, 14 App. Cas. 61, at p. 66; Ashburner on Mortgages, pp. 367-371.]

Where lands are in settlement, and the husband and wife join in a mortgage of them, if the deed creating the security is no more in effect than a simple charge upon the lands, and does not alter the limitations further than is necessary to create the charge, the right of redemption, although it be reserved by the deed to the husband and wife, or either of them, *their or either of their heirs*, etc. belongs only to those who are intitled under the settlement, and not to the heirs of the husband, if he survive the wife.

But where the lands of A. upon her marriage were settled to the use of husband and wife successively for life, remainder in strict settlement, remainder to the wife and her heirs, with a power of revocation and appointment of new uses; and she joined with her husband in a mortgage, and by the deed to lead the uses of a fine which the husband and wife afterwards levied, according to covenant, the lands after the determination of the term, created to secure the repayment of the money borrowed, were limited to the husband and wife, and survivor for life, remainder in tail special; remainder, for default of such issue, to the right heirs of the survivor of husband and wife: The wife having died without issue, leaving the husband survivor, it was held, that this was more than a mere mortgage transaction—that there was evidence of an intention to effect a change of the beneficial interest; and that there was upon the face of the deed a clear manifestation of such intention, equivalent to a declaration; and consequently that the husband and his heirs, and not the heirs of the wife, were intitled to the equity of redemption.

[105] Lord Redesdale.—The facts * material to be stated in this case are as follows:—By a marriage settlement, executed in the year 1743, certain lands were settled to the use of Richard Jackson, the husband, for life: the remainder to Anne, his intended wife, for life: remainder to the children, male and female, of the marriage, in strict settlement; remainder to the use of Anne, the intended wife, her heirs and assigns; and the deed contained a proviso, enabling R. Jackson, and Anne, his intended wife, by any deed, etc. to revoke the uses, and to limit or appoint any other uses to any persons, and for any estates. In the year 1745, the husband and wife borrowed the sum of £200; to secure the re-payment of which, by indenture, dated the 25th of November, 1745, they demised the said lands to John Child, (as mortgagee) for the term of one thousand years, with a proviso for redemption, by R. Jackson and Anne his wife, or either of them, *their, or either of their heirs*, etc. and in case of such redemption, that the term and estate thereby granted should determine. This latter instrument, it is to be observed, could only have effect under the power of revocation contained in the settlement, and it operated merely to create a mortgage term, subject to redemption. It is clearly no more than a simple charge upon the estate, redeemable by Jackson, his wife, and their heirs, etc. and it did not alter the limitations of the settlement farther than was necessary to create the charge; it was, therefore, not redeemable by the heirs of the survivor of Jackson

* The facts, as they appeared upon the pleadings in the Court of Chancery, at the original hearing, are to be found stated at length in Mr. Vesey's Reports, vol. xvi. p. 35. Some omissions and some inaccuracies, owing probably to the state of the pleadings at the date of the decree, have been supplied and rectified in the following report. The observations made in moving judgment comprise a sufficient outline of the facts to make the case intelligible to the reader, and to supersede the necessity of giving a distinct and independent narrative of the case.

and his wife, but only by those who were entitled under the settlement, in the year 1746.

Jackson and his wife having afterwards borrowed of the mortgagee the further sum of £400, by indenture, dated the 1st of January, 1746, they continued to the mortgagee, etc. the lands demised for the remainder of the term, discharged from all former provisos, etc. but subject to a proviso for redemption, upon payment by Jackson and his wife, of the sum of £600 with interest, whereupon the term and the respective indentures, whereby it was granted and confirmed, were respectively to cease and be void: and Jackson and his wife thereby covenanted to levy a fine of the lands, etc. and it was declared that the fine so levied of the premises should enure to the use of the mortgagee, his, etc. for the remainder of the term, subject to the proviso for redemption; and "from and after the expiration, or other sooner determination of the said term, to the use of Richard Jackson and Anne his wife, for their lives, and the life of the survivor, and from the decease of the survivor to the use of the heirs of their two bodies, etc. and for default of such issue, to the use of the right heirs of the sur-[107]-vivor of R. Jackson, and Anne his wife, for ever," etc. A fine was afterwards levied according to the covenant, and it is upon the construction and operation of the latter words of this deed that the whole question in this appeal arises.

Of the same date with the deed by way of further mortgage and limitation, R. Jackson executed a bond and warrant of attorney to C. the mortgagee, to secure the repayment of all the money borrowed. In the year 1755, R. Jackson paid the principal and interest then due to the mortgagee; whereupon the chirograph of the fine, and the deed of 1746, to lead the uses, were given up to him, and satisfaction acknowledged upon the judgment which had been entered up by the mortgagee. But I do not find that any assignment was made to him of the term.*

It is to be observed, that the proviso for redemption, which was contained in the first deed of mortgage, stipulating, that "if R. Jackson and Anne his wife, or either of them, their or either of their heirs, etc. should pay, etc." was by the second deed of mortgage and new limitation discharged; and in this latter instrument the proviso was simply, "if R. Jackson and Anne his wife, should pay, etc. that the said [108] indenture and the former indenture of mortgage, and every article, clause, and thing therein contained, should cease, determine, and be void." The effect, therefore, of the second deed is to confirm a term of years, which should be redeemable and cease on re-payment of the money borrowed, etc. and after such determination of the term, the lands are settled to specified uses.

Mrs. Jackson died in the year 1772, without issue, having made a will, which has no operation upon any matter in question in this case; because her power of disposal by will did not extend to any part of the property in question.

The fine and the indenture of 1746, which had been delivered up to the husband, were oblaid, and supposed by him to have been lost, but they were found after the mortgage transaction between him and Charles Cooth, the heir of Mrs. Jackson.

In the argument of this case much stress was laid upon the expressions of the letter, written by Richard, (then Dr.) Jackson, to Cooth, dated the 8th of July, 1772, thirty-six years after the date of the deed creating the new limitations. In that letter, after mentioning a will, supposed to have been left by his wife, he adds, "It would not hurt me in the least to find it good for nothing. As you are HER HEIR AT LAW, Should I find the fee of her estate in me, I might," etc. When he wrote that letter, he seems to have had an impression of some deed by which the fee vested in him. From this it has been argued, that the relief has been rightly given by a Court of Equity, [109] upon the supposition that the deed of 1746 was a fraudulent transaction. But it appears clearly, from the frame of the decree † itself, that it was not made upon that ground; and from an investigation of the whole transaction, no facts can be collected to justify the imputation of fraud. To forget the particular

* In the report of this case, in 16 Vesey, 356, it is stated, that the term was assigned to Jackson, the husband. But that is a mistake. The provision of the deed is, that on payment, etc. the term shall cease; and there is no proviso for re-assignment. According to the substance and prayer of the cross bill, in the cause, it is supposed that the term is in the representative of Child, the mortgagee.

† Lord Redesdale, in moving judgment, read the whole decree. See p. 112, et seq.

terms of a marriage settlement, executed at a very distant period of time, is no uncommon failure of the memory; and from the letter, dated the 7th of August, 1772, in which Dr. Jackson inclosed a copy of his wife's will, and where he uses, respecting the freehold estate, the expression, "It is mine for life, as heir to my children;" it is clear that he had forgotten the terms of the settlement, and was writing under evident mistake.

At various times after the date of these letters, Dr. Jackson, upon the application of Charles Cooth, had lent him sums of money, which in the year 1783 amounted to £600; and Dr. Jackson by a letter sent to Cooth but a short time before, having informed him that the chirograph of the fine and the deed to lead the uses were missing, and that he (Charles Cooth), as heir-at-law to Mrs. Jackson, was intitled to the estate after his (Dr. Jackson's) death: it was agreed between them that the £600 advanced should be secured by a mortgage to be made by Cooth of his supposed reversionary interest. Upon this misapprehension of Dr. Jackson as to the [110] nature of his interest under the new settlement, it is to be observed (in addition to the length of time since the execution), that the ultimate limitation was not simply and absolutely to Dr. Jackson in fee. But after estates provided to him and his wife for their lives, and for their issue, upon the decease of the survivor: the fee in default of issue was limited to the survivor of the husband and wife. Under this misapprehension, however, a mortgage of the supposed reversion was prepared and executed in 1784, and by the decree upon the hearing in the Court below, it was declared that the Appellant, as representative of Dr. Jackson, was intitled to a charge upon the estate to that amount.

After all these transactions, Dr. Jackson having made farther advances to Cooth by way of loan, to the amount of £400, the parties agreed that a farther charge should be made upon the supposed reversion by way of indorsement upon the mortgage deed already executed, which was accordingly prepared. But before it was carried into effect, the chirograph of the fine and the deed to lead the uses of the fine, dated in 1746, had been discovered by Dr. Jackson, who thereupon sent to Charles Cooth the deed, purporting to create a mortgage upon his supposed reversion as an useless instrument.

Charles Cooth, before he received information of the discovery of the fine and deed, had, by a will dated in 1782, giving to one Hester Bower, his supposed reversionary interest in the Lye Farm, (part of the lands in question). The will adopting [111] the erroneous notion communicated to Cooth by Dr. Jackson himself, recites that "Dr. Jackson is intitled to the premises *for life, as tenant by the curtesy of England.*"

After the death of Charles Cooth, Dr. Jackson sued for and obtained from Mrs. Bower, part of the money advanced to Cooth; and Mrs. Bower died in 1794, without having made any claim to the reversion under the will of Charles Cooth, and without requiring any receipt for the monies paid by her to be indorsed upon the mortgage of the supposed reversion.

In 1797 Dr. Jackson died. He had made a will in 1775, when Charles Cooth was living, by which he had given the lands and farms in question to Charles Cooth and the Appellant. Afterwards, by a will dated in 1797, he devised the same lands, etc. to the Appellant, subject to the charge of certain annuities.

The Bill was filed in 1804 by J. B. Innes, claiming as heir at law to Hester Bower. It was afterwards amended by making Edmund, the heir at law of Charles Cooth a co-plaintiff, and adding other parties. After stating the original settlement, the several deeds of mortgage, and new limitation, etc. and that the equity of redemption was by mistake reserved to the survivor of Dr. Jackson and his wife; the bill prayed an account of arrears of the mortgage, of rents and profits, since the death of Dr. Jackson, etc. and a reconveyance, etc. The cross bill filed by the Appellant seems to have had no reasonable object or purpose, and was properly dismissed. The [112] causes having been heard in 1809, before the Lord Chancellor, it was declared, in the original cause, that (the Appellant) was a trustee of the equity of redemption in the estates and premises called Lye Farm, for the said plaintiff J. B. Innes, as the heir at law of Hester Bower, who was the devisee of Charles Cooth, the eldest son and heir at law of John Cooth, deceased, who was the heir at law of Anne Jackson; and of the equity of redemption in the estate and premises called Burnt House Farm, for the

said Edmund Cooth, as the heir at law of the said Charles Cooth. And it was ordered, that the Master should take an account of the rents and profits of the said premises received by (the Appellant), etc. since the death of the said R. Jackson. And in case (the Appellant) had been in possession of all or any part of the said premises, it was ordered, that the said Master should set an annual value, by way of rent, wherewith he ought to be charged. And it was ordered, that (the Appellant) should be charged with the same accordingly; and in taking the said account the said Master was to apportion such rents, issues, and profits between the said premises called Lye Farm, and the said premises called Burnt House Farm. And it was ordered, that the said Master should take an account of what was due for principal and interest, upon and by virtue of the indentures of lease and release, or mortgage, bearing date the 15th and 16th days of January, 1784, and also what was due in respect of the sum of £80 2s. and interest advanced by the said Richard Jackson to the said [113] Charles Cooth, since the date of the said indentures. And it was further ordered, "That in case what should be found due in respect of such principal, interest, and costs, should exceed what should be so found due for the said rents, issues, and profits, then upon the said John Blundell Innes and Edmund Cooth paying the amount of such excess into the Bank, to the credit of the said cause, within six months after the said Master should have made his report; or in case the said rents and profits should exceed what should be found due for principal, interest and costs, as aforesaid, it was ordered, that Gilbert Jackson (the Appellant,) and Jane Hamilton, should re-convey the said farm, called Lye Farm, with the appurtenances, to the said John Blundell Innes, and the said farm called Burnt House Farm, with the appurtenances, to the said Edmund Cooth, free from incumbrances; but in default of the said John Blundell Innes and Edmund Cooth paying the amount of the excess aforesaid by the time and in the manner therein mentioned, it was ordered, that the Plaintiff's bill in the original cause should stand dismissed; but his Lordship reserved the consideration of the question, who was beneficially entitled to what should be found due for principal, interest, and costs, until after the Master should have made his report." From this decree the appeal is presented upon the ground that the decision is not justified by the authority of the cases in which reservations of the equity of redemption to persons [114] having no previous interest, have been considered as resulting trusts for the previous owners of the estates.

This is a case of great importance as a precedent, and as affecting the titles of persons who take under conveyances, supposing it not to be liable to impeachment upon the ground stated. It is highly important in all cases, that the principles of decision should be known and uniform—that professional persons may be able to advise with safety. In a case of this kind, a purchaser acting under a misconception of his legal adviser, found that his title was deficient. That was the case of *Ruscombe v. Hare* (5 Dow, 1 (D. P. June 5, 1818), in which the doctrine of resulting trust was held applicable. In this case it is alleged, that there is a distinct ground, *scil.* of fraud, to annul the limitation to the husband being the survivor. But no such ground is recognised by the decree, or established in evidence. The only question, therefore, which is now presented for the consideration of the House, is, whether the decree is founded upon the principle which regulated former decisions, and was established by the judgment of this House upon the appeal in the case of *Ruscombe v. Hare*. The principle is this—That in a mortgage, the mere form of reservation of the equity of redemption is not of itself sufficient to alter the previous title. In such a case, (where fraud is out of the question), it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage. This is conformable to the principle upon [115] which other cases have been determined. If a lease be made by tenant for life, under a power created by a settlement, and a rent is reserved to the lessor and his heirs, (which is not an unusual blunder), those words are interpreted by the prior title, and applied to such person as, under the settlement, may be entitled to the estate in remainder, and not to the heir of the lessor, unless he happen to be such remainder man. In all such cases, the words used are to be interpreted according to the title when the instrument is executed. So where an estate belonging to the wife is mortgaged, and the equity of redemption is reserved to the heirs of the husband, there is a resulting trust for the wife and her heirs.

The case of *Broad v. Broad* * was the first in which the doctrine was applied. In Eq. Ca. Abr. 62, it is laid down as a general principle, that where money is borrowed by husband and wife, upon the security of the wife's estate, although the equity of redemption by the mortgage deed is reserved to the husband and his heirs; yet the wife shall redeem, and not the heir of the husband; and for authority, reference is made to the case of *Broad v. Broad*. According to the facts of that case, to be collected from the reports, T. B. the husband of the Plaintiff in the suit, settled certain houses in Bread-street, London, to the use of himself for life, remainder to the Plain-[116]-tiff for life for her jointure. These houses were burnt down in the great fire in 1666. In order to rebuild them, the husband borrowed £600, and a fine was levied by husband and wife to the lender for 99 years, who re-demised the premises to the husband for 98 years, rendering £36 per annum, and binding himself to repay the £600 at a time,† etc. The husband had agreed with the wife that she should have the redemption paying the interest of the money borrowed. But when the houses were rebuilt, the husband settled them, among other lands, upon himself, in tail to the heirs male of his body—the remainder in tail to his brother, (who was Defendant in the suit) charged with portions of £3000 to his daughters. He died, making his brother, the Defendant, his executor; and his personal estate was not sufficient to pay his debts. The Defendant had executed a bond, upon which he was liable as surety for his deceased brother to the amount of £1600, which he satisfied, and also paid the interest of the £600 borrowed, until 1681, when the Plaintiff filed her bill, by which she prayed that she might redeem, paying proportionably, and hold over until she was repaid with interest. The Defendant insisted that the premises, having been re-demised to his brother, were assets to pay his debts; and further, that the Plaintiff's title was but a parol agreement between husband and wife; and that he had no notice of the agreement until the filing of the bill. [117] It was decreed, that the Plaintiff should have the redemption, paying a third part of the principal, but should have no profits received by the Defendant until the filing of the bill in 1681, when he first had notice of the agreement. The decree, therefore, which was made upon the original hearing, proceeded entirely upon the foundation of the agreement. A bill of review‡ having been afterwards filed, suggesting, that the decree was founded upon a trust arising out of an agreement by the husband, and that the agreement was not mentioned in the decree, nor stated to have been proved: Lord North, then Keeper, admitted the objection to the form of the decree, and said, that he took no notice of the agreement on that account, but affirmed the decree, because when the wife joined in the fine of her jointure, in order to a mortgage or security, it was not an absolute departing with her interest; but there resulted a trust for her when the mortgage was paid, to have her estate again, as if it had been a mortgage on condition, and the money paid at the day.

That was the first § case in which the principle was established. It has ever

* This case appears in Eq. Ca. Abr. 316, referring to 1 Vern. 213, under the name of *Brend v. Brend*. In 2 Chanc. Ca. 99, it is *Brond v. Brond*; and in 2 Chanc. Ca. 161, it is *Broad v. Broad*. See note †, *infra*.

† It was in such form that mortgages of this species were made at the date of the report.

‡ 22 Feb. 1683, *Brond v. Broad*, 2 Chanc. Ca. 161. It appears singular that the Court in this case, at the original hearing, should have proceeded upon the ground of the agreement only, and have taken no notice of the doctrine of resulting trust. Because in the same Court three years before, a case seems to have been decided upon that principle. See the note, *infra*.

§ There is an earlier case, decided in the time of Lord Nottingham, in which the same principle appears to have been applied. *Cotton v. Cotton*, 2 Chanc. Rep. p. 72, 30 Car. 2. The cause was heard by Mr. Justice Windham, and the application of the doctrine of resulting trust appears incidentally in the report of the decree, which contains the following declaration:—"And as to the mortgage made to Perkins by the said Nicholas and the Defendant his relict, it appearing that part of the mortgaged lands was, before that mortgage was made, settled on the said Nicholas and Katherine in jointure, or otherwise, so as the same came to her as

since been adopted [118] and referred to in all subsequent cases, up to the late decision in *Ruscombe v. Hare*. The rule fixed by those cases is no more than this,—where the equity of redemption is reserved to the husband, upon a mortgage of the wife's estate, and there is nothing more in the transaction, the Courts hold, that no alteration of the previous rights of the parties is effected. But it is an exception to that rule, where other circumstances occur, affording evidence of an intended alteration of rights.

In *Rowel v. Whalley*, 4 Chan. Rep. 116, the wife joined with her husband in a mortgage of her lands, by a deed containing a proviso and declaration, that if the husband and wife, or either of them, or their heirs, executors, etc. paid to the mortgagee, his executors, etc. the sum borrowed, that the fine to be levied according to a covenant contained in the deed should enure to the husband and wife, and the longest liver of them; with remainder to the right heirs of the husband for ever. Here is a case of a distinct declaration, in no manner depending upon the [119] proviso for redemption, but defining the course in which the property is to be carried after the satisfaction of the mortgage. A fine was afterwards levied, according to the agreement among the parties, and after the death of the husband, a bill to redeem was filed by the relict. The son and heir of the former husband being a party Defendant in the suit, was an infant. The Court decreed, that the Plaintiff and the infant, should proportionably pay what was due upon the mortgage, at the time of the death of the mortgagor, rating the estate for life of the Plaintiff in the premises at one third, and the reversion in fee of the infant at two thirds. In that case it was determined that the subsequent declaration and limitation having no connexion with the proviso for redemption, but declaring what should become of the property after the mortgage was satisfied, operated against the construction of a resulting trust for the benefit of the wife. It was held to be a distinct settlement, and that she had parted with her estate. In the case now pending before us for judgment, the distinction is stronger; for it is the mortgage term which is made redeemable by the husband and wife, and the fee is the subject of settlement.

In the case of the *Earl of Huntingdon v. the Countess of Huntingdon*,* 2 Vernon, 437, the [120] mortgage was made by the mother of the Plaintiff joining with her husband, of lands, being her inheritance; and the purpose was to raise money for the husband to pay for the place of captain of the Band of Pensioners. The mortgage was for a term of years, subject to which the estate was settled to the Countess, (the Plaintiff's mother), for life, remainder to the Plaintiff in tail; the proviso for redemption was, that on payment of the mortgage money, the term should cease. In 1683, the Countess joined with her husband in an assignment of the mortgage; and in the deed of assignment the proviso was, that on payment of the money borrowed by them, or either of them, the mortgage term was to be assigned as they, or either of them, should direct or appoint. The husband afterwards paid off the mortgage, and took an assignment of the term in trust for himself, and by will bequeathed his personal estate to the Defendant, his second wife, who claimed the term. The Plaintiff filed a bill in Chancery, praying that the term might be [121]

survivor: This Court is of opinion, that the equity of redemption belongs to her as survivor, and not to the Plaintiff," who claimed it as heir to Nicholas her husband.

* See *Tate v. Austin*, 1 P. W. 261, where this case appears as cited by Cowper, Lord Chancellor; but the circumstances are not correctly given in the report. The Lord Chancellor is supposed to state in *Huntingdon v. Huntingdon*, that the heir of the wife brought his bill to exonerate the inheritance, and to have the mortgage paid off out of the husband's personal estate; which is repugnant to the facts of the case, and the previous statement in the report itself, that the husband had, in his lifetime, paid off the mortgage. The question in the cause was, Whether the executrix and devisee of the husband, (being his second wife), was entitled to hold the term under the will for her own benefit; or whether there was a resulting trust for the heir of the first wife; and if so, whether he was bound to repay to the estate of the deceased husband the principal and interest, which he had paid to discharge the mortgage, or was entitled to have an assignment of the term without such payment.

assigned to him. The Lord Keeper refused to make such decree, except upon the usual terms of a redemption, paying principal, interest, and costs; but upon appeal (1 Bro. P. C. 1) to Parliament the decree was reversed, and the term directed to be assigned to the Appellant, with an account of profits from the death of the Appellant's mother, making to the Respondent just allowances for the maintenance of the Appellant, and management of the estate. In that case, the limitation, after the life-estate, was to the son in tail; and in the case now under discussion, it is to the husband and wife, and the heirs of their bodies; or, in default of issue, to the survivor of the husband and wife in fee; and that is the only difference in that respect between the cases. The proviso for redemption in the Earl of Huntingdon's case was, that on payment by either of them, the term should be assigned as they or either of them should direct. Under these circumstances, the executrix and devisee of the husband insisted that, as he had paid the mortgage, and taken the assignment, it belonged to her as his representative. The son of the former wife contended, that the estate was under settlement, and bound by the terms of the settlement; that the husband and wife could not deal with the estate beyond their own interest; and it was held, as to the term assigned to the husband, and possessed under his will by the Defendant, that there was a resulting trust for the son.

[122] In the case of *Lewis v. Vangie* (Ambler's Rep. p. 150), the property which belonged to the wife was mortgaged and settled upon the husband and wife, with remainder, not to the wife herself, but to the wife's sister: the wife died, and the sister brought a bill in order to compel the husband to pay off the mortgage. In that case it appeared, that the money raised upon the mortgage being £1100, was in part borrowed for the use of the husband, and part of it for the purpose of paying a debt incurred by the wife previous to the marriage. In giving judgment upon that case, the Lord Chancellor said, "The general rule is, that when the husband borrows a sum of money for his own use, and the wife joins in a mortgage of her jointure, for re-payment of it, that her estate shall be a creditor upon the husband for that sum. So it is where there is no settlement, and the wife mortgages her estate of inheritance, to raise money for the husband, but where, at the time of executing such mortgage, or security, a settlement is made, either before or after marriage, there is no instance in which the husband has been considered answerable to the wife's estate for the money borrowed,"—and he there held, that under the circumstances of this case, there being a settlement of the estate, the husband was not liable for the money borrowed. The subsequent limitation was not impeached by the person who brought the bill, because that person was entitled to the estate under that limitation.

[123] In the case of *Jackson v. Parker* (Ambler's Rep. p. 687), which was decided by Sir Thomas Sewell, a difficulty occurred of a different description. The husband had borrowed a sum of money, and in order to make a security, by mortgage of his own estate, his wife joined in a fine, which would have the effect of barring her of any claim of dower. The limitation of the equity of redemption was to the husband and the wife, and their heirs; and there was a declaration in the deed, that after payment of the money lent on the mortgage, the fine should enure to the husband and his heirs. Other charges were afterwards made upon the estate, and those subsequent charges were all made redeemable by the husband and wife, and their heirs. The husband by his will made a disposition of this property, in trust, to raise provisions for all his children. But the will was disputed by the eldest son and heir at law, upon the ground, that it was a devise of the equity of redemption, of which the husband was not sole seised; because the equity of redemption was reserved to the husband and wife, and their heirs. Sir Thomas Sewell had some difficulty upon the subject at first, in consequence of the words of the statute of wills, which does not admit of a devise of property, of which the devisor is not sole seised. But upon reflection, he decided, that the case was to be considered as in equity; it was not a legal estate, and as an estate to be governed by the rules of equity, it was the seisin of the husband, and not [124] of the wife. Upon a contest for redemption, the Court would regard the ownership of the estate, previous to the mortgage, and in that view the husband would be considered as the person entitled to redeem, the wife being entitled to redeem only in respect of her interest, which would have been only a right to dower, if she had survived her hus-

band. In such case she would have been entitled to have had the estate redeemed, for the purpose of letting in her dower, but there her right ended, and that therefore the husband must be taken to be, in equity, sole seised of the estate, as if the mortgage had not been made. In that case it was argued, "That the Court will put a true construction on the deed, by taking into consideration the ownership of the estate, and the purpose for which the deed was made. That the husband was the owner of the estate, and the intention of the deed was merely to make a mortgage, and the wife was made a party and joined in the fine, for the sake of the mortgagee."—And this argument was adopted by the judgment.

In the case of *Corbett v. Barker*, according to the report (1 Anstr. p. 138), the Court do not seem to have had the least notion that there existed a resulting trust, such as the House of Lords held to exist in the case of *Ruscombe v. Hare*, and they dismissed the bill. In that case, it appears probable that Baron Thomson doubted the correctness of the decision: for he says, "That a reservation of the [125] kind now under discussion, in a fine levied, completely *diverso intuitu*, shall not, without an express declaration of such intention, carry the estate in a new channel." The cause being afterwards re-heard, the Court seems to have been of opinion, that a trust resulted in favour of the original owner of the estate, and determined accordingly. The report of the case is so very imperfect in its language and statements, that it is difficult to discover what are the facts of the case, and the point decided; but as far as they can be collected, the case appears to have been of the same nature*

* The case upon the original hearing is reported 1 Anstr. 138. The only facts reported, so far as they regard the principle discussed in the text, are as follow:—The Plaintiff's father being seised in right of his wife, he and the wife mortgaged the estate for a term of years, and a fine was levied according to previous agreement and covenant; which fine was to enure to the use of the mortgagee, his heirs and assigns, subject to the proviso, and the equity of redemption was reserved to the husband and wife and their heirs. Afterwards, the mortgage having been assigned to the Defendants; the husband and wife, in consideration of £160, by lease and release, conveyed their equity of redemption in fee, and covenanted, that all fines, conveyances, etc. should enure to the sole use of the Defendant in fee. After the death of the husband and wife, the Plaintiff their son filed the bill, claiming the estate by descent, as heir to his mother, subject to the mortgage. For the Plaintiff it was argued, that the mortgage deed being only for a term of years, though the fine is in fee, yet it is to the uses mentioned in the deed; and there is a proviso that on payment, etc. the term shall be void; then only the term was in the mortgage, and the fee was a resulting use in the wife, from whom it proceeded; and that being vested by the statute, she was immediately in of her old estate as to the fee.

Romilly for the Defendant, argued, that the bill could only reach one half of the estate. For as the fine saves the equity of redemption to the husband and wife, and their heirs, one half was therefore vested in him, and passed to the Defendant; but Thomson, B. interposed, saying, "it had often been ruled, that a reservation of this kind, in a fine, levied completely *diverso intuitu*, shall not, without an express declaration of such intention, carry the estate in a new channel; nor even if it had been to the husband and his heirs only." After this interposition by the Court, the argument upon this point of the case appears to have been dropped, and the question was then argued and decided upon the fact of length of possession by the mortgagee. Eyre, Chief Baron, at the conclusion of his judgment saying,—As the Plaintiff fails upon this point, (*i.e.* possession by the mortgagee), it is unnecessary to consider the other, as to the operation of the fine upon the subsequent conveyance; although upon that point the Plaintiff's counsel seemed to be in the right. There is not to be found, either in this report, or in the further report of the case upon the re-hearing, (3 Anstr. p. 755), any other statement or allusion to the doctrine of resulting trust. The principle of decision is to be collected only from the extracts above inserted. It appears singular that it should not have been adverted to by the Court in giving judgment; yet it is possible, considering the decisive remark made by Thomson, Baron, upon the original hearing, that nothing further might have been said upon the subject at the re-hearing.

[126] as *Broad v. Broad*, and the other cases which have been decided upon a similar principle.

It must now be admitted as an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife, or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower, out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where [127] the words admit of any ambiguity; that there is a resulting trust for the benefit of the wife, or for the benefit of the husband, according to the circumstances of the case. But here, it seems to me, that the operation of the deed, as to the mortgage term, and the operation of the deed as to the limitation of the fee, are wholly distinct, and do not in any way depend on each other. The question does not arise upon the interpretation of the proviso for redemption, but it arises upon a distinct and subsequent clause of the deed. The term and the fee are kept distinct in the deed. The term is a security for the re-payment of the money lent, and when the mortgage should be discharged, the intention of the maker of the deed was, that the term should be completely at an end. The way in which they proposed to effect this was, by declaring, that upon payment of the money due, the term shall cease. If the money had been paid at the day, the term ceasing, there would have remained nothing of the mortgage operating upon the property. But there would then have remained the declaration in the deed, directing what should be done with the estate, subject to the term. The term being at an end, the operation of the deed, so far as it declared the limitations of the estate, subject to the term, remained perfectly distinct, and had no connexion whatsoever with the existence of a term, which then would have ceased to exist. A Court of Equity will so deal with a declaration, that, upon payment of a sum of money on a given day, the term shall cease; that, although the term becomes absolute [128] by non-payment of the money at the day, it is still subject to redemption. By whom it may be redeemed, must be discovered from the title, which, by the deed itself, is declared to be in the husband and wife, for their respective lives, then to the heirs of their bodies, and then to the survivor in fee. Upon the declarations, therefore, and the provisions of that deed, the redemption would arise by implication, in case the money was not paid at the day. The implication must be drawn from the deed itself, declaring who were the persons entitled to the estate.

In all the other cases decided upon the general principle, the grounds of the decision were, "that the mode in which the redemption was limited, was by mistake or improper contrivance introduced into the deed." But in this case, there is no ground to raise such imputations. For the deed is clear and express in its declarations and provisions. The case is really in principle, if not in circumstances, the same as the case of *Rowell v. Whalley*.

Where the declaration of the uses of the fine refers simply to the operation of the deed as a mortgage: where it is simply a declaration, that the money being paid, the fine shall enure to the persons who make the mortgage, and there is nothing else which makes it subject to redemption, that would be considered as a mere clause of redemption, and construed in the same way. But where the form of the equity of redemption has nothing to do with the limitation of the estate; where the limitation of the estate is perfectly [129] distinct, it seems to me the rules which have been established in the cases of resulting trusts, do not in any degree apply.

Suppose that Dr. Jackson had died first, and that Mrs. Jackson had married again, and marrying again, had issue by a second marriage, there being also issue of the first,—what would have been the construction then put upon this deed? According to the deed, if she had only daughters by the first marriage, they would take the estate under the limitation to the heirs of the body of Dr. and Mrs. Jackson. But if the estate was to be considered as a fee in her, and if this subsequent declaration was to operate nothing, if she had a son by her second marriage, that son would be her heir at law. Yet if a contest had arisen between the daughters by the first marriage, and the son by the second, could any doubt have been entertained who would be entitled to the estate? Dr. Jackson had stipulated for his own children. Consider how the estate was limited before the mortgage. It was limited by the

original settlement to the children. When that settlement was destroyed by the fine, and the revocation, which was the effect of the fine, and new uses declared, the resulting trust, if any could arise, must be to the old uses declared under the settlement. If otherwise, the estate must have gone according to the new uses; and then there might have been a contest between the persons entitled under the latter disposition, and those who were entitled under the former.

Suppose again, that Mrs. Jackson had survived, [130] and there had been issue of the marriage, and the issue had thought fit to say to Mrs. Jackson, "you are only tenant for life," would not she have had a right to answer, "I am tenant in tail under this deed; I and my husband have levied a fine; and having levied a fine, declared the estate to ourselves and the heirs of our own bodies, which gives me an estate tail, and enables me to dispose of the estate in case I should think fit to suffer a recovery or to bar the entail by a fine." It would have been extremely difficult in such a case to have decided that Mrs. Jackson was not entitled to the benefit of this estate.

The question of fraud must be put out of the case, as it appears to me. How can it be imagined that a prospective fraud was contemplated, the effect of which, according to the view in which the objection is made, must have depended upon the chance, whether the husband would survive the wife. That contingency happened six-and-twenty years after the deed was executed. The Court must interpret the deed. No Court has a power, in such a case, to set aside a deed. *Ruscombe v. Hare*, and all the prior cases, have been interpretations of the deed. The ownership, prior to the deed, and the purpose of the deed, must be considered, in giving the interpretation:—that is the language of Sir Thomas Sewell in *Jackson v. Parker*. In the case before us, we are required not to interpret the deed, but to determine that the part of the deed which, having no connection with the mortgage, disposes of the estate, subject to the mortgage term, is to be wholly set aside, [131] either as a fraud, if a case of fraud can be made out, or as a mistake, if a case of mistake can be made out. If they proceed on the ground of mistake, there must be evidence. To support the allegation of fraud there must also be evidence. It must be shewn that this clear and explicit declaration was contrary to the intention of the wife, in consenting to the deed. If the wife had survived, and she had thought fit to insist upon the validity of this deed against her own children, could it then have been said that it was a fraud upon her intention in executing the deed; and yet, to support such a claim on behalf of the children, it would have been necessary to decide that a fraud was practised upon the wife, and that the deed was made contrary to her intention. Nothing short of that opinion would enable the Court to restore the original settlement, and give the children a claim, in contradiction to the rights of the mother, under this deed.

If the question had been put to me, after the death of Mrs. Jackson, whether Dr. Jackson, having survived her, had a good title to this estate, I should not have scrupled to give my opinion, that he had a good title to the estate. If a similar question had been put to me in *Ruscombe v. Hare*, I should have answered doubtfully; because, in the case of *Broad v. Broad*, and cases decided upon the principle which there prevailed, I should have found that Courts of Equity had applied the doctrine of resulting trust for the benefit of the wife. But, according to the mode in which [132] this settlement has been made, there is no connection whatever, in legal operation, between the mortgage and the new limitations contained in the deed, which are distinct in form and substance, expressly providing for a subject which was not included in the mortgage. They limit the reversion in fee, while the mortgage is confined to the term of 1000 years.

Upon these grounds it appears to me that the part of this decree which declared, that the Appellant was a trustee of the equity of redemption for Blundell Innes, as the heir of Hester Bower, and for the heir of Cooth, is not according to law. The equity of redemption there intended is, I presume, the equity of redemption upon the original mortgage, which was made by Dr. Jackson and his wife, because the Appellant was not trustee of any equity of redemption upon the mortgage of 1784. Dr. Jackson was mortgagee in that mortgage. The mortgage of 1784 was a mortgage made by Charles Cooth to the late Dr. Jackson. It was a conveyance, under the supposition that Charles Cooth had a legal interest in the reversion of the estate. The supposed equity of redemption was in Charles Cooth, and in those claiming under him, and it was the supposed legal estate that was so far in Dr. Jackson. I apprehend

therefore that the declaration that the Appellant was trustee of the equity of redemption, means the equity of redemption upon the mortgage term, which was created and confirmed by the mortgage deeds executed in 1745 and 1746, by Dr. and Mrs. Jackson. If that term of years was vested in Dr. [133] Jackson, it was a term which, according to the spirit of the decree, he or his representative would have been bound to convey. But what is vested in the present Appellant, Mr. Jackson, under the will of the late Dr. Jackson, is not an equity of redemption, but a fee simple of the estate, subject to a term of years, which term of years was subject to an equity of redemption.

I apprehend that at the time when this decree was made, the circumstances of the case could not have been correctly stated to the Court; that there must have been some confusion, arising from the statement which was made to the Court, and owing to that confusion this declaration was contained in the original decree—that the Appellant was a trustee of the equity of redemption in the estates and premises, the Appellant not having in him any estate whatsoever which was in the nature of an equity of redemption. He had the fee simple of the estate, subject to a term of years;—but he had not in him, so far as I can find from the pleadings, the term of years, for I do not find that the term was assigned. He had also whatever interest Cooth conveyed by the mortgage which he executed; but that mortgage executed by Cooth could convey nothing, if Jackson had the fee in him which was vested by the settlement made in 1746. The language, therefore, of the decree is certainly in that respect incorrect, and I think that must have arisen from some misstatement with respect to the circumstances of the case. As they now appear before the House upon the pleadings, my humble opinion is, that this decree, [134] so far as it directs a conveyance by Mr. Jackson to Innes and Edmund Cooth, is erroneous. For the uses limited by the deed of 1746 being to Dr. and Mrs. Jackson, and the survivor of them, and to the heirs of their bodies, with remainder to the survivor in fee, according to the terms of that deed, and as I conceive the intent of the parties, there is no foundation whatever for holding that the settlement made by that deed shall not have the operation which the words of the deed import. I do not find any thing in this case to constitute Dr. and Mrs. Jackson, to whom the estate is limited during their lives, and the natural life of the longest liver, or to constitute the heirs of their two bodies, to whom it was further limited, subject to their estates for life as tenants in tail, or the right heir of the survivor, trustees, or a trustee for any person. But if they were to be deemed trustees, then they must be deemed trustees for the benefit of the persons who would have been entitled under the original settlement. For if the case is to be considered as if the new limitations ought not to have been in the deed, that they ought to be totally expunged from the deed, and that after the declaration that the fine should enure for the purpose of supporting the term of a thousand years, the deed should have no further operation, which is the manner in which a decree of this description, founded on the cases which have been determined, must be framed, if it be maintainable, the consequence would be, that it must result to the trust in the original marriage settlement. In such case, if Mrs. Jackson [135] had survived, and there had been issue of the marriage, she would have had, under this deed, an interest different from that which she would have had under the marriage settlement, and she would then have been reduced to the simple condition of tenant for life, and her issue would have been entitled, the sons in tail male, and the daughters in tail general, and she could have had only an ultimate limitation in fee. If she had survived, and had issue of the marriage, could we have held that she would have taken no benefit under the deed of 1746, but must have been bound by the provisions of the marriage settlement of the year 1743. I confess I cannot find any ground for such a determination, and therefore I cannot find a ground for supporting the decree which has been pronounced.

I shall move simply to reverse this decree, and that the bill should be dismissed.

The Lord Chancellor.—The circumstances of this case are certainly, in point of fact, much better understood than they were, and much greater research has been made into cases, so as to bring before the consideration of the House, the true principle of decision. The Court below did not rightly apprehend the case, as it now appears. The judgment of this House will remove a difficulty, which I know is floating in the

minds of many persons. I conceive it to have been the opinion of Lord Thurlow, that in order to dispose of the equity of redemption of the wife in an estate, it was absolutely necessary there should be in the recitals of the instrument, [136] some expression that the parties meant it so: that it was not enough to collect the intention from the limitations; but that there must be something more upon the face of the deed to lead the wife to understand what those limitations were. It does however occur to me, on looking into the cases which have been referred to, that such a proposition cannot be supported, and therefore I am of opinion that the decree must be reversed.

Decree reversed (10th July, 1819).

*** After I had written the note which is to be found in pp. 125, 6, I was furnished with an extract of the decree upon rehearing in the case of *Corbett v. Barker*. The decree contains only directions for the ordinary accounts upon redemption, without any declaration upon the subject of resulting trust.

[137]

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

JAMES BUTLER, Esq. (commonly called Lord Dunboyne).—*Appellant*;

DANIEL MULVIHILL, and others.—*Respondents* [21th March 1819].

[*Mews' Dig.* iv. 80; vii. 179; viii. 826, 832, 862; xiv. 1357. See *Nagle v. Baylor*, 1812, 3 Dr. and War. 60; *Gore v. Gibson*, 1845, 13 M. and W. 623; *Molton v. Camroux*, 1818, 2 Ex. 187, 1849; 1 Ex. 17; *Matthews v. Baxter*, 1873, L. R. 8 Ex. 132; *Imperial Loan Co. v. Stone* [1892], 1 Q. B. 599.]

A LEASE obtained by fraud and circumvention, from a person in a state of intoxication, is void in equity.

A lease for lives of lands in Ireland, renewable for ever, is not absolutely forfeited by extinction of all the lives and neglect to pay the fines for renewal, even after notice from the lessor. Under particular circumstances, (as in the following case,) the right of renewal may still exist and be enforced.

In a case where A. the heir of the lessee, having such right, had entered into an agreement with B. respecting an independent lease of the lands held under the renewable lease by the ancestor of A., which independent lease B. had obtained from the landlord when in a state of intoxication, and by circumvention:—It was held, that the heir of A. and purchasers for valuable consideration, claiming under him, were entitled in equity to the benefit of the agreement between B. and A., and that the heir of the landlord (lessor) was entitled to the benefit of the same agreement, so far as B. took an interest.

The Respondent, Daniel Mulvihill, filed his bill of complaint in the Court of Chancery in Ireland, against the Appellant, praying that the Appellant might be decreed to grant to the Respondent D. M. a renewal of a certain lease in the bill, stated to bear date the 5th of July 1718, by inserting the life of Walter Molony in the place of Anthony Brady. The bill stated the following case:

[138] Garret Gough, being in and before the year 1718, seised of the town and lands of Ballyvannon and Tullahara, with their sub-denominations, by indenture, bearing date the 5th day of July 1718, demised the said premises unto Joseph Ringrose, subject to the yearly rent of thirty pounds; to hold unto the said Joseph Ringrose, his heirs and assigns, for and during the life and lives of the said Joseph Ringrose, Richard Ringrose, and Elias Ringrose, and the survivor of them, and the lease contained a covenant for perpetual renewal, on payment of five pounds, as a renewal fine on the fall of each life, and the nomination of another life.

Joseph Ringrose, by virtue of the lease, entered into, and continued seised and possessed of the premises until the time of his death, which happened in the year

1758. He left two sons, Jacob Ringrose and Philip Ringrose. Jacob, as eldest son and heir at law, entered into and became seised of the said lands, and continued so seised to the month of July, 1778, when he died without issue, leaving Philip Ringrose his brother and heir at law, who thereupon became entitled to the said lands and premises.

John Brady, nephew of Jacob Ringrose, having alleged that Jacob Ringrose had devised the said lands and premises to him, and all the persons named in the said original lease, as *cestui que vies*, being dead, obtained a renewal thereof in his own name from James Butler, the Appellant's father, in whom the fee of the said lands and premises were then vested, for the lives of him [139] the said John Brady, Mary his wife, and Anthony Brady his son, by a deed, bearing date the 11th day of July, 1783.

By indenture, bearing date on the 4th of July 1793, John Brady declared that he had taken the said renewal in trust for Philip Ringrose; and by the same indenture, Philip Ringrose demised the said premises to John Brady, for the life and lives of him the said John Brady, Anthony Brady his son, and Mary Brady his wife, at the yearly rent of one hundred and forty-two pounds: by virtue of which demise, John Brady became, and continued seised and possessed of the premises.

By a deed bearing date the 26th day of July, 1793, Philip Ringrose, for the considerations therein mentioned, conveyed and assigned all his estate, right, title, and interest, in and to the premises to Walter Weldon Molony, his heirs and assigns.

By indenture, bearing date the 27th day of December, 1794, Philip Ringrose and Walter Weldon Molony, in consideration of a marriage then intended to be solemnized between Walter Weldon Molony and Mary Spellisy, granted etc. to the respondent Daniel Mulvihill and Walter Weldon since deceased, the towns and lands of Ballyvannon aforesaid, with its sub-denominations, subject as therein mentioned, to hold, etc. for three lives, renewable for ever, in trust for the several uses, intents, and purposes in the deed mentioned.

James Butler died in the year 1784, and one of [140] the lives named in the renewed lease granted in July, 1783, having dropped, Daniel Mulvihill made several applications to the Appellant, who upon the death of James Butler, his father, became seised of the reversion of the said lands, for a renewal of the said original lease of 5th day of July, 1718, by inserting the life of Walter Molony, in the place of Anthony Brady, named in the renewed lease; and offered to the Appellant the sum of five pounds, with interest from the death of Anthony Brady, and also the proportion of a renewal-fine for the time which had elapsed since the death of the said Anthony Brady.

The Appellant having refused to renew the lease of 5th July, 1718, according to the request, and upon the terms proposed, the bill was filed against him, containing such allegations and prayer as before stated.

The Appellant, by his answer, after admitting many of the principal facts alleged in the bill, proceeded to state, that although, upon the death of Joseph Ringrose in 1758, Jacob Ringrose, his son, became seised under the lease of 1718, and so continued until 1778; yet the said Jacob omitted to renew the said lease, by nominating any other life in place and stead of Joseph Ringrose, and omitted to pay the rent and renewal fine; and although, in the life-time of the said Jacob, namely, between the said years 1758 and 1778, Richard Ringrose, another of the *cestui que vies*, died, Jacob Ringrose also omitted to renew the said lease, by nominating a life in [141] the place and stead of the said Richard Ringrose, or by paying the rent and renewal-fines; and although, immediately after the death of the said Jacob in 1778, the said Elias Ringrose, the last life in the said lease, died, yet Philip Ringrose omitted to renew or pay the renewal fines, rents, or arrears, pursuant to the covenant of renewal contained in the said lease of 1718, and withheld the yearly rent of the said lands reserved thereunder to a large amount, which arrears of rent and renewal-fines remain still unpaid, whereby the said lease of 1718 became forfeited in the life-time of Jacob Ringrose, and all benefit of renewal thereof for ever lost to the Ringrose family, or any other person claiming under the said lease of 1718.

The answer denied that John Brady, at any time, obtained a renewal of the lease of 1718 in his own name; and stated, that James Butler, who, upon the death of his

uncle in or about the year 1778, succeeded as heir at law to the inheritance of the said lands, was a man of weak understanding, and addicted to excess in the use of spirituous liquors, and being educated in a foreign country, and bred up an officer in the German service, was unacquainted with his family affairs; that John Brady, being well aware of the laches and nonpayment of rent and renewal-fines under the lease of 1718, and of the forfeiture of the lease of 1718 thereby incurred, by the most fraudulent means, at a time when James Butler was in a state of intoxication, prevailed upon him to execute an instrument, purporting to be a new lease of the lands comprised [142] in the lease of 1718, bearing date on or about the 11th July, 1783, at the yearly rent of thirty pounds sterling, for the lives of the said John Brady, Mary his wife, and Anthony Brady his son, subject to a renewal-fine of five pounds on the fall of each life, with a covenant for perpetual renewal.

That Philip Ringrose, on the 15th day of October, 1789, filed a bill in the Court of Chancery in Ireland, against John Brady, impeaching the will alleged by John Brady to have been made in his favour by Jacob Ringrose, and praying possession of the said lands: to which bill John Brady filed his answer, insisting upon the validity of the said will, and that all the lives named in the said lease of 1718, were extinct, and that the term thereof was expired: and stating that he treated with the Appellant's father in whom the fee of the lands was vested, and who alleged that he was not then bound by the covenant of renewal contained in the lease of 1718: and that for several valuable considerations, he obtained a lease of the lands from the Appellant's father, which was executed in 1783, for three lives, renewable for ever, discharged from any claims on the part of P. Ringrose, or any person claiming in his right. And Brady by his answer, further denied that he accepted the said lease as a trustee for Ringrose.

That after a variety of proceedings in the cause between John Brady and Philip Ringrose, they came to an amicable settlement; and that a certain deed, dated the 3d of July, 1793, was executed between them, by which, after reciting that Garret Gough was seised of the lands, and [143] that he executed the lease of 1718, to Joseph Ringrose, and reciting the seisin and possession of Joseph until his death, and the seisin and possession of Jacob till his death, and that all the lives were extinct: and that said Brady thereupon took the lease of 11th July, 1783; it was thereby declared, that the lease of 1783, was taken by Brady in trust for Philip Ringrose, in consideration whereof, Philip Ringrose thereby agreed to execute a lease for three lives, renewable for ever to John Brady, at the yearly rent of one hundred and forty-two pounds, and five pounds as a renewal-fine for each life to be renewed: which lease the said Philip Ringrose, on or about the 4th day of July, 1793, executed to Brady pursuant to the terms of the agreement; and that by the aforesaid deed of 3d July, 1793, John Brady covenanted that all rent then due out of the said premises should be paid by Brady, his heirs, etc. and that Brady would also indemnify Philip Ringrose from all debts and incumbrances due by Jacob Ringrose.

That after the execution of the said deed of compromise of 3d July, 1793, and the said lease of 4th July, 1793, Philip Ringrose, on the 15th of July 1793, executed a mortgage of his interest in the lands to Walter Weldon Molony, his solicitor, to secure a bill of costs claimed by Molony against Ringrose for a sum of £1512.

That Walter Weldon Molony, about the 25th or 26th of July, 1793, prevailed on Philip Ringrose to convey to him the equity of redemption in the lands in consideration of an annuity of forty-[144]-five pounds ten shillings, for the life of Philip, in addition to the former consideration of £1512.

That about the 22d of March, 1800, Philip Ringrose caused a bill to be filed in the Court of Chancery against Walter Weldon Molony and others, impeaching the said mortgage and conveyance for fraud, and charging, that the trustees named in Walter Weldon Molony's marriage-settlement or articles of 1791, had full notice of it: and praying that said deed of mortgage and bond executed therewith, and the said deed of conveyance of 25th or 26th days of July, 1793, and the marriage settlement of Walter Weldon Molony of 26th and 27th December, 1791, so far as same affected Philip Ringrose might be decreed fraudulent and cancelled, and praying a restitution of Molony's costs.

That Molony and his wife, about the 3d of April, 1801, filed a cross bill against

Philip Ringrose, insisting that John Brady obtained the said lease of 11th July, 1783, as a new lease for his own benefit, and discharged from the said old lease or any covenant of renewal therein contained.

That Philip Ringrose, about the 10th November, 1801, filed his answer to the said cross bill, in which he does not deny that forty-five pounds were due for rent and renewal-fines of the said lands in 1766, and that some rent remained unpaid at the death of Elias Ringrose, the survivor of the persons named as *cestui que vies*, in the said original lease of 1718. He admitted that Brady wished to get a new lease to himself of the said [145] lands discharged from the said old lease of 1718, or any covenant for renewal therein contained, or any claim of Philip, and in consequence thereof said Brady obtained the said lease of 1783.

That before any decree was made in the said cause, Ringrose acceded to some amicable settlement.

That the Appellant attained the age of twenty-one years in July, 1801, and never since had received any rent for the lands comprised in the lease of 1783.

That in the year 1801, the Appellant brought an ejectment to recover possession of the lands in question, upon the trial of which, John Brady produced and for his defence relied upon, the lease of 1783, and the jury gave a verdict in his favour.

That the very limited circumstances of the Appellant prevented his taking proceedings to set aside the said lease of 11th of July, 1783, as having been obtained by fraud and imposition.

That James Butler died about the month of May, 1784, and not shortly after the said deed of release of 1794, as by bill alleged, leaving Appellant, his only son; who thereupon became seised of the said lands.

That Anthony Brady, one of the lives in the lease of 1783, died on the 13th day of April, 1804.

Finally, the Appellant, by his answer, admitted that he refused to execute a renewal to the Respondent, Mulvihill, of the lease of 11th July, 1783, or the lease of 1718, on the grounds before stated.

[146] The Respondents, on the 25th day of July, 1809, amended their bill, and thereby stated the death of John Brady. To which amended bill the Appellant put in his answer.

The Appellant filed a cross bill against Daniel Mulvihill, Walter Weldon Molony and Mary his wife, and various other persons interested in the lease; and therein stated the fraudulent means by which the said lease had been, in the year 1783, obtained from his father, the said James Butler, and praying that the same might be declared to have been fraudulently obtained, and be given up to be cancelled.

The Respondents by their answers, respectively insisted on the validity of the lease of 1783, and that they were purchasers of the beneficial interest of the same, without notice of any fraud.

The original and cross causes being at issue, the Respondents respectively exhibited the several instruments under which they claimed to be entitled; and examined a person of the name of Dannaher, to prove that the lease of 1783 had been fairly obtained, and that the fines and rent then due had been paid at the time of the execution of the lease.

The Appellant examined witnesses to prove, First, That the lease of 1783 was not a renewal of the lease of 1718: Secondly, That the lease of 1783 was obtained by fraud, practised on his father when he was so intoxicated as to be incapable of transacting business. Thirdly, That the Respondents, Mulvihill, etc. or those under whom they claimed, had at the time when they became, [147] as they pretended, purchasers of the beneficial interest thereof, notice, that the same had been fraudulently obtained from the Appellant's father, and that the Appellant was an infant, and incapable of doing any act in confirmation of the said lease.*

The causes came on to be heard in 1811, when the Lord Chancellor of Ireland declared, that the Respondent, Daniel Mulvihill, was entitled to the benefit of the covenant for renewal, contained in the lease of the 5th of July, 1718, and directed the Appellant to execute a renewal thereof to the Respondent, Daniel Mulvihill, for

* Upon some of the points, and particularly the intoxication, see the depositions, *post*, p. 150.

the lives of the Respondents, Walter Molony and Arthur Molony, pursuant to the true intent and meaning of the covenant. And in case the parties should differ as to the form of such renewal, or as to the premises contained in the said original lease, it was ordered that it should be referred to the master to compare the lease of the 11th of July, 1783, with the said original lease of the 5th of July, 1718, and thereupon to settle and approve of a proper renewal to be executed between the parties pursuant to the said decree.

The Appellant thinking himself aggrieved by the decree, appealed to the House of Lords upon the following grounds:

The said decree assumes, that the lease of 1718 was in such force, as to entitle the Respondents to a renewal of it, by virtue of the [148] covenant for renewal therein contained; whereas the lease of 1718 had expired in the year 1778; and though the same might, under the Irish Tenantry Act, have been renewed at any time before notice given by the lessor to renew or within a reasonable time afterwards, upon payment of the rent in arrear and renewal fines; yet the lessor was not bound to renew, except upon such terms, and the Appellant's father having given notice, and the same not having been complied with in a reasonable time, he was not afterwards bound to renew, and therefore the court ought not to have decreed a renewal after an interval of upwards of twenty years.

The lease of 1783 does not even purport to be a renewal of the lease of 1718; the several answers of John Brady and Philip Ringrose shew that it was not so intended, and that it includes lands not demised by the said lease of 1718.

The evidence adduced by the Appellant proves, that the lowest rent which was at any time mentioned as the rent to be reserved, was two hundred pounds a year; whereas that actually reserved was thirty pounds a year, and the annual value of the premises very far exceeded even such rent of two hundred pounds a year.

The Appellant's father, at the time when he executed the said lease, was in a condition of mind which did not allow of his duly judging of its contents.

The lease so fraudulently obtained has not been confirmed by any subsequent act, either of the Appellant or his father.

[149] The Respondents who claim as purchasers for a valuable consideration, had notice of the fraud practised in obtaining the lease, and also of the Appellant's intention to impeach the same; and although this objection were founded in fact, it would not follow that the Respondents, as purchasers for valuable consideration, and without notice of a fraud, would be entitled to the assistance of a court of equity to give effect to a fraud practised by a person under whom they claim, more especially to the prejudice of an infant against whose estate such fraud is to be made effective.

On the part of the Respondent it was insisted, that no fraud appeared on the deed of 1783, and that at this distance of time it would be impossible for the Respondents to enter into any proof respecting it. That the Respondents are purchasers for a valuable consideration, without any notice of fraud, (if any were practised by John Brady.) That Walter Weldon Molony gave a full and fair value for the conveyance of the lands to him; and there is no evidence whatever that Walter Weldon Molony knew any thing improper respecting the execution of the said renewal: that the said renewal, though not technically drawn, yet being made by James Butler, as heir-at-law of Doctor James Butler, of Thurles, to John Brady, as devisee of Jacob Ringrose, and at the rent and fine for renewal in the lease of 1718, must be equitably and substantially considered as a renewal, and not as an original lease.

[150] In support of the allegations of the bill filed by the Appellant, a passage from the answer of John Brady to the bill of Philip Ringrose was read: and upon the subject of the notice to renew, the value of the lands, the intoxication, the fraud practised, and the notice to the purchasers, the following evidence was adduced.

Michael Donnellan deposed, that, in the beginning of July, 1783, a conversation took place, in deponent's presence, between John Brady and James Butler, touching a lease, or a renewal of a lease; the particulars of which conversation were, as well as deponent now recollects, as follows: "James Butler told John Brady that his lease of part of the lands which he held was out, for that the lives were extinct; and that although he had been served with notice to renew, and pay the rent and renewal-fines, yet he had neglected to do so; but James Butler added, that he would take no

advantage of Brady's neglect; and Brady said, that he could hold the lands in spite of James Butler, and make them his own property, for that the statute of limitations had nearly run against James Butler, but that if James Butler would grant him a new lease, he would take the entire lands; and after some farther discussion, it was determined to postpone any agreement until they should go over the lands in the morning:" and deponent saith, that on the next morning Brady shewed deponent two of the farms on the lands, namely, Ballyvannon and Tullyhara, and sent an old man of his [151] to shew deponent the other two farms, which lay at some distance, namely, Tenehire and Island Grady; and deponent saw, examined, and valued all the lands: that after dinner on that day the conversation was renewed touching a lease or renewal of the lands; and James Butler alleged that the renewal-fines and arrears, which were due to him, amounted to eight hundred pounds, to which Brady replied that they could not amount to six hundred pounds; but Brady said that the better way would be for James Butler to forgive him all the renewal-fines and arrears, and to make him a lease of all the lands; and Brady said, that he would make it up to James Butler, by giving him a good rent for the lands; and James Butler having asked Brady what rent he would give, Brady said he ought not to give as much rent as another, he being then in possession of the whole, part thereof under James Butler, and part thereof, to wit, Tenehire and Island Grady, as devised to his uncle Ringrose, and he and family being old tenants to James Butler and his ancestors to that part of the lands called Ballyvannon and Tullyhara; that Brady, after some further observation, said, that he *would give James Butler two hundred pounds a year for the entire lands, on getting a lease thereof for three lives, renewable for ever*; and deponent saith he then interfered, and desired said Brady to double his offer, and that he would have the lands for their value, and said that his valuation of the lands was higher, for that he had *valued them to five hundred pounds a year*, but that he would recommend to James Butler [152] to make a lease of the lands to John Brady at four hundred pounds, as an old tenant; which offer Brady peremptorily refused: that he then recommended James Butler and Brady to go in the morning into the town of Ennis, and to lay all their papers before Counsellor Gregg, who was a man of honour and ability, and to be advised by him as to their respective rights and powers, to which they agreed.

Saith, That James Butler and deponent, on the day after, went together from John Brady's house at Ballyvannon, into the town of Ennis; and James Butler remained at a low whiskey house in the town; and deponent slept at a friend's house; that in a day or two afterwards, Brady also came into the town of Ennis, and renewed his treaty for a lease with James Butler; that Counsellor Gregg having been sent for, he enquired for their title deeds and papers, and neither James Butler nor John Brady having brought them, Counsellor Gregg said it would be impossible for him, without seeing such deeds and papers, to determine whether James Butler had a right to make a lease for three lives, or whether John Brady had any right to withhold any part of the lands: and Counsellor Gregg thereupon refused to interfere: and deponent saith that, perceiving John Brady was very pressing upon James Butler, and knowing from the state of intoxication in which James Butler was constantly, that he would be easily led to make a foolish bargain, deponent sent to Mrs. Butler, etc. etc.: and deponent saith, that on the following day, [153] deponent was in the bed room with James Butler, when John Brady, and a clerk of the name of Michael Dannaher came into the room with a pair of leases, one of them ready filled, and the counterpart about half filled up; that John Brady left the clerk in the room filling up the counterpart of said leases: and in some short time returned with Counsellor Gregg, and Brady asked Counsellor Gregg to look at the lease, which he refused to do, perceiving that James Butler was intoxicated: and Gregg immediately directed that Butler should be put to bed, and desired he would get no more liquor: and told Brady, that it was shameful of him to attempt to get leases executed by a drunken man: and said, that any act which Butler did in his present drunken state would certainly be set aside: that Gregg then went away, and Michael Dannaher then filled up the counterpart of the lease: and deponent saith, that two men had come into the room, one a tenant of James Butler, namely, Bartholomew Scanlan, and the other of the name of Sheehan, a kinsman of James Butler: and Brady turned both said men out of the room, and caused James Butler to sit up in his bed, and Brady and Dannaher produced the leases to James Butler, who then

signed the leases in presence of this deponent and Michael Dannaher, who subscribed their names as witnesses thereto, deponent having become a witness thereto, not considering the leases as fairly and honestly executed, but at the desire of Mrs. Butler, in order to be enabled, at a future day, to state the manner in which they were executed and the [154] unfairness of the transaction: and deponent positively saith, that James Butler was, at the time of the execution of the said leases, which was about two o'clock in the day, *intoricated and totally unfit and incapable of doing any solemn or serious act*: and deponent saith, that in some short time afterwards Mrs. Butler came into town, and on hearing that her husband had executed the leases, she enquired what the rent was, and for what term: and deponent saith, that upon investigating the leases, deponent for the first time discovered that they had been filled up at the yearly rent of thirty pounds, instead of two hundred pounds, as deponent had supposed, according to the low proposal made by John Brady.

Jonathan Gregg in his deposition stated, "that Brady had consulted him on the subject of the renewal, and the differences between him, (Brady,) and Butler; that he, Brady, on account of Ringrose's claim, had been in treaty with Butler to obtain a lease of the lands to himself:—that Butler, in the presence of deponent, had insisted that all right to renewal had been forfeited by the neglect of the tenants:—that on a subsequent day, between twelve and one o'clock, deponent accompanied Brady at his request, and upon his allegation that Butler had agreed to execute the leases which Dannaher was preparing at a public house in the neighbourhood: that upon going to the house, he found Dannaher writing at a table, and James Butler seated on the side of the bed, with a table, a jug, and glasses near him: and that [155] upon addressing himself to James Butler, he found him *so stupidly intoricated, that he could not give a collected or rational answer*, whereupon he immediately remonstrated,—represented to Brady the invalidity of the lease proposed to be executed under such circumstances, and departed."

Several other witnesses deposed to the same facts, and the intoxication of Butler was denied only by Dannaher. There was also proof that John Brady, after having obtained the lease, called upon Mrs. Butler, and declared "that he never intended to make use of it:—that he had obtained it only to drive Ringrose to a compromise, and when that object was effected, he would give it up to be cancelled."

Depositions were also made to establish the allegation, that Walter Weldon Molony and Dr. Spellisy, his wife's father, had full notice before the settlement was executed, that the lease in question had been obtained by fraud, and that it was the intention of Mrs. Butler and the Appellant to question its validity.*

All the material deeds set forth in the pleadings were proved in the Court below, and in evidence before the House.

[156] For the Appellants, Mr. Fonblanque, Mr. Horne.—For the Respondents, Serjeant Copley, Mr. Wingfield.

After hearing arguments for the parties, the following order was pronounced (24th March, 1819): "It is ordered and adjudged, That the decree complained of in the Appeal be reversed: And it is hereby declared, That the indenture of lease of the 11th July, 1783, in the pleadings mentioned, from James Butler, deceased, father of the Appellant, to John Brady, deceased, in the pleadings mentioned, ought to be, and is hereby deemed to have been obtained by the said John Brady by fraud and imposition: and the same ought to be, and is hereby deemed void, and of no effect, so far as the said John Brady had any interest therein, after the agreement entered into by him with Philip Ringrose, in the pleadings mentioned, but without prejudice to the rights gained under such agreement by the said Philip Ringrose, claiming to be entitled to the benefit of the lease of the 5th July 1718, from Garret Gough to Joseph Ringrose, in the pleadings mentioned, and of the covenant for perpetual renewal therein contained, as the heir at law of Jacob Ringrose, deceased, son of the said Joseph Ringrose, and impeaching the will of the said Jacob Ringrose, under which the said John Brady claimed and had obtained possession of the lands com-

* According to the view of the case taken by the House of Lords, the question of notice became immaterial.

The judgment was moved by Lord Redesdale, with very few observations. The Order penned by the noble lord is so distinct, accurate, and comprehensive, that a report of the judicial observations would be superfluous.

prised in the said lease [157] of the 11th July, 1718; in as much as it does not appear that the said Philip Ringrose, under the particular circumstances of the case, might not, if he had established his right as heir in contravention of such will, have been entitled to have compelled a renewal by the said James Butler, deceased, in his favour of the said lease of the 5th of July, 1718; and especially as the execution of the said lease of the 11th July, 1783, from the said James Butler, deceased, to the said John Brady, compelled the said Philip Ringrose to assert such right against the said John Brady: And it is hereby further declared, that the Respondent, Daniel Mulvihill, surviving trustee in the marriage settlement of the 27th of December, 1794, in the pleadings mentioned, in trust for the purposes in the said settlement expressed, claiming under the said Philip Ringrose, is entitled as against the Appellant claiming under the said James Butler, deceased, to the benefit of the agreement entered into between the said Philip Ringrose and the said John Brady, so far as the same was for the benefit of the said Philip Ringrose: And it is further declared, that the said Respondent, Daniel Mulvihill, as such surviving trustee in the said marriage settlement, is entitled to have a lease of the lands comprised in the said lease of the 5th of July, 1718, in trust for the purposes in the said settlement expressed, subject to the terms of the agreement between the said Philip Ringrose and John Brady, save so far as such agreement was for the benefit of the said [158] John Brady: And it is hereby further declared, that the Appellant, as heir of the said James Butler, deceased, being charged with the effect of such agreement, for the benefit of the said Philip Ringrose, is entitled to the benefit which the said John Brady might claim under the said agreement, and the lease of the 4th of July 1793, from the said Philip Ringrose to him the said John Brady:—And it is further ordered and adjudged, that the said indenture of lease of the 11th of July, 1783, and the said lease of the 4th of July, 1793, be respectively delivered up and cancelled:—And the Appellant, under the circumstances aforesaid, waiving by his counsel his claim to dispute the right of the said Daniel Mulvihill, as such surviving trustee, as aforesaid, to the lands of Tenchire and Island Grady, comprised in the said leases of the 11th of July, 1783, and 4th of July, 1793, and submitting to execute to the said Daniel Mulvihill, as such surviving trustee as aforesaid, a lease of the whole of the said lands comprised in the said leases respectively, according to the terms of the agreement between the said Philip Ringrose and John Brady, save so far as such terms are varied by this judgment:—It is further ordered and adjudged, that the Appellant do execute to the said Daniel Mulvihill, as such surviving trustee as aforesaid, a lease of all the said lands, as if the same had been all comprised in and specially described by the said lease of the 5th of July, 1718, subject to the rents and covenants, and according to the covenant for perpetual renewal contained in the said lease of the 5th of July 1718; and that thereupon the said Daniel Mulvihill, as such surviving trustee as aforesaid, do execute a lease to the Appellant for three lives, renewable for ever, of all the said lands, reserving the same rent, and under the same covenants and agreements as are contained in the said lease of the 4th of July, 1793, from the said Philip Ringrose to the said John Brady: and that such leases respectively, be settled by one of the Masters of the said Court of Chancery, in case the parties shall differ about the same:—And it is further ordered and adjudged, that such of the Respondents who are or may be in possession of the lands in question, or any part or parts thereof, do forthwith deliver possession thereof to the Appellant:—And it is further ordered and adjudged, that the Appellant is intitled to an account of the rents and profits of the said lands, from the time of filing his bill, subject to the rent of £142 reserved by the said lease of the 4th of July, 1793, of which there ought to be paid to the Appellant the rent of £30 reserved by the said lease of the 5th of July, 1718:—And it is further ordered, that the said Court of Chancery do give directions for taking such accounts against the several persons who have been in possession of such lands since the filing of the Appellant's said bill, and do order the payment by such persons, or their representatives, of what shall appear to be due thereon:—And it is further ordered, that an account be [160] taken of all sums of money which may have accrued due to the Appellant for renewal-fines, according to the terms of the said lease of the 5th of July, 1718, since the date of the deed of the 3d of July 1793, whereby the said John Brady declared the said lease of the 11th of July, 1783, to have been taken for the benefit of the said Philip Ringrose: such account of renewal fines to be taken accord-

ing to the ordinary course of the said Court of Chancery in taking accounts of such fines:—And it is further ordered and adjudged, that if any thing shall appear to be due to the Appellant on such account, the same be paid by the Respondent, Daniel Mulvihill, as such surviving trustee as aforesaid, to the Appellant, before the delivery to the said Daniel Mulvihill, as such surviving trustee as aforesaid, of the lease hereinbefore directed to be made to him by the Appellant:—And it is further ordered, that the Court of Chancery do give all necessary directions for carrying this order and judgment into execution; and particularly such directions as may be necessary on the return of the reports of the Master in Chancery, to whom any reference shall be made, in pursuance of this order; and do give such orders and directions touching any costs which may be incurred by any of the parties in carrying this order and judgment into execution as may be just.

*** According to modern decisions, the father of the Appellant, and, *a fortiori*, the Appellant himself, upon the evidence [161] appearing in the depositions, if the same had been given in the trial at law, ought to have recovered a verdict.

In *Cooke v. Clayworth*, 18 Ves. p. 16, Sir W. Grant, M.R. said, he apprehended that a deed obtained from a man in such extreme state of intoxication as to deprive him of his reason, would be invalid even at law; and by *Cole v. Robins*, which is cited in Buller's N. P. p. 172, it seems, that in an action upon a bond, the Defendant pleading *non est factum*, may give in evidence that he was made to sign the bond when he was so drunk that he did not know what he did. In *Pitt v. Smith*, 3 Campbell's Rep. p. 34, Lord Ellenborough appears to have laid down a similar doctrine with great latitude. For according to the Report, he says, "Intoxication" (without limiting the degree) "is good evidence, upon a plea of *non est factum* to a deed; or *non concessit* to a grant; and of *non assumpsit* to a promise."

This doctrine appears to be contrary to the law, as laid down in Co. Litt. 247 a, who says, "As to a person who, by his own vicious act, depriveth himself of his memory and understanding, as he that is drunken,—that kind of *non compos mentis* shall give no privilege or benefit to him or his heirs." And again, "As for a drunkard who is *voluntarius daemon*, he hath no privilege thereby," etc. The doctrine seems to be also contrary to the principle upon which it has been held that a man who is *non compos* shall not disable himself. The opinions have been various upon that subject:—But Littleton, in sect. 105, and Sir Ed. Coke, citing the passage, and Beverly's case, are of opinion, that a man *non compos* cannot avoid his own act by entry, plea, or writ. And with that opinion accords the case of *Stroud v. Marshal*, Cro. Eliz. 398.

As to relief in equity against a deed or agreement obtained from a man when drunk, it is laid down, that the having been in drink is no reason for granting relief; for this were to encourage drunkenness. But if, through the management or contrivance of the party who obtains the deed, etc. the grantor, etc. was drawn in to drink, relief is administered upon the ground of fraud. See *Johnson v. Medlicott*, 3 P. W. 130, note A. See also *Rich v. Sydenham*, 1 Ch. Ca. p. 202; *Cory v. Cory*, 1 Ves. 19; *Cooke v. Clayworth*, *supra*, and *Cragg v. Holme*, there cited.

[162] The Scotch law makes an important and necessary distinction:—"Persons while in a state of absolute drunkenness, and consequently deprived of the exercise of reason, cannot oblige themselves; but a lesser degree of drunkenness, which only darkens reason, has not the effect of annulling the contract." See Stair, July 29, 1672, 1d. Hatton. So Erskine in his Instit. p. 822, says, "An obligation granted by a person in a state of *absolute and total* drunkenness, is ineffectual, because the granter is *incapable of consent*."

The rule of the French law, in cases of contract, is similar. See Pothier Traite des Obligations, p. 1. c. 1. art. 1. "Il est evident que l'ivresse, lorsque elle va jusqu'au point de faire perdre l'usage de la raison, rend la personne qui est en cet etat, pendant qu'il dure, incapable de contracter, puisque elle le rend incapable de consentement." *

To satisfy this rule, the drunkenness must amount to a privation of reason; but in gambling contracts, the protection afforded by the French laws to drunkards is more ample.

* See the translation of Pothier on Contracts, by Evans.

For in such cases something far short of a privation of reason is sufficient to annul the contract. Pothier says, "Lorsque l'un des joueurs est dans un état d'ivresse, le contrat que renferme le jeu est nul, etc. Nous parlons d'une ivresse qui, sans rendre la personne absolument incapable due consentement, peut seulement rendre imparfait son consentement en l'empêchant de faire les réflexions qu'elle eût pu faire si elle eût été à jeun." *Traité du Jeu*, c. 1. sec. 1. art. 2.

So the law stood before the Revolution; and although the "Code Civil" forbids gaming, except upon martial or gymnastic exercises, and in general affords no remedy to the parties concerned, either to enforce the payment, or the recovery of money won or lost, yet the intoxication of loser at the time of playing, would form an exception, and the case would fall under the rule of the old law.

The Civil Law has no text upon this head. The only allusion to the subject, so far as I can discover, is in the Digest, lib. 49. tit. 16. s. 6. *De Re Militari*. "Per vinum aut lasciviam lapsis capitalis poena remittenda est, et militiae mutatio irroganda."

[163]

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

JOHN SHAW STEWART, and ROBERT STEWART.—*Appellants*: WILLIAM M'KNIGHT CRAWFORD.—*Respondent*. JOHN GEDDES, WILLIAM DONALDSON, HUGH CRAWFORD, HUMPHREY GRAHAM.—*Appellants*: JOHN SHAW STEWART, and ROBERT STEWART.—*Respondents* [11th Feb. 1819].

[This case is cited as *Geddes v. Stewart*, in 1 Bli. 287, note.*]

Where freehold estates are conveyed under circumstances which may create a suspicion that the grantee is under an obligation, legal or honorary, to vote in the election of representatives in parliament, as the grantor shall direct—if the grantee, in the Freeholders' Court, or in the Court of Session, offers to be examined upon interrogatories, the Court has power to administer such interrogatories *ex officio*. Whether such obligation is a valid ground to exclude the grantee from the roll of freeholders—or only to reject his vote—*Quære*.

An obligation, either legal or honorary, to vote as the grantor of the estate shall direct, accompanied by a correspondent obligation to re-convey the estate upon refusal to vote, according to the compact—is sufficient to invalidate the freehold and vote, and to warrant the exclusion of the claimant from the roll of freeholders. But mere political attachment, or feelings of gratitude on the one side, and expectations on the other, which do not amount to reciprocal or perfect obligation, are not disqualifications within the statute, 7 Geo. 2.

The words of the oath prescribed by that statute; "that any title, etc. is not created, in order to enable me to vote, etc." are to be coupled in construction with those which follow: "But that the same is a real estate in me for my own use and benefit," etc.

The penalty given to the party objecting to a vote by the [164] Scots Act, 1681, and 16 Geo. 2. cap. 11. is in the nature of damages; and therefore it seems that the party claiming the vote cannot object to a discovery on the ground that it may subject him to such penalty.

In the year 1815, the Earl of Eglinton, having taken measures to revive a number of dormant* freeholds upon his estate of Eaglesham, in the county of Renfrew, went

* These freeholds are said to be dormant, because, the superiority and the property being in the same person, the right of voting in respect of the superiority is suspended, or the two rights of voting are merged in each other.

through the necessary process to separate the property from the superiority, and to reduce the titles into such a form, that he might dispose of nine superiorities in life-rent, of value sufficient to give to each of the dispanees a vote for the county.* In pursuance of [165] this plan, Lord Eglinton, directly, or by the medium of his agents, entered into a treaty, and finally addressed proposals to the Respondent in the first, and the Appellants in the four last appeals: and also to Mr. Martin, his agent; Mr. Simpson, partner of Mr. Martin; Mr. Crichton, his factor; and a Mr. McKerrell; offering to sell and convey to each of them a life-rent superiority in the lands above-mentioned, sufficient to afford a freehold qualification, with a feu duty, payable by [166] him as vassal to each life-renter. The dispanee was to pay a price for his grant, in proportion to the feu duty receivable by him during his life, the value to be ascertained by reference to some of the common tables for calculating annuities.

Before the conclusion of the treaties upon this first proposal, it having been suggested to Lord Eglinton, by one of the intended purchasers, that an objection to the votes might arise, if the price given was a mere equivalent for the life-interest in the feu duty, that something ought to be added to the price for the freehold qualification; and that it would be expedient also, to prevent objections,† that the agents for the purchasers should prepare the respective dispositions in their favour; new proposals, framed upon these suggestions, were made to the several gentlemen selected as purchasers. These new terms were immediately accepted by all the intended vote-holders, and dispositions were accordingly completed, either upon making small

* By the Scotch Act, 17th Sept. 1681, the qualification of electors for counties is confined to those who are infeft in property or *superiority*, and in possession of a forty shilling land of *old extent* held of the king or prince, or where the old extent appears not, to those who shall be infeft in lands, liable to taxes, for four hundred pounds Scots, (£33 6s. 8d.) of *valued rent*.

Superiority is the seignior, as distinct from the usufruct of land. A superior who has not the beneficial property, is the mesne lord, between the king and the tenant. The rent service, or quit-rent, accruing to the superior, used to be a mere acknowledgment of right, and frequently not exacted. But in consequence of late decisions upon the head of nominal and fictitious, a new system has been adopted, by which the transaction assumes the shape of a real bargain of sale and purchase. (See Bell on Election Law, p. 303.)

The *old extent* is a valuation of the lands in Scotland, supposed to have been made in the reign of Alexander the Third, in order to ascertain the proportion which the different proprietors were to pay, of a subsidy raised for his daughter's tocher, or portion, upon her marriage with Eric, King of Norway. Lands which were computed at 40s. in this old valuation, entitle the holder in life-rent superiority to be put on the roll of freeholders, whether they amount to £400 valued rent, or not. But as by the statute of the 16th of Geo. 2. cap. 11. sect. 8. no other evidence of old extent can be admitted, but a retour of the land prior to the 16th Sept. 1681, the most general and easiest method of making out a qualification, is by what is called, the valued rent. A retour is an *inquisitio post mortem*, or verdict of a jury, who are summoned to inquire into the title of a claimant to succeed as heir to the estate of his ancestor.

The *valued rent* is a valuation of the lands in the different counties in Scotland, made in the time of the Commonwealth, and adopted after the Restoration.

An estate for life, in a superiority, of the value specified in the statute, entitles such superior to vote in the election of a representative for the Commons in Parliament. By dividing a large estate into such superiorities, and granting them for life, as many votes may be created as the number of forty shilling lands, or the amount of the valued rent of the whole, will bear. But this may be limited by the objections of the tenant, upon whom the lord is not at liberty to put a new superior without his assent. The practice of splitting superiorities to create votes has become so common in Scotland, that, in most counties, two or three proprietors (generally Peers) are, in effect, the electors of the representatives in the House of Commons. (See Wight and Bell on Elections, and Ersk. Inst.)

† These precautions were suggested upon consideration of the grounds of former decisions, by which freeholds had been held nominal and fictitious, and votes rejected under similar circumstances.

additions to the price of each freehold, or by small reductions in the feu duty : so as to add or leave a consideration for the freehold, conferring the right to vote upon these titles.

At the Michaelmas head court, in 1816, claims of enrolment were presented on behalf of the several disponees, claiming right to vote under the life-rent qualifications. The enrolments were opposed on behalf of the freeholders, by the Respondents in the four last appeals, and objections were lodged in their names, as members of the court of freeholders ; upon the ground, that the freeholds were held upon terms of confidence, nominality, and dependence. These objections, having been considered by the court of freeholders, were sustained, and all the claims were rejected as inadmissible ; although the Claimants, who were present, offered to submit to examination, upon oath, as to the nature of their estates, and the terms on which they held them. The matter was then brought before the Court of Session, by petitions and complaints, at the instance of each of the claimants, appealing against the judgments of the freeholders, affirming their independence in the transaction, and their ignorance of any unlawful views, by which Lord Eglinton might have been actuated. These allegations they offered to establish *by their declarations on oath* (see the Note ||, p. 178) *if the Court would direct interrogatories* to be administered to them upon the subject.

In the mean time, those who objected to the votes, presented a petition to the Court, craving a diligence for the recovery of writings relating to the transaction between the Earl of Eglinton and the petitioning tenants of his freeholds. By an interlocutor, dated Feb. 1, 1817, the Court granted to the objectors a power to recover all letters regarding the freeholds, which might have passed previous to the dates of the several dispositions between Lord Eglinton and his agent, on the one hand, and the proposed freeholders and their agents on the other. By virtue of this diligence, the corresponding evidence was obtained, which comprises the substance, and forms the evidence of the case.* Upon the production of this correspondence, replies and duplies were ordered by the Court, and given in by the respective parties. Whereupon the Court having formed an opinion, that the confidential nature of the freeholds had been established by evidence, ordered all the petitions and complaints to be dismissed, finding that the titles of the Complainants were nominal, confidential, and fictitious, and sustaining the objections to the claims of enrolment ; and further found the Complainers liable to the Respondents, in the penalty of £30 sterling, in terms of the statute.†

[169] Some of the parties, without reclamation or appeal, submitted to the judgments pronounced against them ; but the Respondent, Mr. McKnight Crawford, presented a petition, reclaiming against the interlocutor made in his case. This petition, complaining of the judgment, contained a request that he might be personally examined as to the facts of the transaction. In compliance with the order of Court,

* The correspondence, so far as it is made the subject of observation in the judgment, and enters into the reasons and grounds of the decision, is printed in the Appendix subjoined to the case.

By that correspondence, and the judgment, the slight distinctions and varieties in the cases of the several Appellants in the last four, and the Respondent in the first appeal, will sufficiently appear. It has been thought most convenient, and best suited to a clear apprehension of the subject, to state in the text no more than a general outline, comprehending the substance of all the cases.

† The Scots statute of 1681, Sept. 17, No. 21, which prescribes the mode of making up the roll of freeholders for the election of commissioners for shires, and the form in taking objections, and the process for obtaining a final decision upon such objections, provides that, "If the persons objected against shall appear at the parliament, or convention, and instruct the right to vote, the objector shall pay their expenses, and be farther fined in 500 marks ; and if the objection be sustained in parliament, the objectors appearing shall have their expenses, and the party objected against shall be fined in 500 marks."

This statute is explained and amended by the 16th Geo. 2, cap. 11, which gives a penalty of £30 against a claimant rejected by the freeholders, and appealing to the Court of Session.

the Appellants in the first appeal gave an answer to this petition, declining to refer any thing to the oath of the Respondent, and insisting that the Court had no power to order the examination requested. On advising the petition and answers, the Court, on the 14th of Nov. 1817, pronounced an interlocutor, directing that a condescendence should be given in, containing such interrogatories to be answered by the petitioner, as the objectors might judge material, to ascertain how far the petitioner's qualification was nominal, fictitious, and confidential, or defeasible.

In pursuance of this order, a condescendence was given in, containing general interrogatories,* to be administered to the Respondent. The objectors, Appellants in the first appeal, at the same time protesting by a minute, that the interrogatories did not originate at their instance, and submitting that Mr. McKnight Crawford should be interrogated, if at all, by judicial examination, either in the presence of the Court, or before a commissioner, and not by answers deliberately prepared, and returned in a written form. It was, however, decided that the answers should be in writing; and they were so made accordingly.* [170] Upon advising these answers, the Appellants in the first appeal having craved, that certain incidental questions, suggested by the answers, should be put to and answered, *visâ voce*, by Mr. McKnight Crawford; an interlocutor was pronounced on the 5th of Feb. 1818, whereby the Appellants in the first appeal were directed to lodge a minute, containing the additional interrogatories, which they proposed to administer to Mr. McKnight Crawford. A minute, containing a few additional interrogatories, was lodged accordingly, and answers in writing were put in by the Respondent, Mr. McKnight Crawford.

The whole cause, between the parties in the first appeal, came on to be finally heard on the 12th of Feb. 1818; when the Court, having considered the petition, answers, additional interrogatories, and answers to both, altered the interlocutor reclaimed against, and found that the petitioner, in virtue of titles produced before the freeholders, was entitled to be enrolled in the roll of electors, and that the objections to his title were not relevant. Therefore they granted warrant to, and ordained, the Sheriff-clerk of the county of Renfrew, to add his name to the roll. The Appellants in the first appeal, on the 14th of March, 1818, presented a petition, reclaiming against the judgment, but the petition was refused, without answers, by an interlocutor pronounced on the 7th of March, 1818.

In the last four cases,† the Appellants also re-[171]-claimed against the judgments, but they were finally confirmed by the Court of Session. Against these several decisions of the Court below, the parties respectively appealed to the House of Lords.

The Attorney General, Mr. Charles Warren, Mr. Brougham, Mr. W. Adam, and Mr. Robert Grant, appeared and argued on different sides for the respective parties.‡

The principal questions argued were as follows:

1st. Whether there was any agreement, understanding, or honorary engagement between the Earl of Eglinton and the several grantees, that they should vote under

* See the interrogatories and answers in subjoined Appendix.

† The facts of the case as they relate to the appeals, with slight differences appearing in the subjoined correspondence, are very nearly similar. The only varieties material to be noticed are, that as to the letter which is called the first circular from Lord Eglinton, there was no proof that it was directly communicated to Mr. McKnight Crawford; that the purchase of his vote was transacted through the medium of Mr. Hugh Crawford, in the manner which will appear by the letters passing between the parties; and that Dr. Donaldson was the family physician of Lord Eglinton; a circumstance which formed a subject of observation in the printed papers, and the arguments before the House of Lords.

Of the nine life-rent dispositions, which were the subject of litigation in the Freeholders' Court, and the Court of Session, five, being the cases above reported, were brought before the House of Lords by way of appeal; one was redispensed to Lord Eglinton; and upon the remaining three, judgments were given, finding them nominal and fictitious, and the parties did not appeal.

‡ The arguments occupied five days of hearing. They are not inserted on account of their length. The most material appear in the above abstract of the questions discussed; and in the opinion delivered by the Lord Chancellor.

his influence, and as he [172] directed; and whether such agreement, etc. could be inferred, from mere inadequacy of price.

2d, Whether it was sufficient to invalidate the vote, that such an agreement, etc. existed, unless it were rendered effectual by a concomitant agreement to re-convey the estate upon breach of the engagement as to voting, or unless the estate were in substance held in trust for the grantor, and whether such trust could be inferred from an honorary engagement to vote as the grantor should direct.*

3d, Supposing such understanding existed between the Earl and his agents, whether the proof of that fact, and the inferences to be drawn from their intercourse and correspondence with each other, or with any of the parties, could be evidence to affect the rights of other parties, and how far, and at what particular time, if at all, the grantees or any of them had adopted the agents of the Earl, as their agents in the transaction, so as to be affected by their acts and declarations.

4th, Whether the facts proved were sufficient ground to adjudge the votes nominal and fictitious; or whether the oath of verity (see the Note ||, p. 178), or interro-[173]-gatories respecting the purity of the transaction, ought to have been administered to the parties before the final decision of the Court of Session; and whether the Court had authority to direct such proceeding upon the requisition of the claimant, where it was opposed by the freeholders objecting to the votes.

5th, Whether interrogatories could be administered to a party, who, by the answers, might subject himself to penalties by the Scotch act, 1681, and the English act, 16 Geo. 2, cap. 11, sect. 4.†

6th, Whether the grant of the superiorities did not constitute sufficient freeholds to entitle the grantees to be put upon the roll,‡ although the [174] facts proved might have furnished valid objections to their votes.

In the course of the arguments, the following were the principal authorities cited and discussed.

Forbes v. M'Pherson.§ Fac. Coll. 6th March, 1789; D. P. 19th April, 1790; *Luders on Elect.* v. 3, p. 387.

* Whether the grantee in such case is bound to re-convey, was a question discussed in *Forbes v. M'Pherson*. Lord Thurlow inclined to the affirmative of that proposition. See the judgments in this case, and the opinion of Eldon, C., as to the equitable right of the grantor in a similar case, *Curteis v. Perry*, 6 Ves. Jun. 747, citing a case before Lord Kenyon, where a father had conveyed an estate to a son to qualify him to sit in parliament, and, the purpose having been answered, filed a bill to have a re-conveyance, the bill was dismissed with costs.

† These penalties relate only to proceedings before the superior Courts, and not to proceedings before the Court of Freeholders. Whether this objection is competent to any but the party examined—Query. By the Scots Act, 1681, if the objection of the freeholders, to put the claimant on the roll, shall, upon petition, be sustained in parliament, the objectors appearing shall have their expenses, and the party objected against shall be fined 500 marks.

By the stat. 16 Geo. 2, cap. 11, sect. 6, which gives to either party aggrieved a summary appeal to the Court of Session, if the judgment of the freeholders, refusing to admit, or striking any person from the roll, shall be affirmed by the Court of Session, the party complaining shall forfeit to the objector £30 sterling, with full costs of suit. As to the examination of parties upon oath, see *Ersk. Inst.* b. 4, tit. 2, sect. 8, 9, and the note, as to the exceptions in cases of prosecutions for penalties, and of interrogatories under the game laws, which are admitted, notwithstanding the liability of the party to penalties. See also the Note ||, p. 178, and further observations on this point.

‡ A freehold may be conveyed under such circumstances, that the party holding it would have no right to vote in the election of a Member of Parliament; yet he has many other duties and rights as a freeholder, for the purpose of performing and enjoying which, he ought to be put upon the general roll. The Stat. 1681, speaks of the election roll as a distinct instrument.

§ In *Forbes v. M'Pherson*, the oath of verity was tendered, and inquiry prayed, by the freeholders objecting to the votes.

Elphinstone v. Todd. Fac. Coll. 1st March, 1787; D. P. 30th April, 1787; Loders on Elect. v. 3, p. 394, App.

Case of Stewart Soutar. Fac. Coll. 3d March, 1807. Fleming v. Drummond, D. P. 23 July, 1811.

Stein v. Campbell, 18th Nov. 1815.*

Sir H. Moncrieff v. J. Campbell, 3-tius. W. S. 1813.†

* In this case, the Court of Session found that the estate was nominal and fictitious, upon proof of an understanding between the parties, that the freehold was to be used for the behoof of the grantor. At the next annual Court of Freeholders, the grantee produced a discharge from the grantor, of any obligation to re-dispense, express or implied; and he was then inrolled upon the same titles as before. But upon complaint to the Court of Session, it was ordered that his name should be struck out of the roll.

† This case is not reported. The following are the circumstances under which it was assimilated to the present, and quoted, on behalf of the freeholders, in support of the objections to the votes. Mr. Campbell (the defender) was agent for Mr. Graham, of Kinross. In 1806, he wrote to him as follows: "I think a seat in parliament would be desirable for you in many points of view, and therefore take the liberty of suggesting to you, that it may be proper to secure yourself against all risks *by giving votes to some of your friends.*" The writer afterwards added, "My brother, George Brown, got a vote from Mr. George Graham, but the titles never were delivered, and he has not on that account taken it. Were you to confirm this conveyance, as he has been some years infeft, his vote would be immediately a good one. To secure yourself, you would require *at least other five.* Mr. Templar, I believe, would accept of one; and I once, I think, heard him express a wish to that effect. Dr. Henderson would be a safe one; and if no other occurred, William Brown, my brother-in-law, of the Lisbon house, now resident here, might answer, and would give a small purchase money to secure it from challenge. I have requested Mr. Templar to write to you on the subject; and on mature reflection, I think it a matter of such consequence to you, that I have extended a disposition by you to Messrs. Templar, George Brown, and myself, of five votes, which I enclose, that if you think right, you may sign it according to the instructions annexed to it."

Mr. Graham acceded to this proposal, and signed the disposition, after which Mr. Campbell again wrote to him as follows: "I wrote you in answer to the first, and prefix a copy of my letter, and have to acknowledge receipt of the dispositions and mandates, with which, I trust your friends will be able to secure you a seat in Parliament. You do not mention the names of these you mention to have enrolled. Should the attorneys approve, I would suggest the following: 1st, Mr. Templar's son; 2d, Mr. George Brown; 3d, Mr. William Brown; 4th, John Campbell. These superiorities being taken to support your interest, I reckon their value as follows: The average price of superiority over Scotland may be taken at £100 sterling for a vote; but Kinross is only represented every second parliament. The value may therefore be taken at one half, or £200. This is the value of a proprietor in the county, who wishes, besides having a vote, to connect his property with a freehold. To those who have no property, but who take it to support a friend, I would reckon £150 a fair price. This price I am very willing to pay, and I have no doubt that those whom I have mentioned will not stumble at it."

In the month of May, 1809, some other votes in Kinrossshire having sold much higher than Mr. Campbell had calculated, he wrote to Mr. Graham in the following terms: "Whilst on the subject of superiority, I think it proper to mention, that the value having gone far beyond my idea of it; and, of course, the calculation on which I proposed the price to be paid by your friends, who took the votes with the view of supporting your interest, turn out inapplicable, I consider myself bound to give up the vote, which on these principles I got to myself. The price of £150 sterling, which, with interest, was to be paid out of the money to be drawn from India, is quite under the mark, which, in proportion to the £375, should be at least £250. I beg leave, therefore, to re-dispense to yourself, or any friend you may wish." In answer to this letter, Mr. Graham, of this date, said: "In regard to your own qualifications, it is my wish that it should remain as originally arranged,

[175] Burnet's Case. Dict. of Dec. tit. Member of Par. 8754, 30th July, 1745.

[176] Hon. Spencer Chichester v. Sir Murray Maxwell. Fac. Coll. 28th Jan. 1809.

[177] Drummond v. Adam, ditto, 26th Jan. 1813.*

Montgomery v. Dalrymple, 2d March, 1813.†

Case of Gordon of Cluny, June 27, 1807.

— Belches, June 29, 1809.

Wigton Cases, June 29, 1805.

Case of Proby.‡

[178] Case of Campbell, 1813, 14.§

Cheap v. Morehead. Bell on El. Law, p. 321, Ed. 1812.

Campbell v. Muir, 5th Feb. 1760. Aff. on Appeal, 1st Dec. 1760.

Stewart v. Dalrymple, 28th Feb. 1781. H. of L. 30th April, 1782.

Skene v. Skene, 9th March, 1768. H. of L. 9th May, 1790.

Lyndsay v. Drysdale, 6th March, 1788.

The substance and effect of the cases, which are noticed here only by name, are to be found in Bell on El. Law, p. 271 to 335.¶

with this exception, that in the event of your having a wish to relinquish it, I should have an option of taking it back on the same terms." To this letter, Mr. Campbell answered thus: "I delayed troubling you, in hopes of seeing you here; but as the time draws near for lodging claims of enrolment, I think it necessary to mention, that I do not consider such an understanding, as that mentioned in your last, at all safe. It would be considered as evidence of the vote being nominal and fictitious. Whatever votes you make, therefore, you must consider as real conveyances, and it is in that view I feel such delicacy in retaining the vote. When I stated the £150 as the price payable by your friends, I looked on £250 as the most a vote could go to; and I consider the value of £250 as not too much to make up for the loss of interest on the £150, whilst it should be held, as the holders could reap no benefit from the property. As the price however has gone so high, I do not see any plan that can be followed, but my giving it up, or advancing the price a little. I could not conveniently go above £200, but I am willing to give this sum, and thus make the vote a good one. There can be no agreement to any return, but from the connexion that would follow of course. I beg to mention from you, as to this. In course, I shall lodge the claims." Mr. Graham acquiesces in the proposition for valuing the vote at £200, and Mr. Campbell was enrolled as the freeholders, but the Court of Session ordered him to be expunged from the rolls with costs.

* This was a case of gratuitous grant, at an elusory feu dug's by an uncle to a nephew. The Court of Session, upon complaint of a freeholder, ordered the name of the claimant to be struck out of the roll. The House of Lords, on appeal, remitted the cause—that interrogatories might be put to the claimant. He, by his answers, having denied that any confidence or understanding existed between him and the grantor, his right to enrolment was confirmed.

† This case is not reported. The objection was, that the freehold having been taken in exchange for another freehold, in a different county—the mutual grantees being also candidates for the respective counties, at the ensuing election—was void, as nominal, fictitious, and confidential. But the Court of Session decided otherwise, and Lord Meadowbank observed: "It is a confidence which the law allows. It is a motive for the grant of the vote: but does not affect its legality or independence. They have a mutual confidence in and affection for each other. There is no nominality, nothing fictitious. We have only to consider whether the freehold is held in trust. I do not see a vestige of any thing of the kind. The fee is given away. It is given absolutely to a personal friend. And is a personal friend incapable of receiving a gift?"

‡ In this case, a freehold gratuitously granted by Lord Seaforth to Mr. Proby, who had been his secretary, was held not nominal and fictitious.

§ This was another case of a gratuitous grant by Lord Elphinstone, who was at that time Lord Lieutenant of the County, to his clerk of lieutenancy and quondam secretary. It was held valid.

¶ In the course of the argument, it was said, that answers to interrogatories should not be confounded with the oath of verity. But the distinction (if any)

[179] The arguments proceeded chiefly upon the foregoing authorities, and the construction and [180] operation of the Scotch Act, 1681, the 12 Anne, st. 1. c. 6. and the 7 Geo. 2. cap. 16.*

The Lord Chancellor.—The question in these cases relates to several interlocutors, seems to be little more than nominal. Answers to interrogatories are declarations upon oath, by a party either confessing or denying what is alleged or proposed, by questions put at the instance of the adverse party, or *ex officio* by the judge; as in the case of McKnight Crawford.

The law as to examination upon the oath of verity, so far as it regards the subject discussed on this point, is thus stated by Erskine, b. 4. tit. 2. sect. 8.

“Though one's right may be taken away by his own oath, when, upon a solemn appeal to God, he is forced to acknowledge that his claim is ill-founded, or cut off by a just exception: yet it is a self-evident proposition, that no man's right can, in the common case, be either proved by his own oath, or extinguished by that of his adversary; because these are no more than the averments of the parties themselves in their own favour. From this rule, however, there is an exception in the case of oaths, which are called *oaths of verity*, where the pursuer, confiding in the defender's veracity, or perhaps sensible that he can bring no other evidence, refers the point in controversy to his oath. For if the defender shall, upon such reference, swear that the pursuer's claim was either groundless from the beginning, or is now extinguished by payment, it is entirely cut off by such oath, though the strongest evidence should be afterwards brought, that his claim was good. In the same manner, the right of a pursuer may be proved by his own oath, affirming it to be good, when the defender refers the point in issue to it. An oath of verity has so strong an effect, not because it can work any conviction in the Judge from the nature of the evidence; for no single testimony upon oath, of the most unsuspected witness, can be received in evidence; but it depends entirely on the transaction that is supposed to intervene between the party referring, and him who deposes, by which they put the issue of the cause upon what shall be sworn,” etc.

Sect. 9. “Oaths of verity cannot be urged against a defender in any trial properly criminal, so as to compel him to depose against himself. Vid. *infr.* t. 4. sect. 94; but in trespass, you,” &c. the conclusion draws no deeper than the damage of the person wronged. In a civil action, where a fine, a defender may be compelled to swear; as in bloodwits before an inferior Judge: Durie, Feb. 13, 1634, (*Tait* against *Darling*, Dict. p. 736), in batteries, Fount. July 24, 1678, *Gordon* (Dict. p. 9397) cited in folio Dict. 1, p. 14; and in injuries verbal or real, Clerk Home 5, (Fiscal of Edinburgh, Jan. 1, 1736, Dict. p. 9400). The same was decided in a prosecution, brought by the procurator fiscal, on the Statute 1707, c. 13, ‘for preserving the game,’ where the prosecutor restricted his claim to one penalty of £20 Scots: *Fac. Coll.* June 27, 1787. Procurator Fiscal of Edinburghshire, Dict. p. 12412.

Sect. 14. “Oaths of verity, as they have been now explained, are oaths referred voluntarily by one party in a suit to his adversary; which therefore are finally decisive of the cause. But oaths of verity are sometimes put by the Judge *ex officio*, without reference by either party to the other; which, because they are necessary, and not grounded on any implied contract between the litigants, are not final; so that sentences proceeding on them may be declared void upon proper vouchers afterwards recovered; or the cause may be brought from the inferior Court to the Session, on this ground, that the Judge ought not to have ordained the party to swear, etc.”

* By the 7 and 8 W. 3. all conveyances, in order to divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in Parliament, are declared void.

By the 53 Geo. 3. cap. 19. it is declared, that devises by will shall be held conveyances within the meaning of the Act.

By the 45 Geo. 3. cap. 59. sect. 8. amending the Irish Act, 35 Geo. 3. cap. 29. it is enacted, that if any person shall fraudulently grant any interest, importing to be a freehold, which is not so, with intent to enable any person to vote, such grant shall be valid against the grantor,† for very purpose but enabling the grantee to vote.

† The word “and” seems here to be wanting in the clause.

which have been pronounced by the Court of Session, in the five several causes which have been heard at the bar: all of them involving a consideration of the same or similar points: whether the estates created by the Earl of Eglinton, according to the law of Scotland, are real or nominal and fictitious estates in the several persons to whom he sent, what is called, the circular letter; namely, one to Mr. Hugh Crawford, writer in Greenock; another not sent by himself, but communicated by [181] Hugh Crawford to William McKnight Crawford; another to Humphrey Graham, writer to the signet; another to Francis Martin, a writer at Paisley, who appears to have been a sort of agent to the others; and that communicated by him to a gentleman of the name of Alexander Simpson, his partner. There was likewise a letter sent to a gentleman of the name of Fulton McKerrell, who was a manufacturer at Paisley; and this circular letter appears, according to the statement I have in my hand, to have been communicated by him to his brother John McKerrell, likewise a manufacturer there. Fulton McKerrell gave up his freehold, as it is stated, in order to make way for William McKnight Crawford. The seventh person particularized, is Mr. John Geddes. There appears likewise to have been (though we have not heard much of that, except that in the papers before me there is an occasional reference to it) a communication to a gentleman of the name of James Crichton, a writer at Irvine. And the ninth, was Dr. William Donaldson, physician in Ayr.

As I understand the proceedings of the Court of Session, the first division of the Court of Session decided, in the first instance, that William McKnight Crawford's title was nominal and fictitious, but they seem afterwards to have thought it requisite, further to examine the grounds of that judgment: and accordingly, under the direction of the Court, the persons who objected to this vote administered to William McKnight Crawford, a great variety of interrogatories; and notwithstanding the inferences stated in the pa-[182]-pers, and the implications as to what must have been the intention and understanding of William McKnight Crawford, drawn from the nature of the correspondence which took place between the Earl of Eglinton and his agents, and particularly Mr. Hugh Crawford, it is material to observe, that William McKnight Crawford, when the Court directed him to be examined upon interrogatories, has entirely, or to a very great extent, destroyed all those inferences and implications. Why similar inferences and implications should not be equally answered by others, whose cases were not much, if any thing stronger than his, I do not perceive.

With respect to Mr. Francis Martin, who was a writer in Paisley, very much connected with Lord Eglinton, it appears from one of his letters, that he certainly meant to accept this vote, in order to support the political influence of Lord Eglinton. He has thought it right, I understand, to abandon his vote. In so doing, it must be considered, that he has acted from a sense of honour, and propriety: for, notwithstanding the terms of this letter, I doubt whether he could have been compelled to abandon his vote.

Mr. Simpson, his partner, became a purchaser of one of those estates, in consequence of a representation made by Mr. Martin, in a letter to Lord Eglinton. He appears to stand very much in the same circumstance as Mr. Martin, and I understand that Mr. Simpson has likewise abandoned his vote.

Mr. Fulton McKerrell made way for William [183] McKnight Crawford, whose vote has been sustained. Upon the correspondence of McKerrell, it is extremely difficult to say, that he was not bargaining for an independant vote; and from that circumstance, I should have inferred that the person standing in his place, William McKnight Crawford, was also bargaining for an independant vote. If we are permitted to infer from the acts of one man, to the intention of another, it may be difficult to answer the inferences which a suspicious mind would raise. From the acts of Hugh Crawford, who dealt for William McKnight Crawford, to a certain extent, he was his agent. But if it can be shown, upon this correspondence, that Fulton McKerrell was really bargaining for an independant vote, and where Lord Eglinton appears not indisposed to let him have such a vote, it is difficult to suppose that a change was made with respect to the person to stand in his place.

In the case of Mr. Geddes, the first division of the Court of Session having found that his titles were nominal and fictitious, he has complained of this interlocutor.

What has been done with Mr. Crichton, I do not know: as he was an agent of Lord Eglinton's, he has probably abandoned his claim.

Then there follows the case of Dr. William Donaldson, who is a physician of Ayr. With reference to whom they found likewise, without examination of the party, that his vote was nominal and fictitious: among other circumstances, upon this, that Dr. Donaldson is, as they say, the phy-[184]-sician of Lord Eglinton, and it has been contended in argument, that, being physician of Lord Eglinton, he could not purchase of his patient a substantial vote.

Appeals have also been made, by Mr. Hugh Crawford, who complains that his vote has been taken to be nominal and fictitious; by Mr. Graham, who complains that his vote has been taken to be nominal and fictitious; and by Dr. Donaldson, who makes the same complaint: that is, there are four persons who state that their estates are mere estates, affected by no obligation, either of a perfect or imperfect kind (I will state presently, why I use the term of an imperfect nature): and that they ought therefore to be put upon the roll, and be allowed to vote on elections. On the other hand, there is an appeal from the gentlemen who are the voters' objectors, with respect to the estate of William McKnight Crawford; and who say, that the Court of Session is quite mistaken in finding that his estate was not nominal and fictitious. They insist that his estate is nominal and fictitious, although interrogatories have been addressed to him, which would puzzle, I think, Mr. Crawford, as much as many we have seen in this part of the island.

It is not my intention to discuss at present the law of Scotland, as to what does or does not constitute nominality and fictitiousness, further than I find it determined in cases. I think we shall be able to collect from these cases, and what has been stated in Judgment in this House, what this House has taken to be (if I may use such an ex-[185]-pression) the common law of Scotland; by which I mean the law of Scotland as it has obtained, independantly of those statutes which have prescribed the rule to us, and likewise the effect of the law of Scotland with respect to those statutes which require an oath to be taken to guard against nominality and fictitiousness. I do not enter into the discussion, because the law of Scotland is very fully stated in the cases, and therefore it would be a useless waste of time.

It is not my intention to say one word upon the question, whether it is good policy, or whether it is likely to contribute to the purity of the constitution, that estates, not nominal and fictitious, but legal, should be reserved and created in the way in which it is acknowledged they may in Scotland. I accede to the notion of Lord Thurlow, who says (in *Forbes v. McPherson*): "He must be a bold man, who undertakes, on any abstract ideas, to new model the constitution of a country." We are not assembled here as a branch of the legislature, but as a Court of Session, to decide what the law is now, and not what it ought to be.

The Scotch statute, which passed on September 17th, 1681, regulates the election of commissioners for shires. According to the opinion of Lord Thurlow, supposing the subsequent statutes of Queen Anne and George the Second not to have passed, this objection of nominal and fictitious would have been just as good an objection, as it was after the acts of Queen Anne, and George the Second passed. This statute regu-[186]-lates the manner in which freeholders shall be allowed to vote. It was made to prevent delay in dispatch of public affairs in parliament, and convention of estates, occasioned by the controverted elections of commissioners for shires. It directs who shall vote in the election of commissioners; namely, those who shall be publicly infeft in property or superiority, and in possession. It provides for the making up of the roll, and at the time when the roll is to be made up, objections may be taken. The persons who, according to this statute, have a right of voting, are those who are publicly infeft, and in possession.

It then states, "that if the objections shall not be cleared, and acquiesced, they shall take instruments against the admitting to, or excluding any person from the roll, and that no other objection shall be held competent in parliament or convention, but what shall be contained in the instruments taken as aforesaid." (I observe here, there were other objections, besides those of nominality and fictitiousness taken in the Freeholders' Court, and again at the election, but all abandoned, except those of nominality and fictitiousness.) Then it is declared, that if the

persons objected against shall appear at the parliament or convention, and instruct the right to vote, the objector shall pay their expenses, and be farther fined in 500 marks; and if the objection be sustained in parliament, the party objected against shall be fined in 500 marks. I have read thus much of the statute, which has no application to the question before us, except as it describes the nature of the property which the [187] voters are to have, for the purpose of taking notice of this penalty of 500 marks. Upon which it may be enough for me to say, that, whatever my opinion may be upon what is to be found in the text writers and the practice of the law of Scotland, there is a great difference between acting upon the oath of the party directed to be administered in such cases, and a penalty given in the nature of damages to the party objecting. It may be open to argument, whether, when a statute gives a penalty, in any shape, the construction of that statute is to be a loose or a strict construction. I state this remark the more strongly, because, in addition to the penalty of 500 marks, the party is required to take the oath prescribed by subsequent statutes: by which it is further provided that the party shall not only be subject to a penalty, but be indictable for perjury.

The statute of the 12th of Anne says this: "Whereas of late, several conveyances of estates have been made in trust, for redeemable elusory sums, no ways adequate to the true value of the lands, on purpose to create and multiply votes in elections of members to serve in parliament, for that part of Great Britain called Scotland; Be it enacted, that from and after the determination of this present parliament, no conveyance or right whatsoever, whereupon infeftment is not taken, and seizin registered, one year before the test of the writs for calling a new parliament, shall, upon objection made in that behalf, entitle the person or persons so infeft to vote, or to be elected at that election, in any [188] shire or stewartry, in that part of Great Britain called Scotland; and in case any election happen during the continuance of a parliament, no conveyance or right whatsoever, whereupon infeoffment is not taken one year before the date of a warrant for making out a new writ for such election, shall, upon objection made in that behalf, entitle the person or persons so infeft, to vote or be elected at that election." This part of the act seems to apply rather to occasionality than to nominality and fictitiousness."

The next part of the act is applied to this point. "And that from and after the said day, it shall or may be lawful to or for any of the electors present, suspecting any person or persons to have his or their estates in trust, and for the behalf of another, to require the preses of the meeting, to tender the following oath to any elector; and the said preses is hereby empowered and required to administer the same in the words following: I A. B. do, in the presence of God, declare and swear, that the lands and estate of —, for which I claim to give my vote in this election, are not conveyed to me in trust, or for the benefit of any other person whatsoever; and I do swear before God, that neither I nor any person to my knowledge, in my name, or by my allowance, hath given, or intends to give, any promise, obligation, bond, back bond, or other security, for re-disposing or re-conveying the said lands and estates, any manner of way whatsoever; and this is the truth, as I shall answer to God."

[189] This statute does not in terms, as I perceive, enact, that a person shall be guilty of perjury, and suffer the pains of perjury as the subsequent statute does; but perhaps, one might venture to go the length of saying, that, without an express enactment, the party might be considered as guilty of perjury.

The words of this oath deserve peculiar attention. It appears to me, from the language of Lord Thurlow, in the case of Sir John Macpherson, that he kept them in view, when he came to talk of what he called the honorary obligation. I was counsel in that case; and I have to this moment, a very lively recollection, that I considered this thing called honorary obligation, though very fit to be considered, was an extremely difficult thing, to be enforced by positive law. When Lord Thurlow speaks of honorary obligation, he uses an explanatory expression, which, in itself, suggests a good deal of difficulty to the trammelled mind of a lawyer, that you are to find, not merely that the voter has a motive operating upon his own mind, but you must be satisfied "that some sensation has passed out of the mind of the grantor into the mind of the grantee, and that the sensation has returned again, out of the mind of the grantee into the mind of the grantor;" so that there shall be an understanding between them, that

the vote is to be used, as the author of the vote shall be pleased to direct. And Lord Thurlow seems to have been of opinion, that if a man was so circumstanced as to be under an honorary obligation, as to the use he was to make of the real [190] estate, he must consider himself under the same obligations of honour to re-dispense the estate.

The statute of the 7 Geo. 2. which is entitled, "An act passed for the better regulating the election of members to serve in the House of Commons, for that part of Great Britain called Scotland, and for incapacitating certain persons to be elected, or to sit or to vote in that House—" that act recites, "Whereas doubts may arise, whether the acts of parliament made in England, for preventing false and undue returns of members to serve in parliament, extend to that part of Great Britain called Scotland." Then there is a penalty given against a false return. Then it is enacted, "that every freeholder, who shall claim to vote at any election of a member to serve in parliament, for any lands or estate in any county or stewartry in Scotland, or who shall have right to vote in adjusting the rolls of freeholders, instead of the oath appointed to be taken by an act made in the 12th year of Queen Anne, shall, upon the request of any freeholder, formerly inrolled, before he proceed to vote in the choice of a member, or on adjusting the rolls, take and subscribe, upon a roll of parchment to be provided and kept by the sheriff, or steward clerk, for that purpose, the oath following, which the preses, or clerk to the meeting, is hereby empowered and required to administer, that is to say, I *A. B.* do, in the presence of God, declare and swear, that the lands and estate of —, for which I claim a right to vote in the election of a member to [191] serve in parliament, for this county or stewartry, is actually in my possession," (those words are not in the act of Queen Anne,) "and do really and truly belong to me," (those words are not in the act of Queen Anne,) "and is my own proper estate," (those words are not in the act of Queen Anne,) "and is not conveyed to me in trust, or for or on behalf of any other person whatsoever," (those words are in the act of Queen Anne;) "and that neither I nor any person to my knowledge, in my name, or on my account, or by my allowance, hath given, or intends to give, any promise, obligation, bond, back-bond, or other security whatsoever," (those words are in the act of Queen Anne). Then follow these words, which are not in the act of Queen Anne: "other than appears from the tenor and contents of the title upon which I now claim a right to vote, directly or indirectly, for re-disposing or re-conveying the said lands and estate in any manner of way whatsoever, or for making the rents or profits thereof, forthcoming to the use or benefit of the person from whom I have acquired the said estate, or any other person whatsoever." Then follow these words, upon which, if they had not received a judicial construction, and received that judicial construction over and over again, I think it would have been very open to argument what the meaning of them was: "And that my title to the said estates is not nominal or fictitious, created or reserved in me, in order to enable me to vote for a member to serve in parliament, but that [192] the same is a true and real estate in me for my own use and benefit, and for the use of no other person whatsoever; and that is the truth, as I shall answer to God."

If this had been *res integra*, I should have found it extremely difficult, in the case of any person claiming an estate under the circumstances now before us, to have advised that person to swear that his title to the lands was not created or reserved in him, in order to enable him to vote for a member to serve in parliament. But construction has put an end to all argument. It has been determined, that you are to take the whole of this sentence together, and that if the purpose be, as in this case I have no doubt it was the purpose of Lord Eglinton, to enable the party to vote in elections to parliament, yet the words following are to qualify those words, namely, "that the same is a true and real estate in me for my own use and benefit, and for the use of no other person whatsoever;" and that, although an estate should have been created or reserved, in order to enable a party to vote for a member for parliament, yet, if it was a real estate in him, vested in him for his own use and benefit, though the purpose was to enable him to vote for a member in parliament, yet, if he was under no obligation in point of honour to vote otherwise than his judgment would direct him to vote, the estate, nevertheless, was not to be considered as nominal and fictitious, but to be considered as a good estate.

Upon the authority of decided cases, these [193] principles are considered as now settled by the law of Scotland: namely, that if the estate is really an estate vested in a person for his own use and benefit, if it be an estate of a quality to give a vote for a member to serve in parliament, the extent of it is of no consequence; and if *bona fide* given without consideration, the fact of its being so given is no objection to the vote. I have found no case in which it has been decided that if the sensation in the mind of the grantor does not pass to the mind of the grantee and the sensation in the mind of the grantee does not pass back again to the mind of the grantor—if there is not an understanding created between them, that the man shall vote as the grantor of the estate shall direct him to vote, that it will not be a good vote. It has been held, and Lord Thurlow himself has stated, that he cannot meddle with estates when the persons voting in respect of them, vote from gratitude, or common obligation, but that there must be a sort of paramount and perfect obligation disappointing the law, as he expresses it: an understanding, that the man who made the vote made it for the purpose of making the grantee his creature, and that the man who took the vote understood that he so took, and was under, if we may so call it (I cannot easily define it), an honorary obligation, that he would in truth become the creature of the man who meant to give him the estate, for the express purpose of his voting as he the grantor pleased. I should apprehend, that Lord Thurlow must have conceived (as it appears from the tenor of his judgment in [194] the case of Sir John Macpherson) that this did not depend upon the oath, but was in the nature of the parliamentary law of Scotland. It would, indeed, be very difficult to apply to an honorary obligation the words which are contained in the statute: "In case any person shall presume wilfully and falsely to swear and subscribe the said oath, and shall be thereof lawfully convicted, he shall incur the pains and penalty of perjury, and be prosecuted for the same, according to the law and form in use in Scotland."

In a Civil Court, much might be effected, according to that case of Sir John Macpherson. Where an oath is administered to the parties, the grantee may declare upon his oath, that he was not bound, that he would not have taken the estate, if there had been any suspicion that he was bound in honour: that the grantor may also declare that there was no such understanding on his part: that in creating votes for members of parliament, he would much rather give those votes to his political friends, and to men of his own turn of thinking, under the notion that, morally speaking, they were much more likely to support his own notions of the constitution of the country, than other persons who differed from him. But, on the other hand, if both parties were to pledge themselves by their oaths, that whatever were the language, or the appearances, neither the one nor the other had any such intention; that no such understanding or obligation existed: it would be a very bold measure, to say, on the general words of this oath, that the parties must be convicted of [195] wilful perjury. It must, therefore, I apprehend, have been the idea of Lord Thurlow and this House, in the case of Sir John Macpherson, when they resorted to the term "honorary obligation," that it was not the thing prohibited by this oath, but that kind of understanding, which it is very difficult to prove exists, but which, when proved to exist, this House has undoubtedly determined, would vitiate the vote, upon the ground that it was not a real, but a fictitious estate: that the grantee was bound in honour to make no use of it: and he is equally bound in honour to re-dispose it, lest he should make use of it. In other words, to make the honorary obligation equal to the effect of the oath, where the honorary obligation existed, inducing the consequence in law that the estate was not a real estate, and inducing a further consequence in law, if the estate could not be used: namely, the obligation to re-dispose it.

In *Forbes v. Macpherson*, it is material to consider what this House must be taken upon the record to have decided. For the Judges of the Court of Session have, in all the cases now before us, except the case of *Macknight v. Crawford*, refused to direct an examination, which this House required in *Forbes v. Macpherson*: yet the Judges of the Court of Session suppose they have been acting upon the authority of this House in the case of Macpherson.

I have stated what appear to me to be principles established, and they may be taken so [196] to be. Yet there is no denying, on the other hand, that if a doubt fairly arises, whether the vote is nominal and fictitious, or not, you will look at all

the circumstances; you will inquire whether the man has the possession; you will look at the want of consideration; and in every case of that kind, there may be a number of circumstances creating suspicion, which would, on sound principles, mature a suspicion into judgment, that the estate was nominal and fictitious. But then I see Lord Thurlow, when he was venturing upon this extremely delicate and difficult ground, this thing called honorary obligation, states himself thus, "It must be upon the general state of the transaction, that the Court may collect, that the estate, instead of being intended to be used or disposed of by the grantee, was intended between them, to be at the use and disposition of the grantor, and whenever a case affords circumstances sufficient, fairly and roundly to raise that presumption in an unanswerable degree, or to raise it in a degree which the party himself cannot answer," (that is, cannot answer by his oath) "in such a case as that, the vote must be held to be void." Then, Lord Thurlow here requires that the circumstances should fairly and roundly raise that presumption, in an unanswerable degree. I observe here, that the Judges of the Court of Session were at first of opinion, that in the case of M'Knight Crawford, the presumption was raised in an unanswerable degree; but when they have put the [197] party to answer, he has answered in a clear and unequivocal way, and they have reversed their judgment.

Taking the whole of what Lord Thurlow says together, he does not mean to say, that he would not raise the presumption, merely because the party answers it. His expression is, if the presumption is raised in a degree which the party himself cannot satisfactorily answer. He appears to be of opinion, (and I think the case imports as much,) that although the party has been examined on interrogatories, yet, if the case required you to disbelieve the party, (it is another question, whether you believe him or not,) you might disbelieve him, provided the circumstances had fairly and roundly raised such a presumption, that his answer to it could not get the better of that presumption, and could not repel it, and drive it out of the judicial mind of the court.

This being the way in which the matter was treated in the case of *Forbes v. Macpherson*, it is hardly necessary to state the former case of *Elphinstone v. Todd*. Lord Thurlow's judgment in which is set forth in the printed cases.* In the later case, I think I shall be able to determine what must have been the meaning of the House. As the case is stated, it is said, "It is believed no country can afford a more remarkable instance, than the county of Aberdeen, where, by parcelling out the superiority of lands contained in one charter, a noble Duke has at-[198]-tempted to add to the roll of freeholders, one wadsetter, and twenty-four life-renters;" (that is, five-and-twenty. Upon that I would observe, there is no doubt in the world that the contemporaneous creation of votes, and the number of votes contemporaneously created, are circumstances of evidence to be attended to. In the present case we have nine, in the case of the Duke of Gordon there were twenty-five:) "In consequence of an equal number of dispositions and assignments, all dated in one day, the 26th of Sept. 1786, and of as many instruments of seisin, all dated in like manner, the 27th, and registered the 29th of the same month," (there is, indeed, a similarity in the cases, in respect of the dates of the instruments.) "The whole of these pretended titles were made by the order, and at the expence, of the Duke of Gordon."

But in this case, Lord Eglinton is not so liberal, and he has found more disinterested adherents. For they have given large considerations for their purchases, and it is not alleged in the case that they have not substantially parted with the money. If it were fit for judicial minds to entertain suspicion, there might be ground for a surmise that the money which passed, was like a sensation that it passed from the hands of the grantee to the hands of the grantor, and back again from the hands of the grantor to the hands of the grantee. But allegations of such a nature cannot be entertained without proof, nor can it be presumed, in the absence of proof, that this gentleman, the physician, and several others, who had [199] no more connexion with the Earl of Eglinton than the most indifferent persons or mere strangers, have thought proper, in order to become his creatures, and to vote as he pleased, each of them to put into his pocket a hundred pounds, or thereabouts.

* See the judgment in Loders, *Election Cases*, vol. iii. p. 371.

There is no contract to redispense that money, a circumstance which becomes extremely material.

If a proposition were made to give me an indifferent vote, provided I would send the proposer a certain sum of money, and in a country where it is expressly admitted, that if it be absolute gift, without a money consideration, it is a good vote; can it be requisite, that I, as a purchaser, should reject an independent vote, because it is offered at a low price? Must I insist on paying a larger price than the owner demands for his vote? It is possible I may be taking from him, as matter of sale, that which is intended as matter of gratuity; but surely it is contrary to the settled rule of legal presumption, to hold that, because the surrender is made in that shape, therefore, it must be a case *ubi aliud agitur, aliud simulato concipitur*. Those who make the allegation, must prove it; they cannot shut out the evidence, whether the fact be of the one nature or of the other. In the case of the Duke of Gordon, the whole affair was transacted at his own expence. He had not the least consideration for any of the estates conveyed, some of the alienees being asked previously, whether they would accept of a qualification. The deeds, when engrossed at Edinburgh, were blank, in the names of the grantees, and remained so till sealed at Gordon Castle.

[200] After this, a very remarkable circumstance happened. It suited the purpose of the Duke of Gordon, to tender these votes when at the Freeholders' Court in Aberdeen; but it suited likewise the ideas of the agent of the Duke of Gordon, without any communication with any one of these voters, whose claims had been improperly put upon the roll, (as it was said,) to withdraw the whole five-and-twenty of them; and then in the subsequent year, without any authority from any of these claimants, except two, they were brought forward again; and being brought forward, the freeholders stated, that the qualification upon which Sir John Macpherson, (who was one of them,) claimed to be enrolled as a freeholder of the county, was nominal and fictitious, and created for the sole purpose of enabling him to vote, and that in fraud of the statute of 7 Geo. 2. The majority of freeholders, however, thought proper to admit him to the roll.

In consequence of this, there was an application under the authority of the statutes, summarily to the Court of Session, and various questions were proposed to be put, in order to prove that these votes were nominal and fictitious. The questions, each and every of them, I understand to have been sanctioned as questions which might be put by the Court; because the Judgment of this House was, that Sir John Macpherson should confess or deny the averments in the pleadings mentioned. The averments in the pleadings mentioned were, "First, that the conveyance of the lands, contained in the Respondent's titles, was made without his previous consent, [201] or knowledge, or at least, that the Respondent was solicited by the noble Duke, from whom he derived his right, to accept of a freehold qualification. Secondly, that the expence of making out the title deeds was paid by his Grace;" (and I need not here state, that matters, which are alleged, and not denied, are in Scotch pleadings taken as confessed.) "Thirdly, that these title deeds were not delivered to the Respondent before his enrolment, or at any time in his possession previous thereto. Fourthly, that when he was informed of the conveyance, or was prevailed upon to accept it, he did not mean or think himself called upon to defray the expence of defending his title in the Court, or elsewhere. Fifthly, that he did, when he accepted the said conveyance, and still does, consider himself *as in honour bound* to vote for the candidate who may be patronized by the noble Duke, and to renounce his freehold qualification at his Grace's pleasure." To be sure, if a man was bound in honour to vote for the candidate of the Duke, and felt that obligation in honour, he could not say that he was not bound in honour (to use a Scotch phrase) to denude himself of the estate, when called upon, in case his views differed from those of his patron.

What did Sir John Macpherson say to these averments? (Lord Thurlow anticipated that Sir John Macpherson could not support his case by the oath required.) Sir John Macpherson stated in his pleadings, "That the estate he had acquired from the noble Duke yielded 16s. 8d. a year, and that he had purchased it at a fair [202] and adequate price," not saying what it was, and "that it was for the express and special purpose of enabling him to vote for a member of parliament." Now,

although he admitted it was for the purpose of enabling him to vote for a member of parliament, yet, if it was a real estate, the decision of this House would not interfere with it solely on that ground. That was his object. Had it not given him that right, he probably would never have acquired it; and were that right taken away, he would care very little what became of the superiority. He nevertheless maintained, and that he might maintain with good effect, "that a life-rent superiority afforded a good freehold qualification; and that his titles were not nominal or fictitious, because he was possessed of every thing they contained." But the law of Scotland, as declared by the authority of this House is, that the conveyances are to be not only clear, but sincere.

The Lords of Session found that it was incompetent to put the question to the Respondent, proposed by the complainers; but they did not stop here, for they repelled the objection of nominal and fictitious to the Respondent's qualification, and therefore dismissed the complaint, assolized the Respondent, and decerned.

In that case, the appeal to this House was on two grounds. First, it was said that the Court ought to have put those questions; but, secondly, that if the Court did not put those questions, the circumstances of the case were sufficient to shew that those estates were nominal and fictitious. Upon the decision in this House, though [203] Lord Thurlow stated that honorary obligation would destroy the right, he nevertheless, in the conclusion of what he states, beseeches the House not to come to a hasty conclusion of the matter; that he would wish to know every thing which could be known upon the subject; and instead of deciding on the circumstances of the case as they appeared in the transactions between the Duke of Gordon and those voters, he sent the case back again to examine the parties; and it turned out that he had prophesied very truly. For Sir John Macpherson would not take the oath proposed to be administered, and he refusing to take that oath, his estate was held to be nominal and fictitious. If he had taken the oath, (as I understand Lord Thurlow,) it would then have been reserved for the Court to have considered the effect of his oath; but his silence was deemed a confession, and he was therefore struck off the roll.

The question, then, I apprehend to be, whether the case of Macpherson is to be taken as an authority for what the Judges of the Court of Session have done in the present cases. It is not my intention to go through all the circumstances of the present cases, and to consider the effect of Lord Eglinton's proposal to create nine voters; his proposing for one Mr. Martin, his agent; and another, Mr. Simpson, the partner of that agent; and for a third, Mr. Crichton, his agent, at Irvine. There is not, in the case of Mr. Martin, evidence that would satisfy me, that his was not a real estate, provided he would deny that which would [204] affect his estate; and looking at all the correspondence that passed with Hugh Crawford, the correspondence that passed with McKnight Crawford, through Hugh Crawford, and his whole correspondence; looking at the correspondence which passed with Geddes, and with McKerrell: looking at the correspondence which passed with Dr. Donaldson the physician: looking at that correspondence which I must look at, if *I can consider it as evidence at all*, with infinite caution, I mean the correspondence with Mr. Martin, and through him, Mr. Simpson, and the communication to Mr. Crichton—the agents having possibly very different purposes from those of the Earl, who proposed to sell; looking at the voluntary increase of price, (which I confess I do not wonder at, in these writers of the signet, and if I were purchasing an independent vote, I had rather have given more for it, than any of those persons had given. You might call that my motive to meet a popular prejudice, or my motive to meet the judicial inferences that would be raised in the House of Lords, as to the motive of the conveyance, because I had not given enough for it;) yet if the parties sincerely believed that the Earl of Eglinton was offering independent votes, and purchased accordingly, they would not be destroyed by such circumstances. I do not pass over here, the fact that the votes were created out of dormant titles. That acts both ways. The Earl of Eglinton had dormant titles, and it is stated that he had formerly created votes, which he could not support. There is no evidence to the fact: but [205] taking it to be so; am I to suppose that the Earl of Eglinton, if examined as a witness, would state, that instead of that which he professed to be his purpose; namely, the making independent votes, he had no such purpose; that it was all simulation—am I to suppose, that in a case in which his

Lordship acted with the advice of such a man as Mr. Cranstoun, who appears to have been his adviser, aided by persons of considerable professional skill, I mean the writers here spoken of, Mr. Russell, Mr. Anderson, and Mr. Martin, that he who had been foiled in his purpose before, of creating fictitious votes, was really endeavouring, in contradiction to all that was stated by him, in contradiction to all that is stated by those who are dealing with him, and in contradiction to what they voluntarily undertake to swear, wishing to examine him as well as themselves—and I, notwithstanding all these circumstances, to understand, that in his second attempt, he was endeavouring to do the same nugatory thing, which he had formerly attempted, but failed to accomplish.

I do not go through every observation which may be made upon every part of this case, but I say again, that the case of Mr. McKnight Crawford teaches me to deal with infinite judicial jealousy, with the question how far I am to cut down an estate, which upon the title deeds is clear, and which the parties aver is sincere, as well as clear by inferences and implications, from the acts of other persons. Inferences and implications were raised in the case of Mr. McKnight [206] Crawford, with almost, or quite as much force, as in the case of these Respondents. But all these inferences and implications were proved to be unfounded, even in the judgment of the Court of Session in Scotland.

We are here upon an infinitely delicate subject. I agree the objection is founded, if the estate can be shown from circumstances, from the refusal of the party to be examined upon interrogatories, or from his deficient answer to those interrogatories, to be an estate not given to him for his own use and benefit, to be used by him as he shall think proper. But I follow Lord Thurlow in opinion, that if the grantee shall, from the obligation of gratitude, act in the same interest as his friend the grantor, that is no objection. Where a father gives to his son a qualification; where an uncle gives to his nephew a qualification; where a brother gives to a brother a qualification; it is very difficult to suppose that the qualification is given by the father, uncle, or brother, without conceiving that, in the one instance, filial affection, and in the other instances, the affections resulting from those relationships, will induce the party to vote in the same interest, with his relative and patron. But authorities cited in argument prove that there must be something further: that you must make out that there is this understanding between the parties. How far that rule is to be carried, is a consideration which led me to submit to this House, in the case of *Fleming v. Drummond*,* the [207] propriety of remitting the case to the Court of Session; and I expressed a very strong wish, that, if they sustained their first opinion, they would do that which they have often done most usefully to the King's subjects, embody, in their decision, the reasons for that decision.

It is my purpose to propose that this case should be remitted, very much in the terms in which that case of *Fleming v. Drummond*, was remitted. If the Court of Session shall be of opinion, after the examination, that they cannot come to the same conclusion as in the case of McKnight Crawford, I again respectfully express to them my wish, that they would embody in their interlocutor the reason upon which they proceed. The authority of this Court, as established in Macpherson's case, must not be shaken. To the extent of that case, the law is settled: but the doctrine, if pressed beyond that authority, may be attended with grievous consequence. Suppose I have a whole fee which I could contrive to vest in the noble Lord who sits near me, and he might create out of that a dozen votes; if I should happen to say, I know your political principles: we have gone through life's journey together, acting very much in the same way with respect to what we conceived to be the public interest, and I had rather you should have that estate for £5000 than some men, whose private character I revere, and whose conduct I estimate very highly, for double the money: will it be said, because I make a foolish pecuniary bargain, (if that is the real case,) and I am at liberty in this view to make the hypothesis—that my impro- [208] dence, caprice, or policy, is to destroy the estate thus created? and this may be diversified in a number of modes. Upon the whole, therefore, I cannot come to such a conclusion as Lord Thurlow contemplated,

* June 25, and July 11, 1810. D. P. June 23, 1811. Bell, p. 303.

in the case of McPherson; namely, that these estates were intended, between the Earl of Eglinton and these grantees, to be at the use and disposition of the Earl of Eglinton; or that the case, as it now stands before me, affords circumstances sufficient *fairly and roundly to raise that presumption in an unanswerable degree*. I should have said exactly the same, if the case of McKnight Crawford had come here before it had been reviewed in the Court of Session, and before they had been convinced that their presumption was not raised in an unanswerable degree. Nor can I go to the length of saying, after what I have seen, in *Fleming v. Drummond*, and what I have seen in this case, that the circumstances do fairly and roundly raise a presumption in such a manner, that these parties cannot satisfactorily answer it. If I am right in saying the circumstances fall short of producing that degree of presumption, I conceive I have the authority of this House for saying, that they fall short of that ground, on which this House can be called upon to support the judgment, and that it is our duty to send it back again to the Court of Session, for revision, with liberty to examine the parties as in that case. If they shall be finally of opinion that these estates were nominal and fictitious, I again respectfully intimate my entreaty that they would state the grounds upon which they come to that finding.

With these observations, I purpose, after the [209] drawing out an order, something in the terms of that made in the former case of *Fleming v. Drummond*, to send this case back again to the Court of Session to be reviewed, and to examine the parties on interrogatories, in the four last appeals. But the final judgment in the case of Mr. McKnight Crawford must be affirmed.

In each of the four last appeals the following order was made:

"*Die Joris*, 11 *Februarii*, 1819.—Ordered and adjudged, that the cause be remitted back to the Court of Session in Scotland to hear parties further thereupon with liberty to receive such new allegations as the occasion may require, and with liberty for the Appellant to confess or deny such averments as to the alleged nominality, as the Respondents, by interrogatories, according to the course of the Court, shall call upon him to confess or deny: And it is further ordered, that the Court do review the interlocutors appealed from, and determine, whether it is sufficiently established, that the freeholders of the County of Renfrew did right in refusing to admit the Appellant upon the roll, and also do determine, whether such fact shall be sufficiently established by what hath already been made to appear to the said Court, together with any such evidence or proof, as may be received or made, under such liberties as aforesaid."

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APPENDIX.

No. I. First Letter sent by the Earl of Eglinton, to the Persons whom he had selected as the Holders of his Freeholds.

Eglinton Castle, 2d February, 1815.

Dear Sir: Being determined to bring forward and dispose of some dormant freeholds in the county of Renfrew, I must naturally apply to those gentlemen who I consider my friends, and whom I already consider myself under obligations to. The plan I propose, after mature consideration and consultation with the first counsel at the bar, is as follows:—

That I am to convey the superiority of my own property lands to afford a freehold qualification in life-rent, with a feu-duty payable by me to the life-renter of £5 sterling yearly. The price I receive will be the value of £5 sterling upon the life of the person to whom this conveyance is made, conform to the most approved tables of annuities.

Should it be more agreeable to you to have a larger sum of feu-duty paid, (although it can make no difference to the title, and therefore appears quite unnecessary,) be so good as inform me what extent you would wish it, and I will take it into consideration. To save you trouble I herewith enclose a table for calculating the value of these freeholds.

(Signed) EGLINTON.

This letter was sent to the following Claimants, or their agents, viz.

1. Hugh Crawford, writer in Greenock.

2. By Hugh Crawford to William McKnight Crawford of Cartsburn.

[211] 3. Humphrey Graham, W.S.

4. Francis Martin, writer, Paisley.

5. By him communicated to Alexander H. Simpson, his partner.

6. Fulton McKerrell, manufacturer, Paisley, and by him to his brother, John McKerrell, manufacturer there. John McKerrell is one of the Complainers; but Fulton McKerrell gave up his freehold, in order to make way for William McKnight Crawford.

7. John Geddes, of the Verreville glass works, Glasgow.

8. Communicated verbally to James Crichton, writer, Irvine, who, as his Lordship's agent at Irvine, corresponded with the other Complainers.

9. Communicated verbally to Dr. William Donaldson, physician in Ayr, as appears from a subsequent letter to him.

No. II. Second Circular, sent as above, and intitled on the back, "Lord Eglinton to the different purchasers of Renfrewshire freeholds, relative to the additional sum proposed by Mr. Russell, W.S."

Eglinton Castle, 20th February, 1815.

Dear Sir: I have received a letter from Mr. Russell, with respect to the superiorities in Renfrewshire, which I am disposing of. He observes, "that although the superiorities are meant to be disposed of for a price, without trust or confidence, yet it may be right, in order to meet the popular prejudice, not to confine the price to the precise value of the life interest in the feu-duty. But to add something to it, as for the freehold, such as from £20, or £30 to £50 on each freehold." He likewise recommends, that the purchasers' own agents prepare the dispositions in their favour, and complete their title by infeftment.

If either of these sums should be agreeable to you, to [212] add to what was mentioned formerly, a copy of the proper disposition will be sent by Mr. Martin, that you may give directions to your agents to extend it accordingly. I remain, dear Sir, your's faithfully,

(Signed) EGLINTON.

P.S. The same idea as mentioned by Mr. Russell had occurred to my friend, Mr. Humphrey Graham, W.S. who is a purchaser, and requested, that instead of paying the sum corresponding to his age in the table, which was £75, that it should be made £100.

Copies of the above wrote to the following gentlemen:—Colonel Geddes, Verreville, Glasgow; John McKerrell, Esq. Paisley; Hugh Crawford, writer, Greenock; Dr. Donaldson, Ayr.

LETTERS RELATING TO THE CASES OF MR. MCKNIGHT CRAWFORD AND MR. HUGH CRAWFORD.

No. III. Excerpt from Letter, Lord Eglinton to Hugh Crawford, Esquire,
Writer in Greenock.

27th January, 1815.

After a long paragraph on a separate and private matter, his Lordship writes as to the freehold thus:—

I hope in a short time now to have my dormant freeholds in your county brought forward, and will be happy that you should have one of them. I believe you understand the footing on which they are to be sold,—for the life of the purchaser; and as to the sum to be paid, five pounds or fifty will make the freehold equally good. Will you have the goodness to write me on the subject? and hope you will have the goodness to purchase one of them. Few men will be more agreeable to me, being grateful for the friendly support I have received from you. I remain, etc.

[213] No. IV. Excerpt from Letter, Mr. H. Crawford to Lord Eglinton.

[Produced by Lord Eglinton.]

Greenock, January 1815.

My Lord: I feel very much honoured and obliged by your Lordship's polite

information respecting the division of your Lordship's freeholds in this county, and I shall be most happy to become a purchaser of one of these life-rents, so soon as your Lordship shall have made the arrangements, and fixed a price. I have the honour to be, etc.

(Signed) HUGH CRAWFORD.

The Right Hon. Earl of Eglinton, etc.

No. V. Hugh Crawford, Esquire, to Lord Eglinton.

Greenock, 9th February, 1815.

My Lord: During my absence in Edinburgh, where I have been for a week, your Lordship's favour of the 2d arrived, containing the scheme upon which your Lordship is inclined to dispose of some freeholds in this country. I have attentively considered the scheme, and, in so far as I can judge, it has my hearty approbation. I beg leave, therefore, to mention that I shall readily become a life-rent purchaser from your Lordship of one of these freeholds. My age is between 52 and 54, so that I shall fall under the class of £56 7s., and the money will be paid whenever, and in any manner, your Lordship may be pleased to signify. My friend, Mr. Crawford of Cartsburn, is very desirous of purchasing £180 of valuation to join to his own extent, which is so much defective; but if that cannot be obtained, he will purchase a complete freehold, and upon the terms that your Lordship has pre-[214]-scribed. May I be permitted to recommend Mr. Crawford to your Lordship's notice? I again beg leave to offer your Lordship my most respectful acknowledgments, for the repeated kindnesses which your Lordship has shown to me; and remain,

(Signed) HUGH CRAWFORD.

To the Right Hon. the Earl of Eglinton, etc.

No. VI. Lord Eglinton to Hugh Crawford, Esq.

Eglinton Castle, 11th February, 1815.

Dear Sir: I have to acknowledge the receipt of your letter of the 9th inst., and am glad that you are to become a purchaser of one of the freeholds.

It would have given me pleasure that I had it in my power to have accommodated your friend, Mr. Crawford of Cartsburn, by the valuation he wants, to make out a freehold, but I have it not. I will be happy, therefore, that he will purchase one of those on the terms I have been advised to propose; and, as you mention, that he will accept, I have wrote Mr. Martin to transmit his name to Mr. Russell, at Edinburgh, for that purpose, and I hope it is not yet too late. I shall be proud to have two such respectable purchasers as he and you. I have wrote Mr. Martin, therefore, in case the number is filled up, if possible to give a preference to Mr. Crawford, in the room of some other. Excuse this hurried note. I am, etc.

(Signed) EGLINTON.

Hugh Crawford, Esq. Writer, Greenock.

P.S. I will be most happy to be honoured with the acquaintance of Mr. Crawford, and if you will be so good as to endeavour to prevail upon him to pay me a visit, and show him the way here, it will give me very great pleasure.

[215] No. VII. Lord Eglinton to Mr. Martin.

(Private.)

February 11, 1815.

Sir: In a letter which I have just received from Mr. Crawford of Greenock, he mentions that Mr. Crawford of Cartsburn is willing to purchase one of my votes. He, therefore, *privately*, is much more agreeable to me than young Mr. Robertson, who I wrote you of, yesterday. I beg, therefore, his name may be forwarded to Mr. Russell, which completes the number, being eight. I have time to add no more, but remain, etc.

(Signed) EGLINTON.

No. VIII. Hugh Crawford to William McKnight Crawford.

Greenock, 13th February, 1815.

My Dear Friend: I lost no time, upon my return, in writing to the Peer of

Eglinton, and last night's post brought me a letter from his Lordship, which I now beg to transcribe:—

[Here Lord Eglinton's letter to Hugh Crawford, of 11th February, 1815, already printed No. VI. is inserted.]

This, you will say, is civil enough, and I hope soon to advise you that there is yet one open for your honour.

I trust that, in the course of this season, you will be able to run down the length of the Castle, taking another castle in your way.—I am, etc. ever yours affectionately.

(Signed) HUGH CRAWFORD.

No. IX. Lord Eglinton to Hugh Crawford.

Eglinton Castle, 12th February, 1815.

Dear Sir: Since writing you, I had received a letter from Mr. Fulton McKerrell, accepting of the terms offered for the purchase [216] of one of the freeholds. He had made an application formerly upon the subject, but as I had not received an answer, I concluded that the terms were not agreeable to him. From his letter, however, I find that he has been from home, and as his application was prior, I am afraid he must be preferred. Perhaps, however, I may have an after one to offer to Mr. Crawford, which I will be happy to do. In the mean time, I hope that will not prevent me from having the pleasure of seeing you and him here, and to be honoured with his acquaintance. I remain, dear Sir, etc.

(Signed) EGLINTON.

Hugh Crawford, Esq. Writer, Greenock.

No. X. Mr. Hugh Crawford to Mr. McKnight Crawford.

Greenock, 14th February, 1815.

My Dear Sir: Since writing yesterday, I last night had another letter from the Earl of Eglinton, dated the 12th, of which the following is a copy:—

[Here Lord Eglinton's Letter of 12th February, No. IX. is inserted.]

I confess much disappointment at this last letter, as I really concluded that all was fixed. Before making any reply to these letters, I request to hear from you, and may I beg of you to do so on receipt, etc.

(Signed) HUGH CRAWFORD.

William McKnight Crawford, Esq.

No. XI. Mr. McKnight Crawford to Hugh Crawford, Esq.

15th February, 1815.

My Dear Sir: I know no particular answer that can be given to the Peer's letter, but that I regret my application had not been [217] made sooner. If a sum of valuation to make up my title could be had at a reasonable expence (my own writings included), it would require only about £180 Scots. Thank the Earl in my name for his wishes to serve me.

(Signed) W. McKNIGHT CRAWFORD.

Hugh Crawford, Esq. Writer, Greenock.

No. XII. H. Crawford, Esq. to Lord Eglinton.

Greenock, February 22, 1815.

My Lord: On my return last night from the interment of Mrs. Crichton, I found your Lordship's favour of the 20th. The suggestion of Mr. Russell, I presume, is very proper, and I have no objection whatever to make a corresponding advance in the same way as Mr. Graham has done.

My class is that falling under the purchase of £56 7s.; so that if Mr. Graham (whose class is £75) advances £25, mine will be in proportion. When convenient for your Lordship, you can direct Mr. Russell to correspond with my agent, Mr. Horne, W.S., who between them will do all matters properly. I regret very much that I had

not the honour of paying my respects to your Lordship yesterday, as I returned home immediately after the interment. I have, etc.

(Signed) HUGH CRAWFORD.

The Right Hon. the Earl of Eglinton, etc.

No. XIII. The Earl of Eglinton to Hugh Crawford, Esq.

Eglinton Castle, 25th February, 1815.

Dear Sir: Mr. Martin is just now with me, and I find that I have still another freehold to dispose of in the county of Ren-[218]-frew, upon the estate of Eastwood, which I am glad to have it in my power to offer to your friend, Mr. Crawford. If he will have the goodness to accept, I beg you will write to Messrs. Russell, Anderson, and Tod, mentioning his Christian name and age, without delay, in the hope that his disposition may be made out, along with the others, which I have given positive directions to be immediately completed. I will be glad to hear from you. Excuse this hurried letter, and believe me to be, etc.

(Signed) EGLINTON.

Hugh Crawford, Esq. Writer, Greenock.

No. XIV. Hugh Crawford to Lord Eglinton.

Greenock, February 27, 1815.

My Lord: I am this morning honoured by your Lordship's letter of the 25th, and have by this post transmitted a copy of it to Mr. Crawford, with a request that he may, with the least possible delay, inform Messrs. Anderson, Russell, and Tod, of his resolution. His residence (Ratho) is within seven miles of Edinburgh, and I trust my letter will find Mr. Crawford at home, in which case he will to-morrow write to, or wait on these gentlemen, and I shall not fail to communicate his answer to your Lordship.

I again beg your Lordship to accept my grateful acknowledgments for these repeated marks of attention; and I remain, with the greatest respect, etc.

(Signed) HUGH CRAWFORD.

[N.B. The letter to Mr. McKnight Crawford, referred to in the above, was not produced.]

[219] No. XV. Hugh Crawford to Messrs J. and D. Hornes and Easton, W.S.

Greenock, 4th March, 1815.

Dear Sirs: I have purchased from the Earl of Eglinton one of his Lordship's life-rent freeholds in the county of Renfrew, and he has suggested that my agents should draw the conveyance, and for this purpose it will be necessary that a meeting be had with the Earl's men of business, Messrs. Anderson, Russell, and Tod, W.S.

Will you have the goodness immediately to see these gentlemen, and have all matters properly fixed. I am, etc.

(Signed) HUGH CRAWFORD.

Messrs. J. and D. Hornes and Easton, W.S.

No. XVI. Messrs. Hornes and Easton, W.S. to Hugh Crawford, Esquire, Writer, Greenock.

6th March, 1815.

Dear Sir: In consequence of your letter of the 1th received yesterday, we, to-day, waited on Messrs. Russell, Anderson, and Tod, the agents for the Earl of Eglinton, to receive the titles, and arrange respecting the conveyance of the freehold purchased by you from His Lordship; but we were told that the terms had not yet been agreed on between Mr. Martin of Paisley and you, and that nothing could be done here until that should take place. The only things we understood you had to fix were, the price and the fee-duty. When they heard of that being done, they were to let us know, and we shall of course lose no time in getting the conveyance prepared.

(Signed) J. and D. HORNES and EASTON.

To Hugh Crawford, Esq. Writer, Greenock.

[220] No. XVII. Mr. Francis Martin, Writer, Paisley, to Hugh Crawford, Esq

7th March, 1815.

Dear Sir: I inclose you a draft of a life-rent disposition by Lord Eglinton to you.

There is a blank left for the price. You can fill it up with any sum from £50 upwards. The sum you insert regulates the feu-duty. You'll observe that twenty guineas is to be included for the value of the vote.

I request, after you have perused the draft and filled up the blank article, that you will send the deed to your agent, Mr. Horne, who will deliver it to Mr. Russell, W.S., that the description of the lands may be inserted; after which Mr. Horne will extend it, and then Mr. Russell will transmit the extended deed to be signed by his Lordship. I beg you'll get this done *as expeditiously as possible*. I am, etc.

(Signed) FRA. MARTIN.

Hugh Crawford, Esq. Writer, Greenock.

No. XVIII. Mr. Crawford to Messrs. Hornes and Easton.

Greenock, 8th March, 1815.

Dear Sirs: Prefixed you have copy of a letter received last night from Mr. Martin, and inclosed you have draft of the disposition which (agreeably to the table of the annuities and usage, I have inserted £56 7s.), as there is an immediate necessity for the business being arranged, I request you may, on receipt, wait on Mr. Anderson, and get the whole completed. I am, etc.

(Signed) HUGH CRAWFORD.

Messrs. J. and D. Hornes and Easton, W.S.

[221] No. XIX. Hugh Tod to James Horne.

59 George Street, 11th March, 1815.

Dear Sir: We have been favoured with your letter of the 9th instant, inclosing draft of a disposition by Lord Eglinton to Mr. H. Crawford, of the superiority, in life-rent, of certain lands in Renfrewshire, which, however, we delay revising, until the feu-right necessary for creating the vassalage shall be framed and completed. To enable us to do this, will you have the goodness to let me know, by the bearer, the feu-duty which Mr. Crawford has agreed to pay? I am, etc. for Messrs Russell, Anderson, and Tod.

(Signed) HUGH TOD.

James Horne, Esq.

No. XX. Hugh Crawford to Messrs. Hornes and Easton.

Greenock, 15th March, 1815.

Dear Sirs: From your unusual silence of late, the writer of this is necessitated to refresh your memories, requesting you would, with your earliest conveniency, write him on the following cases, the life-rent freehold from the Earl of Eglinton. I am, etc.

(Signed) HUGH CRAWFORD.

Messrs. J. and D. Hornes and Easton, W.S.

No. XXI. H. Tod to Messrs. Hornes and Easton.

59 George Street, March 23, 1815

Dear Sir: I return you revised the draft of the disposition by Lord Eglinton, to Mr. Hugh Crawford, of the superiority [222] in Renfrewshire, and shall be glad if you can get it extended, and sent me to-morrow, in time to admit of its going west by the post of that evening. I am, gentlemen,

(Signed) H. TOD.

Messrs. Hornes and Easton, W.S.

No. XXII. Messrs Hornes and Easton to Messrs. Russell, Anderson, and Tod.

24th March 1815.

We were this morning favoured with your letter of yesterday, returning the draft

of the life-rent disposition, by the Earl of Eglinton to Mr. Crawford, revised, and we now, agreeable to your wishes, send it to you extended, that you may forward it by this night's post to his Lordship, for execution.

We presume the price is to be paid to you, and we shall be accordingly ready to do so. We are, etc. (Signed) J. and D. HORNES and EASTON.

Messrs. Russell, Anderson, and Tod.

No. XXIII. Messrs. Hornes and Easton to Hugh Crawford, Esq. Writer, Greenock.

17 Heriot Row, 21th March, 1815.

We have now sent Messrs. Russell, Anderson, and Tod, the extended disposition, by the Earl of Eglinton, to you, to be forwarded to his Lordship for execution. We presume we should pay the price of the freehold to Messrs. Russell, Anderson, and Tod, when they return the disposition to us, signed, and we shall accordingly do so, unless we hear from you that it is to be settled otherwise. We are, etc.

(Signed) J. and D. HORNES and EASTON.

Hugh Crawford, Esq. Writer, Greenock.

[223] No. XXIV. Mr. Hugh Crawford to Messrs. Hornes and Easton, W.S.

March 25, 1815.

Dear Sirs: I have been favoured with yours of yesterday. I am at a loss to say whether I am to remit Lord Eglinton the price, or pay it to his agents, Messrs. Russell, Anderson, and Tod; and upon the whole, I think you had better offer it to these gentlemen when you receive the titles, and draw on me through the Bank of Scotland.

(Signed) HUGH CRAWFORD.

J. and D. Hornes and Easton, Esquires, W.S.

No. XXV. Hugh Tod, Esq. to Messrs. Hornes and Easton, W.S.

59 George Street, 6th April, 1815.

Dear Sirs: I received back the disposition by Lord Eglinton to Mr. Crawford, signed by his Lordship; and as you mentioned that you would be prepared to pay the price, I hope it will be convenient for you to settle to-morrow. If, however, you are anxious to get the infeftment passed immediately, and are not in funds of Mr. Crawford's to pay the money, I shall, in the mean time, accept of your letter, declaring that it has not been paid, and engaging to do so within 10 days.

The Crown-charter, upon which the infeftment must proceed, is in the hands of Mr. Francis Martin, writer in Paisley, who will readily give Mr. Crawford access to it when he wishes for it, for the purpose of getting the infeftment passed. I remain, etc.

(Signed) HUGH TOD.

Messrs. Hornes and Easton, W.S.

[224] No. XXVI. Messrs. Hornes and Easton to H. Crawford, Esq.

Heriot Row, 7th April, 1815.

We have now settled with Messrs. Russell, Anderson, and Tod, for your Renfrewshire freehold, and received the disposition, which we shall inclose. In the course of a day or two, we may value on you for a sum nearly equal to the price, being £56 7s. Should you wish us to prepare a draft of the infeftment, or to look at any draft you may prepare, we shall be happy to do so. The Crown-charter is with Mr. Martin, who will lend it to you for this purpose. We are, etc.

(Signed) J. and D. HORNES and EASTON.

Hugh Crawford, Esq. Writer, Greenock.

No. XXVII. Excerpt of Letter from Messrs. Hornes and Easton, W.S. to Hugh Crawford and Son.

8th April, 1815.

Dear Sir: We have now settled with Messrs. Russell, Anderson, and Tod, for your

Renfrewshire freehold, and received the disposition, which we shall inclose. In the course of a day or two we may value on you for a sum nearly equal to the price, being £56 7s.

Should you want us to prepare a draft of the infeftment, or to look at any draft thereof you may prepare, we shall be happy to do so. The Crown-charter is with Mr. Martin, who will lend it to you for this purpose, in which there should be no delay. And we are, etc.

[225] No. XXVIII. Hugh Crawford, Esq. to Francis Martin, Esq.

Greenock, 10th April, 1815.

Dear Sir: Inclosed I beg leave to hand you disposition in life-rent by the Earl of Eglinton in my favour, and as I presume you will have occasion to be in Eaglesham, on a similar business, I beg you may then get me infest also, and the sooner this may be accomplished the better.

Before extending the sasine, I beg you may submit the scroll to Messrs. Hornes and Easton, 17, Heriot Row, Edinburgh. I am, etc.

(Signed) HUGH CRAWFORD.

No. XXIX. F. Martin, Esq. to Hugh Crawford, Esq.

Paisley, 10th April, 1815.

Dear Sir: I received yours this afternoon. I am to be at Eaglesham on Friday morning, and will then pass your infeftment, along with some others, and shall afterwards send the draft to be revised as you desire. I am, etc.

(Signed) FRA. MARTIN.

Hugh Crawford, Esq. Writer, Greenock.

Have you given orders for Cartsburn's disposition being extended *as it stands*, agreeable to the Earl's wish?

No. XXX. Hugh Crawford, Esq. to John Dillon, Esq.

Greenock, 14th March, 1814.

Dear Sir: Our friend Mr. M. Crawford having completed the purchase of a freehold (life-rent) in this county from the Earl [226] of Eglinton, his agent, Mr. Martin, of Paisley, is very solicitous that the business be immediately completed.

It falls to you, as Mr. Crawford's man of business, to draw the disposition, and Mr. Crawford having by this post written to you to that effect, he has desired me to state to you, under what class in the scheme of valuations of lives Mr. Crawford falls. His age, between 29 and 30, makes the value of his life £74 9s.; will you therefore *immediately* wait on Messrs. Russell and Anderson, (the agents for the Earl,) and peruse the draft of the disposition, which can be filled up with the above sum, and then get it extended, so as no time may be lost in obtaining the Earl's signature, and afterwards Mr. Martin expedes all the infeftments on the same day. I believe Mr. Anderson has Mr. C.'s name and designation; if not, you can give it, designing him *younger of Crawfordsburn*. I am, etc.

(Signed) HUGH CRAWFORD.

John Dillon, Esq. Writer.

No. XXXI. Mr. M^K. Crawford to Lord Eglinton.

Cartsburn by Greenock, 4th March, 1815.

My Lord: Mr. Hugh Crawford has just informed me that your Lordship has still a freehold in this country to dispose of, and that you was willing to let me have it. I shall be very happy to become the purchaser; and I have directed Mr. Crawford to write to your Lordship's man of business on that subject. I regret very much that owing to the shortness of my stay in this part of the country it is out of my power to accept of your invitation of being at Eglinton; and in the mean time, etc.

[227] No. XXXII. Mr. Dillon to Mr. Hugh Crawford.

March 15, 1815.

Dear Sir: I have your letter of yesterday, and called upon Russell. Anderson,

and Tod, when I saw the latter, who tells me he has the papers ready for signing by Lord Eglinton, which create a feu-right, previous to conveying the superiority; these, he said, he was to get signed to-day by Lord Eglinton, who is in town; after which they will be sent west for infeftment. The one for Mr. C. contains a feu-duty of £5 to be conveyed to him for his life, the value of which he desired me to calculate, which we have to pay, along with £21 for the vote. I mentioned to him your calculation of £74 9s. which I suppose is the value of £5 a year for the probable term of Mr. C.'s life. Please mention to me the number of years, and according to what table it is taken, that I may adjust the calculation to their mind. When the feu-right is completed by infeftment, I will get from them the materials for a disposition to the superiority. I am, etc.

No. XXXIII. Hugh Crawford, Esq. to John Dillon, Esq.

Greenock, 17th March, 1815.

Dear Sir: Yesterday I had your favour of 15th, and, in answer, I beg to inclose you copy of the Earl's letter to me, with the schedule of the lives, which after having made your own use of, you can return to me. Mr. Crawford's age is thirty, so that you can be at no loss to fix the sum. I am, etc.

(Signed) HUGH CRAWFORD.

Mr. John Dillon, Writer.

[In the above letter was inclosed a copy of Lord Eglinton's circular letter to his voters.]

[228] No. XXXIV. Mr. Hugh Tod, W.S. to Mr. John Dillon,
Writer, Edinburgh.

59, George Street, 23d March, 1815.

Dear Sir: I return you revised the draft of the disposition by Lord Eglinton to Mr. McKnight Crawford of the superiority in Renfrewshire, and should be glad if you could get it extended and sent to me in time to-morrow, to admit of its going west by the post of that evening. I am, etc.

(Signed) HUGH TOD.

Mr. John Dillon, Writer.

No. XXXV. Hugh Crawford, Esq. to John Dillon, Esq.

Greenock, 11th April, 1815.

Dear Sir: Yesterday I forwarded my life-rent disposition from the Earl of Eglinton to Francis Martin, writer, Paisley, in order that he might expedite my infeftment. This morning I have a letter from him, acknowledging the receipt of that deed, and saying that he would be at Eaglesham on Friday, and then pass my infeftment, along with some others. He then adds,—“Have you given orders for Cartburn's disposition being extended *as it stands*, agreeable to the Earl's wish?” As I am unable to answer that query, and as the sooner Mr. Crawford is infeft the better, I request you may get the disposition expedite, with the least possible delay. I have written to Mr. Martin to the above effect. I am, etc.

(Signed) H. CRAWFORD.

[229] No. XXXVI. John Dillon, Esq. to Hugh Crawford, Esq.

Edinburgh, 12th April, 1815.

Dear Sir: I have your letter of yesterday. Mr. Crawford's disposition has been extended, signed, and delivered. On inquiry where I was to get the charter to expedite the infeftment, Mr. Tod told me that it was lodged with Mr. Martin, in order that his Lordship's disponees might have access to it for that purpose. Accordingly, I yesterday dispatched the disposition, and a draft of the sasine, to Mr. Knox, with instructions, without delay, to get Mr. C. infeft, and, for that purpose, to apply to Mr. Martin for the charter. Perhaps they may go together to the ground, and do the business at the same time. I am, etc.

(Signed) JOHN DILLON.

Mr. Hugh Crawford, Writer, Greenock.

LETTERS RELATING TO THE CASE OF HUMPHREY GRAHAM.

No. XXXVII. Lord Eglinton to H. Graham, W.S.

Eglinton Castle, February 2, 1815.

Dear Sir: There are several dormant freeholds on my estate in Renfrewshire, which I want to dispose of to my particular friends, on the footing mentioned in the inclosed letter. If your father or you will have the goodness to purchase one of them, it will add to the favour and friendly attachment I have already received from you. There can be no doubt that these freeholds are unchallengable, and as in-[230]-dependent as any in the kingdom, but of this you will be a perfect good judge yourself. I remain, etc.

(Signed) EGLINTON.

[This letter contained the general circular of 2d of February, 1815, No. I.]

No. XXXVIII. H. Graham, W.S. to Lord Eglinton.

Edinburgh, 6th February, 1815.

My Lord: Allow me to return your Lordship my most grateful thanks for the very polite offer of a life-rent freehold in Renfrewshire, contained in your letter of the 2d current. A purchase of this nature would not suit my father so well,—but as I have every desire to become a voter in that county, *if your Lordship will be so good as put a value on the life-rent qualification, as well as on the feu-duty*, I shall be happy to become a purchaser. The value of the annuity seems accurately calculated according to the government tables,—and a vote purchased in this manner must undoubtedly be as good as any in the kingdom. I have the honour to be, etc.

(Signed) HUMPHREY GRAHAM.

No. XXXIX. James Crichton, Writer, Irvine, Factor for Lord Eglinton, to H. Graham, W.S.

Irvine, 9th Feb. 1815.

Sir: I am desired by the Earl of Eglinton to explain to you the value of the life-rent freeholds mentioned in his Lordship's letter to you of 2d inst. in answer to your letter of 6th.

You request, in that letter, the Earl to put a value on [231] the freehold. The value of the feu-duty being in the nature of an annuity on the life of the purchaser, you will find, according to the age, by the table sent, and this value is meant to be the price of that *feu-duty*, and *freehold* thereby given.

If this be satisfactory to you, you will have the goodness to mention it to Mr. Russell, who will make out the deed in your favours, and it will be obliging your dropping me a few lines, saying you have done so. I am, etc.

(Signed) JAMES CRICHTON.

No. XL. Mr. Graham's Answer to the above Letter from Mr. Crichton.

Edinburgh, 11th February, 1815.

Sir: I have, to-day, been favoured with yours of the 9th current. I was aware of Lord Eglinton's goodness in intending the qualification should be included in the price of the annuity. But as it undoubtedly possesses a value over and above what-ever may be that of the annuity, I should wish to give what may be considered a fair price for it also. Say, therefore, that both together may be worth £100. If this price be approved of, I shall apply immediately to Mr. Russell, so that the necessary deeds may be prepared as soon as possible. I remain, etc.

(Signed) HUMPHREY GRAHAM.

No. XLI. James Crichton, Esq. to H. Graham, W. S.

Irvine, 15th February, 1815.

Sir: I am favoured with yours of the 11th current, and have to observe, that though the sum only in the table sent you is exacted as the price of the annuity and freehold, and is calculated on Price's tables of annuities, as the value of the £5 only,

yet the same sum laid out to the best advantage in purchasing an annuity only, would [232] yield nearly one half more than the £5. So that the difference may be considered as the value of the freehold. You can arrange the matter to your satisfaction, however, with Mr. Russell,—meantime, I am, etc.

(Signed) JAMES CRICHTON.

No. XLII. Lord Eglinton to H. Graham, W. S.

Eglinton Castle, 15th February, 1815.

Dear Sir: My wish is, that the purchase of the freehold may be made entirely to your pleasure. I am happy to have such a purchaser. If you will be so good, therefore, as take the trouble to communicate with Mr. Russell on the subject, the affair will be settled; and I am anxious that dispositions and conveyances may be made out, that the freeholds may be effective as soon as possible. Excuse this hurried note, and I remain, etc.

(Signed) EGLINTON.

No. XLIII. H. Graham, W. S. to George Russell, Esq. W. S.

Edinburgh, 21st February, 1815.

Dear Sir: I have, within these few days, had some correspondence with Mr. Crichton at Irvine, relative to my purchasing from Lord Eglinton a life-rent vote in Renfrewshire, with a feu-duty attached of £5 sterling, and I have been referred by him to you, in order to conclude the business. I made offer of £100 for the feu-duty and vote together, of which, perhaps, about one-half may be considered the price of the annuity, as I should conceive myself entitled to not less than 10 per cent. on my life, and the remainder to be the value of the vote. If you agree with me in thinking this a fair price, I shall be glad to have it concluded as soon as possible. I remain, etc.

(Signed) HUMPHREY GRAHAM.

[233]

No. XLIV. Lord Eglinton to H. Graham, W. S.

Eglinton Castle, 25th February, 1815.

Dear Sir: I am so much hurried to-day, that I have only time to say in answer to your letter to Messrs. Russell, Anderson, and Tod, on the purchase of the Renfrewshire freehold, which they sent me, that I heartily agree to its being done in the way you propose. It is my wish that the matter should be made quite agreeable to you and the purchasers, and you are entitled to have it done so. Pray remember me kindly to your father. And I remain, etc.

(Signed) EGLINTON.

No. XLV. George Russell, Esq. W. S. to H. Graham, W. S.

Edinburgh, 27th February, 1815.

Dear Sir: I have Lord Eglinton's instructions to accept the offer contained in your letter to me of the 21st instant, and hope soon to be able to send you the necessary papers for completing the transaction. I am, etc.

(Signed) GEORGE RUSSELL.

No. XLVI. Hugh Tod, Esq. W. S. to H. Graham, W. S.

59, George-Street, 23d March, 1815.

Dear Sir: We delayed handing you the writs necessary to enable you to prepare the draft of the disposition to the freehold in Renfrewshire, purchased from Lord Eglinton, until a vassalage was completed, and that being now done, I request you will take the earliest opportunity of framing and sending, for our review, a draft of the disposition to the superiority, in the terms mentioned in your offer. I [234] cannot conveniently part with the charter, but it shall be shown to you before the transaction is completed, and, in the mean time, I annex a note of the description of the lands. I shall also satisfy you afterwards, that these extend to the valuation necessary. To save us both some trouble, I send you the draft of a similar disposition, which I beg you will return.

No. XLVII. Hugh Tod, Esq. W. S. to H. Graham, W. S. also dated 59, George Street, 23d March, 1815.

Dear Sir: With reference to my letter in the early part of the day, I have now to trouble you with the Crown-charter in favour of Lord Eglinton, among others, of the superiority of the lands which is to be conveyed to you, and also a certificate of the valuation of his Lordship's property lands in the county of Renfrew, both of which I hope you will return me early to-morrow. I am, etc.

(Signed) HUGH TOD.

No. XLVIII. H. Graham, W. S. to Hugh Tod, W. S.

Edinburgh, 24th March, 1815.

Dear Sir: I am this morning favoured with yours of the 23d, accompanying the Prince's charter in Lord Eglinton's favour, and certificate of valuation of his Lordship's lands in Renfrewshire. I return you herewith these writings, with the draft disposition you were so good as send me. I have prepared a draft disposition of the freehold purchased by me, which I enclose for your revival, and shall be glad how soon it be returned to be extended. It will be proper, at the same time, that I see the feu-rights of the lands disposed.

[235]

LETTERS RELATING TO THE CASE OF JOHN M'KERRELL,
MANUFACTURER, PAISLEY.

No. XLIX. Fulton M'Kerrell to Lord Eglinton.

Paisley, 10th February, 1815.

My Lord: On my return from Ayrshire, where I have been for a few days, I have the honour of receiving your letter of the 2d instant. Permit me to express how sensible I am of the very handsome manner in which you are pleased to offer me a freehold qualification in this county. At the same time I have to state to your Lordship, that when I made application on this subject to Mr. Robertson at Irvine, it was for my brother John M'Kerrell of this place, as well as for myself, and to whom, I am persuaded, you will feel equally friendly disposed. If, therefore, you have not already completed your number, I hope we may both be included. If, however, it should unfortunately prove otherwise, and although I am very anxious for a vote, yet I feel I should not act properly by my brother, considering that I undertook to apply for him at the time I did for myself, if I did not yield the qualification to him. To this arrangement, should it prove inconvenient for you to accommodate us both, I trust you will have no objection. I have noted below my brother's age, as well as my own.

With regard to the sum of feu-duty to be paid, it is perfectly the same to us, and may be made whatever is agreeable to your Lordship. I have the honour to be, etc.

(Signed) FULTON M'KERRELL.

The Right Hon. the Earl of Eglinton, etc.

[The letter of which M'Kerrell here acknowledges the receipt, is the general circular, 2d February, No.1.]

John M'Kerrell completed his 56th year Aug. 31, 1814.

Fulton M'Kerrell ditto 45th ditto 17th September, 1814.

[236]

No. L. Alexander M'Lean (Lord Eglinton's Secretary) to
Francis Martin.

Eglinton Castle, 11th February, 1815.

Sir: Lord Eglinton wrote you to-day, requesting that you would transmit Mr. Crawford of Cartburn's name to Mr. Russell, for a freehold in Renfrewshire. His Lordship has, however, by this night's post, received an answer to his letter to Mr. M'Kerrell, of which I inclose you a copy. His Lordship desires me to say, that he is most anxious, if possible, to accommodate the Mr. M'Kerrells, and requests that you will, in the mean time, delay transmitting Mr. Crawford's name, although he is equally anxious to have him as a purchaser.

Perhaps it may not be an object of much consequence to Mr. Simpson *at this time* to get upon the roll; if he could, therefore, withdraw his claim till the Eastwood votes are made effective, it would, I think, be agreeable to His Lordship. I am, etc.

(Signed) ALEX. McLEAN, Secretary.

Lord Eglinton will write you himself soon.

Mr. Martin, Writer, Paisley.

No. LI. Lord Eglinton to Francis Martin.

Eglinton Castle, 12th February, 1815.

Sir: Mr. McLean, at my desire, sent you a copy of Mr. McKerrell's letter by last night's post. It is very unfortunate that I did not receive this letter sooner, as I should have been anxious to accommodate these two gentlemen, and to have had them for purchasers. I scarcely know what can be done. One of them, however, must have a preference to Mr. Crawford of Cartsburn, and I will write his friend, Mr. Hugh Crawford, on the subject, Mr. McKerrell having the undoubted right, from having first [237] applied. I know no way of accommodating the brothers, but by soliciting either your friend Mr. Simpson, or Mr. Crichton, to resign their claim, and it will be doing me a particular favour, if one or other of them should be good enough to do it. May not another vote afterwards be made out upon Eastwood, which may be given in lieu of the one given up! I have some reason, upon enquiry, to believe that I am superior of John Govan's Mains of Eastwood.

I request your answer as soon as possible. If you have wrote to Mr. Russell, it will be proper that you write him again, that a more correct list will be sent him. I mean to be in Edinburgh myself this day se'nnight, when I will get this and other business arranged. I am, etc.

(Signed) EGLINTON.

Mr. Martin, Writer, Paisley.

No. LII. Lord Eglinton to Fulton McKerrell.

Eglinton Castle, Feb. 18, 1815.

Dear Sir: I have a thousand apologies to offer you, for not having answered your letter sooner; but being engaged in some very interesting business, I hope you will accept as my apology.

I very much regret that, from prior engagements, it will not be in my power to give a freehold to your brother. Had I known at first I would have been most happy to have given a preference to you, to most others on the list.

I hope, when your brother and you come to this country, that you will not pass this house, for, I assure you, nobody will be more happy to see you, or make you more welcome. I am, etc.

(Signed) EGLINTON.

Fulton McKerrell, Esq. Paisley.

[238]

No. LIII. Mr. Martin to Lord Eglinton.

Paisley, 13th Feb. 1815.

My Lord: I have the honour of your Lordship's different letters respecting the freehold qualifications in this county. It is my intention to be in Edinburgh on Wednesday, where I shall remain for several days, during which I shall be frequently with Mr. Russell, and shall endeavour to bring west with me the dispositions, so far as they can be got finished.

In the list of names which your Lordship has transmitted me, I do not find the *ages* of the several gentlemen; Mr. Russell will of course be unable to fill up the *sums* until this is known. Your Lordship has not signified your pleasure with regard to the feu-duties. I therefore take it for granted that you have fixed upon £5 to go with each vote, in which case the price will be regulated by the age entirely.

With respect to Messrs. McKerrells' application, I was quite aware of Mr. Fulton McKerrell's intention as to his brother John, and I knew also that he wished for a vote himself; but I fear that *he cannot put his vote in action so long as he holds his present situation of distributor of stamps for the district*. Perhaps he may have some

arrangements in view respecting it, but it is right for me to apprise your Lordship of his situation, in case I might be reflected on afterwards.

I shall be happy to have the honour of a letter from your Lordship while I am in Edinburgh, with information as to the particulars above stated, in which case I shall be able to bring the dispositions with me. I have the honour to be, etc.

(Signed) FRA. MARTIN.

[239]

LETTERS RELATING TO THE CASE OF MR. GEDDES.

No. LIV. Lord Eglinton to Colonel Geddes.

Eglinton Castle, February 22, 1815.

Dear Colonel: *The enclosed is a circular which I have sent to several of my friends,* who appear willing to purchase the freeholds which at present are dormant in your county. When I had the pleasure of seeing you at Eaglesham, you flattered me by saying that you would purchase one of them. I will take it as a particular favour if you will do so. If the footing they are put upon is not agreeable to you, I will be glad to make it in the way most agreeable to you. As it stands at present, it is according to the opinion I had at Edinburgh from Mr. Cranstoun and other professional gentlemen there.

I beg you will accept of my warmest thanks for the many instances of attention and friendship I have received from you, which shall be ever remembered with heart-felt gratitude. Yours, etc.

(Signed) EGLINTON.

[The letter here referred to is the general circular, No. 1.]

No. LV. Colonel Geddes to Lord Eglinton.

Verreville, February 3, 1815.

My Dear Lord: I am honoured by your Lordship's obliging communication of the 2d instant, and will readily purchase a life-rent qualification in the county of Renfrew, upon the terms mentioned in your Lordship's letter.

Your Lordship will be so kind as desire the proper deed to be prepared, and I shall at once pay the price, agree-[240]-able to the table sent me, estimating my age at 56, which it is. I have the honour to be, etc.

(Signed) JOHN GEDDES.

No. LVI. Colonel Geddes to Lord Eglinton.

Verreville, February 22, 1815.

My Dear Lord: I am honoured with your Lordship's favour of the 20th instant, and cheerfully agree to the proposal there made.

Your Lordship's agent can send the draft of the disposition, and I will direct my agent here to complete the same, and to take the infeftment, and the sooner the better. The money is ready. I have the honour to be, etc.

(Signed) JOHN GEDDES.

No. LVII. Mr. Simpson to Mr. J. Geddes.

May 26, 1815.

Dear Sir: I am this evening favoured with your letter to Mr. Martin, relative to your freehold qualification in Renfrewshire. Mr. Martin is at present from home; but I beg to inform you that your infeftment was passed nearly six weeks ago, and the instrument of sasine was immediately afterwards sent to the registration office, to be recorded. It has not yet been returned to us, but we expect it, along with the others, in about a week. I am, etc.

(Signed) A. H. SIMPSON.

For Mr. Martin and Self.

John Geddes, Esq. Verreville, Glasgow.

No. LVIII. John Geddes, Esq. to Martin and Simpson.

1815.

April 14.	Going to Eaglesham, and infefting you in lands there, on life-rent [241] disposition, by the Earl of Eglinton, in your favour, and drawing Latin instrument of sasine, six sheets	£4	4	0
	Instrument-money	0	2	6
	Paid your proportion of chaise hire and travelling charges	0	9	0
	Paid for stamped vellum	0	11	6
	Paid extending same	0	10	6
April 26.	Paid carriage of sasine to Glasgow	0	0	3
May 25.	Paid postage from you	0	0	4
	Writing and booking letter to you in answer	0	3	4
	31. Paid postage from you	0	0	4
June 13.	Paid for recording your infeftment	1	2	6
				<hr/>
				£7 4 3
Drawing the life-rent disposition, and transmitting it to you for revisal				1 1 0
				<hr/>
				£8 5 3
				<hr/>

13th October, 1815.—By cash in full.

(Signed) MARTIN and SIMPSON.

LETTERS, ETC. RELATING TO ALL THE CASES PRODUCED BY LORD EGLINTON
AND HIS AGENTS.

No. LIX. Deposition of Lord Eglinton.

Before Archibald Bell, Esq. Sheriff-depute of the county of Ayr, etc.

N.B. The first part of this document relates to letters set forth in this Appendix, and produced by Lord Eglinton as a haver. The document concludes thus:—

The commissioner, on considering the terms of the commission, conceives that it does not include the private correspondence between his Lordship and his own [242] agents; and, therefore, that his Lordship is not obliged to produce the same. And all the letters or copies of letters above produced are marked by the deponent and commissioner as relative hereto; and depones, That he has not willfully put away or concealed any documents which might be called for under this commission, nor does he know that any such are in any other person's possession. All which is truth, etc.

No. LX. Letter from Mr. Robertson, Lord Eglinton's Factor, to Mr. F. Martin—
inclosed in the above.

Bower Lodge, January 20, 1816.

Dear Sir: On the subject of the freeholds, I have the Earl's authority to say, that £250 may be fixed on as the price of each, with a life-rent annuity corresponding to this sum, according to the respective ages of the different parties.

Of that you have already a scale, and I should suppose, in the first place, that a scroll of a disposition might be made out on some one particular life (say your own), and this by Messrs. Russell, Anderson, and Tod, and sent out by them to the Earl, after which his Lordship would cause it to be signified to his different friends, who, if they agreed to it, the whole might be gone into without more delay. I am, etc.

(Signed) GEO. ROBERTSON.

Francis Martin, Esq. Writer, Paisley.

No. LXI. Mr. Francis Martin, Writer in Paisley, to Messrs. Russell, Anderson and Tod, W.S. Edinburgh.

Paisley, 24th January, 1815.

Gentlemen: On the preceding page I send you a letter which I received from Mr. Robertson, under cover from his Lordship.

[243] You will please make out the draft of a disposition in my favour, to as much superiority as give a vote. I should prefer it upon Eastwood, if agreeable.

My age is 41, and the annuity corresponding to this is £7 10s. per cent. per annum upon my life.

I believe you have the scale made out by Mr. Robertson; but in case you have not, I enclose you the copy sent to me. As the Earl is desirous to have the votes immediately created, I shall be extremely obliged by your writing me when the draft of the disposition has been sent to him. I am, etc.

No. LXII. George Russell, Esq. to Francis Martin, Esq.

Edinburgh, 26th January, 1815.

I was yesterday favoured with your letter of the 24th instant, and by this post I send to Lord Eglinton drafts of the dispositions relative to the freeholds he meant to dispose of in Renfrewshire, together with a memorandum, stating what has occurred to me on the subject, and in consequence of which I have no doubt that you will be immediately sent to for your assistance in the business.

No. LXIII. Mr. Martin to Lord Eglinton.

Paisley, 4th February, 1815.

My Lord: I have the honour of acknowledging receipt of your Lordship's letter of the 2d current, and beg leave to return your Lordship my most grateful thanks for the confidence you have been pleased to repose in me.

The possession in a freehold in the county of Renfrewshire is highly flattering to me, and it is no less gratifying to my feelings, *the idea that it will afford me an opportunity of promoting your Lordship's political interest in this quarter*, which has hitherto remained inactive.

[244] I am quite satisfied of the legality, as well as the independence of the freehold votes your Lordship intends to create, and I have no objections, if it meets with your Lordship's approbation, to pay for an increase of the feu-duty proposed to be given with each vote, according to the table transmitted to me, so as to make the amount £15 or £20 per annum; but this entirely as your Lordship shall consider proper.

My age is 41; Mr. Russell can therefore regulate the price by the table accordingly. I have the draft of a disposition, which came under your Lordship's cover to me two days ago, accompanied with Mr. Russell's notes, which I shall take the liberty of returning to him, if your Lordship does not require it to be transmitted to you.

It appears to be Mr. Russell's opinion, that the calculation of the valuations of the different freeholds is rather too close. No doubt, they are as near to the legal amount as it is possible to make them; but as the valuations are accurately taken from the cess-books, *it would be a pity to extend the amount of each vote far beyond the legal quantity, so as to make a sacrifice of a vote, if it is possible to save it.*

Eaglesham affords eight qualifications, including the old re-			
tours on Floors, and leaves a surplus of	£169	1	2
Eastwood, after deducting £11 13s. 6d. thrown into one of			
Eaglesham votes, extends to	608	6	6
Amounting together to	£777	7	8

which is within £33 of making two votes more; and if your Lordship is superior of John Givan's Mains of Eastwood, it stands valued at £73 6s. 8d. which is sufficient to make up the vote. I do not know how this stands, but Mr. Russell will perhaps know. If your Lordship is not superior of Mains, then the spare valuations may be

divided as he proposes, because it is insufficient to make a vote of itself; but if it is very near that, I think it practicable, for the necessary quantity to complete it, to be obtained from some proprietors in the county, in which case *your Lordship would be able to create ten votes in all*, besides the two already held by General and Mr. Montgomerie.

As soon as your Lordship has fixed upon the names of the voters, I shall furnish Mr. Russell with the descriptions for each, as he requires in his notes.

I took the liberty of mentioning to Mr. Robertson, on a former occasion, the wish of my partner, Mr. Simpson, to hold one of your Lordship's votes; *I think I can safely pledge myself for his attachment to your Lordship's interest*, and I beg leave most respectfully to recommend his application to your Lordship's consideration. I have the honour to be, etc.

(Signed) FRA. MARTIN.

No. LXIV. Francis Martin, Esq. to George Russell, Esq.

Paisley, 7th February, 1815.

Dear Sir: Along with this you will please receive a new cast and description of My Lord Eglinton's lands in Eaglesham parish, the superiority of which is to be conveyed in life-rent, as formerly proposed. This cast affords eight votes, including the retour of Floors.

I also enclose you in this packet the draft of one of the life-rent dispositions, which I presume is correct. But in a letter from his Lordship to me, of date the second current, he says, "I am to convey the superiority of my own property lands, to afford a freehold qualification in life-rent, with a feu-duty, payable by me to the life-renter, of £5 sterling yearly. The price I receive, will be the value of the £5 upon the life of the person to whom this conveyance is made, conform to the most approved tables of annuities." He afterwards adds: "Should it be more agreeable to you to have a larger sum of feu-duty, although it can make no difference to the title, and, therefore, appears quite unnecessary, be so good as to inform me to what extent you would wish it, and I will take it into consideration." Now will it not be necessary to take notice of the feu-duty in the disposition? The sums will vary according as the dispoonees purchase a greater or less quantity of feu-duty. The particulars of which, and the names of the dispoonees, will most likely be transmitted to you by his Lordship this week.

I also enclose you the draft of the disposition for separating the property from the superiority, which is to be filled up in your favour.

As his Lordship has expressed his anxiety to get the votes made effectual as soon as possible, I trust you will get the disposition expedited at your earliest convenience.

I have not kept any copy of the valuation of Eastwood, but you have the certificate from the cess-books, which will enable you to describe the lands when you come to convey them. I may observe, however, that many of the possessions are now in the hands of other persons than those who are stated as the possessors when the valuations were split in the cess-books; but I presume this will make no difference in the description now, if the words "as some time possessed by," are used. I am, etc.

No. LXV. Lord Eglinton to Mr. Martin.

Eglinton Castle, 11th February, 1815.

Sir: Being most anxious to have the Renfrewshire freeholds completed as soon as possible, I do not delay a moment answering your letter of yesterday. I thought that it had been understood that I had fixed upon £5 to go with each vote, so that the price will be regulated by the table; the names and ages only wanted, which I will now fill up as far as I can. Colonel Geddes, 56 years past.—Hugh Crawford, Esq. writer, Greenock, returns himself between the age of 52 and 54. John McKerrell concluded his 56th [247] year the August 1814.—William Donaldson, Esq. physician in Ayr, 36 years.—James Crichton, 13.—Yourself and your partner you can fill up, and I request you will call upon Mr. Humphrey Graham, W.S. who I have every reason to believe will be a purchaser, and who will inform you of his age, which completes the number, eight.

You will observe by this that I still give a preference to your partner, Mr. Simp-

son, and, upon consideration, I think it but fair, as, in fact, I knew only at the time of one of the McKerrells. This, I hope, will finish the transaction: at all events, the sums need not delay the making out the dispositions and conveyances, so that the gentlemen may be infest without delay, and I trust that this may be done before the Exchequer term rises. I have not time to write Mr. Russell, but request you will be so good as to read him this letter. Upon reading your letter over again, I am glad to observe you say that you will be able to bring the disposition with you. I am, etc.

(Signed) EGLINTON.

No. LXVI. Mr. Martin to Lord Eglinton.

Paisley, 20th February, 1815.

My Lord: I had the honour of your Lordship's letter of the 14th current, when in Edinburgh, and as it appeared to me to contain all the information requisite, I devoted part of two days in arranging the descriptions of the several parcels of land with Mr. Tod, preparatory to the drawing of the dispositions.

After finishing this, however, I found that both Mr. Russell and Mr. Tod had some difficulties to remove, which they requested I would state in a *personal conversation* with your Lordship, *as it would be improper to commit them to writing*, and that I should wait upon you for that purpose. It occurs to me that I can state what was said to me to Mr. Robertson, at Eaglesham, this week, who can report to your Lordship on his return to [248] Eglinton Castle. But if your Lordship should think it necessary for me to wait on you for the purpose myself, I shall accompany Mr. Robertson from Eaglesham, on hearing from your Lordship previous.

I beg to return your Lordship my grateful thanks for the preference which you have shewn to Mr. Simpson, in the list you did me the honour to transmit me, and have the honour to be, etc.

(Signed) FRA. MARTIN.

No. LXVII. Francis Martin, Esq. to George Russell, Esq.

Eglinton Castle, 24th February, 1815.

Dear Sir: I have, this afternoon, had the honour of an interview with my Lord Eglinton. The alteration of the feu-duties in the dispositions intended to be granted by his Lordship of the superiorities in Renfrewshire has been agreed to by the gentlemen to whom they are to be granted, and I am directed by his Lordship to send draughts of the dispositions, leaving blanks for the price and feu-duties, to the several gentlemen interested, to be filled up by their agents, his Lordship being desirous to make the matter quite agreeable to all of them. I shall, therefore, on my return home to-morrow, transmit the scrolls accordingly, leaving the description of the lands also blank, as this will fall to be filled up by you, from the arrangement made with Mr. Tod when I was in Edinburgh; after which they can immediately be returned to me, that they may be put into the gentlemen's hands, to get extended by their agents.

In the meantime, it will be proper for you to go on with the trust disposition to the feus of the different lands, preparatory to the execution of the feu-dispositions.

His Lordship desires me to say, that he accepts of Mr. Graham's offer, and he requests that you will be so good as mention so to him: and now, that there appears to be [249] nothing in the way of getting matters brought to a speedy termination, he hopes that you will forward the dispositions, so far as depends on you, without delay, and am, etc.

(Signed) FRA. MARTIN.

No. LXVIII. Francis Martin, Esq. to George Russell, Esq.

Eglinton Castle, 25th February, 1815.

Dear Sir: Upon perusing the two precepts of *clare*, lately granted by the Earl of Eglinton, in favour of Mr. Brown of Nether Borland, and John Mather in Muirhouse, I find that the lands of Nether Borland are described as being a ten-shilling land of *old extent*, and Muirhouse a twenty-shilling land of *old extent*; but I can discover no retour of these lands, although certainly one must be. If any retour could be found of these lands, there is a retour of the ten-shilling land of old extent of Windhill, which would be sufficient to make up another vote in Renfrew-

shire. May I take the liberty of requesting that you will be so obliging as write me on the subject as soon as possible?

Besides the eight votes upon Eaglesham, there is superiority sufficient for another upon Eastwood, which my Lord Eglinton has also signified his intention to dispose of. I do not know the amount of the feu-duties payable to his Lordship on Eastwood; but if they do not amount to £5, the price of the vote must be less in proportion to the deficiency, in reference to the Eaglesham votes.

It occurs to me, after different conversations with his Lordship, that twenty guineas may be specified as the price of the vote, exclusive of the price of the feu-duty; and upon this principle the purchasers can easily regulate the amount of the feu-duty, as his Lordship leaves it to themselves to increase or diminish the proposed sum of £5 as they feel inclined, and this freedom of choice will no doubt produce a difference in the purchase prices in [250] almost all the dispositions, which is what appeared to me to be your opinion should be the case. If any thing occurs to you on the subject, I shall be extremely happy to hear from you, and am, etc.

(Signed) FRA. MARTIN.

Might not a small portion of valuation be taken from Eaglesham, and added to Eastwood, in which case the feu-duty could be fixed according to the wish of the purchaser? I have read the above letter to my Lord Eglinton, who begs you will write by return of post.

No. LXIX. George Russell, Esq. W.S. to Francis Martin, Esq. Writer, Paisley.

27th February, 1815.

I am favoured with your letters of the 24th and 25th instant. You mentioned, that, at the Earl's desire, you are to transmit drafts of the disposition, leaving blanks for the price and feu-duties to the several gentlemen who are to become purchasers; and you then add, "in the meantime it will be proper for you to go on with the trust-disposition to the feus of the different lands, preparatory to the execution of the feu-disposition." Now, I am quite at a loss to understand this. You will recollect that I stated to you distinctly when you were here, that we could not move one step until the feu-duties to be attached to each parcel were ascertained, but that so soon as we were informed of the amount of these respective feu-duties, the feu-disposition for creating the vassalage, and in which the feu-duties must necessarily be inserted, would be made out and sent to be executed by the Earl. And after this, the sasine being taken, on the feu-right, nothing remained to be done but to convey the superiorities to the different purchasers at the stipulated prices. The feu-dispositions are granted in trust, but as to any other trust-disposition, I really cannot imagine what it would refer to.

We have examined our retour-book for Renfrewshire, [251] but do not find any separate retours either for Nether Borland or Muirhouse. We observe a two-merk land of Weitland and Borlands, in the lordship of Semphill, and a Muirhouse, as part of the seven-pound land of Leye; but nothing can be made of these *cumulos*, unless the separate extent of each parcel had been given.

The feu-duty of the whole of Eastwood is £5, and a proportion of this could be conveyed corresponding to the extent of the superiority, that is to constitute a freehold. I am afraid it would derange the state you have already made up if you were to take part of the Eaglesham valuation and add it to Eastwood; but you will be able to judge of this from the materials in your hands.

What you have proposed, as to putting a certain value on the freeholds, and modifying the feu-duties, according to the inclination of purchasers, is agreeable to what I suggested, and I hope you will soon be able to inform me what the feu-duties of the different parcels are to be, so that no time may be lost in completing the feu-rights.

No. LXX. Francis Martin, Writer in Paisley, to George Russell,
Writer to the Signet.

Paisley, 6th March, 1815.

I send you Mr. McKerrell's, Mr. Simpson's, and my own dispositions for your

perusal. I wish Mr. Tod would be so obliging as correct the description in mine, as I have copied it from some loose notes, which I cannot depend upon, and he has the certificate of the valuation, which is correct. Have the goodness to return the drafts to me, after you have perused them, although I am aware that they cannot be signed until you have arranged the whole feu-duties, and got the dispositions to the feus. I have requested of the other purchasers to forward their drafts to you with all speed, and I am, etc. (Signed) FRANCIS MARTIN.

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No. LXXI. Mr. Russell to Mr. Martin.

Edinburgh, 9th March, 1815.

I am favoured with your letter of the 6th instant, with drafts of three life-rent dispositions of Lord Eglinton, in favour of yourself, Mr. McKerrell, and Mr. Simpson; but to revise these deeds before the feus are created, would be putting the cart before the horse, and might lead to confusion. I expect the Earl in town to-morrow, and hope while he is here to get all the feu-dispositions executed; and this being once done, the conveyances of the superiority will go on in regular course. I take it for granted that I shall immediately be apprised of the extent of all the respective feu-duties.

No. LXXII. Mr. Martin to Mr. Russell.

Paisley, March 13, 1815.

I inclose you Colonel Geddes's disposition, which, after you have revised and filled up the description you will please return me, to be given to his agent to extend.

No. LXXIII. Mr. Hugh Tod, Writer to the Signet, to Mr. Martin.

Edinburgh, March 27, 1815.

I return you, as a parcel by this evening's mail, the drafts of the dispositions by Lord Eglinton to yourself, Mr. Simpson, Mr. Geddes, and Mr. McKerrell, which you may get extended, and then forward them, with the scrolls, to Mr. Crichton, who will get them executed by Lord Eglinton. I have mentioned to Mr. Crichton, that the two last cannot be signed until we receive back from Mr. Lamont a renunciation of a life-rent right which he holds over certain parcels of the lands contained in them, and which has been sent to him in England for his sub-[253]-scription; but this need not delay your sending to Mr. Crichton the extended disposition. Mr. Ferrier, the accountant, struck the feu-duty to be paid to Mr. Geddes at £8 11s. 10d., holding the purchase-money to be £79, and his age 56.

No. LXXIV. Mr. Tod to Mr. Martin.

Edinburgh, March 27, 1815.

I have only to say, that the deed of renunciation by Lamont has just come to hand, and that the dispositions to the superiority may therefore be completed as speedily as the parties incline.

No. LXXV. Extract from Letter Mr. Tod to Mr. James Crichton, Writer, Irvine.

Edinburgh, 27th March, 1815.

We have revised and adjusted the whole of the dispositions to the superiority, in order that they may be got extended in the meantime. The drafts of those of Dr. Donaldson and yourself, we send you as a parcel by this evening's mail-coach. The feu-duties are £5 each, and Mr. Ferrier has struck the Doctor's purchase-money at £61, taking his age to be 36, and yours at £56, holding your age to be 43. This is besides £21 for the votes. We also send the extract of Lord Boyd's retour, upon which your vote proceeds.

You will please observe, that, with the exception of the disposition to Mr. Martin and Mr. Simpson, none of the others can be signed by the Earl until we advise you that Lamont has signed and returned the renunciation.

No. LXXVI. Mr. Tod to Mr. Crichton.

Edinburgh, March 27, 1815.

I am happy to inform you that since writing you, as above, the deed of renunciation by Lamont has been re-[254]-ceived and is put on record, so that you need not delay getting one and all of the dispositions to the superiority, signed by the Earl, how soon they come to hand.

No. LXXVII. Mr. Crichton to Messrs. Russell, Anderson, and Tod.

Irvine, 31st March, 1815.

I am favoured with both your letters of the 27th, and the packet containing drafts of the dispositions by the Earl of Eglinton to Dr. Donaldson and myself,—also extended dispositions by his Lordship to H. Graham, Hugh Crawford, and M^cKnight Crawford. The three dispositions are signed. I forwarded Dr. Donaldson's on the 29th to Ayr by the Earl, who has since been there. I expect it to-morrow, when the whole five will be sent you along with the tack of Auchinmead, which you wrote for, to make out the articles of roup of that farm.

I have not heard from Mr. Martin with the other dispositions, but when they are sent will be attended to. I have fixed with the Earl that the prices of the whole of these freeholds are to be paid to you.

No. LXXVIII. Mr. Crichton to Messrs. Russell, Anderson, and Tod.

Irvine, 3d April, 1815.

I have this night sent, to go by coach to-morrow from Kilmarnock, the dispositions, by the Earl of Eglinton, in favour of Humphrey Graham, Esq., Hugh Crawford, Esq., and William M^cKnight Crawford, Esq., as you desired, also the scroll of the one in favour of Dr. Donaldson, and extract tack of Auchinmead.

[255] No. LXXIX. Mr. Crichton to Messrs. Russell, Anderson, and Tod.

Irvine, 7th April, 1815.

This morning I sent off to Kilmarnock, to go by the coach, a sealed parcel, addressed to you, containing the four scrolls of dispositions, by the Earl of Eglinton, which were sent me from Mr. Martin, on the 5th current, and executed the same day, also the scroll of my own, from his Lordship.

No. LXXX. Note showing the Annuity Price, and Feu-Duty, attached to each of the nine Freeholds.

	Feu-duty.	Price
1. Hugh Crawford	£3 12 6	£56 7 0
2. William M ^c Knight Crawford	5 0 0	95 9 0
3. Humphrey Graham	5 0 0	100 0 0
4. Francis Martin	3 7 3	66 0 0
5. Alexander H. Simpson	5 4 0	100 0 0
6. John M ^c Kerrell	5 4 2	75 0 0
7. John Geddes	8 11 10	100 0 0
8. James Crichton	5 0 0	77 0 0
9. Dr. William Donaldson	5 0 0	82 0 0

Interrogatories in the Condescendence for John Shaw Stewart, Esq., and Robert Stewart, Esq., and answers thereto, for William M^cKnight Crawford, Esq.

30th January, 1818.

Q. 1.—Whether the complainer had any intimacy or intercourse with Lord Eglinton, previous to 9th February, 1815? If he had so, state what it was.

[256] A. 1.—Above twelve years ago, the complainer met Lord Eglinton at the Ayr races, to whom he was introduced. This circumstance he had forgot, till lately

put in mind of it. He has not since that time had the honour of being in his Lordship's company.

Q. 2.—Whether upon any other ground of family connection, or otherways, he had any reason to expect that Lord Eglinton would sell him any property for less than its full market-price? If he had, to state the same.

A. 2.—The complainer has no reason to think that Lord Eglinton would sell him any property at less than his Lordship thought a fair price.

Q. 3.—Whether he ever employed any person (excepting Mr. Hugh Crawford, to whom subsequent interrogatories apply), to make proposals to the Earl for his receiving a life-rent, or other qualification for him, previous to 9th February 1815? If so, state the particulars of that correspondence and negociation.

A. 3.—The complainer never employed any person to make proposals to the Earl: The part Mr. Hugh Crawford took in this business, falls to be explained afterwards.

Q. 4.—Whether the complainer has been several years acquainted with Hugh Crawford, writer in Greenock, and lived in habits of intimacy with him, both previous to and in the course of the year 1815?

A. 4.—The complainer, since his infancy has been acquainted with Mr. Hugh Crawford, writer in Greenock, and has lived in habits of intimacy with him, both previous to, and in the course of the year 1815; but owing to a particular circumstance, he was very little in Mr. Hugh Crawford's company towards the end of 1814, and during the whole of 1815.

Q. 5.—Whether, previous to the year 1815, and during that year, the complainer took the chief management of the estate of Cartburn, belonging to his mother, and corresponded with Hugh Crawford, and gave instructions relative to the management of that estate.

A. 5.—The complainer, during the lifetime of his father, [257] was frequently employed to copy some, and to write other letters to Mr. Hugh Crawford, about the management of Cartburn: and since his father's death his mother has managed all her business through him.

Q. 6.—Whether, between 27th January and 9th February 1815, he met with Mr. Hugh Crawford at Edinburgh or elsewhere, and had conversation with him with regard to the liferent freehold Mr. Crawford was to receive from Lord Eglinton? Whether he had one or more conversations; to state the particulars of these conversations.

A. 6.—On Saturday the 4th February 1815, the complainer dined at the Pitt Club, at which dinner Mr. Hugh Crawford was present. On the 5th, the complainer called at Mr. Leven's for Mr. Crawford, who accompanied him to Ratho House; staid all night, and went next morning to Glasgow by the mail coach. The complainer does not recollect that the subject with regard to the liferent freehold Mr. Crawford was to receive from Lord Eglinton was even mentioned.

Q. 7.—Whether, previous to 9th February 1815, he authorised Mr. Hugh Crawford to apply to Lord Eglinton for £180 of valuation, or if he could not obtain that for a liferent freehold qualification?

A. 7.—The complainer has, for many years past, wished to add a freehold to the estate of Cartburn: this wish he uniformly expressed in the most open manner, and he more than once hoped to have made a purchase. With the steps he took, Mr Hugh Crawford was made acquainted; but he does not recollect of giving any instructions to Mr. Hugh Crawford, to apply to Lord Eglinton either for £180, or for a liferent freehold qualification. At the same time, Mr. Hugh Crawford was perfectly aware, that the complainer would be most happy to purchase either the £180, or the liferent.

Q. 8.—Did the complainer receive Mr. Hugh Crawford's letter of 13th February 1815, ingrossing copy of Lord Eglinton's letter, 11th February 1815.

[258] A. 8.—The complainer received and produced the letter.

Q. 9.—Did the complainer receive Mr. Hugh Crawford's letter of 14th February 1815, ingrossing copy of Lord Eglinton's letter of 12th February 1815?

A. 9.—The complainer received and produced this letter.

Q. 10.—Whether, from these letters or otherwise, the complainer understood, that other persons besides Mr. Hugh Crawford and himself were to receive freehold qualifications from Lord Eglinton in the county of Renfrew?

A. 10.—Till the complainer was refused the freehold on account of Mr. Mac-

kerrell's acceptance, he was ignorant that any other person, save Mr. Hugh Crawford, had purchased a life-rent vote in Renfrewshire from Lord Eglinton.

Q. 11. When did he first hear of that circumstance, and from whom, and what was the nature of the information he received?

A. 11. The complainer first heard from Mr. Dillon, that others besides Mr. Hugh Crawford and Mr. Mackerrell, had purchased from Lord Eglinton; but with even their names he was unacquainted until he went to the county meeting, at which his claim for enrolment was rejected. It was after the complainer had made his own purchase, when Mr. Dillon mentioned that others were to be infest on the same charter.

Q. 12. Did the complainer receive a letter from Mr. Hugh Crawford, written on or about the 27th February 1815, containing a copy of Lord Eglinton's letter of 25th February 1815?

A. 12. The complainer did not receive this letter.

Q. 13. If he did not receive it, say whether he knows or suspects what is become of the said letter from Mr. Hugh Crawford, containing copy of Lord Eglinton's said letter of 25th February 1815.

A. 13. The complainer left Ratho House on the 27th February 1815; and on the 28th he arrived at Broadfield, [259] near Port-Glasgow, where he remained some time. During his visit there, he occasionally saw Mr. Hugh Crawford. It, therefore, Mr. Hugh Crawford did write, and put a letter into the post-office of date 27th February, 1815, that letter would go to Ratho House, and would from thence be forwarded to the complainer, at Mr. Hugh Crawford's office, Greenock, the direction that the complainer left for his letters, which were to be forwarded to him. When the letter arrived there, he suspects it would either be used as waste paper, or perhaps returned to the post-office. He has in vain made many inquiries and searches about this letter.

Q. 14. Whether the complainer received from Mr. Hugh Crawford, Lord Eglinton's three principal letters of the 11th, 12th, and 25th February, 1815, produced by the complainer? State where, when, and on what occasion, he received these three principal letters, and what conversation took place on his receiving them.

A. 14. In January, 1817, Mr. Dillon mentioned to the complainer, that he wished to have the originals, or copies of all the letters that mentioned any thing about the freehold qualification. The complainer requested Mr. Hugh Crawford to look out and send him any letters, or copies of letters, that he might have, noticing in any way the subject of the complainer's freehold. Mr. Hugh Crawford thereupon sent to the complainer these three principal letters of Lord Eglinton.

Q. 15. Whether Mr. John Dillon, the complainer's law-agent in Edinburgh, proceeded upon the directions and informations he received from Mr. Hugh Crawford to make up the titles?

A. 15. As this is a question that can be answered alone by Mr. John Dillon, the complainer must refer it to him. The complainer supposes that Mr. Dillon derived the first knowledge of the bargain from Mr. Hugh Crawford. Mr. Dillon afterwards received information from Mr. Tod, and from the complainer. It appears by a letter from Mr. Hugh Crawford to Mr. Dillon, of date 11th April, 1815, [260] and Mr. Dillon's answer, of date 12th of that month, Nos. 29, and 30, of Appendix, that Mr. Dillon did not communicate with Mr. Crawford as to the steps he was taking.

Q. 16. Was it at the desire of the complainer that Mr. Hugh Crawford wrote to Mr. Dillon relative to this vote?

A. 16. The complainer does not recollect of giving Mr. Hugh Crawford any directions to write to Mr. Dillon on this occasion: he does not recollect of ever seeing Mr. Hugh Crawford's letter to Mr. Dillon, till after the commencement of this process.

Q. 17. Did the complainer write to Mr. Dillon on that occasion? If he did, he is desired to say if he knows or suspects what became of his letters to Mr. Dillon?

A. 17. The complainer can find no copy or jotting of any letter to Mr. Dillon on this occasion. If he did write, the letter would be sent by post. He supposes Mr. Dillon keeps his letters.

Q. 18. Whether the complainer produced, when cited as a haver, Mr. Hugh Crawford's letters to Mr. Dillon, dated 11th and 17th March and 11th April, 1815,

and copy letter by Lord Eglinton to Mr. Hugh Crawford, inclosed in Mr. Hugh Crawford's letter of 17th March?

A. 18. The complainer produced Mr. Crawford's letters to Mr. Dillon, of 14th and 17th March, 1815: he did not produce the letter of 11th April, 1815.

Q. 19. Whether the price of the freehold was at one time calculated at £74 9s. or thereabout?

A. 19. The complainer never heard of this calculation till after the price had been fixed and paid.

Q. 20. Whether the price which he or his agents ultimately agreed to pay, was £95 9s.?

A. 20. The price agreed upon was the only one that was fixed or proposed, and was £95 9s. which was the sum paid.

Q. 21. What was the cause of the difference?

[261] A. 21. There was no difference, and therefore no cause of difference.

Q. 22. Was the complainer consulted with regard to paying that difference?

A. 22. As there was no difference, there was no consultation about it.

Q. 23. When, and by whom was he consulted, and did he give any instructions relative to it?

A. 23. He was not consulted about the difference, as none existed.

Q. 24. Whether the complainer did not bring with him, on the day fixed for his examination as a haver, the ten writings specified in the inventory from No. 14, to No. 24, inclusive?

A. 24. The complainer took in all the letters he had discovered, with the exception of the three principal letters above mentioned, from Lord Eglinton, and gave them to Mr. Dillon. But Mr. Dillon then told the complainer, that he ought to produce these three letters also. There was not time for him to return to Ratho House that day and bring them in. He, therefore, left those which he had brought with Mr. Dillon, and on a succeeding day, he again returned to Edinburgh, and brought with him the three said letters, which were also put into the inventory, and he accompanied Mr. Dillon to the Outer House, where Mr. Dillon gave the letters, etc. to Mr. Patrick, who took them away with him. Some time afterwards, perhaps half an hour, Mr. Patrick returned, and told the complainer, that there was no occasion for his longer attendance, nor for his examination on oath, which the complainer testified his willingness to give.

Q. 25. Did he state to the Respondent's counsel, that on his word of honour, these were all the writings he had relative to the transaction, in consequence of which his examination on oath was dispensed with?

A. 25. In answer 24, this question is fully answered, and the complainant could only repeat that answer, to which he refers.

[262] Q. 26. Whether these were, or were not, the whole papers and letters that were in his possession at the time?

A. 26. These were all relative to this transaction, and included within the diligence, that he had discovered to be in his possession at the time.

Q. 27. Whether he has since discovered any other papers or letters relative to this transaction between Lord Eglinton and him? If he has, he is desired to produce them.

A. 27. The complainer did afterwards discover a jotting of a letter from himself to Lord Eglinton, of date 4th March, 1815, which he immediately sent to Mr. Dillon, and it was printed page 9th of his petition; had he discovered any other, he would instantly have sent them, but he has not found any other.

Q. 28. Whether he wrote a letter to Lord Eglinton upon 4th March, 1815?

A. 28. He did write that letter mentioned in the preceding answer.

Q. 29. Whether he ever wrote any other letter to Lord Eglinton, or had any other correspondence or communication with him, directly or indirectly, after 9th February, 1815, otherwise than through Mr. Hugh Crawford? If he had, to state what it was.

A. 29. The complainer never wrote any other letter to Lord Eglinton, nor had any correspondence or communication with him directly or indirectly, except that which has been fully and distinctly stated in the previous answers.

Q. 30. Whether, previous to 29th March, 1815, he had any conversation with any

person at Greenock, or at any place in the county of Renfrew or elsewhere, relative to Lord Eglinton's measures for bringing forward and disposing of his dormant freeholds, in the county of Renfrew, or heard any thing thereof?

A. 30. Previous to 29th March, 1815, the complainer never knew or heard of Lord Eglinton's measures for bringing forward and disposing of his dormant freeholds in the county of Renfrew.

[263] Q. 31. Was any progress of titles, or search of incumbrances on Lord Eglinton's estate exhibited to you, or to your agents, or had you any information with regard to them?

A. 31. No progress of titles, or search of incumbrances on Lord Eglinton's estate was exhibited to the complainer, nor had he any information with regard to them.

He refers to his agent Mr. Dillon, for a further answer to this question, to whom he trusted the conducting of this business. W. MACKNIGHT CRAWFORD.

Ratho House, 26th January, 1818.

Minute for John Shaw Stewart and Robert Stewart, Esqrs. containing additional interrogatories.

6th February, 1818.

In terms of the above interlocutor, and under the reservation and explanation contained in their former minute of 13th January last, the Respondents now propose the following additional queries to the complainer, Mr. Macknight Crawford:

1mo. When the complainer mentions, in answer to query 5th, that his mother managed all her business through him, does he not mean, that she managed her whole business, and particularly the business of the Cartsburn estate, through the complainer; and was not Mr. Hugh Crawford the factor and country agent who managed the Cartsburn estate under the complainer, and with whom the complainer, previous to and during the year 1815, corresponded in that character?

2do. The complainer has stated, in answer to query 6th, that when he saw Mr. H. Crawford, on the 4th of February, and afterwards went with him to Ratho-House, on the 5th, "he does not recollect that the subject, with regard to the life-rent freehold Mr. Crawford was to receive from Lord Eglinton, was even mentioned." He is desired to read Mr. H. Crawford's letter to him of the 13th February, 1815, written on his return from Edinburgh, in which he says, "My dear Friend, I lost no time upon my return, in writing to the Peer of Eglinton, and last night's post brought me a letter from his Lordship, which I now beg leave to transcribe"; and he is desired to say, whether this letter does not refer to a previous conversation between Hugh Crawford and the complainer, in which it had been agreed, that Hugh Crawford should apply to Lord Eglinton, for one of his votes to the complainer?

3tio. The complainer is also desired to read the following passage in his reclaiming petition, page 7, viz. "To that gentleman himself, (Mr. Hugh Crawford) Lord Eglinton had offered to convey a superiority in life-rent, at the value of the feu duties, calculated at a price, according to the tables for ascertaining the worth of annuities. This circumstance Mr. Crawford mentioned to the petitioner in conversation, when he happened to be at Edinburgh, and to be with the Petitioner at his seat of Ratho, in this neighbourhood, about the beginning of February, 1815, stating verbally the price and mode of calculation, without showing to the Respondent any letter from Lord Eglinton; and the Respondent immediately said, that at this rate he would willingly purchase either superiority to the extent of £180 in valued rent, or to the amount of an entire qualification." The complainer is desired to say whether this statement was not made by his authority, and whether the same was not correct, according to his recollection at the time.

4to. In query 10th, the Respondents inquired, whether the complainer understood, from letters or otherwise, that other persons besides Mr. H. Crawford, himself, were to receive freeholds from Lord Eglinton. In answering the query the complainer states, that he was ignorant that any other person, save Mr. Hugh Crawford, had "purchased a life-rent vote" from Lord Eglinton. The complainer [265] is requested to read the passages after quoted from the following letters, viz. 1st, From Lord

Eglinton's letter to Hugh Crawford, of 11th February, 1815, (admitted to have been received by the complainer) in which Lord Eglinton writes, "I will be happy, therefore, that he, (the complainer) will purchase one of those, *on the terms I have been advised to propose*; and as you mention *that he will accept it*, I have wrote Mr. Martin, in case the number is not filled up, if possible to give a preference to Mr. Crawford in the room of *some other*." 2d. The passage from Lord Eglinton's letter to H. Crawford, of 12th February 1815, (also admitted to have been received by the complainer) in which his Lordship writes, "I have received a letter from Mr. Fulton McKerrel, accepting of the terms offered for the purchase of *one of the freeholds*"; and, 3dly, The passage from Lord Eglinton's letter of 25th February, (the contents of which the complainer admits to have been communicated to him at Greenock,) in which his Lordship writes, "I have *still another* freehold to dispose of in the county of Renfrew, which I am glad to have it in my power to offer to your friend Mr. Crawford. If he will have the goodness to accept it, I beg you will write to Messrs. Russell, Anderson, and Tod, mentioning his christian name and age, without delay, in the hope that his disposition may be made out, along *with the others* which I have given positive directions to be immediately completed." The complainer is now desired to state, Whether from these, or any other letters or information, he did not understand that freeholds in the county of Renfrew had been offered to other persons besides himself and Hugh Crawford? and Whether he was not aware that other persons were to receive, or were in treaty to receive, such freeholds?

5th. The complainer has stated, in answer to query 13, that he left Ratho-House, and arrived at Broadfield, on 28th February, 1815, where he remained some time, during which he occasionally saw Mr. Hugh Crawford; and it was during this period that he states, in his reclaiming [266] petition, page 9, that Mr. H. Crawford made a verbal communication to him of the contents of Lord Eglinton's letter of 25th February, and in the same page of the petition, he quotes a letter from himself to Lord Eglinton, written at Greenock, during the same visit, dated 4th March, 1815, in the following terms:—"Mr. Hugh Crawford has just informed me that your Lordship has *still* a freehold in this county to dispose of, and that you was *willing to let me have it*. I shall be very happy to become the purchaser, and I have directed Mr. Crawford to write to your Lordship's man of business on that subject"; and he states in his reclaiming petition, that it was the complainer "who himself accepted the purchase." The complainer is desired to say, whether he did not understand the above letter to be an acceptance on his part of the terms, previously offered by Lord Eglinton, in his correspondence with Mr. Hugh Crawford, both to Mr. Hugh Crawford himself, and to the complainer. If he shall say, that it was not an acceptance of these terms; then, whether there were any other terms of which it was an acceptance; what were these terms, and to whom communicated? The complainer is farther required to say, whether the terms which he states, in the above letters, that he accepted of had not previously been communicated to him, and stated to be the same as offered to Mr. Hugh Crawford himself, and if he shall say they were not communicated, then did the complainer write the above letter accepting of the freehold, while in ignorance of the price, and other terms on which it was offered.

6th. The complainer has said in his petition, page 10th, that Mr. Crawford communicated the transaction to Mr. Dillon, the complainer's agent, "and it was left to Mr. Crawford to frame that communication as he saw fit." And again, "The only notification of the bargain to Mr. Dillon, was contained in the above letter from Mr. Hugh Crawford," viz. the letter of 14th March, in which Mr. Crawford writes:—"His (the complainer's) age, between 29 and 30, makes the value of his life [267] £74 9s. Will you, therefore, immediately wait on Messrs. Russel and Anderson, and peruse the draft of the disposition, which can be filled up with the above sum, and then get it extended." Is it not the complainer's opinion that Mr. H. Crawford, in this letter, communicated the terms of the bargain which had been concluded with Lord Eglinton, to the best of his knowledge and belief at the time; and does it not appear, from this letter, that the price fixed by Mr. Hugh Crawford was £74 9s.?

7th. The complainer is also requested to peruse Mr. Dillon's answer to this

letter of 15th March, where after mentioning the demand made by Lord Eglinton's agents, at Edinburgh, of £21 for the vote, besides the £74 9s. he writes—"Please mention to me the number of years, and according to what table it is taken, that I may adjust the calculation to their mind"; and Mr. Crawford's reply of 17th March, in which he writes—"I beg to inclose you a copy of the Earl's letter to me, with the schedule of the lives. Mr. Crawford's age is 30, so that you can be at no loss to fix the sum."—and also to peruse the copy of Lord Eglinton's letter, here stated to be inclosed, being the letter of 2d February, 1815, called the first circular (all which letters were produced by the complainer), and regarding which last-mentioned letter the complainer states, in his petition, page 11. "that neither he nor his man of business knew of its existence till it was communicated by the preceding letter of 17th March, expressly to inform the latter of the principle on which the value of the freehold was calculated." The complainer is desired to say, whether it does not appear from these letters, that the price, for which the freehold was offered by Lord Eglinton, was the value of £5 of feu-duty, upon the life of the purchaser, conform to a table of annuities annexed; and whether it did not appear, that according to this table, the price of the annuity, on the complainer's life, amounted to £74 9s.; and whether it does not appear, from the above letters, that Mr. Crawford, when he wrote [268] them, acted on the belief that he had made the purchase for the complainer at the above price of £74 9s.

8vo. The complainer states, in his reclaiming petition, page 12th. "That on receiving the information contained in the above letters, Mr. Dillon *immediately* waited on Messrs. R. A. and Tod, the agents of Lord Eglinton, in this city. He calculated the value of the annuity, and found it correct, to which was *added*, 20 guineas for the freehold, making the whole price £95 9s. To this, with the defender's (complainer's) *approbation*, he agreed." The complainer is required to say, at what time this meeting between him and Mr. Dillon took place, and whether it was not immediately after Mr. Dillon had received the above letter of 17th March, with its inclosure, and prior to Mr. Dillon waiting on Messrs. Russell, Anderson, and Tod, and finally settling the transaction as alluded to in the passage before quoted.

9no. Was the disposition by Lord Eglinton to the complainer prepared after this meeting, and was that deed subscribed by Lord Eglinton on the 29th March, 1815?

Answers for William Macknight Crawford, Esq. to the
Additional Interrogatories.

1. The complainer has already stated in the most unqualified terms, that his mother managed all her business through him. The complainer did correspond with Mr. Hugh Crawford, as factor of his mother upon the estate of Cartburn, and as her agent in the country, previous to, and during the year 1815.

2. The complainer has no recollection still, that any thing was said about "the life-rent freehold Mr. Crawford," (that is, as the complainer understands, Mr. Hugh Crawford) "was to receive from Lord Eglinton," at the time here referred to. Neither has the complainer any recollection, that the subject of the complainer's own intention to purchase superiority, or a life-rent qualification, was then spoken of between them, either at Ratho House [269] or at Edinburgh. At this time there was no prospect of getting either. He recollects that their time was occupied when together upon that occasion, so far as they had leisure, with a law question then in dependence before the Second Division of this court, relative to some shore ground at Cartburn. Indeed, the complainer is satisfied from the correspondence, that Mr. Hugh Crawford did not receive Lord Eglinton's letter to himself, of 2d February, 1815, till after he, Mr. Hugh Crawford, had returned from Ratho House to Greenock. Mr. Hugh Crawford wrote to Lord Eglinton, his letter of 9th February, 1815, without making any communication whatever to the complainer, of the letter of the 2d, which the Earl had written to him. The first communication Mr. Hugh Crawford made to the complainer of this correspondence, was by his letter to the complainer of the 13th February, produced.

3. The complainer entrusted the preparation of the reclaiming petition for him to his agent Mr. Dillon. He furnished to Mr. Dillon all the correspondence and copies which he had, and left it to Mr. Dillon and his counsel to make the proper

use of these materials. The complainer did not revise the reclaiming petition when drawn, or see it before it was printed and presented. No statement in that paper alters or affects the complainer's own recollection of the facts. It is evident from the correspondence, that Mr. Hugh Crawford did not receive the communication from the Earl of Eglinton to himself, of the 2d February, 1815, till after he, Mr. Hugh Crawford, had returned to Greenock.

4. The complainer did not formerly answer to query 10th. that "he was ignorant that any other person, save Mr. Hugh Crawford, had purchased a life-rent vote from Lord Eglinton." His answer was, that he was ignorant of this, "till the complainer was refused the freehold, on account of Mr. Mackerrel's acceptance." The complainer had no information upon the subject of this additional question, except what he received from the terms of the [270] letters he has produced. He made no inquiry as to the offers or treaties of any other persons for freehold qualifications, and to the best of his recollection, he heard no more of their transactions with Lord Eglinton, than appears from the terms of the letters to which he refers.

5. During the complainer's visit at Broadfield, in the end of February and beginning of March 1815, he recollects that his thoughts, which at no time have been much engrossed by county politics, were particularly disengaged from that subject. It has been only from finding the note of his letter to Lord Eglinton of 4th March, 1815, that he has been able to recollect the fact, that he then wrote to his Lordship; and it is from the same evidence he is now satisfied that he had a verbal communication with Mr. Hugh Crawford at that time. The complainer has no recollection that he then knew the exact price required, nor does he believe that it had then been stated to him. He had no idea that any other terms could be proposed to him but the price, and no other terms but the pecuniary terms or price ever were, directly or indirectly, proposed to the complainer. He left Broadfield on the 26th March, and dined in Edinburgh on the 27th. He does not now remember that he actually then saw Mr. Dillon, or that Mr. Dillon then told him the sum of the price. But he has no doubt that he did on the 27th see Mr. Dillon at Edinburgh, and then learned from him the sum of the price. And he is certain that Mr. Dillon first informed him what the price was, and did so about this time. The complainer has a loose recollection, that from the first his impression was, that the price demanded would not exceed £100; but he cannot remember upon what authority he took this impression. The complainer thinks it proper to add, that he does not now remember directing Mr. Hugh Crawford to write to Lord Eglinton's man of business while he was at Broadfield, and he has no reason to think that Mr. Hugh Crawford did write any such letter. The complainer's mind was otherwise engaged at the time. He did not suppose the circumstances to be of the small-[271]-est consequence, and he has no farther recollection of these than he has stated.

6. The letter of Mr. Hugh Crawford to Mr. Dillon was not shown to the complainer, nor were its terms mentioned to him. He cannot, therefore, say what were Mr. Hugh Crawford's views when he expressed himself in these terms. It now appears to the complainer that Mr. Hugh Crawford then calculated only the value of the feu-duty, as an annuity upon the complainer's life.

7. The first precise information which the complainer can recollect that he got of the price was from Mr. Dillon. He did not see Mr. Dillon, nor hear from him on the subject of the price, so far as he can recollect, till Mr. Dillon wrote to him for the money, which he immediately sent without objection. He does not know what Mr. Hugh Crawford's belief was, farther than now appears from that gentleman's letter to Mr. Dillon. But the complainer has no reason to think that Mr. Hugh Crawford believed that he had made the purchase at the price of £74 9s. On the contrary, the complainer sees from the correspondence, that Mr. Hugh Crawford was informed by Mr. Dillon that the price was £95 9s., and that Mr. Hugh Crawford made no objection to that price or remark upon it.

8. The complainer did not see Mr. Dillon, or hear from Mr. Dillon, so far as he recollects, from the 17th of March, till after the bargain was completed. Mr. Dillon did state to the complainer, as above mentioned, that the price was £95 9s., and on the first demand the complainer sent him the money without objection.

9. The complainer has no doubt that Lord Eglinton's disposition was prepared after the 17th of March. But neither Mr. Dillon nor any other person made any

communication to the complainer about the mode of preparing and executing that deed. He has no reason to doubt that it was subscribed by Lord Eglington upon the date it bears.

W. MACKNIGHT CRAWFURD.

[272]

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

LACHLAN MACKINTOSH, Esq. of Raigmore,—*Appellant*; ALEXANDER MACKENZIE, Writer in Inverness,—*Respondent* [9th March, 1819].

[See *McAulay v. McKenzie*, 1830, 9 Shaw, 48; *Harvey v. Swan*, 1837, 16 *ib.* 249; *Baillie v. Waddell*, 1822, 1 *ib.* 368. Mackay, Pract. i. 296, 297. *Henderson v. Warden*, 1845, 17 Scot. Jur. 271; 6 Geo. IV. c. 23, s. 10; 1 and 2 Vict. c. 119, ss. 3, 4.]

By the common law of Scotland, as declared by an Act of Sederunt of the Court of Session, dated the 6th of March, 1783, sheriffs and judges of inferior courts are prohibited, under the pains of law for malversation in office, from acting as procurators in any cause depending before them, in their respective courts. But it seems that a prosecution can only be instituted against the offender with the concurrence of the Advocate-General, as public prosecutor; or, *ex officio*, by the superior court; whether a private person, who has suffered injury by the violation of the law, may proceed as for a private remedy—Quæry.

By an order of the Court of Session, dated the 6th of March, 1783, and entitled “An Act of Sederunt prohibiting *inferior judges* and their clerks from *acting as procurators or agents before their respective Courts*,” “The Lords of Council and Session considering that it is *contrary to law*, and subversive of the impartial administration of justice, for any judge to act as procurator or agent in any cause depending before his court; and as it is a similar abuse that any clerk of court, or his depute, having [273] trust and custody of processes and writs produced therein, and being employed in extracting of acts and decreets, should be agents or procurators in these processes; and having observed in the course of certain processes depending in this court, that such illegal and improper practices have prevailed in some of the inferior courts, and may prevail in others; the Lords therefore, to prevent such abuse in time to come, do hereby strictly prohibit and discharge all *sheriff substitutes*, magistrates of burghs, and other judges whatever, and the sheriff clerks, clerks to baillie courts, and other clerks of court within Scotland, and their deputies, not only from acting either directly by themselves, or *indirectly by mediation of any confident persons*, procurators or agents before their several courts, *in any action or cause depending or to depend before them*, but also from giving partial counsel or advice in any such action or causes; and that under the *pains of law for malversation in office*, *excepting always* herefrom petitions or applications for commitment. And they hereby appoint this act to be inserted in the books of Sederunt, and copies to be transmitted to each sheriff clerk, with injunctions that he affix the same in the most patent place of his office, and transmit a copy thereof to the clerk of each baillie court and other court within his jurisdiction, with the like injunctions to affix the same upon the most patent place of their respective offices, that all [274] concerned may be certiorate thereof, and that none may pretend ignorance.”

The sheriff depute of Inverness having appointed a sheriff substitute, in May, 1814, issued a commission, which, after stating the appointment of the grantor as sheriff depute, proceeds in the following terms: “And whereas I am sometimes necessarily absent, and that Thomas Gilzean, Esquire, my *ordinary* substitute, may happen to be necessarily *absent and indisposed*, or may be *disqualified from his connection with the parties, or otherwise*, from judging in some causes that may be brought before him; and as it is regular that a proper person should be named to act in my absence, or during the *absence or indisposition* of the said Thomas Gilzean as my substitute, in case of any emergency or other business that may occur as *aforesaid*; and I being

well satisfied with the fidelity and capacity of Alexander Mackenzie *, Esquire, *banker in Inverness*, for exercising and discharging the trust, and that he is well affected to his Majesty's person and government: therefore witt ye me to have nominated, constituted, and appointed likeas I hereby nominate, constitute, and appoint the said Alexander Mackenzie to be one of my sheriff substitutes in the foresaid shire of Inverness, during my pleasure; and the *absence, disqualification, or indisposition* of the said Thomas Gilzean, with full power to him in my absence to hold courts, etc."

[275] This *commission* was dated the 12th May, and produced in court by Mr. Mackenzie on the 19th May, 1814, who qualified himself by taking the requisite oaths.

On the 20th and 26th of May, 1814, Mr. Mackenzie appeared as procurator for Mr. Robertson of Inches, upon the execution of a commission granted by the sheriff to the clerk of his court, to take a proof in a cause in which the appellant was a party adverse to Mr. Robertson, the client of Mr. Mackenzie.

In the course of the proceeding under the commission, the Appellant's agent applied to the commissioner, who was clerk to the Respondent, to adjourn the proof, on account of the Appellant's absence. That application was refused, owing to the influence, which, it was alleged, the Respondent had over his clerk the commissioner, and to the injury and loss of the Appellant.

He therefore presented to the second division of the Court of Session a *petition and complaint* founded upon the Act of Sederunt, before stated, praying that the Respondent might be found incapable of acting as *sheriff substitute*, and *suspended from his office*, and also that he should be found liable in such damages or other penalties for malversation, as the Court might think just.

The Respondent, by his answer to this petition and complaint, insisted on four objections, of which the two first only are material to be stated, as being the foundation of the judgment.

1. That the complaint was incompetent, as [276] presented without the concurrence of the procurator fiscal, or other public prosecutor.

2. That the Appellant had no title, even as a private prosecutor, to insist on such a complaint, inasmuch as he, having received no particular injury by the breach of the Act of Sederunt, had no peculiar interest to enforce the infliction of the penalties for its violation.

In support of those objections, the Respondent cited the following authorities: Hume on Crimes, vol. iii. pp. 185 and 198; *Squire v. Steel*, Fac. Coll. 10th Aug. 1765; *Darby v. Love*, 10th Feb. 1796.†

In reply to the first objection the Appellant cited the cases of *Ritchie v. Siervewright*, 4th Feb. [277] 1786; *Murray v. Suter*, 9th July, 1793 (not reported); *Hawthorn v. Fraser*, 14th Dec. 1799; and *Seller and Thomson v. Duff and Bain*, 11th Feb. 1809; in all which cases the complainers were private parties, procurators, or litigants, in the courts in which the accused persons illegally united the characters of clerk and agent, and they prosecuted exclusively on their own title, without the concurrence of any public prosecutor.

* The Respondent, who was also a writer.

† The two last were cases of prosecutions for fraudulent bankruptcies, at the instance of trustees for creditors. See *Syme v. Murray*, 19 January, 1810, where a complaint was instituted under the act 16 Geo. 2. c. 11. s. 26. which regulates the conduct of returning officers at elections in Scotland, and provides, that if the common clerk of a borough shall refuse to sign and seal a commission to the person elected a commissioner to serve in Parliament, by the majority of the magistrates, and town-council, or shall sign and seal a commission to any other person, he shall forfeit £500 sterling to the commissioner elect, to be recovered (s. 43. by summary complaint before the Court of Session, upon thirty days notice to the person complained of, etc.); and shall also suffer imprisonment for six months, and be disabled to hold the office, etc.

The Court at first refused to sustain the complaint, as not having the concurrence of the Advocate-General. The complaint was ultimately sustained, but only so far as related to the pecuniary penalty which was awarded to the complainer. See Burnett's Treatise on Various Branches of the Criminal Law of Scotland, p. 506. note.

With regard to the *second objection*, the absence of any *legal interest* to prosecute on the part of the appellant, the cases, *Ritchie v. Sieweright*, *Barthorn v. Fraser*, and *Sellar v. Duff and Bain*, were again cited for the Appellant. In all those cases the complainers were merely *procurators* or practitioners in the courts where the illegal combination of offices had taken place, without any pretence of peculiar interest in the observance of the Act of Sederunt, or of peculiar injury by its violation. In the case of *Sellar and Thomson v. Duff and Bain*, where the title was contested, the objection was founded upon the very circumstance of the complainers *being procurators and not litigants*, under which last character it seems to have been admitted as indisputable, that any party had a title to complain. In that case the complainers do not seem to have had that secondary interest arising from a professional connection with the clients against whom the parties accused acted as agents, as it appears from the pleadings in that case, "that they (the [278] complainers) did not state directly, that they were employed as agents in the causes in which, as they alleged, the Respondents acted as agents."

Yet, in that case, all objections to title were repelled.

The case of *Murray v. Suter*, decided on the 9th July, 1793 (not reported), was also cited. There the complainer, founding his application to the court on the Act of Sederunt, was a private *litigant without any concurrence of a public prosecutor*.

The Respondent in that case urged "that the complainer had no interest in the matter, because he was not a procurator." But the Court found the complainer entitled to *damages* and expenses, and besides inflicted a fine on the Respondent.

On this second point was also quoted Hume on Crimes, vol. i. p. 188.

On the 9th of March, 1815, the following judgment was pronounced in the Court below:

"The Lords having advised this petition and complaint, with the answers thereto, replies and duplies, find, that the complainer has not shewn any title to insist in this complaint, therefore they dismiss the same."

The Appellant brought the question again under the view of the Court by a reclaiming-petition, upon considering which, with answers for the Respondent, the Court adhered to the interlocutor [279] complained of, whereupon this Appeal was brought.

For the Appellants—Mr. Wetherell and Mr. Bligh. For the Respondents—the Solicitor General and Mr. W. Murray.*

For the Appellant, upon the two first points, the argument was to this effect. The law, as declared by the Act of Sederunt, seems to contemplate a civil remedy as well as a penal infliction: for the word *damages* is used together with the word *penalties* (*Syme v. Murray*, 1 Bl. p. 276). For the public security, both by the common law, and by the declaration of the Court, judges are prohibited to act as agents in any cause depending in their courts. This prohibition must have arisen from a well grounded apprehension of the propensity which judges infected with the zeal of agents must naturally feel to favour their clients. The characters are wholly incompatible. Suppose that in this or any other case no injury to the party could be proved, should it depend upon the accident, whether the party in the cause suffered injury, to give a character of criminality to an act which the law has positively forbidden and noted as criminal. Such a construction is contrary to the analogy of all penal laws. The object of this law is [280] to preserve purity in the administration of justice: the penalties, therefore, ought so to be directed and enforced as to deter a judge from placing himself in a situation in which he may be tempted to act partially, and violate the great duties of his office. When a judge becomes an agent in the cause, he must betray either his client or his oath. According to the construction now attempted, the law is supposed to be merely remedial, giving a private compensation to each individual suitor who might be injured, if he should, by good fortune, be able to prove the fact: and the reparation, upon this hypothesis, ought to be a payment to the party according to the amount of the injury. But here is .

* The question was decided both in the inferior and Appellate Court, upon the ground that the Appellant had no title to pursue, and could not proceed without the concurrence of the public prosecutor. The facts, therefore, and arguments upon the other points of the case, became immaterial, and are omitted.

solemn regulation of law made to secure the impartial administration of justice: ought this to be reduced in practice to a mere private remedy, by which a party injured might seek a reparation in damages at his peril? That the public prosecutor is not a necessary party, appears by the cases cited in the Court below (*ante*, pp. 276, 277). And although in some of these cases, procurators acting in the same court with the offender were the prosecutors, it is a libel on jurisprudence to imagine that such a law was made, not for the important and obvious purpose of preventing partiality and corruption in the seat of justice, but for the trifling or pernicious object of protecting agents and proctors against competition: that is, for the purpose of aiding a monopoly.

On the part of the Respondents it was argued—[281] 1. That the Appellant, having suffered no injury, could not have title to prosecute. 2. That if the Appellant had such title, the proceeding ought to have been in the name of the Advocate-General as public prosecutor: that the Act of Sederunt was only declaratory of a pre-existing law: that malversation was the offence contemplated by the Act of Sederunt. That in the case of Sievwright he was found guilty of malversation. Here was only one act charged of an equivocal nature, refusing to give time for the Appellant to appear at the proof under the commission. That might have been properly refused. The proceeding is of a criminal nature, and the party ought to have proceeded in the name of the Advocate-General.*

[282] The Court of Session has in some cases assumed a jurisdiction:† but the offence is of a public nature. The proof must be of malversation by acting at the same time, in the same cause, as judge and agent. In the commissions of oyer and terminer, etc. in England, practising barristers are included, and often try causes.

Reply. In such case they have nothing to do with the cause as counsel or agents.‡

* In England, all criminal proceedings are in the name of the King, but at the suit and under the direction of a private party. In cases of oppression, or a double proceeding, application may be made to the Attorney-General, and he, if he thinks fit, may direct a *nolle prosequi* to be entered on the roll, by which the proceedings are suspended. How far this is a discretionary power in the Attorney-General, and how far in particular crimes the undue exercise of discretion is controlled by the right of appeal, or other checks, are questions of great interest, but too large to be discussed in a note.

In Scotland, it seems to be held that no indictment can be sustained by a private party, without the concurrence of the King's Advocate. But it is said to be understood that the concurrence cannot be refused, and that the Advocate may be compelled to give it (how is not stated) in all cases where the complaint of the private party is founded on a known and relevant *point of dittay*, and as to which he has, *primâ facie*, a title to insist. It is allowed on the other hand, that the King's Advocate may refuse his concurrence in cases of an opposite description. See Burnett's Treatise on, etc. p. 306. The King's Advocate, according to this doctrine, must exercise a discretion. How it is to be controlled, or what appeal there may be against his decision, except by impeachment, quere. It is, however, more distinctly stated by the same author, that the King's Advocate cannot suspend the prosecution by a *nolumus prosequi*. To do so (and in proper cases to refuse his concurrence) is manifestly a denial of justice. See Burnett, p. 298.

† In the case of A. Ritchie, 29th June, 1798, upon a complaint against printers for giving a false account of proceedings in the court, concluding for damages to the complainer, and stating the offence as *derogatory to the dignity of the court*: it was said that the vindication of the Court belongs exclusively to the Advocate-General, or the Court itself; and the complaint was dismissed upon this among other grounds. See Burnett, p. 302.

‡ In the Court below, the case of Murray was cited on behalf of the defender: and on the part of the pursuer it was further argued, that the concurrence of the Advocate-General was not necessary, because the purpose of the proceeding was merely to enforce an Act of Sederunt published by the Court; and although this act may be merely declaratory of the former law, still it is the duty of the Court to enforce it. The judges undermentioned delivered their opinions to the following effect.

[283] Lord Redesdale.*—This is a question whether the Court of Session have done wrong in deciding [284] that there was no title in the Appellant. That Court cannot make an act criminal which is not so by the common law of Scotland. The Act of Sederunt recognizes the common law as the foundation of their Act, which

Lord Glenlee.—The Act of Sederunt is applicable only to permanent judges; if it were otherwise, the inconveniency would be great. If it were applicable to occasional substitutions, what could be done in case of sudden emergencies, disqualifications of ordinary judges, etc.; for who else than a procurator so fit to be appointed? It must be a man of business; and a more proper person could not be chosen. And I believe this to be the universal practice. If he carried on business during the subsistence of such substitution, and in a process against the Complainer, then his title to complain would be undoubted; but this did not happen; and besides, I see no injury has been suffered; I am, therefore, inclined to dismiss the complaint.

Lord Robertson.—*I agree, with regard to doubts on the title, with Lord Glenlee.* The law of Scotland knows of no popular action against a judge. I agree also with his Lordship in thinking that the Complainer has no title; he must qualify an interest peculiar to himself: no such title, however, is alleged; he has no more than any other inhabitant of the county. And as to the case of Sellar, I have even very great doubts on the title of the Complainer, in that case. As to the merits, however, I differ from Lord Glenlee. There can be no doubt that substitution, granted merely for routine business, as signing warrants, etc. would not fall under the Act. But the substitution here complained of is of a very different nature: it is so broad, that if Mr. Gilzean were in any way incapacitated, the Defender may act; and it is *not at this moment recalled or resigned*. No man can act as judge and procurator in the same court; and, therefore, were the question to rest on the merits, I should be inclined to entertain the complaint; but only to the effect of giving the most lenient sentence, and should only go the length of the mere strict letter.

Lord Bannatyne.—The competency depends much on the fact. The Complainer has shown no action of his, wherein the defender acted both as judge and procurator; and there is nothing in the commission to prevent this also acting as procurator. The Court can take cognizance in the shape before us; they can do so at any time, *ex officio*. The Complainer has shown no title to complain; and I am, therefore, for dismissing the complaint.

Lord Justice Clerk.—On the title, I am clear that the Complainer has a good one. I am not in the least moved, as to the case of Murray, which related to statutory penalties. This Complainer only meant to enforce your Lordships' Act of Sederunt. There is no distinction *as to the party complaining, whether litigant or procurator*. The party here complaining has a positive interest, and is, undoubtedly, entitled to complain, and has fully more interest than a procurator. It gives me a good title to complain, if a judge shall act against me in any cause, in the same court, because of influence, etc.; and he has, therefore, as tangible a title as can be conceived. The case of Murray, alluded to, does not apply. On the merits, the question is, Has there been a violation of the Act of Sederunt? There is no doubt that the great object of the Act was to affect the existing and permanent judges. It would be an odious practice, in any process depending before a court, to permit the judge, in any case, to act *as agent*. The question here is, whether this substitution be within the scope of the act. Now I agree with Lord Robertson, that *this is not a limited substitution, but a general one*, enabling Mr. Mackenzie to act in every case, in certain circumstances, viz. absence, indisposition, or disqualification. Now this word, "disqualification," is very important in judging of the nature of the substitution; for if a permanent substitute may even now be in that predicament, in a process at his own instance, or in behalf of the numerous constituents for whom Mr. Gilzean acts; so that Mr. Mackenzie will be entitled to judge in cases, even after Mr. Gilzean's return; and I am, therefore, clear that the substitution is neither *sopite* nor recalled; at least, of recall there is no evidence. Is this decent? I am not prepared to say that the Complainer is not entitled to have the substitution recalled; being clearly within the

* The Lord Chancellor was absent on account of illness. The Chief Justice of the King's Bench sat in the House during the hearing of the Appeal.

made the law more public; and it is again recognized more fully in [285] one of the cases which have been cited. The Act of Sederunt prohibits inferior judges to act as procurators, or agents, before their respective courts; and considering it, as they by their act declare it to be, an abuse, "*contrary to law, and subversive of the impartial administration of justice, for any judge to act as procurator, or agent, in any cause depending before his court*, and having observed that such illegal and improper practices had prevailed in some of the inferior courts, and might prevail in others; to prevent such abuse in time to come, they strictly prohibit all sheriffs substitute from acting, directly or indirectly, before their several courts, in any cause depending before them."

Whether the act done by Mr. Mackenzie comes within the prohibition, is not now to be discussed here; because the Court below have only considered the question, whether the Appellant was intitled to sue. In the cases cited, the Court does seem to have acted on petition and complaint, without the concurrence of the public prosecutor. But in all those cases, the Court acted under circumstances which brought the matter before them *quasi ex officio*.

It is not customary, in proposing to affirm a judgment, to go, at large, into the reasons for affirmance; and, unless some Lord differs from me, I shall propose to find that the decision of the Court of Session is not wrong, finding, as I do, that the judges of the Court of Session, having the cases before them, have paid no regard to them. I agree that the appointment of a person, known [286] to be acting as agent, to be sheriff's substitute, was highly improper. It is a practice which ought not to be continued. It may lead to great inconveniences, to speak of it in the mildest terms. But as all the judges agree that if the complaint had been entertained, they should have inflicted a slight punishment, it is not worth while to reverse the judgment.

There is, however, so much in the case, that I cannot recommend to the House to give costs for Mr. Mackenzie, although, by this judgment, he is absolved.*

spirit of the act. If a special substitution be necessary, it should not be given to an agent.

However, I conceive, that if the complaint is to be entertained, the slightest possible judgment should be given.

* By the act 20 Geo. 2. c. 43. for abolishing heritable jurisdictions in Scotland, the appointment of sheriffs of counties and stewartries, heritable, or for life, and their jurisdictions, etc. was taken away from subjects, and resumed and annexed to the crown, and by sect. 29. it was enacted, that there should be but one sheriff or steward depute, in each county, etc. in Scotland, to be appointed by the King, after seven years from the date of the Act, *ad vitam aut culpam*; and to every such sheriff depute is given power to appoint one or more sheriffs substitute to act during his pleasure.

The sheriffs depute and their substitutes have, by the law of Scotland, very large jurisdiction, both civil and criminal, including the trial of almost every species of crime, and of the most important civil causes. See Ersk. Inst. b. i. t. 4. ss. 3, 4, et seq.

The rule, therefore, which prohibits their acting as agents, is of much greater importance than in England, where the sheriff has a very limited jurisdiction. But even here the law has provided (1 Hen. 5. c. 4.) that no under-sheriff, sheriff's clerk, receiver, or bailiff, shall practise as an attorney, in the King's courts, during the time when he is in office with any sheriff.

This statute is evaded by practising in the name of other attorneys, or by putting in sham deputies as nominal under-sheriffs; a practice which excited the indignation of Dalton. See Blac. Com. i. 345.

[287]

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

Major General JOHN HUGHES, and Sir HEW DALRYMPLE HAMILTON, Baronet,—*Appellants*: WILLIAM GORDON, Esq. of Milrig,—*Respondent*.
[25th March, 1819].

[Cited in *Dobbie v. Duncanson*, 1872, 10 Macph. 810, at p. 814; discussed in *Brownlie v. Miller*, 1878, 5 Rettie, 1076, at p. 1083.]

THE sale of a superiority* of a forty-shilling land, of old extent, with warrantice, does not necessarily imply a warranty of a freehold qualification.

IN an action where the summons concludes for peaceable enjoyment of lands sold, with warrantice, or damages, in case of eviction, it is in form and substance an action upon the warrantice: and unless the pursuer proves that he is evicted of something expressed, or necessarily implied, in the warrantice, he cannot recover in that form of action.

AN offer, by the defender, to meet the plaintiff in another action, if he amends his pleading, is not a waiver of the form.

A conveyance, referring to letters of a preceding treaty, but not specifying what letters, is too uncertain to incorporate the letters, and make them part of the final contract.

SUCH letters cannot be used in evidence, to explain the contract, by showing what was intended to be part of the sale and purchase, although not expressed in the conveyance.

The Appellant was proprietor of the estate of Milrig, held of the crown, and estimated a 60s. land of old extent. The Appellant entered into a treaty with Mr. Charles Stewart, writer to the signet, who acted for the Respondent for the sale [288] of Milrig; and the parties having at last come to an agreement for the sale of this estate, with the exception of the superiority of a part called the twenty-shilling land of Millside, regular instruments of obligation of feu of the part of which the superiority was to be retained, and disposition of the remaining part, were duly executed by the Appellant, and also by Sir Hew Dalrymple Hamilton and John Barnes, Esquire, now deceased, as trustees for Mrs. Hughes, whose provisions under marriage contract were secured upon the estate of Milrig. The instrument of agreement or obligation is in these words: "Know all men by these presents, that I, Lieutenant Colonel John Hughes, of Milrig, heritable proprietor of the lands and others underwritten, with the special advice and consent of Sir Hew Hamilton Dalrymple of Bargany and North Berwick, Baronet, and John Barnes of Lausdowne-place, in the county of Middlesex, Esquire, trust-disponees of me the said John Hughes, conform to disposition by me in their favour, in trust for behoof of Mrs. Hamilla Hamilton, my spouse, and the other purposes therein mentioned, dated the 22d July, 1802, upon which they stand infeft, conform to instrument of sasine, dated 1st, and registered in the general register of sasines, the 15th September thereafter; and we the said Sir Hew Dalrymple Hamilton and John Barnes, for all right which we have to the lands and others underwritten, at present or upon the decease of the said John Hughes, in virtue of the foresaid disposition and infeftment, considering that by [289] *missives of sale of different dates*, I the said John Hughes sold to William Gordon, Esquire, some time senior judge at Arnee in the East Indies, *the forty-shilling land of Milrig, and twenty-shilling land of Millside of old extent*, with the teinds and pertinents at the price of £13,125 sterling, by which missives it was agreed that I the said John Hughes should retain *the superiority of the said whole lands*, in which I stand publicly infeft until Michaelmas 1808, at which time I became bound to denude *of the superiority*

* For explanations of the nature of superiorities, and of the old extent, and the amount sufficient to confer a freehold qualification, etc. see the case of *Geddes v. Stewart*, and the notes, *ante*, p. 161, *et seq.*

thereof, excepting the twenty-shilling land of old extent of Millside, so far as regards the superiority thereof which was to remain in my person, and the property thereof was to be held feu of me and my successors: and whereas the parties hereto have of even date with these presents executed a feu right and disposition of the said whole lands in favour of the said William Gordon for payment of the feu-duties therein specified, in consideration of payment of and security for the said sum of £13,125 as the price of said lands in manner therein mentioned, and that it is proper we should grant the obligation underwritten, as to the superiority of the said forty-shilling land of Milrig: therefore we hereby bind and oblige ourselves, for our several rights and interests foresaid, and our heirs and successors, at and against the term of Michaelmas, 1808, to make, execute, and deliver to the said William Gordon, his heirs or assignees, at our expense, a formal, valid, and effectual disposition in his and their favour, of all and whole the said forty-shilling [290] land of Milrig of old extent, comprehending as parts of the same, the lands of Milrig-hill, with houses and pertinents of the same, excepting the privilege of pasturage on the common of Galston, lying within the barony of Riccarton, bailiary of Kyle-stewart and shire of Ayr, as the same are described in the public rights of said lands: which disposition shall contain procuratory of resignation, precept of sasine, clause of absolute warrandice on the part of me the said John Hughes, and from fact and deed on the part of us the said trustees, with an assignation to the clause of warrandice in the trust deed in our favour, assignation to writs and evidents, and to the feu duties and casualties of superiority and other clauses in common form; and also a clause excepting from said disposition, the feu-right of the said forty-shilling land and others, as contained in our foresaid feu disposition in favour of the said William Gordon: which disposition shall be so granted by us at the term foresaid, under the penalty of £100 sterling to be paid by us to the said William Gordon, or his foresaids, in case of our not granting the same, over and above performance."

The feu right* and disposition of the superiority are agreeable to this obligation. The disposition is in the names of the same parties, and after reciting the obligation it proceeds: "Therefore we have sold and disposed, as we do hereby, for all right we or any of us have or can pretend in the premises, sell, alienate, and dispose from us [291] our heirs and successors, to and in favour of the said William Gordon, his heirs and assignees whomsoever, heritably and irredeemably all and whole the forty-shilling land of Milrig of old extent, comprehending as parts of the same the lands of Milrig-hill, with houses and pertinents of the same, excepting the privilege of pasturage on the common of Galston, together with the teinds, parsonage, and vicarage of the said lands lying within the barony of Riccarton, bailiary of Kyle-stewart, and shire of Ayr, together with all right, title, and interest, claim of right, property, and possession, as well petitory as possessory, which we or any of us, our predecessors, authors, heirs, and successors have, had, or can anyways claim or pretend thereto, in all time coming; in which lands, teinds, and others above disposed, we bind and oblige ourselves and our foresaids to infest and seise the said William Gordon."

The procuratory of resignation is conformable to this disposition.

The clause of warrandice is thus expressed: "*Which lands and others above disposed, with this right and disposition of the same, and infestment to follow hereon, we bind and oblige ourselves for our several rights and interests before written, to warrant to the said William Gordon and his foresaids as follows; videlicet, I the said John Hughes oblige myself and my foresaids to warrant the same to be free of all burdens and incumbrances, and grounds of eviction whatever, at all hands and against all deadly as [292] law will; and we the said Sir Hew Dalrymple Hamilton and John Barnes, as trustees foresaid, do oblige ourselves to warrant these presents from our own facts and deeds only; and further we hereby assign and make over to the said William Gordon, and his foresaids, the clause of absolute warrandice contained in the foresaid trust disposition in our favour, excepting always from this warrandice the feu right and disposition before*

* The statement of this instrument is omitted, as being immaterial to the point in question.

mentioned of the property of the said lands of Milrig and others granted by us to the said William Gordon as aforesaid."

The Respondent, in 1812, for the first time, claimed to be admitted upon the roll of freeholders for the county of Ayr, at their Michaelmas Head Court, held upon the 6th of October, 1812; and in evidence of the old extent of the lands upon which his claim of inrolment was made, he produced an extract from the records of Chancery, of a retour of the service of Alexander Nisbet, of Greenholm, as nearest lawful heir of Margaret Nisbet, his mother, *inter alia*, in the forty-shilling land of Milrig, therein retoured to be a forty-shilling land of old extent, expedie before the sheriff of Ayr, on the 25th of December, 1578.

By the titles and documents then produced, the Respondent's qualification, as a freeholder, was held to have been sufficiently established, and he was accordingly admitted to the roll; but at the meeting for electing a commissioner to serve in Parliament, held upon the 23d of the same month of October, an objection to the Respondent's vote [293] was stated, on the part of Sir Andrew Cathcart, of Carleton, Baronet, founded upon an allegation that the document preserved in Chancery, as the warrant of the record of the retour of the service of Alexander Nisbet, in the forty-shilling land of Milrig, in that office, was not an authentic or probative retour. This objection was repelled by the Court of Freeholders; but a petition and complaint was presented, in the name of Sir Andrew Cathcart, to the First Division of the Court of Session, praying that, upon the ground above alluded to, the Respondent should be found not to have produced proper and sufficient evidence of the old extent of his lands, and that his name should be ordered to be expunged from the roll.

Of these proceedings the Appellants were apprised, by an instrument of protest, in the name of the Respondent, which was immediately followed by the execution of a summons, in an action of warrandice against them. In this action, however, no farther proceedings were taken until after the issue of the complaint, at the instance of Sir Andrew Cathcart, which terminated in a judgment of finding "That Mr. Gordon was not entitled, in virtue of his titles produced, to be enrolled in the roll of freeholders for the shire of Ayr." This judgment appears to have proceeded upon the ground that the registration of the retour, above alluded to in the books of Chancery, was liable to challenge, and that the document exhibited by the clerks of Chancery as the warrant of registration, did not appear to be either an original retour, or a duly authenticated [294] copy of such retour. Having been thus removed from his place on the roll of freeholders, until he should be able to establish, by better evidence, the old extent of his lands, the Respondent began to move in the action which he had previously instituted against the Appellants.

The summons, in this action, proceeds upon a narrative of the transactions between the Respondent and Appellants, and particularly upon a recital of the deeds of conveyance executed in favour of the former; consisting, in the *first* place, of the disposition of the whole lands to be held in feu of the granters; *secondly*, of the obligation to convey at a certain subsequent term, the superiority of that part of the lands called Milrig and Milrig-hill; and *thirdly*, the disposition and conveyance of that superiority in terms of the previous obligation. This last is the deed mainly founded on, and from that deed the clause of warrandice, already quoted, is given as the basis of the action. The summons then proceeds to narrate the history of the Respondent's inrolment, and the nature and grounds of the complaint against that inrolment, which was then in dependence; and upon these premises the summons proceeds to aver, that "in the bargain between the said John Hughes and William Gordon, for the purchase of the said lands of Milrig, it was stipulated as aforesaid, that the said William Gordon was to have a freehold qualification at Michaelmas, 1808, and in terms of the obligation before recited, and disposition granted by the said John Hughes, Sir Hew Dalrymple Hamilton, and John Barnes, they, for their respective interests, [295] are liable in warrandice of the said disposition, and are bound to free and relieve the pursuer of all risk and consequences of the petition and complaint before mentioned, and of any decree or act and warrant to be pronounced in the same," etc. The summons concludes alternately, that the Appellants should maintain the pursuer in the peaceable possession of the said freehold qualification, "or otherwise, and in case of *eviction*

of the said freehold qualification and right of voting, as aforesaid, by any decret or act, and warrant, to follow and be pronounced in the foresaid petition and complaint, the said defenders ought and should be decerned and ordained by decree foresaid, to make payment to the pursuer of the said sum of £1000 sterling, as the price and value of the said freehold qualification, with the legal interest thereof, from the date of *eviction*, by any decret or act, and warrant, to be pronounced in the foresaid petition and complaint: as also to make payment to the pursuer of the sum of £500 sterling, in name of damages, and by way of recompence for the loss sustained by the pursuer through the said eviction, and *in solatium* of the detriment arising from the loss of the pursuer's vote and right of electing at the said election meeting; together with the expences incurred, or to be incurred, by the pursuer, in the said petition and complaint." etc.

The following defences were stated by the Appellants:—"None of the writings founded on in the summons of this action have been produced, and until they are seen, the defenders cannot [296] know whether by their terms they afford any ground for the pursuer's conclusions. From the pursuer's own shewing, however, it would appear that he made a slump bargain of the property as well as the superiority of Milrig, and that no warrandice was undertaken by General Hughes, that the superiority afforded a freehold qualification, but only that the superiority truly belonged to him, which is not disputed, no *eviction* of the superiority having taken place, or even been threatened. In point of fact, General Hughes is conscious that he never meant to undertake any warrandice of a freehold *qualification*; and that if such a thing had been required of him in the course of the transaction, he would rather have been off from the bargain than agreed to it. If, therefore, there is any thing in the writings referred to in the summons importing such warrandice, it must have crept in *per incuriam*, and was not *pars contractus* between the parties.

"As to the other defenders, Sir Hew Hamilton and Mr. Barnes, nothing is stated in the summons that can implicate them in the alleged warrandice. They are merely said to have warranted from their own facts and deeds; and as no breach of this is alleged, they will fall to be immediately assoilzied and found entitled to their expences."

This action came before Lord Glenlee, Ordinary, and his Lordship on hearing parties appointed the case to be stated to the Court in mutual informations.

In the information for the Respondent in the [297] court below, certain letters of treaty preliminary to the conveyances were offered to prove an obligation by the Appellants to convey and warrant, not only the lands and superiority, or crown vassalage of Milrig, but absolutely a freehold qualification in the county of Ayr. The Appellants denied that these letters were admissible evidence in the case after the execution of formal instruments; and they also pleaded that if they had been admissible, they did not prove the obligation alleged by the Respondent.

The second division of the Court of Session pronounced the following interlocutor: "Upon report of Lord Glenlee, and having advised the informations for the parties, the Lords repel the defences proponed; find it relevant to diminish the price of the lands, that it was intended by the parties that the lands should entitle the purchaser to a qualification as a freeholder, affording a right to vote at elections; ordain the pursuer to give in within ten days, a pointed condescendence of the amount of diminution of price demanded by him, as well as of the damages concluded for, and reserve consideration of the conclusion for expences till the issue of the principal cause."

In consequence of this interlocutor, various proceedings* took place in the Court below, to ascertain the value of the freehold qualification in [298] dispute, and the expences incurred by the Respondent in the proceedings against him in the Freeholders' Court and Court of Session, upon the subject of his right to vote and remain upon the roll of freeholders.

Upon these points the Court pronounced the following interlocutor: "The Lords

* These proceedings are not stated, because the question which gave rise to them became immaterial by the judgment of the House of Lords upon the preliminary question of right upon the terms of the contract.

having resumed consideration of the cause, and advised the condescendence and additional condescendence for the pursuer, with answers thereto, decern against the defender for payment of £538 l. 8s. 4d. sterling, as the amount of diminution of price, to which the pursuer is entitled in terms of the judgment of the Court, with legal interest of the same, from and after the 3d March 1813, as the date of eviction, also for payment of £167 l. 8s. 3d. sterling, being the amount of the expence incurred by the pursuer in maintaining his title as a freeholder against the challenge of Sir Andrew Cathcart: find the defenders liable in expences, subject to modification, and remit to the auditor to report on the account thereof when lodged; and *quoad ultra* assolvie the defenders from the conclusions of the libel and decern."

Against these several interlocutors an appeal was presented to the House of Lords, and on 23d March, 1819, came on to be argued.

For the Appellants—the Solicitor General and Mr. Lumsden. For the Respondents—Mr. Wetherell and Mr. Abercrombie.

[299] Two principal questions were argued.

1. Upon the question as to the admissibility of the preliminary correspondence as evidence on the part of the Respondent, Stair's Inst. Tit. Probation, *Clinan v. Cooke*, Scho. and Lef. Rep. vol. i. p. 22; and *Wiglesworth v. Dallison*, Doug. Rep. p. 206, were cited; and it was compared to the cases of latent ambiguity, where parol and external written evidence has been admitted to explain a deed.* Upon the general question, *Hughes v. Gordon*, decided in the Court of Session before the Second Division in the year 1811, was cited.

2. Upon the question whether the contract implied a warrandice, it was said the parties agreed to sell and to buy the lands of Milrig, both parties understanding that the 40s. land had the quality of affording Mr. Gordon a title to be inrolled as a freeholder, and both understanding it on grounds equally known to both, viz. the actual enrolment and the title-deeds.

For the Appellants the arguments were thus stated:—

There is no reason to doubt, that *de facto* the crown-vassal in the 40s. land of Milrig had been [300] a freeholder in virtue of his right to these lands, from the very commencement of such freehold rights. The lands had afforded a freehold qualification during the possession by the Appellant General Hughes, since he actually stood enrolled on these lands. It continued for three years and more after the sale and disposition to the Respondent, and till after the Respondent too was enrolled, when an objection was stated. The objection was not that the lands were not truly 10s. lands of old extent, and therefore substantially sufficient to confer title to a vote. But it was this, that the extract of the retour of the lands of Milrig, which purported to be taken from a writing held to be a retour about the end of the 16th century, had now for the first time been discovered to have been taken from a writing of that period, but which was not a regular retour. In this way, the existing evidence of the old extent of Milrig which had supported the vote on these lands from time immemorial, happened on the fourth year of the Respondent's possession of these lands, to be destroyed by an investigation, which the dilatory and imprudent conduct of the Respondent, in waiting for years, till the eve of a general election, before he claimed enrolment, had occasioned.

It cannot constitute a case of eviction or of warrandice, either express or implied, for it is clear that there was no eviction of any subject whatever by any person; and it is equally clear, that the mere fact of parties believing a subject to have any quality, would not constitute warrandice, even although it never had such quality at all; [301] otherwise actions of warrandice would be infinite; for there always are prevalent opinions as to the qualities of subjects sold which turn out to be erroneous. Far less, however, could a claim of warrandice arise, when the subject did possess that

* On this point, see *Baumont v. Field*, 1 Barnwell and Alderson's Reports, 207, which was a case of letters written upon a previous treaty, and admitted to explain a deed.

The deed in that case purported to convey coal mines by a certain description; and there were no mines corresponding to the description. So in this case, if the disposition had professed to convey, or the warrandice had included a freehold qualification by an erroneous or mistaken description, the letters might have been held admissible.

quality as believed by both parties, and by a subsequent accident, which neither could foresee, was afterwards found to want evidence to support the claim. This was a case of *periculum rei venditae et traditae*. The subject was sold by the Appellant to the Respondent, with a supposed quality, without any express warrantice of this quality: and nothing was said or done by the Appellants, to which the belief of the Respondent that the subject was so qualified can be attributed. After three years, an incidental discovery is made, and the quality perishes. This seems no more the ground of claim against the seller, than if a volcano had burst out from under the lands, or if they had sunk into a gulph. Though these catastrophes had been prepared by the operation of centuries, yet no claim would on that account have existed against the seller, who never could be construed to warrant the duration of the subject sold, in all its value against innumerable accidents. It may be asked where the claim could stop? The date of the retour was about the end of the 16th century. Since that time the lands may have passed through twenty hands, by similar bargains. With whom is the responsibility to rest? Prescription cannot operate; it never does operate in cases of eviction and warrantice, except from the date of the eviction or breach of war-[302]-ranchise. The claim then must run back to the date of the retour, and be handed from purchaser to purchaser, till it reaches that period. Supposing the lands to have been sold by A. B. in 1599, and that A. B. had heirs at this day, would they be liable in warrantice? Yet on what principle could the burden be laid on any intermediate possessor? Another case may be put:—Suppose the lands had been sold as a forty-shilling land while both the parties understood that there was no vote on them. Suppose then, that a retour had by accident been found, could the Appellant, General Hughes, have brought a claim of any kind against the Respondent? Surely not. The answer would have been, that this was an accession *rei venditae et traditae*, to which the buyer was fully entitled; and if the Appellant, General Hughes, had pretended to push his claim, he would have been told, that the lands might have passed through many hands while this capacity of accidental improvement existed, and that he must blame his own bad fortune or negligence that the lucky accident did not happen in his time. But the very same argument applies in the converse case. The retour has accidentally been found to be irregular while the estate is held by the Respondent. It must equally follow, that the Respondent must bear this accidental diminution of value, as enjoy an accidental increase. *Cujus est commodum ejus debet esse incommodum*.

For the Respondent were cited the cases of *Wilson v. the Creditors of Auchinleck*, Nov. 11, 1764, Dict. of Decis. vol. iv. p. 210; (in which [303] the purchasers at a judicial sale were allowed a restitution of one fourth of the price of the teinds; the whole of which they had bought and paid for with the lands; it having been discovered after the sale that one fourth of the teinds did not belong to the bankrupt, but to the crown:;) *M'Lean v. M'Neil*, Fac. Coll. June 28, 1757; (in which it was found relevant to diminish the price of lands, that it was intended by the parties that the lands should entitle the purchaser to a qualification as a freeholder having right to vote at elections*;) and *Edwards v. M'Leay*, Cowper's Rep. p. 308.

* The facts of this case were thus stated by the appellant's counsel from the Sessions papers. Two parcels of lands were sold to M'Neil by minute expressly describing *each of them as separately a two merk land of old extent*, and over and above this, it was not only the understanding of the parties, but distinctly expressed between them, that the lands did afford a vote in the county, and were bought with a particular view to that quality. In truth, however, the lands taken together, were only a two and a half merk land, and *for that reason*, did not afford a vote. It was a long time before M'Neil, the buyer, made up his titles. In doing that he found out the fact, and it did not appear possible that the error could have been innocent on the part of the seller. Having found this out, M'Neil appears to have resisted payment of the price, and M'Lean's heir brought an action against him. M'Neil pleaded alternately, that he was entitled either to rescind the sale or have a deduction from the price; and he aided this plea by very strong allegations, and proofs of wilful deceit in M'Lean. M'Lean's heir, the pursuer, attempted to defend himself, on the plea, that the lands being or not being of four merks of old extent, and affording or not affording a vote, was not in law a valuable or estimable quality. The first inter-

[304] In the course of the argument, Lord Redesdale made the following observations.

locutor by Lord Drumore, Ordinary, upon the merits, is dated Feb. 22, 1754. In it the Lord Ordinary finds "the allegation made by the defender, that it was *actum et pactatum* betwixt him and the deceased Lochbuy and his interdictors, at the time of executing the minute of sale, that they should dispose to the defender such an estate as would entitle him to vote for a member of Parliament in that county, neither competent to be proven by the interdictor's oath, nor relevant to resolve the sale or abate the price, in respect the defender does not qualify any damage he sustains by the want of such vote; and allows the defender's procurator to see the writs produced for instructing that the incumbences are purged."

This interlocutor was adhered to by refusing a petition for McNeil, the defender. The defender presented a second reclaiming petition, which was remitted to the Lord Ordinary, (Lord Kames, Lord Drumore having died.) It appears that the pursuer, at advising the last reclaiming petition, had made an offer of taking back the lands. To which the defender's counsel had stated, they were not instructed to make an answer at that time. With this the cause went to the Lord Ordinary. Before the Lord Ordinary the defender's counsel appear to have signified their acceptance of the pursuer's offer; but by this time the pursuer had changed his mind, and refused to adhere to his offer. Upon this the defender again petitioned the Court against the former interlocutor, in respect the pursuer had refused to take back his lands, and because the Lord Ordinary had refused to judge in that matter. This petition was answered. In the answers the pursuer pleaded *res judicata*, and maintained that he had eight interlocutors in his favour, and that the cause was finally decided. Upon this petition and answers an interlocutor was pronounced, which is the interlocutor quoted in the report as a final one. It is in these words: "The Lords find it relevant to diminish the price of the lands; that it was intended by the parties that the lands should entitle the purchaser to a qualification as a freeholder having right to vote at elections." But this interlocutor was *not* final. On the contrary, a petition was presented for McLean's heir of this date. The petition was answered. This case was not decided upon this petition and answers; but memorials were ordered upon a point, whether a retour in 1609 shewed the value of the lands to have been four marks. The Appellants have not been able to discover the final judgment. But there appear to have been memorials given in. That for McNeil is dated Jan. 5, 1758, and that for McLean, Feb. 6, 1758.—The following passages in the papers will shew the nature of the facts and pleadings in the case.—In the answers Aug. 5, 1757, by the defender, McNeil, are the following passages:—"Want of qualification implies a fraud on the part of the seller, as he must have known the defect at the time of the bargain; and as this defect existed from the very beginning it could not arise from the purchase, nor could be supplied with regard to the subjects sold."

"The last observation in the petition, that in fact the lands of Ardlussa and Knockintavel, are part of the barony of Moy, which, by an old retour in 1609, is valued at eighty merks of old extent, and that if this old extent was divided, a proportion of four merks would belong to the lands of Ardlussa and Knockintavel, which, as the law stood at the time of the purchase, would entitle to a vote, is clearly founded upon a wilful mistake as to the import of this retour. Though it is true that in the valent, it is said, '*Quod omnes et singulæ superscriptæ terræ, etc. tempore pacis valuerunt octogentas mercas*,' yet when the particular description of the lands in the retour is adverted to, those in question are thus described: '*Terris duarum mercatorum terrarum et dimidiata terrarum de Ardlussa et Knockintavel in insula de juray*;' so that here the particular proportion of the old extent belonging to these lands is expressly described and specified in the retour."

In the memorial for McNeil, Feb. 6, 1758, are the following passages: "In the sequel it shall be made appear that this false description could not possibly have proceeded from error and mistake."

After saying that the lands are falsely described, it proceeds: "For the Defender is now in condition to aver, that from the examination made of all the title-deeds produced for Lochbuy, conceived in favour of his predecessors, from the earliest period down to this day, this description is not to be found in any one of them. They

[305] The objection to the form of proceeding as stated by Lord Robertson, is that the present [306] action rests entirely upon the warranty. Whether the objection to

were neither described in any of these title-deeds, as a four merk land, nor as of any old extent whatever. On the contrary, your Lordships will observe, from what is now called the retour 1699, and from another retour in 1615, that they are described to be but a two and a half merk land, without the least mention of old extent:" "and therefore the defender must be pardoned to insist that when the aforesaid false description was for the first time assumed in this minute of sale, *res ipsa loquitur*, these false colours were hung out purposely, and of design, to deceive and impose upon the defender, and to induce him to give so much a higher price, upon the supposition that, being truly of that extent, they entitled to the qualification of a freehold in the county.

"And that this must have been the case will further appear to your Lordships, from the disposition granted by John M'Lean of Lochbuy to Lauchlan M'Lean his son, no farther back than the 18th of Jan. 1733, of the whole lands and barony of Lochbuy, which was but four years prior to the minute of sale, in which disposition the lands of Ardlussa and Knockintavel are especially described as a two and a half merk land, without the addition of old extent. And it is from hence submitted to your Lordships, what possible excuse can be offered for so material a variation in the description of these lands assumed by the said John and Lauchlan M'Lean in the minute of sale, 1737?

"But neither is this all. It further appears, that the same Lauchlan M'Lean in the year 1742, which was but five years posterior to the minute of sale, did execute a disposition to these very lands to himself in life-rent, and to Hector M'Lean his son in fee, under the description of the two and a half merk land of Ardlussa and Knockintavel, without the addition of old extent: and the after titles to these lands are made up under this last description. So that, from first to last, except in this single instance of the aforesaid minute of sale, these lands had never received, in any one of the title-deeds, any other description, but that of a two and a half merk land, without the addition of the words of old extent. How then this description came to be varied in the minute of sale, and these lands to be therein set forth and described as a four merk land of old extent, will require some better apology than has yet been attempted, to induce a belief that this was not done of design and intention to increase the value and price of the lands at the sale."

From these passages, and from the interlocutors coupled with the defective report, it was contended to be quite clear, 1mo. That there was a deficiency of a subject expressly mentioned in the minute of sale, *i.e.* conveyed and warranted in the minute of sale, *viz.* the *old extent* of the lands: and that it was in consequence of this deficiency the lands did not afford a vote. 2do. That there were strong allegations and apparent evidence of wilful deceit by the seller. 3tio. That after all it does not appear that the claim of McNeil was ultimately sustained.

In the court below, and slightly also in the arguments upon the Appeal, a point of Scotch pleading was discussed, *viz.* whether the *actio quanti minoris*, *i.e.* for compensation or reparation in damages, on account of a latent insufficiency or defect of the subject of purchase can be sustained, except in cases of fraud.

For the Defender upon this point, the cases of *Hannay*, 26th Jan. 1785, and *Hughes v. Gordon*, 1811, were cited. For the Pursuer, the following authorities were cited: *Stair*, i. 9. 10. b. i. 14. 1.; *Bank*, i. 9. 2. i. 11-15; *Ersk.* iii. 3. 10, as explained by iii. 3. 9.; 23d June, 1757, *Macneil v. Maclean*; 26th Jan. 1785, *Hannay v. Creditors of Bargally*; 13th Feb. 1782, *Lloyds v. Paterson*; 23d Jan. 1801, *Gray v. Hamilton*. It was also argued, that the Appellant, the Defender in the Court of Session, had waived the objection to the informality of the pleading, by a passage in his information, by which he submitted, that "If the Court should be of opinion that the Pursuer was intitled, without any amendment of his libel, to change entirely the grounds of his action, and to substitute an action *quanti minoris*, for an action of warraudice, the Defender was ready to meet him."

See the argument and the opinions of the judges, *Fac. Coll.* June 15, 1815.

the form of proceeding has been [307] waived by the defender's answer to the information, is a question to be considered. If that [308] were decided in the affirmative, a further question arises, viz. whether there is in the disposition a sufficient reference to incorporate the letters, and enable the Respondent to proceed upon them. The letters undoubtedly import, that in the contemplation of the parties, the property carried a freehold qualification. That could hardly be otherwise; for the vender was then a freeholder entered and standing upon the roll.

Upon the question as to the form of action, it is necessary to attend to the words of the conclusion of the summons: "or otherwise, and in case of eviction, etc. to pay the price, etc. and damages of £500." The satisfaction in value is claimed distinctly for eviction, and the damages also for injury sustained by eviction.

The information for General Hughes objects to the form of action. The Respondent is thereby challenged to amend his pleading in order to raise the question; but he has made no amendment.

At the conclusion of the arguments (March 25, 1819), Lord Redesdale delivered his opinion to the following effect:

The first interlocutor finds it relevant to diminish [309] the price of the lands: that it was intended, by the parties, that the lands should entitle the purchaser to a qualification as a freeholder, affording a right to vote at elections. The second interlocutor decerns, that the defender (Appellant) is to pay £—— as the amount of diminution of price, to which the pursuer (the Respondent) is entitled, with interest, expenses, and costs. The proceedings in this case were founded on a transaction between General Hughes and Mr. Gordon for purchase. After much correspondence, they came to an agreement, and conveyances were executed in pursuance of the agreement. The form of action is unquestionably of warrandice. The summons, reciting the agreement, states that it was carried into execution, by conveyances, (for the sum of £——) of the lands of Milrig, etc. with absolute warrandice, on which the pursuer was infest. The obligation proceeds upon the narrative, that it was agreed Hughes should retain the superiority until Michaelmas, 1808, etc. Two dispositions were made, because the lands were immediately conveyed; but as to the superiority, part was to remain with the Appellant, and other part was to be conveyed to Mr. Gordon; and it was understood that the superiority would convey the right of voting. The procuratory of resignation is consonant to the previous disposition, and the clause of warrandice is thus expressed: "Which lands, and others above disposed, with the right and disposition of the same, and infestment to follow thereon, we bind and oblige ourselves, for our several rights and interests before written, to warrant to the said William Gordon, and his [310] foresaids, as follows, videlicet, 1. the said John Hughes, oblige myself and my foresaids to warrant the same to be free of all burdens and incumbrances, and grounds of eviction whatever, at all hands, and against all deadly as law will: and we, the said Sir Hew Dalrymple Hamilton and John Barnes, as trustees foresaid, do oblige ourselves to warrant these presents from our own facts and deeds only; and further, we hereby assign and make over to the said William Gordon, and his foresaids, the clause of absolute warrandice, contained in the foresaid trust disposition, in our favour; excepting always from this warrandice the feu right and disposition before-mentioned of the property of the said lands of Milrig, and others, granted by us to the said William Gordon, as aforesaid." The summons proceeds to state that Gordon was infest; and that an extract of the retour was delivered among the title deeds. The right of voting was not made out by Mr. Gordon, and his name was expunged from the roll. He had called on Hughes to appear and defend him from eviction. The summons concludes that defenders are liable in warrandice, etc.; that the value of the freehold qualification is £1000, and concludes also for damages, all which is required, in consequence of the warrandice of the disposition being incurred. The summons demands that the defender should maintain the pursuer in peaceable possession, or otherwise; and in case of eviction, should be decerned to make payment of £—— by way of compensation. I have stated this summons of warrandice at length; because it is important to be considered [311] whether this is to be taken as an action principally on warrandice, or of two descriptions, on warrandice, and for damages. It appears to me, following the opinion of one of the judges in the Court below, that the action rests on the warrandice; and the question is, whether any thing has been evicted. It

is admitted, that the Respondent has the superiority; and the complaint is, that he has no vote. But the warrandice is not of the vote; and you cannot go beyond the disposition. It is said, indeed, that the disposition has reference to the missives on which it is founded; but, although it refers to the missives, it *does not specify* what missives. The question now is upon the disposition of the superiority, which expresses only a conveyance of the superiority. The obligation is the foundation of the warrandice in the disposition, and in that, there is no reference to the missives. But suppose the missives were referred to in the obligation, the introduction of the mere words "missives" would not give a construction to the deed, although it might give a right to have the deed reformed, or of action upon the case, on the ground of fraud, or misrepresentation, if that could be made out. As to the correspondence, if it were admissible, there is the proposal of sale: the answer requiring particulars, and whether there was a freehold qualification, etc. the reply, that it has a vote, and undoubtedly here is a representation; but it is not clear that this was the subject of final agreement. For after this, it appears there was an end of the treaty upon the terms proposed. Afterwards, [312] a new proposal, as to price, is made by the Respondent's agent, which is accepted, on the terms that Gordon should take the lands as they stood. These letters I have stated to show how dangerous it would be to admit, in actions of this kind, such evidence. How does it appear, if Hughes had been called on to warrant the vote, that he would not have said as he did, with respect to the admeasurement of the lands; I will not warrant, you must take it as it stands. It is highly dangerous to admit such evidence to explain a deed, unless there is fraud or misrepresentation to afford a ground. The question is, therefore, whether upon a deed, which does not express warranty of the vote, it can be held that the Appellant is bound. The action proceeds upon the supposed eviction of something contained in the warranty. Nothing, as to the right of voting, is contained therein: nor is it necessarily, *incident* to the subject thereby disposed. Before the statute of 1681, the right was confined to a forty-shilling land of old extent; and where that is the ground of claim the statute of 16 Geo. 2. requires proof by retour of old extent, of a date prior to the statute, 1681. On the part of Respondent, it is contended that, by reference to the missives, the deed contains the grant of a right of voting; but the authorities cited from the laws of Scotland, and of England, do not, in any degree, sustain the argument. As to the case of *Wigglesworth v. Dalison* (Doug. 196), where by the custom of the country a way-going crop was allowed to the tenant for years, that was an action of trespass, which was met by a plea of title [313] and custom; and there may be a question, whether that decision is right in all its parts. The Court held, that a general custom, applicable to lands, gave a construction to the deed. The real state of the case is, that where custom warrants a way-going crop, unless the tenant has the way-going crop, he has not, in effect, the land for twenty-one years. When a transaction is concluded by solemn deed, that settles the right between the parties; and unless there be misrepresentation, knowingly made by one of the parties, the legal and technical import of the deed must prevail. As to the case of *Clinan v. Cooke* (1 Scho. and Lefr. Rep. p. 22), rightly understood, it is an authority against the Respondent. If this had been the case of a lease executed, it must have stood according to the terms expressed, unless reformed for fraud or misrepresentation. There is nothing here to connect the deed with the correspondence.

The form of action being on a warrandice, the question is, whether the thing described in the warrandice is evicted. As to the conclusion, with the claim of damages, it cannot warrant a total departure from all forms of action.

As to the waiver alleged, the expression is, If you amend, I shall be ready to meet, etc.; but this, I think, is no waiver. Lord Robertson says, the action appears to rest entirely upon the warrandice. If the Respondent wished to have the right of voting warranted, he should have taken care to have had it so expressed in the disposition. The summons contains no conclusion for damages, but in respect of the eviction of the thing war-[314]-ranted. The judgment is upon an action *quantum minoris*, if it can be sustained in such a case; not a judgment on the warrandice. It is founded upon the supposed previous contract between the parties. The case of *Edwards v. McLeay*, which was cited from Cooper's Reports, was decided on the ground of a misrepresentation, or else the deed could not have been affected. It is important to preserve the forms of actions. But if he is advised that he has grounds

to maintain such action, the judgment here is not to preclude Mr. Gordon from insisting upon his claim, in a right form of action.

Judgment *reversed*, without prejudice to any relief which in any other form of action the Respondent may be entitled to.

Note. In the case of *Clinan v. Cooke*, (which was decided by Lord Redesdale, when he was Lord Chancellor of Ireland) the Defendant, by public advertisement, had offered lands to let for three lives, or thirty-one years. A treaty took place upon the footing of this advertisement: and, finally, the agent for the Defendant signed a contract for a lease of the lands to the Plaintiffs: but the term for which the lease was to be made was not specified in the agreement, and as it contained no reference to the advertisement, parol evidence to connect the agreement with the advertisement was rejected; and the bill, which was for a specific performance of the contract, was dismissed, upon the ground, that the term for which the lease was to be made was unascertained by the agreement.

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SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WILLIAM MACDONALD,—*Appellant*: Mrs. ELIZABETH MACDONALD, otherwise LILLIE, and JOHN LILLIE, of Forres, her Husband, for his interest.

Respondents [20th May, 1819.]

[Discussed in *Campbell v. Clason* 1838, 1 Dunlop 270, at pp. 276, 278, 280–282.]

A LAW agent continuing to act for his client, held responsible for a loss caused by his neglect, although twenty-five years had elapsed since the transaction: notwithstanding a correspondence respecting the loss, in which the client acquiesced without remonstrance: and after a settlement of accounts with the Representatives of the client, and a discharge given by them before they had discovered the facts.

Macdonald of Finlarig, the father of the Respondent, Mrs. Lillie, employed in the management of his affairs William Macdonald, of St. Martin's, father of the Appellant, and writer to the signet.

Towards the end of the year 1787, Finlarig wrote to W. Macdonald, expressing his wish that some of his money then lying at a bankers should be laid out on security at five per cent. to his (W. Macdonald's) satisfaction. In April 1788, Macdonald was applied to by another of his clients, Colonel Charles Campbell, of Barbreck, by letter, in the following words:

[316] "I have been so harassed and plagued with applications for and from my son Charles, that I have at last agreed to his purchasing Captain Campbell Ederline's company, which, with my former advances this season raising men, and to enable him to prepare for the voyage, will at least cost £1600. So unexpected a demand I did not expect, and consequently will oblige me to borrow some money. I do not like the idea of giving any person security if it can be avoided: but I have no objection to lodge a bond of Captain Hector M'Niel's to me for £1000 in the hands of the person who will let me have that sum, as an additional security with my own bond."

The letter then noticed some other difficulties in which Colonel Campbell was involved from advances he had been obliged to make, observing that, on the whole, these were "*dreadful drains*," and he concluded thus:

"I beseech you to get this £1000 business settled without loss of time, and let me hear from you in course of post."

Upon this application, Macdonald accommodated his client, Colonel Campbell, with £1000 of his other client Finlarig's money, taking as a principal security for that sum the bond of Colonel Campbell, with an assignment to that of Captain Hector M'Niel, as a collateral security, both conceived in favour of Finlarig as the lender; and on the 19th of May, 1788, Macdonald wrote thus to Finlarig: "I have lent another £1000 of your money at this time, on very good [317] security, to Colonel Charles Campbell of Barbreck."

The *security* intended by this expression, appears from an entry in Macdonald's books to Finlarig's account, of which a copy by way of account current was sent to Finlarig in December, 1788, having this article:—

"To cash lent Colonel Charles Campbell of Barbreck, on your account, on bond and assignation to Captain Hector M'Niel of Ugadale's bond for £1000."

It appeared afterwards that Macdonald, the agent of Finlarig, did not complete the right of his principal to Captain M'Niel's bond, by giving intimation of the assignment to M'Niel, the obligor and debtor, according to the law and practice of Scotland.

In May, 1789, Colonel Campbell and Captain Hector M'Niel granted their joint bonds to three different persons for £1000 sterling each: and of the same date, Colonel Campbell granted a bond of relief or indemnity to Captain M'Niel, on the recital of these three bonds, stating that the money was received by Colonel Campbell, and wholly applied to his use; and that Captain M'Niel had become bound in the said securities at his, Colonel Campbell's desire, and for his account, and therefore engaging to indemnify Captain M'Niel, or to pay the money to him, that he might relieve himself of the said engagement. All these transactions were conducted by Macdonald.

On the 2d of January, 1792, Macdonald, in a letter addressed to Colonel Campbell, [318] uses the following expressions. "I had a letter lately from my namesake William Macdonald, who lent you £1000 some years ago, upon your own bond simply, containing an assignation to a bond of Captain Hector's for the like sum; and he mentions his intention of sending me the bond, as he wants money to, etc. I have been thinking of the affair you mention as to Mr. Calland's securities, and as I hear of a Mr. Turing lately from India, who has plenty of money, which it seems he is desirous to lend, might you not try Calland, who, I believe, is connected with him, and see if he would give the money on a conveyance? What say you to this plan, as people here are perpetually *at searches of records, the moment you mention heritable security, and that is to be avoided on all occasions.*"

In April, 1792, Colonel Campbell died in a state of insolvency, and his estates were brought to a judicial sale. Captain M'Niel being obliged to pay all the three bonds above mentioned, received from the creditors therein assignments *qua cautioner*, or surety, of their respective debts, for the purpose of enabling him to operate his relief against the estate of Colonel Campbell. On these and the bond of indemnity he was ranked as a creditor, and took a dividend with the other creditors when the estates of Colonel Campbell were sold.

On the same occasion Macdonald, who continued to enjoy the confidence of Finlarig, and the management of his affairs, got him ranked as a creditor on the estate of Colonel Campbell, [319] by virtue of the Colonel's bond for £1000, but made no claim on M'Niel.

Pending the action for a sale of Colonel Campbell's estate, and the division of the purchase-money, Macdonald advised Finlarig, from time to time, of what was going forward, representing the Colonel's insolvency as a matter of surprise to himself and every one else, by taking no notice of the collateral security by the assignment of M'Niel's bond.

Colonel Campbell's death and insolvency had been announced to Finlarig by Macdonald in the following letter:—"The hurry and confusion I have been thrown in by the death of my book-keeper and principal clerk, the one after the other within six months, has engrossed my attention so much, that I am not able to answer letters regularly of late, and prevented me writing you earlier of the death of Colonel Charles Campbell, to whom £1000 of your money had been lent several years ago, when he was in as good credit as any man, possessed of a land estate better than £2000 sterling of yearly rent; but since his death, it turns out that he was greatly in debt, owing to an expensive and extravagant family, and various projects of improvements; for he was a man of no expensive turn himself. However, after a full examination into matters, it is the general opinion, when the estate is sold, there will be no short coming in payment of the creditors, though the interest will not be drawn regularly, at least while the widow lives. This is so far uncomfortable; but as I lent your money on all occasions as I would my own, [320] misfortune cannot be avoided at times, though it seldom

happens; and even in this instance, I don't look on it by any means as desperate, now that matters are pretty well understood."

Finlarig wrote an answer to this letter in the following words: *

"Dear Sir, I have been favoured with yours in course of post. I observe what you say concerning Colonel Campbell; it is not very agreeable, but it might be worse."

On April 25th, 1800, Mr. Macdonald transmitted to Finlarig a copy of his account, accompanied with a letter, in which he says:—"I have judged it proper to send a duplicate, as then made up for your examination, having got a frank from Lord Perth for that purpose, and shall be glad to hear from you when convenient, that you find the account right. You'll observe, that you have just now £2100 lent on the two bonds by the Perthshire trustees, of whom I am one myself, along with Lord Perth, and several others, so that no accident can befall any part of it; and this, besides the debt due to you, as formerly mentioned, by the estate of the late Colonel Charles Campbell, the recovery of which, or some part of it, must be a distant period before dividends are made to the creditors, till the widow dies."

In answer to this letter, Finlarig wrote in the following terms:—"Dear Sir, I was duly favoured with yours of the 25th ultimo, [321] covering my account; which I have examined, and find perfectly right; and I have great reason to be very thankful to you for the great trouble you have been at, and so many transactions which I see by the account, till you got my little matters put out of all danger. Those transactions show very plainly, that I was not forgot, for which I return my most cordial thanks; at the same time I see likewise, that there is nothing charged on your part for trouble, which is more than I have any right to look for; and therefore wishes that you charge me whatever you see proper; for I have it not in my power to make you any recompense any other way. I have been more obliged to you than all the rest of Adam's posterity; and it was a lucky introduction for me, that first brought us together. I observe, that as this is a bad year, although the balance in my favour be but very small, that you allow me to draw on you as usual. May God keep you in good health and long life, in the head of your own affairs; and much satisfaction may you have of your family and your fortune, is my prayer towards you," etc.

In the month of April, 1802, Mr. Macdonald transmitted to Finlarig an affidavit to be made by him, relative to the debt due from the estate of Colonel Campbell, in order to be produced in the process of ranking, sale, and division above-mentioned. In his letter inclosing this paper, Mr. Macdonald says—"Dear Sir, I send you the inclosed affidavit to be made before a justice of the peace, and I fancy you need not go farther [322] than my cousin Tullochgriban to do it, as he will readily oblige you or me so far. You and he will have each page to sign with your names, immediately below the writings; and mention, when you send back the paper, after signing, the place and date of signing, and the shire, so as to be filled up by the same hand. This is a desperate debt, as I formerly mentioned to you, but it is right to take all that can be got. I never was so much deceived by mankind as by Colonel Campbell, who had a large estate; but his debts have turned out immense in England and Scotland."

Finlarig returned the affidavit, executed, in a letter to Mr. Macdonald, of the following tenor:—"Finlarig, 15th April, 1802. Dear Sir, I received yours, inclosing the affidavit, and I hope that matters is done to your mind. Your cousin Tullochgriban is just such another justice as myself; although appointed for two counties, we never qualified either of us. I have not been well since I was at Elgin, with fever and ague, and have not been out of the house for eighteen days; therefore was obliged to get the justice of the peace to my own house, so that you may date it at Finlarig, 11th instant, in the county of Moray or Elgin, and the justice is for the same county, and Inverness; take your choice. I am afraid I must call on you for money at *Whitsunday* and *Martinmas* both. Those years have ruined us. This is a terrible climate; we could not get a yoke a plough for three days past, with frost and snow; it will kill [323] all our lambs; it bids badly for a crop or a good harvest, as they say that the harvest will be like the spring. The justice of the peace is James Grant, Ballintom, in case you should want his designation. I hope all is according to your directions; and with best respects to yourself and family, I remain," etc.

* It appeared from all the letters of Finlarig that he was a very illiterate man.

In the month of April, 1803, Mr. Macdonald sent Finlarig for execution, a discharge for a dividend from Colonel Campbell's estate: in the letter accompanying which, Mr Macdonald says—"I now send you a discharge for a dividend from Colonel Charles Campbell's estate, *upon that unlucky debt he owed to you upon bond*; and there will be another dividend of less amount very soon, but no more till the death of his widow, when the sum she liferents will also be divided among the creditors, etc. This same sum, small as it is, I had once little hopes of recovering; the Colonel's failure from affluent circumstances being to so great an amount as astonished every body."

In his letter returning this discharge, Finlarig says:—"I find by the dividend, that Campbell must have died much involved; and from seeing the bond being landed security, I see it hardly possible to guard against a man that is in good credit, when he is inclined to be a villain," etc.

In the month of November, 1803, Mr. Macdonald transmitted to Finlarig a discharge for another dividend inclosed in a letter, of which the following is an extract: "I am favoured with yours of the 12th current, and was just prepar-[324]-ing to write you with the inclosed papers for your signing, when your letter came to hand. This second dividend of Colonel Campbell's estate, (and God knows when the next will take place,) will, small as it is, enable me, with £50 of interest I have to draw in January next for you, to pay the £100 you are to draw for, which do when you please. I have lent this term £400 for you, made up of interest with the former dividend from Colonel Campbell, as I manage for you as I do for myself; and therefore don't draw for more than this £100 you mention, till next Martinmas, if you can avoid it, because I'll have no money of yours till then; but for all that, if you are in need, I'll honour your bills."

Finlarig returned the discharge, executed, in a letter to Mr. Macdonald, in which he says,—"I am favoured with yours, inclosing the instrument and discharge, which I have executed, as near as I can, according to your instructions. The witnesses are both my servants, and lives in my family at Finlarig, and signed this day the witnesses and myself. I will draw no more than the £100 from you, I hope, for a year. I am always sensible of your good offices towards me, since I had the honour of your acquaintance, and I am always sensible that you do every thing for my interest," etc.

The dividends received from Campbell's estates, and paid over to Finlarig, amounted to £304 1s. 3d. He died in the year 1806, leaving an only child, the Respondent, Mrs. Lillie.

[325] In the year 1807, Mr. Macdonald, the Appellant's father, having rendered a state of his accounts, and in the year 1811, a farther and final account, to the representatives of Finlarig, Mrs. Lillie, in a letter of July 20th, 1811, wrote to Mr. Macdonald in the following terms:—"My uncle, Mr. Grant, at Muirtown, was favoured with your letter of the 11th instant, inclosing an account current between you and my curators, commencing the credit side in your favour on 20th March, 1807, and ending on the 11th July current; commencing the debit side against you 26th February, 1807, and ended on the said 11th July current; on which there arises a balance due by you to me and my late curators, of £51 15s. 9½d. *This account has been perused by myself, Mr. Lillie, and Mr. Grant for himself, and acting as factor for my other curators, and is, as well as all other accounts rendered by you of your intromissions with my father's concerns, found to be perfectly accurate and satisfactory to all concerned; not only so, but the liberal and friendly manner in which you have conducted this business in general, by departing from claims so competent to yourself, merits, as I trust it will have, my most ample acknowledgements and gratitude upon all future occasions. I have therefore, this day, drawn upon you, with the consent of my husband, for the above balance of £51 15s. 9½d. in favour of John Gordon, Esq. Forres, at three days' sight, which we have no doubt will be duly honoured by you, and will of course be in full of all you are resting and owing either on account of your intromissions with my father's estate [326] during his life-time, or since his death with mine, as his only child and executor.*"

After the death of Finlarig, and after all the correspondence and transactions before stated (see p. 17), the account current, which Macdonald had transmitted to Finlarig in 1788, being found among his papers; the entry in it respecting Captain McNeil's bond suggested an inquiry why, instead of resorting to the insolvent estate

of Colonel Campbell, and taking the small dividends which it afforded, Macdonald had not recovered the money from M'Niel, a person in affluent circumstances.

Upon this subject, a correspondence * took place between Macdonald and the friends of Mrs. Lillie, in consequence of which a demand was made on Captain M'Niel; but he founded on the want of intimation of the assignment, as entitling him to plead compensation (a set off) on the three bonds for borrowed money granted in 1789, which he as surety had been obliged to discharge, and Colonel Campbell's bond of indemnity; and he pleaded also compensation on another debt, alleged to have been due to him from Campbell, on a transaction previous to the date of the bond assigned.

* As to the latter ground of set-off, it appeared that by a personal bond dated in Dec. 1776, Colonel Campbell of Barbreck, and Captain John M'Niel the younger of Ugadale, upon a recital that they had borrowed and received from Niel M'Niel, Esq. of Ugadale, the sum of £1100 ster-[327]-ling, became bound jointly and severally to repay the said sum to the said Niel M'Niel, of Ugadale, or failing him by decease, to Captain Hector M'Niel of the Marines, his second son, and his heirs, etc. Captain Hector M'Niel, the substitute in this bond, is the same person who became the debtor in that which was assigned as security to Finlarig. The right to the sum secured by this bond, devolved, as it was alleged in the pleadings, upon Captain H. M'Niel. But, notwithstanding this apparent claim, H. M'Niel had, in 1788, paid three years' interest upon his bond to Colonel Campbell; and in the process of ranking of Colonel Campbell's creditors, no claim upon this bond for £1100 was made by or on behalf of Captain H. M'Niel.

Under these circumstances, in the year 1813, the Respondents brought their action in the Court of Session against Macdonald for payment of the £1000 and interest, so far as payment had not been recovered from the estate of Colonel Campbell; founding on his gross and culpable negligence in not having intimated the assignment of Captain M'Niel's bond; and in order (as it was said) to give Mr. Macdonald an opportunity of proving, if he could, that there had been intimation, the Respondents made Captain M'Niel a party to the action. Macdonald, one of the defenders in this action, died shortly after its commencement; whereupon the Appellant, his son, became a party as his representative.

By an interlocutor pronounced on the 25th of June, 1811, the Lord Ordinary, before whom [328] the cause came, assozied Captain M'Niel, but repelled the defences pleaded for the Appellant, and decerned against him according to the conclusion of the libel.

The Appellant having given in a representation against this interlocutor, to which answers were made for the Respondents, the Lord Ordinary, on the 17th January, 1815, pronounced the following interlocutor: "The Lord Ordinary having considered this representation, with the answers thereto, and whole process of consent of the pursuer, restricts the principal sum decerned for to the sum libelled of £1000 sterling, deducting therefrom the sum of £218 17s. 8d. sterling paid to account, on the 13th of April, 1803, and £55 1s. 0½d. sterling paid to account on the 30th of November, 1803; and further ordains the pursuers on receiving payment of the sums decerned for to assign over to the defender their claim to be ranked on the estate of Barbreck, that he may operate his relief, but *quoad ultra* refuses the desire of the representation, and adheres to the interlocutor represented against."

A representation against this last interlocutor was refused by the Lord Ordinary without an answer.

The Appellant then presented his petition to the Court in the Second Division, reclaiming against the said interlocutor of the Lord Ordinary, to which answers being made for the Respondents, the following interlocutor was pronounced: "The Lords having advised this petition with the answers, refuse the petition, and adhere to the [329] interlocutor complained of in so far as respects the principal sum, and two partial payments therein specified, but consent to find interest only due from the 15th day of May, 1791, and to that extent alter the interlocutor complained

* The only letter in this correspondence which appears to be material, is mentioned by the Chancellor, in his observations, *post*, 382, and an extract from it is printed at the end of this case.

of and decern; find the defender liable in expences; allow an account thereof to be given in, and remit to the auditor to tax the same and report."

To this interlocutor the Lords adhered, by refusing a second petition for the Appellant on answers made:

And finally, they awarded costs to the Respondents, to the amount of £140 19s. 2d.

From these several interlocutors of the Lord Ordinary, and Lords of Session, the Appellant appealed to the House of Lords.

For the Appellant—the Solicitor General (Sir R. Gifford) and Mr. J. A. Murray. For the Respondents—Mr. C. Warren and Mr. W. Adam.

On the part of the Appellants, it was argued that the agency was gratuitous—that the neglect was not gross—that intimation ought to be presumed—that it would have been useless if made—as M'Niel might have pleaded compensation upon the old bond—that the client's claim was barred by acquiescence and prescription; and that of his representatives by discharge—and both by length of time.

[330] The gratuitous agency was denied on the part of the Respondents, and argued to be immaterial; and it was insisted that the responsibility continued, notwithstanding time and apparent acquiescence; for the client was ignorant both of the fact and the law; and the agent, continuing to act for the client and his family, kept them uninformed, contrary to his duty. The fact was discovered by the representatives, after they had given the discharge. If M'Neil had any counterclaim, he would not have paid interest.

On behalf of the Appellant the following authorities were cited:—Ersk. 3. 7. 29. on the extinction of obligations by taciturnity; Ersk. 4. 4. 109. As to the vicennial prescription, which operates even in cases of murder, Macgregor's case, M'Laurin's Crim. Cases.* As to bar by presumption, *Wemyss v. Clark*, 28th June, 1749, Dict. of Decis. 11640; Case of Fullarton, 27th July, 1757. As to length of time, Kames, tit. Grounds and Warrants, p. 353; *Blackwood v. Purvis*, Dict. of Decis. 5167; *Provost of Stirling v. Jardine*, Dict. 5191; *Maxwell v. Maxwell*, Dict. 5174; *Maxwell's Creditors*, Dict. 5181; *Wilson v. Sellers*, Fac. Coll. 6th July, 1757, Dict. 5184. As to prescription, under stat. 1494, c. 57. and 1617, c. 13. Ersk. 3. 7. 19. As to implied discharge and renunciation, Kames, pp. 430-440. *Hogg v. Niven*, [331] Dict. 6533. As to settlement of accounts, *Graham v. Rothead*, Id. 6534.†

For the Respondents the following cases were cited, of mandatories and agents held liable for neglect:—*Garden v. Lindsay*, Dict. 3519; Case of Susanna Rae, Id. 13963; *Goldie v. Macdonald*, Id. 13965; *Lizars v. Dickie*, Id. 3532; *Masson Thorn*, Id. 3535 and 13967.

The Lord Chancellor, in the course, and at the conclusion, of the argument, made the following observations:—when Campbell's insolvency became known, it did not appear that M'Donald the writer mentioned the assignation in the whole course of the correspondence—the form of the assignation was to M'Donald the lender (Finlarig), and to M'Donald the writer, which was said to be the common form—in the summons, the pursuers state that they did not discover the fact of the assignation until after the letter of discharge: there was no clear evidence that the bond was in the hands of Finlarig—Colonel Campbell's bond contained a recital of the assignation—and Finlarig ought to have had, not only Colonel Campbell's bond, but also the bond recited to be assigned—it did not appear why M'Donald the writer made no claim against M'Niel—if the intimation had been given, he was liable—if M'Niel had a prior demand upon Campbell, how [332] did it happen that M'Donald, being the law agent of both, took it as a security, knowing a fact which would make it ineffectual—if there was no prior debt, then there was nothing to prevent the claim against M'Niel. Suppose M'Niel had a prior claim, unknown to both the writer and the lender: if he suppressed that fact, knowing of the transaction of loan and

* pp. 595. 773. Callum Macgregor, Aug. 9. 1773, was put upon his trial for a murder committed twenty-five years before the indictment. It did not appear that any sentence of fugitation had passed against the prisoner, and the Court unanimously sustained the defence of prescription.

† And see generally in the Dict. of Decis, the titles Prescription, Presumption from Lapse of Time, Grounds and Warrants, and Implied Discharge.

security, he could not claim compensation. It is unaccountable that the security was not made complete by intimation. For when the writer recommended the security, he had received a letter from Campbell, which showed the hazard of lending the money on his personal responsibility.

But if the bond had been duly assigned, and duly intimated, would there have been any necessity to wait for the winding up of Campbell's affairs, before suing upon the bond of M'Niel?

In the oath of verity, in the process of ranking, M'Donald recites the assignment, "This deponent," etc. Appendix to paper, 6th April, pp. 18, and 19. After this he cannot say he considered the security as good for nothing.

The printed cases have not stated letters written in 1813, which are material. In one of those (see end of the case), M'Donald the writer states the bond only to have been deposited. From this representation, it appears improbable that there could have been intimation of assignation. Paper, 12th June, 1815, p. 11.

[333] Lord Redesdale observed, that when M'Niel became a creditor, it was not likely he would leave a bond in the hands of his debtor.

The Lord Chancellor moved the Judgment. (May 20, 1819.)

The proceedings in this case were instituted in 1814, and as they refer to transactions commencing in 1788, the case deserves great attention. It is a claim made against an agent, for compensation on account of negligence in providing for the interest of his client. It is admitted that Mr. M'Donald was highly respectable in his profession. I should be unwilling to act on any principle adverse to the doctrines of presumption or prescription. If this is to be represented as a cause of action arising in 1788, and there was nothing to keep it alive, it would be too dangerous to inquire into it. But, unless I mistake the nature of the case, there certainly was negligence; and the ground of the complaint is not taken away by lapse of time, or the nature of the transactions which have since taken place.

The word negligence, I do not use in a sense reproachful to the memory of Mr. M'Donald the writer.

In 1788, M'Donald the father (Finlarig) employed M'Donald the writer to place out his money on good securities. Colonel Campbell was a man in suspicious circumstances, as we may understand from the advice against real securities, on account of the evidence which it would furnish upon record. The fact that he wanted £1000 is a proof that he was not in easy circumstances. Colonel [334] Campbell was obligee in a bond from M'Niel, and M'Donald the writer gets an assignment of this bond, as an additional security. There is no doubt that the bond was assigned: it must be inferred that M'Donald the father knew that his money was lent on a bond. That might have been an objection in England, though not in Scotland.* The policy of the law requires that we should hold that Macdonald the writer knew that intimation was necessary, and that the security was imperfect without it. By a letter, written in January, 1792, from Macdonald the writer to Campbell, it appears that Macdonald the father intended to call up the money; or that Macdonald the writer, knowing the risk of Campbell's insolvency, desired it. In that letter, he says, "I had a letter lately from my namesake, who lent you £1000 some years ago, upon your own bond simply, containing an assignation to a bond of Captain Hector's, for the like sum, and he mentions his intention of sending me the bond, as he wants the money," etc.

There has been much argument as to the question in whose possession the bonds were; but it is not material. It is fully ascertained that, at a subsequent period, the bonds must have been in the possession of Macdonald the writer. At this time, Macdonald the writer was negotiating securities from Colonel Campbell; and then, not confiding in the circumstances of Campbell, occurs [335] the expression as to heritable securities. It is not easy to understand the expression, as to securities of record, in any but one way. The accounts sent in (the first, the second, and the third, being further parts of the same account,) may be said to have been in the possession of Macdonald the father, from 2d April, 1792, up to the year 1811. There is, in these accounts, an item thus: "*By three years' interest from bond and assignation.*" This is said to be an intimation to the father; but from the com-

* Because heritable bonds charge the land specifically, and, when perfected by seisin, operate as a direct conveyance by mortgage, in England

plexion of the accounts, and the other transactions, it is just to say that Macdonald the writer was, in the amplest sense, the man of business of Macdonald the father, and bound to advise and act for him. Colonel Campbell died in 1792, in a state of embarrassment. Immediately following that event, there is a letter from Macdonald the writer, intimating that his affairs might be retrieved.

Macdonald the writer still continued to be the man of business for the father, and afterwards for the representatives. If the bond of M'Niel had been intimated, the insolvency of Campbell would not have prevented their putting it in suit. But no demand was made upon it; and in the correspondence it is remarkable, that in all the letters between Macdonald the father, and Macdonald the writer, no mention is made relative to the bond supposed to be assigned, or the intimation of it, or the reason why it was not made effectual, if completed. To meet this observation, it is said that if there be taciturnity, courts do not inquire; and, undoubtedly, though nothing is more important than to hold professional men to accuracy, yet, on the other hand, they ought not to be made to account, twenty-five years after a transaction, if the circumstances of the particular case make it unreasonable; but circumstances are to be considered. Whether the father knew the law of intimation, is doubtful; but the writer must have known it, and ought to have acted upon it. This is the taciturnity, not of Macdonald the father, but of Macdonald the writer. The representatives, when they find the papers as to the bond and assignment, call upon Macdonald; and, looking at the letters, it is difficult to read them, and suppose he had lost his memory. He could not have forgotten so far the transaction as to call that a deposit, which, in the accounts, he had called an assignment. This case, therefore, by its circumstances, is taken out of the principles of presumption and prescription, which ought to protect professional men. On these grounds, and a fair view of the case, as a jurymen, it is my opinion that the bond was not intimated; and, by reason of non-intimation, the debt was lost from the estate. Either the want of intimation caused the loss, or, if it was intimated, and the doctrine of set-off had applied, Colonel Campbell might have been called upon forthwith to pay, and, at that time, could have paid; because he afterwards raises £3000 on different bonds. That transaction could never have furnished a defence against a bond duly intimated.

Professional men must be strictly held to such accuracy as to give security to their employers. [337] Lapse of time, under circumstances, may be an excuse; but the former principle preponderates here; and as the safety of clients ought not to be discussed at the expense of their representatives, this case ought to be affirmed with £80 costs.

Lord Redesdale.—Macdonald the writer recommended the security of his own client, Campbell, with collateral securities. It is clear that no intimation was given, because of the transaction in 1789, where M'Niel became security for Campbell to the amount of £3000. If M'Niel had been debtor to Campbell in £1000, that transaction would have taken place in a different form. When Campbell died, and his affairs were in a state of insolvency, Macdonald does not give notice immediately; but in December following, stating the circumstances, and the necessity of going upon the estate of Campbell, he does not mention a word of the demand against M'Niel. If Macdonald had not been then conscious that no demand could be made, he would have spoken of the claim on him. His memory was then full; because it was but a few years after the transaction, and then he must have known whether he had given intimation. The letter of 1813 clearly proves that there was no intimation.* There was [338] no necessity to wait for winding up the affairs

* Referred to by the Lord Chancellor. *ante*, p. 332. It is a letter from M'Donald the writer to Mr. Lillie, dated March 26, 1813. It contains the following passages:

"I can now, however, tell you that Captain M'Niel was not bound as cautioner along with Colonel Charles Campbell; for, at that time, the Colonel was in great credit, and in possession of a large estate; but the Colonel gave him a bond of the Captain's for £1000 *by way of deposit, as additional security, with his own bond for the £1000 of Finlarig's money lent him*; and upon the Colonel's death, it was found that he was so much involved in transactions with Captain M'Niel that it is difficult to say what may be recovered from Captain M'Niel, or how far he may be liable.

of Campbell's estate. These transactions could arise from this circumstance only, that there had been no intimation. The negligence is clear. As to length of time, the letter of 1813 holds out hope as against McNiel. There was no negligence in Finlarig, or his representatives. He was a person of ignorance, trusting to his legal adviser, and the representatives acted as *soon as* they had information.

Judgment affirmed.

[339]

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

CASE OF THE QUEENSBERRY LEASES.

[12th July, 1819.]

[See H. Dow, 90, and V. Dow, 293.]

POWER of an heir of tailzie in respect of leasing.

In what respects an heir of tailzie is absolute owner of the estate, and in what respects he is bound to administer for the benefit of his successors under the entail.

The word "dispone," in the prohibitory clause of a Scotch entail, has the same meaning and operation as the word "alienate."

Those words prohibit long leases, as alienations inconsistent with a due administration of the estate.

A lease for 57 years is a long lease within the meaning of the prohibition.

Words prohibiting alienation affect a lease by which the grantor of the lease, the heir of entail in possession, does not reserve to the succeeding heir of entail the same benefit as to himself, as, by reserving a given rent to the grantor during his life, or for the first years of the term, and a smaller rent after his decease, or for the remainder of the term.

Grassum (a fine taken upon granting a lease), is anticipated rent.

Therefore, a lease made upon a grassum paid to the grantor, is an alienation *pro tanto* of the rent.

A power in an entail to make leases "without diminution of the rental, at the least at the just avail for the time," means, at the fair value at the time of leasing, not the last rent, which may have been paid a century before.

"Rental," in that clause of the entail, is the same in construction as "rent."

The heir in possession taking a grassum effects a diminution of the rental or rent, and does not take the just avail for the time.

It is a diminution of the rent if grassum was taken upon a preceding lease; and such lease being surrendered before its expiration, a new lease is granted at the old rent.

[340] Leases granted upon such terms are void, as between the heirs of the entail.

Whether leases granted for 31 years, or so many years as the Court of Session or House of Lords shall deem to be within the power of the heir of entail, are void as uncertain, and not according to a due administration of an entailed estate. *Quære.*

Leases made by the heir of entail in possession, for nineteen years, with cove-

until the process of ranking and division, among the Colonel's creditors, is deliberately examined into, which must take time, as there is no access, at present, to that part of the process, which is most material to be looked into, it being borrowed up by one of the agents for creditors, who has either mislaid it, or lent it to some other of the agents, and requires time to be got at. At any rate, there are further dividends to be made, of which Mrs. Lillie draws her share; which is all I can say on the subject at present."

nant to renew annually during his life, are not void, as being a transgression of the power to lease for the setter's life, or nineteen years.

Numerous leases granted by the heir of entail for his own benefit, and to the prejudice of the succeeding heir of entail, operate as a fraud upon the entail.

THE LORD CHANCELLOR *.

My Lords: This is unquestionably the most weighty and important cause, which, in the course of my professional life, either at the bar or in a judicial situation, I have ever had occasion to consider: important in its [341] consequences

* These were appeals arising out of various actions of declarator and reduction, in which the trustees of the late Duke of Queensberry, the present Duke of Buccleugh and Queensberry, the Earl of Wemyss and March, and certain lessees of the late Duke of Queensberry, were parties. The cases turned upon the construction of two entails; the one called the March and Neidpath, the other, the Queensberry entail: and the principal questions arising and discussed in the cause were,—1st. Whether, in the prohibitory clause of an entail, the word "dispone" was equivalent to the word alienate, and had the same effect to prevent alienation? 2d. Whether long leases, and of what endurance, were alienations? 3d. Whether taking grassum was a breach of the prohibition to alienate? 4th. What was the true construction of a power given to the heir of tailzie in possession to make leases "without diminution of the rental, at the least at the just avail for the time;" whether it meant the last preceding rent taken, or the fair value at the time of leasing; and whether taking a grassum was a breach of that condition annexed to the power of leasing? 5th. Whether leases for 31 years, or if the Court of Session or House of Lords should hold such leases to be void as too long, then for such period as those Courts should approve, were good leases, *i.e.* whether the Court would restrict the endurance, and define the *ish* for the parties? 6th. Whether leases for nineteen years, with obligations to renew for the same period annually during the life of the grantor, were prohibited, as being for the setter's lifetime *and* nineteen years? 7th. Whether leases at the same rent, substituted for and upon the surrender of former leases, which had been made with grassum, could be sustained? And finally, Whether leases of the several descriptions before stated, granted by the heir of entail in possession to the amount of many hundred, were to be considered as frauds upon the successors in the entail.

The appeal was before the House of Lords in the year 1817, and on the 10th of July was remitted, with special directions, for the reconsideration of the Court of Session. After judgment upon the remit, the cause now came for the final decision of the House of Lords.

The nature of the several actions in the Court below, the parties to them, the terms of the respective entails, the several matters in issue, the arguments urged before the original and appellate jurisdictions, so far as they are material to understand the question, appear in the following observations made in moving the judgment on this appeal. More exact information (if desired) upon these points, may be found in the printed cases; and a general outline of the pleadings, and the facts and questions, may also be found in the observations of the Lord Chancellor in moving the remit upon the former appeal.—MS. 9 July 1817. Dow's Rep. vol. 5. p. 297.

No part of the arguments are given in this report, because the principal topics of argument are noticed in the Chancellor's speech in moving judgment, and from their extreme length, it would not be possible, within moderate bounds, to do justice to the great ability of the advocates who pleaded the cause at the bar of the House.

The several cases were argued at the bar of the House of Lords upon the original hearing by Mr. (now Vice Chancellor) Leach, Mr. Jeffrey, Sir S. Romilly, Mr. Cranstoun, and Mr. Moncrieff, on the 3d, 5th, 7th, 10th, 13th, 14th, 17th, and 18th of February 1817; and after the judgment of the Court of Session upon the remit, by the Lord Advocate (Machonochie), the Solicitor General (Gifford), Sir S. Romilly, Cranstoun, Moncrieff, and J. Murray, on the 13th, 15th, 17th, 20th, 22d, and 27th of April 1818.

as a question of great value to those who are directly interested in it; but in that [342] point of view, it sinks, as it seems to me, into absolute insignificance, when it is considered, with reference to the effect, which the judgment in this cause, whatever it may happen to be, must have upon the interest of landed proprietors of Scotland.

In order to render the question intelligible, it becomes necessary to enter into a statement of the law of Scotland as referrible to the facts and circumstances of this case,—the law of Scotland, not as it is understood in interpretation, but as it is to be found in acts of Parliament; for the question between these parties arises upon what is the true intent and meaning of an act passed in Scotland in 1685, which is their act respecting tailzies. Tailzies existed long before that period, but the present case is to be considered upon the true construction of that act of Parliament, as attaching upon the tailzies of the March and Noidpath estates, and the Queensberry estate.

Before and since the passing of that act, it has been the subject of much controversy, what is the law of Scotland as to the interpretation of tailzies. They have been treated as matters *strictissimi juris*, as not to be construed by intention, but only on what you find embodied (to use their phrase) in expression; and those principles have certainly, before and since the act, been applied to tailzied instruments.

[343] That act of Parliament is in these words:

“Our Sovereign Lord, with advice and consent of his Estates of Parliament, statutes and declares, that it shall be lawful to his Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie to **sell annaizie or dispose* the said lands, or any part thereof, or contract debt, or do any other deed whereby the samen may be apprysed, adjudged or evicted from the others substitute in the tailzie, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void, and that the next heir of tailzie may immediately, upon contravention, pursue declarators thereof, and serve himself heir to him who died last infeft in the fee, and did not contravene, without necessity anywise to represent the contravener. It is always declared, that such tailzies shall only be allowed in which the aforesaid irritant and resolute clauses are insert in the procuratories of resignation, charters, precepts and instruments of seisin, and the original tailzie once produced before the Lords of Session judicially, who are hereby ordained to interpose their authority thereto, and that record be made in a particular register-book, to be kept for that effect, wherein shall be recorded the names of the maker of the tailzie, and of the heirs of tailzie, and the general designations of the lordships and baronies, and the provisions and conditions contained in the tailzie, with the foresaid irritant and resolute clauses subjoined thereto, to remain in the said register *ad perpetuum rei memoriam*; and for which record there shall be paid to the clerk of register and his deputies, the same dues as is paid for the registration of seisins; and which provi[344]sions and irritant clauses shall be repeated in all the subsequent conveyances of the said tailzied estate to any of the heirs of tailzie; and being so insert, his Majesty, with advice and consent foresaid, declares the samen to be real and effectual, not only against the contraveners and their heirs, but also against their creditors, comprisers, adjudgers, and other singular successors whatsoever, whether by legal or conventional titles. It is always hereby declared, that if the said provisions and irritant clauses shall not be repeated in the rights and conveyances, whereby any of the heirs of tailzie shall brook or enjoy the tailzied estate, the said omission shall import a contravention of the irritant and resolute clauses against the person and his heirs who shall omit to insert the same, whereby the said estate shall *ipso facto* fall, accresce, and be devolved to the next heir of tailzie, but shall not militate against creditors, and other singular successors who shall happen to have contracted *bonâ fide* with the person who stood infeft in the said estate, without the saids irritant and resolute clauses in the body of his right.”

* Here the Lord Chancellor noticed the arguments upon the construction of the words *sell, alienate and dispose*, which occur afterwards, p. 360.

And then there is a saving of his Majesty's confiscations or fines.

Without entering at present into other considerations relative to this act, it appears that authorizing certain entails, it requires, in order to make them good, at least against claims of third persons, that they should have prohibitory, irritant and resolute clauses; and it has always been held, that clauses of each of these kinds are necessary to give the effect to those tailzies which this act of Parliament intends should be given.

In construction this also seems to have been settled, that you cannot entail unless there is an express prohibition; you cannot entail by implication. That appears to have been intentionally prevented by some of the expressions used in the act of Parliament. If [345] there be no prohibition to sell, annailzie and dispone, a prohibition to make any deed by which persons might be evicted has been held insufficient. And so it has been decided in the case of other implications, that the *prohibitions from which they* appear to arise by necessary consequence would not deprive the heirs of tailzie of the power over the estate as to matters not expressly prohibited. Unless there is a prohibition of each sort, the heir of tailzie is free to take advantage of the omission. Where, for instance, the prohibition is not to alter the succession: nothing in the world could more clearly interrupt the succession than the sale of the estate: and yet a prohibition to interrupt the succession would not prevent a sale by the heir. I conceive also, that if the clause *de non alienando* fail, the acts prohibited not being stated again in the irritant clauses as acts that are prohibited, they are not effectually prohibited. If the clauses are not complete, the frame of the tailzie would not be sufficient to protect those who are to take under it: and indeed in some decisions, this sort of construction has been carried to a length, which I confess has surprised me very much; but a Judge must take care that the surprise which affects his mind, shall not affect the law as settled by decisions. Nothing surprised me more (to mention one among many) than the Duntreath case*, in which it was held by this House, contrary to the opinion of the Court below, that where there were prohibitions against the heirs of tailzie, yet, as the first taker under the disposition was known to the law of Scotland as the institute, [346] and not as the heir, he was not affected by the prohibitory or other clauses, notwithstanding the person who had framed the tailzie, the donor of the gift, had called that very individual, in many many places in his tailzie, an heir of tailzie. In considering the two deeds of entail upon which this question arises, attention must be paid to what may be represented as the difference between the *prima facie* and obvious meaning of those instruments, and what may be contended to be their legal construction.

The entail of the March of Neidpath estate was effected by a deed bearing date the 12th of October 1693, but not recorded till the year 1781. It appears from the leases, that the late Duke of Queensberry had possessed the estate from the year 1731 to the year 1781, before this entail was recorded, as the statute requires it should be, yet the late Duke raised a very considerable sum of money upon the estate soon after he succeeded to the Queensberry estate in 1772.

This deed of entail was made upon the marriage of Lord William Douglas with Lady Jane Hay, stating that in contemplation of the marriage, "William Duke of Queensberry, in virtue of the power and faculty reserved to him by the infettments of the lordship of Neidpath be thir presents binds and obliges him, and his heirs and successors whatsoever, upon his own proper charges and expenses, to duly and lawfully infeft and sease the said Lord William Douglas, and his heirs male and of tailzie after mentioned, in the lordship of Neidpath, containing and comprehending the several lands, baronies (and so forth), particularly and generally after mentioned, to be holden from his [347] Grace and his foresaids, of his immediate superiors thereof, sicklike and as freely as he holds the same himself, and that he is to do this *by resignation* in favour of the said William Lord Douglas his son, and the heirs-male to be procreat betwixt him and "the said Lady Jane Hay his promised spouse; which failing, to the heirs male of his body to be procreat in any other lawful marriage;"—(I call your attention to the words, that he is to do it by resignation, without stopping to state my reason at present:)"—which failing, to the other heirs of tailzie after specified, according to the order under-

* *Edmonstone v. Edmonstone*, Nov. 24, 1769. D. P. 15 April, 1771.

written, under the express provisions, reservations, limitations and conditions hereafter rehearsed, and no otherwise; and for making the aforesaid resignation, the said William Duke of Queensberry and Lord William Douglas make (certain persons) their very lawful and irrevocable procurators for them, and in their names to resign, surrender, overgive and deliver, as they be thir presents resign, surrender, overgive and deliver, all and haill the lordship of Neidpath."

The tailzie then, at great length, mentions the particulars which form that lordship, among which are, "All and haill the tenandry of the Holy Cross Kirk of Peebles; and moreover all and sundry the lands and barony of Newlands, the lands and barony of Linton respectively, with their pertinentis called Kirkwird and Lochwird; and further, *the lands, baronies and others under written.*" The particulars comprehended under those words, lordships, baronies and others under-written, are distinguished in this tailzie as what are called warrandice lands.

Then the entail goes on to state who are the heirs [348] of entail, and the substitutes, and then there is a reservation in the following words: "Reserving always to the said William Duke of Queensberry his liferent of the haill lands, baronies, lordship and others above rehearst, except as to those parts thereof particularly after specified, which are hereby allocate to the said Lord William Douglas for his present maintenance, and to the said Lady Jane Hay for her liferent, as the same shall happen to fall out, and during the existence thereof *respectivè*:" then follows this clause, "notwithstanding the right of fee of the said haill lordship and warrandice lands: specified be hereby conveyed and established in favours of the said William Lord Douglas and his foresaids, and of the other heirs of tailzie above mentioned, yet it shall be always lawful to, and entirely in the power and liberty of the said William Duke of Queensberry, by himself alone, at any time during his life, without consent of the said Lord William Douglas his son, and his heirs above mentioned, or of any other of the heirs of tailzie a-specified, hereby appointed to succeed in the lands, baronies, lordship and others a-written, to sell, alienate and *dispose* the lands of Newlands and Linton, and also the tenantry of Holy Cross Kirk of Peebles, comprehending all and sundry the particular lands, annualrents, and so forth, that is, the lands of Newlands, Linton, and Holy Cross Kirk of Peebles, and all and haill the foresaid tenandry of the said Holy Cross Kirk of Peebles, comprehending the lands, etc. in favour of any other person or persons he shall think fit, and likewise to burden the said lands and others immediately [349] above rehearst," (that is, those three parcels of land,) "with such debts or sums of money as his Grace shall appoint, either by bonds of provision or any other rights or obligations, albeit the same be only personal rights containing no clause of infeftment; and likewise reserving power and liberty to the said William Duke of Queensberry during his lifetime, to set tacks of the haill lands, baronies and others immediately above rehearst, for payment of such yearly duties, and for such space and endurance as he shall think just, and to set tacks of the remanent lands and others above rehearst, except these which are allocated hereby to the said Lord William for his present maintenance, and to the said Lady Jane for her liferent from and during the time that her said liferent shall exist, and that for such duties as he shall think fit, and to continue during all the days of his lifetime;"—(I read these words, because in the *prima facie*, or if I may so state it, the English meaning, we should infer from this sort of positive provision, that the general words of disposition which the author of this entail had made as against himself, would tie up his hands from doing those acts, unless he had reserved to himself permission to do those acts which I mention, because it will be necessary to go into a great deal of discussion on points of this nature;)—"and likewise to burden the said lands, and set tacks thereof in manner above written; all which rights to be granted by the said William Duke of Queensberry, in the respective cases above-mentioned, are hereby declared to be good, valid, legal and effectual, and with the burden whereof the lands and estate a-men-[350]tioned, in the cases above rehearst, is *hereby disposed* to the said Lord William Douglas"—(I lay a stress on the words "disposed," and "disposed to," and small variations of that kind, not from a sense of any intrinsic difference in the phrases "dispose," "dispose to," "dispose of," etc. but on account of the observations which I find in the printed cases,)—"to the said Lord William Douglas, and his heirs-male foresaids in fee, and to the other heirs of tailzie a-written, and that not only against the said Lord William

Douglas, and the heirs of tailzie *respectivè* above specified, but also against all singular successors, whether legal or conventional, who shall have right to the lands, baronies and others above *disponed* in all time coming."

Then the heirs of tailzie are bound to confirm the deeds of William Duke of Queensberry, with respect to these excepted lands of Lintoun and Newlands; and then follows this clause, which appears to me not to be altogether immaterial with a view to observations which I shall have to make by and by: "and in like manner it is hereby expressly provided and declared, and to be provided and contained in the resignations, charters and infeftments, and all the subsequent rights to follow thereupon, that all and sundry the foresaids lands and baronies of Newlands and Lintoun, and tenandries of the Holy Cross Kirk of Peebles, comprehending as said is, with the teinds, patronages, offices, jurisdictions and others particularly and generally above mentioned, pertaining thereto and comprehendit therein, shall be redeemable, and under reversion by the said [351] William Duke of Queensberry himself, at any time of his life, from the said Lord William Douglas and his heirs-male, and the other heirs of tailzie above mentioned, by payment making to them, or consignment to their behoof, of ane twenty-merk piece of gold, or £15 Scots, as the value thereof, and that upon any day the said Duke should think fit during his said lifetime, upon the premonition of six days of before to be made by him to the said Lord William Douglas and his foresaids, at the mercat-cross of Peebles, in pre- of ane notar and two witnesses," and so on: which provision and condition of reversion above written, and for the using of the which order of redemption, the extract hereof, or of the charter, or instruments of resignation or seisin to follow hereupon, is hereby declared to be as valid, effectual and sufficient, to all intents and purposes whatsoever, as if ane particuler letter of reversion were made, subscribed and delivered, be the said Lord William Douglas and his foresaids, to the said William Duke of Queensberry, apart for that effect, with all solemnities requisite, whereanent for him and his foresaids he has dispensed, and hereby dispenses for ever: declaring always, likeas it is hereby expressly provided and declared, that in case the said William Duke of Queensberry shall not, during his lifetime, exerce the foresaid faculty, by using ane order of redemption, otherwise *disposing* of the lands and others contained in the foresaid provision of reversion: that in that case, the said haill lands and lordship shall entirely pertain and belong to the said Lord William and the heirs of tailzie a-men-[352]-tioned, upon the provisions, and with the burden of the clauses irritant and resolute under written."

Then follow the prohibitory, irritant and resolute clauses upon which so much of difficulty has arisen in the present case: (those clauses are not the same in the entail of March and Neidpath, as they are in the entail of Queensberry.) "It shall noways be leisome and lawful to the said Lord William Douglas and the heirs male of his body, nor to the other heirs of tailzie respectively above-mentioned, nor any of them, to sell, *alienate*, wadset or *dispose* any of the lands, etc. above rehearsed, as well those to be resigned in favours of the said Lord William, in fee, as these reserved to be disposed by the said Duke of Queensberry, in manner foresaid:"—(observe here, that speaking before of the lands which were to be disposed by the Duke of Queensberry, in the manner stated in former clause, he is to have the power of *disposing*: the word "*dispose*" being the self-same word as the word in the prohibitory clause, and mentioned in the statute as one of the words to be used in the prohibitory clause. The word "*dispose*," in the sense in which it is here used *primâ facie*, at least means the same as to "*dispose of*;" for the power of disposing, before rehearsed, is a power to dispose of:—) "or any part thereof; nor to grant infeftments of liferents, nor annualrents, forth of the same: nor to contract debts, nor do any other fact or deed whatsoever, whereby the said lands and estate, or any part thereof, may be adjudged, apprized or otherwise evicted from them, or any of them: nor by any other manner of way whatsoever, to alter or infringe the order and course [353] of succession." So that this prohibitory clause certainly contained every thing that is required.

Then follow the irritant and resolute clauses, and upon them no objection has been made which has given rise to any argument; but then there follows this permissive clause: "It is hereby provided and declared, that notwithstanding of the irritant and resolute clauses above mentioned, it shall be lawful and competent to the heirs of tailzie a-specified, and their foresaids, after the decease of the said

William Duke of Queensberry, to set tacks of the said lands and estate during their own lifetimes, or the lifetimes of the receivers thereof, the same being always *set without evident diminution of the rental*." Upon this clause, it is said on the one side, that it is a permissive clause; but that according to the construction of Scotch tailzies, the author permitting these tacks, has not prohibited other tacks to be made, unless in addition to what he permits, he states what he prohibits, and therefore they say that this clause cannot prevent the heirs of tailzie from making leases other than those which under this clause they are permitted to make, for they say there is nothing in this tailzie prohibiting their making leases other than they are here permitted to make. On the other hand it is argued, that the obvious meaning of this (I refer to the *prima facie*, or the English meaning), is, that giving this permission is a ground for saying that all other leases except those which you are here permitted to make, must be understood some how or other to be prohibited to be made, and that the general words which occur in the prohibitory clause, namely, "that he shall neither sell, alienate, wadset, or dispoⁿe," [354] must in all, or some of them, contain a prohibition against leasing, and that it was necessary, in order to make such leases as here permitted, to take them out of the prohibition which is included in these terms, some or one of them, by inserting in the tailzie this permissive clause. In answer to that it has been said, "to sell," means to make sale; "alienate" does not apply to leases, which are personal rights of possession for a time, and although they are made *quasi* real by the act 1449, it is not in that sense which means an alienation; and so again they said with respect to "wadset" and "dispoⁿe." In the Queensberry entail, we are delivered in some measure from the difficulty which arises from those opposite arguments which I have been just hinting at, by what has already been done in the Wakefield case; in which a lease was made for ninety-seven years of a part of this estate, and it was insisted, that that was a good lease under the instrument which I have now been stating. But it was found in that case by the House of Lords, and I believe indeed by the Court below, that making a ninety-nine years lease was prohibited by the word alienate; and though the word alienate has one peculiar strict sense, namely, the local transfer of dominion of property, it was insisted, it might be construed, by looking at the language of various acts of Parliament and of various instruments; and that whatever might become of a lease of ordinary endurance, that is such a lease as was necessary for the administration of the estate, yet that a tack of ninety-nine years was included under the word alienate.

The deed then goes on to state, "that liferent provisions shall be in full contentation and satisfaction to the wives of the heirs of tailzie in possession of [355] all right of terree." Then it proceeds to impose the obligation on the heirs of tailzie to place no debt upon the estate; and then follows the clause empowering them to lease, with the peculiar expression which occurs also in the Queensberry entail,—"*without evident diminution of the rental*; and likewise, that it shall be lawful and competent to the said heirs of tailzie to grant suitable and competent liferent provisions in favour of their wives, not exceeding the sum of five thousand merks of yearly free rent of the said estate, and to grant provisions in favour of their children, not exceeding two years free rent of the same." What is to be considered an evident diminution of the rental in the case of the Queensberry entail, has been a great subject of controversy. On the one side, "without evident diminution of the rental" has been represented to mean, that you shall increase the rental if you can, by taking what is the just avail at the time; on the other hand, it is said, it means this, you shall let without diminution of the rental; but as circumstances may arise, in which you cannot get the former rent, you shall then get the just avail at the time.

There is then a clause which occurs in many English entails, and which generally occurs in the entails of Scotland, "that in case the said estate shall, be virtue of this present tailzie, descend and fall to one heir female, the said eldest heir female shall succeed thereto in haill, without division, and so forth *successivè*, and that they shall be holden to marry one nobleman, or gentleman of quality of the surname of Douglas: *at the least*, who, and the heirs above mentioned, shall be holden and [356] obliged, as in like manner the haill heirs of tailzie and provision above specified shall be holden and obliged, to assume, take on and use the said surname, and carry the arms of the family of Queensberry, with the proper distinction; and that, in

case they shall either not assume the said surname or arms, or make any addition thereto, or at any time desist to use the same, the person so contravening shall *ipso facto* amit and lose their right, and shall incur all the clauses irritant and resolute above mentioned." Then, "there is reserved to the said William Duke of Queensberry and Lord William Douglas, full power and liberty, during their joint lifetimes allenarly, to alter and innovate the taillie, both as to the substitute heirs, after the heirs male of Lord William's body, and other conditions and clauses above mentioned, as they both shall think fit, but with this express declaration, that if no alteration be made be them during their joint lives, this reservation shall import no power to Lord William to alter the same after the Duke of Queensberry's decease."

Then follows this: "And in regard that the right of the lands and lordship of Neidpath, hereby appointed to be resigned in favours of the said Lord William Douglas, and his foresaids, (besides the saids lands and baronies of Newlands and Lintoun, and tenandry of the Holy Cross Kirk of Peebles, which the said Lord Duke has reserved power to redeem, burden, or *dispose upon*, in manner above written,) were, by the former infeftments of 1687, redeemable by payment of a twenty-merk piece of gold, conform to the provision of reversion [357] therein specified; and the Duke of Queensberry had otherways power to *dispose thereupon*, or burden the same, or set tacks thereof, as he thought fit; yet, being resolved now, that the same shall be free to the said Lord William Douglas his son, and his foresaid, from all debts and burdens; therefore the said William Duke of Queensberry has, in contemplation of the marriage, consented to renounce, and by thir presents renounces, quit claims, and *simpliciter* discharges and overgives, the reservations and clauses contained in the said former infeftment, in so far as concerns the haill lands, baronies and others of the lordship of Neidpath, except the said baronies of Newlands and Lintoun, and tenandry of the Holy Cross Kirk of Peebles, comprehending as said is, and that in favours of the said Lord William Douglas, and the heirs male to be procreate betwixt him and the said Lady Jane Hay; which failing, to the said Lord William his heirs male to be procreate be him in any other lawful marriage." He also renounces the clauses, reservations and reversion contained in the foresaid infeftments, namely, that clause whereby the Duke of Queensberry had power to sell and wadset, or grant infeftments of annualrent, and all other rights irredeemable or under reversion, and to burden the lands with debts; as also that clause whereby his Grace had power to set tacks; and also that clause whereby is reserved to the said Lord Duke of Queensberry power to hold courts, and to use all jurisdictions, and to *dispose upon* the fines; and likewise "he renounces and discharges in favour of Lord William [358] and the heirs of his body, in so far only as may be extended to the lands particularly a-written, hereby appointed to be resigned in favours of Lord William, and which are not excepted nor reserved to be *disposed upon* by the Lord Duke of Queensberry, the reversion or provision of redemption contained in the foresaid infeftment or charter of 1687, and all right of redemption competent to him be virtue thereof; which renunciation and discharge of reversion William Duke of Queensberry binds and obliges himself to warrant to Lord William Douglas and his foresaids, at all hands, and against all deadly.—And that the said Lord William Douglas may have a present maintenance for himself and the said Lady Jane Hay, his promised spouse, and their family, during their father's lifetime; therefore the said William Duke of Queensberry gives, grants and *dispones* to the said Lord William Douglas and his foresaids, the castle, tower," and so on, "and that for the term payable at Martinmas 1693, for the half-year preceding, and in all time thereafter;" and then it gives him power of raising actions, and warrants him against all stipends payable to the ministers of the parish, and from payment of all cess and other public burdens. (I call your attention to the words, "cess, stipends and public burdens," because you will find there is a great contest between the parties with respect to cess, stipends and public burdens, which, if chargeable on the rental, operate as a diminution of the rental.)

Then there is an obligation to infest the Lady Hay during her lifetime, which is not material to [359] be stated; and a clause for provision for daughters, and another clause as to minister's stipends, which will deserve some consideration; but there then follows another clause, which it appears to me right to notice: "And further, that the said William Duke of Queensberry gives, grants, assigns and *dispones* to Lord William Douglas, the *rents* which might be due from the lands at

the time of the death of the Duke of Queensberry, but which had not been received by him." One of the words used in making this grant of the rents, and not of the lands out of which they arose, is the word "dispose;" and describing the rents he had himself not collected, he says, he grants and *dispones* such rents, viz. "such as he should not otherways assign or dispose thereupon," he gives them to Lord William, to be collected after his death.

Such is the charter upon which the questions arise with respect to the entail of Neidpath or March.

The entail of Queensberry was made upon the 26th of December 1705, and registered in the Register of Tailzies on the 21st of February 1724, and in the books of Session on the 17th of June 1724. That tailzie is introduced by these words: "Be it known to all men by these presents, Us, James Duke of Queensberry, etc. heritable proprietor of the lands, lordships, baronies, heritable offices and others after specified, with the pertinent: Forasmuch as we having considered the state and condition of James Earl of Drumlanrig, our eldest lawful son, are fully convinced of his weakness of mind, and unfitness to manage our estate, or represent us in our dignities and in our said estate, [360] and being well resolved to leave no place for any question concerning the said James Earl of Drumlanrig, his condition and capacity, after our decease, for preventing all process or arbitrament on that subject, or on the succession to our honours and estate, and also for preventing the snares that may be laid for the said James Earl of Drumlanrig, to the visible prejudice of our estate and family: Therefore, and for the other weighty causes and good considerations us moving, We have thought fit (with and under the reservations, conditions, provisions, limitations, restrictions, clauses, prohibitory, irritant and resolute underwritten, allenarly, and no otherways) to be bound and obliged to *sell*,"—(here the word *sell* is certainly used not in the common sense of the word, because this is a gratuitous donation.)—"annailzie and dispose,"—(observe that the word *annailzie* is in this sentence coupled with *dispose*)—"heritably and irredeemably,"—(that is one way of disposing)—"to and in favours of ourself in life-rent during all the days of our lifetime, and to Lord Charles Douglas, our second lawful son, and the heirs male lawfully to be procreated of his body, in fee;"—(then it goes through the illustrious family by name, limiting estates to a great many persons, and the heirs of their bodies;)—"reserving always to us our life-rent-right of the said earldom, whole lands, baronies and others above written: as also reserving the life-rent-right of such of the said lands and baronies as Mary Duchess of Queensberry is provided to,"—(viz. the said lands and barony of Sanguhar, comprehending the lands and others contained in her [361] rights and infeftments thereof.)—"as also it is hereby specially provided and declared, that the said Lord Charles Douglas and his heirs male, and the other heirs of tailzie above specified, shall be bound to make payment of all the debts that shall happen to be due by us, and perform all the deeds prestable by us the time of our decease;" and then it is further stated, "that notwithstanding the right of fee of the said whole earldom, lands, baronies and others above specified, be devolved and secured by this personal disposition and tailzie in favours of the said Charles Lord Douglas and his foresaids, and the other heirs of tailzie above mentioned: yet it shall be lawful for us to contract debts which shall affect the said Lord Charles Douglas and the heirs of tailzie, and the foresaid tailzied estate, in the same manner as if they were consenting with us in the several bonds, contracts, obligations, *dispositions* or other writs whatsoever, to be granted by us, or as if they were served heirs to us in our lands and estate: as also to *sell*, *annailzie* and *dispose*,"—(this is in the reserving clause; and observe how the word *annailzie* again occurs)—"as also to *sell*, *annailzie* and *dispose* the said lands and others above and after mentioned, in whole or in part, redeemably or irredeemably, for whatsoever cause, or in whatsoever manner of way; and to revoke, alter or innovate this present disposition and tailzie, and order of succession, in whole or in part, and generally to do all other things;" and so on.

Then follows the prohibitory clause, "that it shall not be lawful to the said Lord Charles Douglas, and [362] the heirs male of his body, nor to the other heirs of tailzie above mentioned, or any of them, to *sell*, wadset or *dispose*" (*omitting the word "alienate"*) any of the foresaid earldom, lands, baronies, offices, jurisdictions, patronages, and others foresaid, nor any part of the same, nor to grant infeftments

of liferent or annual rent out of the same, nor to contract debts, nor do any other fact or deed whereby the same, or any part thereof, may be adjudged, apprised or anywise evicted from them, or any of them."

I pause here to observe, that even some of the judicial opinions, the soundness of which you have now the difficult duty of examining, turn upon the circumstance, that the word "alienate" is omitted in this prohibitory clause; and although in the Wakefield case, by force of that generic term, a lease of ninety-seven years was prohibited, it is held that the word "dispone" will not have the same effect. Some of the learned Judges were of opinion, that they would have the same effect; but they differed very much upon that point. I therefore call your attention to the circumstance, that the word "alienate" is not in the prohibitory clause in the Queensberry entail.

Then follow these words, "except in so far as they are empowered, in manner after mentioned, nor to violate or alter the order of succession foresaid, any manner of way whatsoever:" that is, they are not to "wadset, sell or dispone, nor to contract debts, nor do any other fact or deed, except so far as they are empowered in manner after mentioned, nor to violate or alter the order [363] of succession in any manner whatsoever." Upon these words again arises much argument about permission and about exception. In an English instrument, we should say that a power to make leases being found in the clause of exception, was a ground for arguing, that unless it had been included in the clause of exception, it would be taken to be included by implication in the general words of the prohibition or restriction; but they say, that is a principle not applicable to the law of Scotland. The prohibitory clause farther provides, "that the heirs and descendants of their bodies, so succeeding, shall be obliged in all time coming, upon their succession, to assume, and use, and bear the surname of Douglas, and the title, designation and arms of the family of Queensberry, as their own proper surname, title, designation, and arms." Then follows another clause, which is material: "and the said heirs female shall also be obliged to marry a nobleman or gentleman of the name of Douglas, *at least*, who shall assume, use and bear the said name and arms of the said family of Queensberry; and if married, the said heirs female and the heirs of their bodies succeeding in manner foresaid, shall assume, use and bear the said name and arms of the said family of Queensberry;" and they are to take the surname of Douglas, with the arms, &c. of the family.

Then follows this: "and that the said Lord Charles Douglas, nor the other heirs of tailzie above specified, shall not set tacks nor rentals of the said lands for any longer space than the setter's lifetime, or for nineteen years."—(One great point [364] of dispute between the parties here is, whether certain leases, the particulars of which I shall mention hereafter, are leases for longer than the setter's life or nineteen years, and if they are, whether they are prohibited under the word "dispone," and the other words here used:)—"and that without diminution of the rental, at the least, at the just avail for the time." In the course of this cause, much discussion and most able reasons for the opinions on both sides have been stated, with respect to what these words, "without diminution of rental," mean. Those who take one side say, that it means no more than this, that if the land was let at the time of granting the new lease, for £3, and it is let again for £3, that is no diminution of the rental; others say, that if you let it for £3 when you might let it for £300, there is a diminution of the rental within the meaning of these Scotch entails; that if instead of letting it for more than £3 you take a sum of money equal to the difference of value between £3 and £300, true it is, in one sense, you do not let it with diminution of rental, because the rent is still £3; yet that the operation of the law of Scotland upon the fact of your commuting the difference in rental between £3 and £300 for a sum of money put into your own pocket, is such, that though you have reserved to the persons to take after you a rent of £3, it is demonstrable, that by the operation of such a law, £3 is a diminished rental. How justly either of those propositions are stated, it is not for me to enter into now, when I am merely stating the facts of the case.

Then follow the words, "nor doe no other fact [365] or deed, civil or criminal, directly or indirectly, by treason or otherwise, in any sort, whereby the said tailzied lands and estate, or any part thereof, may be affected,"—(it is further contended,

that what has been done by the late Duke of Queensberry was prohibited by these words,)—"apprised, adjudged, forefaulted, or any manner of way evicted from the said heirs of tailzie, or this present tailzie, in order of succession, thereby prejudged, hurt or changed."

Then follow these words, (which are important words for our consideration, if the law of Scotland operates upon the rent of £3 in such manner as it has been argued :) "neither shall the said Lord Charles Douglas, nor any of the said heirs of tailzie, suffer the duties of ward, marriage, and relief, either simple or taxed, nor the feu, blanch and teind duties, nor any other public burdens or duties whatsoever, payable forth of the said tailzied lands and estate, to run on unsatisfied, so as therefor the lands and others foresaids may be evicted, apprised or adjudged from them, for any of the said casualties or superiority, and public burdens *."

Then, after making the irritant and resolute clauses, and also directing that the heirs and parties succeeding should denude on existence of a nearer [366] heir, there follow provisions to spouses of male or female heirs, and provisions for daughters and younger children, and reserving the question, how far we are at liberty to look into such circumstances with regard to such entail; and not forgetting the principles of interpretation, as applied to entails, it has always struck me, that those clauses would be very material clauses to be considered: "And notwithstanding of the premisses, it is hereby provided and declared, and shall be provided and declared by the infestment to follow hereupon, and whole subsequent conveyances of the said tailzied land and estate, that it shall be lawful to, and in the power of the said Lord Charles Douglas, and of the other heirs of tailzie above specified, whether male or female, to provide and infest their lawful spouses in competent liferent provisions, of a part of the said lands and estates, not exceeding the sum of £1000 sterling of yearly rent: and if there shall happen to be two liferent provisions upon the said estate, then and in that case the second liferent provision, during the existence of the first, shall not exceed £800 sterling;"—(so that if there were two, there might be provisions for spouses, to the amount of £1800 a year, affecting the estate at the same time:)—"and if there shall happen to be a third liferent provision upon the said estate, then the same shall not exceed £500 sterling, during the existence of the other two liferent provisions:" (so that there might be £2300 required for these jointures.)

Then there is this clause: "And also it is hereby further provided and declared, and shall be declared by the infestments to follow hereupon, and [367] all the subsequent conveyances of the said estate, that it shall be lawful to, and in the power of the said Lord Charles Douglas, or any of the said heirs of tailzie, to burden the said estate with any sum not exceeding the sum of fourscore thousand pounds Scots, for providing of their daughters or younger children." So that there might be three-and-twenty hundred pounds a year charged upon and issuing out of the rent of this estate by way of jointure, and likewise this sum of money for children, amounting to between six and seven thousand pounds. These are considerable burdens upon an estate, if it can be dealt with in the manner in which it is contended it can be by such tacks as have been made; but still we must take into our consideration, that whatever may be the effect of reasoning of that kind, the question at last results to this, what according to the general rule of interpretation as fixed by decision on Scots tailzies, you are at liberty to reason from such circumstances as those to which I have been alluding.

During some part of the time which has elapsed since these tailzies were made, these estates of March and Neidpath undoubtedly (and the estate of Queensberry too) have been let on leases for such terms and upon such grasssums as I shall have occasion to mention; and it is a circumstance unquestionably of considerable weight, that leases of that nature were made by persons who stood connected with the heirs of tailzie, and holding judicial situations, from which it is fairly enough inferred,

* Here the Lord Chancellor entered into a discussion as to the effect of taking grasssum upon the rent, the operation of law upon the transaction, and the consequence of the principle established in the Scotch courts by their final decision as to teind-duties, and the mode in which grasssum is to be taken into calculation in the estimate of rent for the payment of those duties. The discussion is omitted here, because it is afterwards resumed to the same effect. See *post*.

that they must have been acting upon their notions of what was the law of Scotland at the time.

When the late Duke of Queensberry came into [368] possession, he seems to have done acts of which I shall say no more, than that his Grace appears to me to have intended to make as much of the estate as the powers he had would enable him to make, and no court of justice has a right to say that there was any thing wrong in that intention. The leases of Easter Harestanes and of Whiteside, the set of leases which have been called "alternate leases," and the leases sought to be affected at the suit of the Duke of Buccleuch, particularly the lease of a farm called Hallscar, are the most material to be considered. There are some other leases of minor note, which I shall not trouble you with in the detail of the facts and circumstances. They may be very easily disposed of, when you have determined what is your judicial opinion as to the others.

Case of Harestanes.—The lease of Easter Harestanes was granted under the Neidpath entail, in which it is declared, that the heirs of tailzie are not *to sell, alienate, wadset or dispose*, nor to grant infefments of liferent, nor annualrent. There is no prohibition of any sort against granting leases; but the deed contains a permissive clause, by which "It is expressly provided and declared, that notwithstanding of the irritant and resolute clauses above mentioned, it shall be lawful and competent for the heirs of tailzie above specified, and their foresaids, after the decease of the said William Duke of Queensberry, to set tacks or rentals of the said lands and estate during their own lifetimes, or the lifetimes of the receivers thereof, the same being always set without evident diminution of the rental." The late Duke had granted a lease to Alexander Welsh of the lands of Easter [369] Harestanes for fifty-seven years. The entry of the tenant was at the term of Whitsunday 1791: the rent payable was £74 *ls.* sterling; and it was further stipulated, that the tenant should pay the sum of £300 of grassum, or entry money. In consequence of proceedings (in the Wakefield case) which had taken place before the Court with respect to a lease for ninety-seven years, under the same entail, Welsh brought an action of declarator against the late Duke of Queensberry, the late Francis Earl of Wemyss, and the late Francis Charteris Lord Elcho, his eldest son, as the next heirs of entail, setting forth, that as some doubts had arisen with regard to the validity of the lease, he had brought the action, to have it found and declared, that it was a valid and sufficient title in his person for all the years of its endurance then to run. The action having come before Lord Woodhouselee, the defenders were assolizied by an interlocutor of the 25th of June 1808; this lease for fifty-seven years, as the lease for ninety-seven years, being, in the judgment of the Court, prohibited by the prohibitory, irritant and resolute clauses contained in the entail of the Neidpath estate.

Lord Wemyss and Lord Elcho having both died, an action of transference was raised, and the suit was, to use our expression, revived. On the 6th of December 1809, the Lord Ordinary having considered the memorials for the parties, and whole cause, repels the reasons of declarator, assolizies from the conclusions of the libel, and decerns; that is, again stating his opinion that the lease was bad; "but he reserved to the pursuer, (that is the tenant,) [370] his recourse upon the warrandice in his tack against the Duke of Queensberry and his representatives, in the event that the said tack should be set aside, as *ultra vires* of the granter, in a regular process brought for that effect." The Lord Ordinary was of opinion that the lease was good for nothing, regard being had to the nature of the entail: but that the late Duke of Queensberry having entered into a warranty, his assets were answerable to the tenant for such damages as would compensate him for the loss of his tack: and as those assets will be equally affected by his warrandice as to all the tacks, it becomes a question of very great value as between the parties in the cause; but the value is trifling, compared with the extreme importance of the case, as establishing a rule for the administration of property.

After this decision the late Earl of Wemyss brought an action of declarator against the late Duke of Queensberry: in which he stated, that William Duke of Queensberry, in the year 1731, made up his titles under this entail, but notwithstanding the limitation therein contained of the powers of the heir of entail in setting tacks, he had set or granted tacks or leases of different parts or parcels of the said lands and estates, to endure for a longer term or period than his own lifetime, or the lifetime of the receivers thereof: and that the said tacks or leases had been granted, upon pay-

ment by the tenants of fines or grassums, and with diminution of the rental: he then alleged that he was the heir of entail, and entitled to succeed to the lands and estates on failure of the Duke of Queensberry, and the heirs-male of his body; that the tacks or leases had been granted [371] to the manifest prejudice of his eventual right and interest as heir of entail, and therefore he prayed that the Duke, and all those tenants whom he names, should be convened before the Lords of Council, and that it should be found and declared by their decree, that it was not competent to, nor in the power of the said William Duke of Queensberry, to set or grant any tacks or leases of any part of the entailed estates to endure for a longer period than his own lifetime, or the lifetime of the tenants receivers thereof, except in terms of, and under the provisions of the act for encouraging the improvement of lands in Scotland held under settlements of strict entail, nor to grant any tack of the lands and estate in consideration of fines or grassums, and thereby diminish the rental; and that all such tacks and leases so granted, either for a longer period than prescribed by the entail, (unless they are in the terms of the act of Parliament,) or upon the payment of grassums by the tenants, are void and null, and should be of no effect as against the heir of entail.

This action was remitted to the previous process of declarator at the instance of Welsh, depending before Lord Woodhouselee. A representation having been given in for Welsh against Lord Woodhouselee's interlocutor, there was another interlocutor pronounced: "Having heard parties procurators upon what is stated in the representation, the Lord Ordinary recalls the interlocutor complained of; and in respect the action of declarator at the instance of the Earl of Wemyss against the Duke of Queensberry and others his tenants is now remitted to the present process, [372] conjoins the processes;" then there is the usual direction in that respect.

The Duke of Queensberry died soon afterwards. There was an action of transference against his representatives; and on the 12th of November 1812, the case having been then reported, the following interlocutor was pronounced by the First Division of the Court. "Upon the report of the Lord President in place of Lord Woodhouselee, and having advised the informations for the parties, the Lords sustain the defences in the process of declarator at the instance of Alexander Welsh against the Earl of Wemyss and others, substitutes under the deed of entail; and assoilzie the defenders from the conclusions of the libel, and decern;" that is, the whole Court then concur with the Lord Ordinary, and hold that this lease for such a rent and such a grassum, and such a term, was not a good lease. Then they "remit to Lord Hermand to hear parties on the conclusions of the libel for damages, and to do therein as he shall see just." And with respect to the process of declarator at the instance of the Earl of Wemyss against the late Duke of Queensberry, and John Anderson and others, tenants of the tailzied lands and estate of Queensberry and others, they also remit the said process to Lord Hermand as Ordinary, in place of Lord Woodhouselee, to hear parties on the conclusions of the same as applicable to the cases of the several defenders, and to do therein as he shall see just. The interlocutor of the First Division of the Court of Session pronounces, that Welsh cannot sustain his lease against the persons who are [373] the heirs of entail; but the interlocutor on the declarator of the Earl of Wemyss against the subtenants, leaves the heirs of entail to proceed, in order to determine whether they can substantiate their declarator, against each and every of those tenants mentioned in that declarator; those tenants having leases which were of the same nature as those sought to be affected by that action of declarator.

The case of Easter Harestanes includes two questions, the first, Whether a fifty-seven years lease is an alienation? you have decided that a ninety-seven years lease is an alienation;—and there are some decisions that leases between fifty-seven and ninety-seven are alienations:—another question is, What is the effect of the grassum which was taken in this case of Easter Harestanes? that is a question common to that and the other cases: with respect to the duration of the lease— the fifty-seven years furnishes a question peculiar to that case.

Case of Whiteside. The next case which was before the Judges of the First Division, was the case of the lease of Whiteside, and with respect to that lease, it was a lease for the life of the tenant. The rent was not less than the rent which was payable under the former lease, but it was insisted that this was a lease made for a grassum, and that therefore it ought to be reduced. The fact that it was made for a grassum, is a finding clear in the case. This farm had been let, together with two other farms; they were afterwards divided in the manner stated in these cases. There

is no doubt that Whiteside, which is mentioned as having been let for the same rent, was let upon a grassum; and that the rent in this lease was affected by the [374] amount of the cess, and rogue and bridge money, with which it was not let by the former lease.

There was a special interlocutor, first of Lord Hermand, then of the Lords of Session, with respect to this lease; and in order that the case may be fully comprehended and properly decided, it is necessary that the interlocutors should be read: "Having advised the condescendence and answers, in the process of reduction at the instance of the Earl of Wemyss and March against William Murray, and whole processes, conjoins this process with the declaratory action between the parties depending before the Lord Ordinary, in so far as the declarator is applicable to the present case: Finds it stated in the condescendence, and not denied in the answers, that the whole farms, whereof the leases are now under reduction, were formerly let by the late Duke of Queensberry for fifty-seven years; and, with an exception stated by the defender of the lands of Flemington and Crook, under burden of grassums, the interest of which bore a considerable proportion to the yearly rent: Finds it admitted in the answers, that in or about the year 1807, many of the tenants holding leases for fifty-seven years, *renounced their leases, and took new ones for periods equal to the terms unexpired of the old ones, but without paying any grassums for their new leases*; and that soon afterwards, the tenants of all the farms to which the present discussion relates, whether they had got new leases of the nature above mentioned, or had continued to possess on their fifty-seven years leases, executed renunciations, and accepted [375] of the existing leases, for which they paid no grassums; as also, that when the tenants renounced their former leases, and took the present ones, contracts were entered into betwixt them and the Duke's commissioner Mr. Tait, as stated in the condescendence: Finds, that although it be stated by the respondent, that, depending on a contingency not explained, but said not to have existed, these contracts never were acted upon, yet they afford evidence to show, that the new leases were, with the exception of the term of endurance, a *surrogatum* or substitute for those which had been renounced: Finds, that the rents payable under these renounced leases, must, of necessity, have been, from the inconvenience and loss arising to the tenants from the advance of money, a consideration of the doubts of the powers of the lessor, held out in the contracts and other circumstances, have suffered a greater reduction than the amount of the interest of the sums paid in name of grassum: Finds, that the entail founded on by the parties in this cause, contains a clause by which it is expressly provided and declared, that notwithstanding of the irritant and resolute clauses above mentioned, it shall be lawful and competent to the heirs of tailzie therein specified, and their foresaids, after the death of the said William Duke of Queensberry, to set tacks of the lands and estate during their own lifetimes, or the lifetimes of the receivers thereof, the same being always set without evident diminution of the rental: Finds, that the rent payable under the renounced leases, diminished as it [376] was by the payment of grassums, cannot be considered as constituting a fair rental, such as is implied in the above clause: Finds, that the lease under reduction, though it might be supported by the first part of that clause, as granted for the lifetime of the receiver, is cut down by the concluding part of it being set with evident diminution of the rental." Then he repels the defences.

When this came before the Court, they pronounced this interlocutor: "They find, that the entail in question contains a strict prohibition against alienation; but a permission to grant tacks of the said lands and estate during their own lifetimes, or the lifetimes of the receivers thereof, the same being always set without evident diminution of the rental: Find, that in the year 1769, the petitioner's father obtained a tack of Whiteside for nineteen years, at a rent of £109, for which he paid a fine or grassum of £132 18s. 10d.: Find, that in the year 1775, the petitioner's father obtained from William Duke of Queensberry a tack of the farm of Fingland for twenty-five years, at the rate of £50 10s., for which he paid a grassum of £480: Find, that in the year 1788, he renounced this lease, of which twelve years were to run, and obtained a new lease, for fifty-seven years, of the said farm of Fingland, and also of the farms of Whiteside and Flemington, at the rent of £260 16s. 4d., being the amount of the old rents payable under the former tacks, with the addition of the cess, and rogue and bridge money, amounting to £11 odds, for which he paid [377] a grassum of £400, which was declared to be for

Whiteside and Fingland only: Find, that in the year 1807, the petitioner's father renounced the said tacks and took new tacks to himself and sons for their lifetimes, at the rents payable under the tacks renounced: Find, that this current tack must be held merely as a substitute for the former ones, and subject to any objections, on the ground of grassum, diminution of rental, or otherwise, which were competent against the tacks renounced: Find, that in estimating the rents of Whiteside and Fingland, the value of the fines or grassums paid at the commencement of the former tacks ought to have been added to the annual-rent: Find, that this was not done, and that the new rent was made the same as the old rent, *plus* the cess and bridge money: Find, that this was not equal to the value of the grassums taken, and therefore that the said last tack of Whiteside and Fingland was set with evident diminution of the rent, and in violation of the said clause in the entail: Further find, that the conversion of part of the new rent into a fine or grassum of £100 was to the manifest prejudice of the succeeding heirs of entail, and operated as an alienation *pro tanto* of the uses and profits of the estate; therefore, although the said tacks in point of endurance do fall within the permission of the entail above referred to, find that they are struck at by the clause prohibiting alienation, as well as by the condition in the said permissive clause against evident diminution of the rent; therefore, in the process of declarator, repel the defences; and in [378] the process of reduction, repel the defences, sustain the reasons of reduction, and reduce, decern and declare accordingly." And there was an additional interlocutor with respect to the lease of Flemington, which it is not necessary I should state to your Lordships. The principle therefore laid down in the declaration is, that this lease operates against the prohibition of alienation, and also amounts to an evident diminution of rental.

Case of alternative leases.—With respect to Neidpath, there was a third case as to the alternative leases. I will state enough to show what is meant by that term. There was a farm called Edstoun. In the year 1731, when the Duke of Queensberry succeeded to the estate, it was rented at the sum of £83 10s. In 1756, the rent was raised to £85 12s. In 1769, it was let for nineteen years to Alexander Horsburgh and John Saltoun, at a rent of £149, with a grassum of £193 7s. 4d. When that lease expired, a gentleman of the name of Symington obtained a lease for fifty-seven years from Whitsunday 1792; the rent stipulated upon that occasion was £155 7s., and the grassum £300. In 1807, Robert Symington renounced his lease, and obtained a new one,—which is the lease sought to be set aside,—“for the space of thirty-one years, and from and after the term of Whitsunday 1807, which is hereby declared to have been the term of the said Robert Symington's entry, notwithstanding the date hereof; declaring always, as it is hereby expressly provided and declared, that in case it shall be found that the said William Duke of Queensberry is prevented by the entail of his [379] Grace's estate of March, from granting a lease of the aforesaid subjects for the above-mentioned term of thirty-one years, then, and in that case, this lease is granted for, and shall subsist, and be understood to have been granted for, the term of twenty-nine years, twenty-seven years, twenty-five years, twenty-one years, or nineteen years, from the said term of Whitsunday 1807, whichever of the said several terms of years, from the said term of Whitsunday 1807, (short of the aforesaid period of thirty-one years), the Court of Session or House of Lords shall find to be the longest period of those above specified, for which the said Duke had power to grant a valid lease of the aforesaid subjects.”

In the narrative of this lease, it appears to be a lease the duration of which is to depend upon the decision, when it is obtained, of the Court of Session or the House of Lords, whether it is to be a lease for twenty-nine years, twenty-seven years, twenty-five years, twenty-one years, or nineteen years. Now, according to the law of Scotland, there must be what they call an *ish* (that is a determination) to a lease: But no man living can tell what it is to be in this lease, until the Court of Session or the House of Lords have said in that or some other case what it may be. This is a lease, which one party says cannot be exposed to challenge, on account of a grassum being taken: the other party says it can, and ought to be affected upon that ground. The Court of Session held at first, that the limit of the Duke's power was nineteen years; but they say the whole transaction is affected by that general fraud which affects the in-[380]strument; and that therefore, though the lease

might be a good lease, notwithstanding the determination of it is uncertain, for some period stated in it, yet it is affected by the general fraud.

These are the cases which appear to me necessary to be stated. I pass over the minor cases.

Points and arguments in the three cases.—1. *Harestanes.*—The points with respect to these three sets of leases, may be thus shortly stated. First with respect to Easter Harestanes; the lessees and the representatives of the late Duke of Queensberry contend, that the Duke had power to grant such a lease; that the decided cases prove the power of granting such leases; that the entail, according to its legal construction, does not prohibit granting leases for fifty-seven years, and that, whatever may be the case with respect to a lease for ninety-seven years, a lease for fifty-seven years cannot be objected to; they say, that the rent being equal to the last rent reserved, is equal to that which the law requires; and being equal to that which the law requires, that grassum is not prohibited by entail, or by any implication, or by any fair understanding of the words in the entail. It was further insisted, that the lease was within the meaning of the statute of 1449, and that the act is in complete force at the present day; though leases are not in the law of Scotland conveyances, but mere incumbrances on the fee or property, and only so made by the statute, inasmuch as the lessees cannot be ejected during their terms while they pay their rents. The words of the act are, "It is ordained for the safety and favour of the poor people that labour the ground, that they, and all others that have taken, or shall take lands in time to come [381] from lords, and have terms and years thereof, that suppose the lords sell or annaillie the lands, the takers shall remain with the tack until the issue of their terms, whose hands soever the lands come to, for sicklike mail (that is the same rent) they took them for." And they say, that by virtue of this statute, the tenant of Harestanes paying a grassum, is entitled to his lease.

Upon this statute, the effect of the word annaillie must be considered. We have decided, that a lease for ninety-seven years is void as an alienation. The present question is, how far that may apply as an authority to a lease for fifty-seven years.

The successor in the tailzie contended, that a lease of this endurance is prohibited by the entail; that any leases of extraordinary endurance are prohibited; that with respect to the statute of 1449, it authorizes only such leases as may be lawfully made, not such as contravene the prohibitions of an entail; that the lease is bad on various grounds, all of which they proceed to state, if made for a grassum. They contend, that the practice did not sanction such leases; and that practice, if proved to exist, could not sanction such leases.

2. *Whiteside.*—With respect to Whiteside lease, the argument on one side was, that such a lease does not fall under the prohibition to alienate, because deeds of entail are by the settled rules of interpretation in the Scotch law *strictissimi juris*, and a prohibition to alienate, according to such rules of interpretation, does not extend to leasing, and when the entail is so interpreted, does not extend to a lease of ordinary endurance, though granted in consideration of [382] grassum; that the lease being granted for a term, and at the rent permitted by the entail, the grassum worked no injury. They further contended, that a man who is permitted to let without diminution of the rental, if he lets without diminution of rental, does no injury to the person who is to take after him, because, if he takes no grassum, the person to take after him cannot complain; and if he takes a grassum, he still takes that which he may take, and that there cannot be a complaint if the lease is granted for that length with a grassum; that the rentals of Whiteside and Fingland were not, in the sense of the deed, diminished by the grassum being taken, and that therefore the lease cannot be said to be set with a diminution of the rental; and further, they insisted that neither the Duke nor the tenants were guilty of any fraud in this matter; that in his own particular dealing, the Duke was not, by the general and comprehensive deed he entered into with all his tenants, guilty of fraud upon the entail, if what fraud upon the entail can be defined. Then they rely upon the practice; they say all landed proprietors do, and for a very long period have let with grassum. As to the words, "without diminution of rental," they must be construed, they say, with reference to former leases, or leases immediately preceding; that it was so with respect to church and

crown lands; that it has been so to a vast extent with respect to a vast number of estates; that it appears by a long series of decisions, that such a prohibition to let with a diminution of the rental, did not prohibit the letting with grassums. They further insist, that if there was any irritancy, that irritancy might be purged.

[383] The heir of entail, on the other hand, says, that the lease is comprehended under the prohibitions of the entail; that the construction which is put upon the word rental on the other side, is not the proper construction; that grassum is anticipated rent, within the meaning of the deed of entail, and that it is so when taken upon surrender of former leases; that such dealing with the estate 's within the meaning of the words diminution of rental; that upon a lease, twelve years of which were unexpired, if the tenant renounces the lease, and takes another lease, extending the term twelve years, that the grassum taken for the first lease must have some operation.

The tenant contends, that whatever may be the case as between the Duke of Queensberry's representatives as standing in his place, according to all the principles of law which ought to affect his case, he is the tenant, and ought to be considered as a third party; that he is a purchaser, that he is contracting onerously, that he is entitled by virtue of the statute of 1449, and he prays that, whether his lease is a good lease or not, the Court will not consider what the case of any other persons may be, because he happens to have a good recourse against the assets of the late Duke of Queensberry. Then he insists, that all the prohibitions must be embodied in expression, that there is no prohibition embodied in expression, and that the irritancy (if any) may be purged.

3. *Alternative leases.*—With respect to the alternative leases, as far as the points made on each side arise out of the facts of the case, they insist that those leases are bad, on the same grounds as all the other leases that are to be affected by a grassum; and they say it is impos-[334]-sible that the law can be such, that when a lease is executed, neither the heir nor any body else who is to succeed him, can tell whether the lease is for thirty years, twenty-nine years, twenty-seven years, twenty-five years, twenty-one years, or nineteen years.

These include all the points with respect to the Neidpath estate.

Queensberry leases.—With respect to the Duke of Buccleuch's case: That came before the other Division of the Court of Session, and the two Courts differ altogether in their views of the law on this most important question.

The Duke of Buccleuch's leases relate to the entail of the estate of Queensberry; and without going through all the particulars of the leases which have been granted upon that estate, they may be represented generally as being *leases granted for long periods, grassums being taken upon those leases*, and first leases granted to tenants in those tacks which were current, or to strangers under the burden of the current tacks, and with obligations in both cases, to grant a new lease annually for nineteen years during the Duke's life. With respect to that species of lease, they say, that it is not only affected by the circumstance of grassums having been taken, but that it is to be considered as a lease for more than the Duke's life *or* nineteen years; they say it is a lease for the Duke's life *and* nineteen years; to which it is answered, that is not a lease for more than the lifetime of the setter or for nineteen years, because, in order to make the lease good, there must be possession, and that the possession is a possession which at the death of the Duke of Queensberry must [385] be referred to the lease then actually existing; and in truth and in fact they say, whatever it may be, in semblance and appearance, it is nothing but a lease for the life of the person or for nineteen years.

There is a second class of leases, where *the current leases had* actually expired.

There is a third class of leases granted without an obligation of renewal, but where the leases renounced were not near their natural expiry; and there were other leases which were not granted till the previous leases had expired, but on which grassums were taken. The validity of those leases was not only discussed in the general case of the Duke of Buccleuch, but also in the case of one of the tenants. With respect to the tenant's right, he insisted likewise upon the circumstance, that he was an onerous purchaser.

In this case, the Second Division of the Court of Session declared the particular lease before them was good, and that the leases in general were good; and in this state of things, the cause came before this House, when you were pleased to make a

remit, which has brought before you the collective opinion of both Divisions of the Court of Session, by which it appears that there is great diversity of opinion among the Judges.

One of the defences of the Duke of Buccleuch, in one of those actions, stated that "the deceased Duke of Queensberry succeeded to the estate of Queensberry in the year 1778, as an heir of entail under the foresaid deed of tailzie, and made up titles accordingly under the conditions therein contained: but after entering on the possession of the estate, he [386] did not, as the leases gradually expired, let the lands at the just avail for the time, in terms of the entail, but granted leases for nineteen years below the true value, and in consideration of large grassums received; and after having continued this system for a period of eighteen or nineteen years, during which time he had consequently drawn a grassum for the letting of every farm on the estate, not satisfied with the slower mode of again exacting grassums as the leases might periodically fall, he, from the desire of speedily raising a large sum of money to add to his great wealth, and with the view of defeating the prohibitions contained in the said deed of tailzie, thought fit, about the year 1796, when the whole estate was under current leases, which had been granted by himself, to form a device, without waiting for the expiry of these leases, of letting anew the whole estate, both for his own lifetime and for nineteen years after his decease, and also in diminution of the rental, contrary to the conditions of the entail;" and then it proceeds to state what the Duke of Queensberry had done in pursuance of that device, contending that it was a fraudulent use of his power, and that there might be a fraudulent use of the power of the heir of entail, although what he did in the execution of this power might be within the letter of the power under which he professed to act. Then they say, "that these were not proper leases, but complex contracts, conveying away the lands for a term of years, partly for yearly rent, but in great part for a grassum or price payable to the Duke himself, because they were granted for [387] a space longer than the setter's lifetime or nineteen years; the obligation of renewal being part of the contract, and elongating the term of possession for which the lands were let; and because the leases were not let for the just avail, but for a rent known and intended to be inadequate, and for less than that avail; and because they were let with diminution of the rental actually existing previous to letting them, the Duke having previously, by grassums, received an additional rent for the lands beyond that stipulated in these leases."

Upon the remit, two orders were made by this House, one with respect to the tenant, and the other with respect to the general cause; which latter (Dom. Proc. July 10, 1817) was, "that the cause be remitted back to the Court of Session in Scotland, to review generally the interlocutor complained of in the said appeal: and in reviewing the same, the Court is to have especial regard to the fact, that this action of declarator is brought by the executors and trust-disponees of the late Duke of Queensberry, as such, against the heir of tailzie, seeking thereby to establish, unconditionally, all and each of the numerous tacks mentioned in the summons, and granted by the said Duke, in the manner and under the circumstances mentioned in the pleadings, and is not instituted by any of the persons to whom such tacks are granted, nor are any such persons parties thereto: that the Court do reconsider the defences of the appellant, and especially whether, in a question *between such parties*, the leases so granted ought or ought not to be considered as granted in execution of such device, [388] as is alleged in the said defences: and if so granted, whether the same ought to be considered as granted in fraud of the entail, and are not such as ought on that account, or any other account appearing in the pleadings, to be held invalid, or not to be sustained at the instance of the pursuers, as representing the Duke: and in reviewing the interlocutor complained of, the Court do particularly also reconsider what is the legal effect of the word 'dispone,' contained in the deed of tailzie of the 26th December 1705, with reference to tacks of lands comprised in the said deed; and further, do consider what is the effect, with reference to such tacks, of all other parts of the said deeds which relate to tacks, having regard to the endurance of such tacks, and to the fact of grassums being or not being paid upon the granting thereof, or paid upon the granting of former leases: and all other the terms and conditions upon which such tacks were made: and to the effect of such grassums, terms and conditions, in reducing the amount of the clear rent receivable by the heir

of tailzie: and to all the circumstances under which the appellant has alleged, and it shall appear that the late Duke of Queensberry granted all such tacks." And then this was addressed to the Second Division,—“that the Court to which this remit is made, do require the opinion of the Judges of the other Division in the matters and questions of law in this case in writing; which Judges of the other Division are so to give, and communicate the same; and after so reviewing the said interlocutor complained of, the said Court do and decern in this cause as may be just.”

[389] There are in print the opinions of all the Judges which have been taken in consequence of this remit. Upon these opinions I will make only this observation: I am either bound to suppose, that the question about the Duke of Queensberry's declarator, as contradistinguished from the proceedings of declarators in general, by the circumstances which are stated in this case, was not a question understood, or that it was a question thought of so little importance, as certainly not to produce information enough from those opinions, to enable those who thought that question of any weight, to look at them, to resolve any doubts they might feel.

There was no ground to attribute to me, that I felt a notion that an action of declarator was not the form in which the representatives of the late Duke of Queensberry could proceed in the Court of Session, in order to have it declared that these leases were good. I knew that was the species of action which would be brought in the Court of Session; but the remit was made in the Duke of Buccleuch's case; and the reason of making the remit in that form was, that in the proceedings of the trustees of the Duke of Queensberry against the Duke of Buccleuch, they not only sought to have these leases substantiated, but to be protected from all claims of damages, on the ground that they were good. Much of the contest in this case went on this ground, that whatever might be the effect of granting one such lease on the payment of a grassum, yet there might be such a conduct on the part of the heir of entail in possession, such a comprehensive and vast dealing, buying up the leases of tenants, making them renounce their leases, and letting all the lands [390] upon such a general system, as to amount to fraud, and although it might be the most difficult thing in the world with respect to tenant A. or tenant B. or tenant C. to say it was a fraud on the entail, yet that there might be such a thing as a fraud upon the entail nobody in the course of that matter disputed. The question under these circumstances was, whether those who were the representatives of the late Duke of Queensberry had a right to interpose to have all those leases declared good instruments, although it might be very fit to know how far the lease of A. or B. or C. or D. was or was not connected with that system of fraudulent management, and whether, notwithstanding that system of fraudulent management, you could prevent a particular tenant having a declarator, if he was entitled to it in an action of declarator, that his lease was a good lease.

In the case of the Roxburghe feus,* where the heir of entail having a power to feu such part of the lands as he should think fit, provided his grants were not made in diminution of the rental, etc. and the heir feued all the lands, taxing the casualties, the House of Lords decided, that this was making such a use of the power of entail, as a court of Justice would not permit. As between the Duke and his tenant, if there were no other parties in the cause, you might decide in favour of the leases: but here there might be one principle, it was argued throughout, on which to contend against the Duke of Queensberry, yet a principle that would not enable you to contend against all his tenants, or most of his tenants.

[391] When the Court of Session was asked, by the terms of the remit, whether the action was an action which he could have maintained, if it was made out that there was in the leases that device, and that fraud upon the entail which the Duke of Buccleuch insisted made part of the system of the Duke of Queensberry, I had not the least idea that it would be considered as a remit, desiring to be informed, whether a man could in the ordinary case proceed by action of declarator. The particular circumstances that led to that particular remit, were of some such sort as I have been alluding to; and I must say, that the remit in its nature has not been well understood, and that it has not received the answer which was expected.

* *Ker v. Roxburghe*, Dom. Proc. 18 Dec. 1813. MSS. and 2 Dow. 119

The majority of the Judges seem to have been of opinion, that these leases were good; that grassums could not affect them. And with respect to the word "dispose," the majority of them were of opinion, that the word "dispose" would have the same effect as the word "alienate."

After these proceedings, from this interlocutor, (this case embracing the general consideration, and the additional circumstance that there is an onerous purchaser,) the appeal now comes back to this House. The several points which seem to have been stated in the Courts below, and discussed, involving the merits of the question upon this remit, were, with very little alteration, the same points on both sides as before submitted to the Court.

In the March and Neidpath entail, the clause about setting tacks is a permissive clause, that is, "notwithstanding the irritant and resolute clauses [392] above mentioned, it shall be lawful and competent for the heirs of tailzie above specified, and their foresaids, after the decease of the said William Duke of Queensberry, to set tacks or rentals of the said lands and estate during their own lifetimes, or the lifetimes of the receivers thereof, the same being always set without evident diminution of the rental."

In the Buccleuch entail, the question arises upon the prohibitory clause, that is to say, the clause against *disposing* in any manner of way whatsoever, "except so far as they are empowered in manner after mentioned." The clause then which relates to tacks and rentals, is a clause that they shall not do so and so, it is therefore a prohibitory clause in the terms of it, but still seems to be in some degree permissive also, by the words "except so far as they are empowered in manner after mentioned."

To the March and Neidpath entail, there is subjoined a paper which has this denomination: "Rental of the lands, teinds and others, lying within the sheriffdom of Peebles and Selkirk *respectivè*, which did pertain to John Earl of Tweeddale, and John Lord Yester his son, and were sold and disposed by them to William Duke of Queensberry in liferent, and to Lord William Douglas, his second lawful son, and their heirs of tailzie therein mentioned, in fee, conform to the disposition thereof of the date the 19th day of October last," and which has particular relation to this present rental. Then they state what the lands are let at. There is, first in the parish of Lyne, I think they call it, the sum or rent of £5840 Scots; then follows this, "Paid out of this in sti-[393]-pend to the minister of Lyne, £466 13s. 4d. Item, deduced for the teinds of Scroggs, £66 13s. 4d." the sum of the deduction so much; and then follow the words, "remains of neat rent, £5306." They then proceed to state the rent in Peebles parish, where the sum of rent is £2428 6s. 8d.; "paid out of this of tack-duty to the parson, £66 13s. 4d.; to the vicar, so much;" there then rests of neat rent £2348 6s. 8d. It is not necessary to particularize the whole; but it goes through the several items of property which yield rent, stating the sum of rent, and stating what remains of neat rent, and then it concludes summing up the whole foregoing rental contained in the preceding four pages, which extends to the sum of £17,002 13s. 10 pennies Scots, which I take to be the amount, not of what is called the rack-rents, but of the rents, making the deductions which give the quantum of the revenues.

According to the law of Scotland at the time when this tailzie was executed, in calculating the teinds, the estimate was made by looking only at the rent reserved, and no benefit was given in that valuation to those who were entitled to the teinds with respect to any grassums that had been taken: but at a period long subsequent to this, the Court of Session having reconsidered the statutes, with reference to this matter of teinds, put a construction upon the words * "the rents of lands constantly paying;" [394] and held, that under these words they were entitled to say that a grassum was worth so much with reference to the calculation of rent, and that, instead of estimating the teinds by the rent reserved, they would take a proportion of the grassum, though the land did not constantly pay that grassum, and consider as the rent not the rent which the land constantly paid, but the rent which they

* Originally by decreets arbitral of Chas. I. dated 2 Sept. 1629, upon submission by titulars, proprietors and other parties interested; ratified in Parliament by act 1633, c. 17. See the decreets. subjoined to the acts of the reign.

thought in justice they ought to consider it as paying as between the persons entitled to the teinds and the land-holder.

This was a very just alteration as to any question between the parties entitled to these different species of property; but how the Court of Session, after their predecessors, for nearly a century together, had said that the statute afforded the rule, and the words were what they were to go by, could give a construction which the words do not bear, in order to reach the justice of the case, is a difficult question, which ought to have been discussed upon the remit, but has been altogether neglected. I am not saying, that because this has been done in a question between the person entitled to the teinds and the owner, that therefore it is applicable to heirs of tailzie and onerous purchasers; that is another question; but the question is material for this reason, that this alteration of the law, by necessary consequence reduces the clear rents of the March and Neidpath and Queensberry estates in a very serious degree.

As to the question, what is the effect of the statutes of 1449 and 1685 taken together, with respect to a tack for fifty-seven years; supposing, for argument's sake, that the March and Neidpath entail must be considered as prohibiting a tack of fifty-seven years [395] as an alienation, does the statute of 1449 * afford any objection to the conclusion of law? My clear opinion is, that it does not. Whether entails before that are to be considered as odious or not, or whether the statute of 1685 is or is not to be considered as purging them of all odious qualities, it is extremely clear, that if the statute of 1685 authorizes the entail, and if the entail, by force of that statute, prohibits a tack of fifty-seven years as an alienation, it is impossible to say the statute of 1449 can prevent the effect of the statute of 1685.

We have been told again and again, that we are to proceed on the matter upon that system of interpretation that he who runs and can read may fix instantly the interpretation; yet, notwithstanding all these dicta, and the representations of the great character of the heir of tailzie, most assuredly I may say, as to these decisions about estate tail, that those who have run and read, have felt very different convictions, and entertained very different feelings with respect to the interpretation to be put on what they have so read. Looking at the opinions of the Court of Session, it is very difficult to reconcile their opinions in a matter in which no two men who run and read it is said can differ.

It was stated at the bar, on the hearing of this case, that the present proceeding was not to be looked upon as a claim for damages against an heir of entail, or his representatives, on account of his having contravened the prohibition; that it was not [396] to be looked upon as a claim for sums of money, or rather as a repetition of rents unduly anticipated; but that it was to be considered as a case of a right granted to a third party, for valuable consideration, if effectual; and which could only be made effectual by the combined operation of the different clauses which the statute of 1685 requires in entails—that it was a claim founded in contravention, (which is important to be observed) and where therefore the operation with respect to the smallest part of the estate, if it could not afterwards be purged on account of circumstances, would extend to the whole estate: In such a case, where it was insisted that the generality or universality of the acts of the late Duke, constituted a species of dealing with the entail which (whatever name he might give to that dealing, or however he might characterize it) might with respect to him be looked at in a point of view in which it might not be capable of being represented to the mind in a question between tenant A. and tenant B. and others, and where the defences of the Duke of Buccleuch were defences founded on the allegation of devices which the law would not sustain, and where the summons demands (as it does in this case) not merely to have a judgment that these leases were good, but to have it declared by the Court, that, free of all molestation or interruption whatever on the part of the heirs of tailzie, the executors might take the personal estate of the late Duke of Queensberry, and dispose of it as they thought proper; and where the distinctions were drawn between tenants claiming as purchasers, and all this device,

* By this statute for the encouragement of agriculture, leases, which before had been mere personal contracts, were established as *quasi* real rights against general heirs and purchasers of the inheritance.

as it was called, on the part of the Duke: Before we proceeded to decide [397] on a Scotch case of such a nature, it was surely expedient to know what the Scotch Courts thought of the case so represented; and for this purpose the case was remitted.

If I am to look at the opinions of the Judges, in consequence of this remit, as amounting to this, that a court of justice is not to change the law, (and God forbid they should change it!); if I am to look at what I read in those opinions, as pointing out, that although the Duke of Queensberry has made deeds to the amount of three or four hundred, although he has made tacks, and taken large grassums, and procuring the tacks to be renounced, has let the lands again, and so covered the whole estate with these tacks, if I am to look at those opinions as declaring that he has not thereby exceeded his power, that he has only done what it was lawful for him to do, it is very difficult to imagine in what cases those who make claims against him can say, that what it was lawful for him to do he has fraudulently done.

We have, in our own law, cases, where men acting according to their powers, may abuse them as to the objects of the powers. These are difficult cases to decide, and the Judges should take care they are not misled by the idea, that because powers may be abused, there has been in the cases put abuses of the powers. A noble Lord,* in one of the cases of this kind, had a power of appointing a certain sum of money among his younger children under a settlement. He made an appointment to one of those children, who was at that time at death's door in a consumption. What was the object of this appointment? It was, that if the child died, the [398] father should take out administration to that child, and claim the estate himself. That was according to the letter of the power; but the Court said that should not be, because it was substantially an appointment to himself, and not to that child.

The Judges differ very much upon the point. Some of them are quite clear this was a device, and that it cannot be sustained; others being of opinion that this was nothing more, in a great variety of instances, than a legal exercise of that power which the Duke had a right to exercise.

This remit has been treated as if those who had the honour of advising this House had really doubted whether the law of Scotland would permit such a thing in general cases, as bringing an action of declarator by the representatives of the deceased, to have the acts of the deceased cleared from all doubt, and difficulty, and controversy. Certainly your Lordships did not mean to express any such doubt.

In looking at the memorials which were presented when this judgment was to be applied in the Court of Session, I find what passed in this House treated in those memorials in a manner of which I know no example, and of which I trust I shall never see another instance. Your Lordships are in the habit, for the sake of assisting persons in doing justice to the suitors in the Court of Session, of endeavouring to put into the possession of those who are the agents of the parties all the doubts and difficulties which have occurred to your minds upon the subject. It is accorded as an assistance to those who are afterwards to discuss the points below; but it never was intended, that when such notes are handed out to those who are to deal with the case below, they are to use them as [399] if they were printed pamphlets, and to make observations upon them in the style, and tone, and temper, in which some of these memorials treat (and I think not very accurately either) what was stated in this House. No man entertains a higher respect than I do for the learning, talents and character of the persons whose names are subjoined to those memorials; but that is not a mode in which I can see a member of this House dealt with, without saying, I hope I shall see no other instance of it. The President of the Court of Session, upon this subject, says, "I shall first consider the chief arguments on which this proposition is disputed by the executors, and that in such a lofty tone of scorn, and such a cry of danger to established principles, as almost to frighten one from daring to think otherwise."

It is supposed, that those who advise your Lordships, have very little notion of the difference between an English entail and a Scotch tailzie, because I observed there seemed to be this difference between persons claiming under a Scotch entail, and persons claiming under an English entail; that leases of short duration, under

* Case of Lord Sandwich. See 11 Ves. 479.

a Scotch entail, have been sustained against prohibitions, and that that possibly might arise from the circumstance, that a person making an entail might be presumed not to mean to prevent ordinary leases being granted of the estate; although if the term "alienation" applies to leases at all, it is difficult to say why it is not to apply to those of short as well as those of long duration. A lease of short duration was by the Scotch Judges held good; whereas our Judges have held leases made by a tenant in tail as voidable, not as void. Upon reconsidering that question, I am at [400] a loss to know on what else the difference depends, in the law of Scotland, between long and short leases. We have been told we are overturning the law of Scotland,—that we are beating down established principles and rules which have been established for ages. I shall consider it an injustice done to the country, if in any decisions of mine an attempt to change the law of that country can be found; but it may happen that persons may have very different opinions as to what is the law of a country.

In applying the word "alienation" in the Neidpath case, in construction, I am perfectly satisfied that whatever distinction there may be, (if there be a distinction) as to the effect of the word "alienation," that word in all time has prohibited a long lease in Scotland. I formed that opinion upon the ground that the term was not now to be applied for the first time as prohibiting such a lease. If the law of Scotland be thoroughly investigated, it will be found there was no period when it was not an alienation. Holding that a long lease was an alienation, the next question is, Upon what principle,—for this is what I want to have sifted and examined—upon what principle is it to be said a short lease is not an alienation? The text books, and the authorities which decided the Wakefield case,* show that a long lease is an alienation; and it is now supposed, because they have said a long lease is an alienation, and have not said a short lease is an alienation, that it is to be concluded that a short lease is not an alienation; but I must find some principle on which the distinction has been made.—Now those who [401] contended for what is called strict interpretation in the law of Scotland with respect to entails, (and rightly, for I do not venture to trench on that principle of construction), say that alienation means something quite different from allocation; that alienation is the actual conveyance of a real right; that allocation is a personal contract for the use of the property, which by the statute of 1419, with respect to Scotland, is made a species of real right. But alienation, whether long or short, in essence, nature and quality, is exactly the same. A lease of nineteen years, and a lease of thirty-one years, do not differ as to their essential qualities and attributes. The one is no more an alienation, nor less, *primâ facie*, than the other. The one is no more and no less, *primâ facie*, an allocation. How long is too long for a lease, or how short is right, is quite a different question. If a short tack be sustainable according to the law of Scotland, which I take it to be unquestionably, and which (whether I can account for the principle on which it is so or not) I never will disturb (I think I can account for it upon a principle satisfactory to my mind) I wish to see what is the principle upon which other persons have seen the difference between a short tack and a long one.

It is said, and I agree it has great weight—what sort of a situation will you put all persons into, if you give a general sense to such words as "alienation" or "disponing?"—Perhaps it is a little too late to discuss that, after the general sense has been given, as far as leases are concerned. But it has been often asked, (and the papers in this cause go a great way to controvert the Wakefield case, but being settled we shall be bound by it.) How are we [402] to know what this lease is to be?—How are we to know which is a long, and which is a short lease? I never could bring myself to have any difficulty about that; and for this reason: If a lease was prohibited in any of these terms, you must travel with all the difficulties till you find the description of the tack. How is it with respect to death-bed?† How is it with respect to inhibition,‡ and other cases in which a distinction has been taken between

* *Montgomery v. E. Fernys*, D. P. Dec. 1813, MSS. and 2 Dow, 90.

† See *post* p. 116, and notes.

‡ *Gordon v. Milne*, id. 7008; and *Wedgewood v. Catto*, Fav. Dec. 13 Nov. 1817.

leases of one character and the other, with regard to which the assertion occurs, that such and such leases are not to be endured?—It is quite obvious, that whenever a question arises, where, notwithstanding inhibition—notwithstanding death-bed—notwithstanding prohibition, leases have been made which A. says are prohibitory, and B. says are not, a Court of Justice must deal with them, and say whether they are so or not.

We have had these arguments at our bar, as if they were the most unfortunate people as to landlords; and yet, if you look at their tacks, they seem so to deal with their landlords, as we have been told, if we were to insist on landlords dealing with their property, we should place them in the situation of not knowing what they should do, or forbear to do. You are not to place persons under the harrow of those difficulties, if the instrument has not placed them there; nor are you to be astute to find, that the instrument has a meaning to subject them to such difficulties; but if, in the true legal construction, they are exposed to them, they must submit. The instrument under which they claim is [403] the law by which they must abide. It comes, therefore, round again to the same question, if long leases be alienation, what is the principle on which short leases are allowed? That principle must be ascertained, with a view to see whether the same principle does or does not in any manner, and to what extent, apply to that which is certainly the great question in this cause, and which perhaps may be stated fairly to be the only question in this cause. What is the effect of leasing, and in that sense alienating, provided the lease be long, and falls under the term alienation? What is the effect of that principle, or any other you can discover out of the fact of taking grassums on leases too short to be alienations; but nevertheless where, though in one sense there is no diminution of the rental, it must be admitted, on the other hand, there is a diminution of what might have been the profit?

There are some points upon which I agree with some of the Judges—in some cases with a majority of the Judges—and I have the mortification to differ from a majority of the Judges in others. There is one very important part of this case, which is pronounced, I think, as the judgment of them all, in the interlocutor of the First Division of the Court—that is, with respect to those leases (I lay grassum out of the question for the present) in which the late Duke of Queensberry, having power to set for lifetime or nineteen years, set for nineteen years with a covenant to renew. It is contended that was a lease he could not make within the meaning of the charter, as it amounts to a lease for the life of the receiver, and eighteen years after. If so, it appears to me to be a [404] lease prohibited;—but I go so far with those who lay down the principles of strict interpretation of entails as to say, I have no doubt the Duke might, without covenant, from time to time take a renunciation, the effect of which would have been the same. Then the question is, does the obligation to do so, make any difference in a question between him and the heir of tailzie?—I think not; for this reason, that whenever the Duke happened to die, the possession of the tenant must have been under the lease that actually existed. With respect to the covenant for another lease, it is a mere personal contract, upon which it appears to me there could be no possession. According to the manner in which these tailzies are constructed, that is not to be denominated a lease or a tack for the whole of that period; entering into an obligation which does not fix itself by way of lease on the heirs of tailzie, would not affect the legal or equitable right *ultra* that of the person who grants the lease, and his power to grant. So it was decided in this House, in that case of *Leslie v. Orme*, where upon the main question a lease for four nineteen years was sustained; yet with respect to a reversionary lease, where there could be no possession during the life of the heir of tailzie, the House held it to be bad.

Whether taking the teinds affects the transaction, is a distinct point: taking a grassum cannot affect it in any other way than in a higher degree. There can be no doubt, that, generally speaking, a man would give more of grassum, if grassum can be legally taken for a lease of this sort, with such a covenant, than for a lease without; but in that point of view the question by which the lease is to be affected, is not upon the duration of the lease, for as a lease it has [405] a duration for nineteen years only—it is not upon the effect of the covenant, for the covenant does not bind the heir of

tailzie; but it is upon the effect of receiving that sum of money, which they contend, on the other hand, ought to be considered as rent, and not as grassum. Upon that part of the case, therefore, (omitting now the question of grassum) notwithstanding the effect which this sort of covenant has, and an effect which I should strongly conjecture was intended throughout these transactions; yet I am not at liberty to act upon any thing beyond the legal effects of its character; and if it is not prohibited by the charter, I trust this House never will make law, where they are acting in that department of their functions which belongs to interpreting law, and not making it.

The tailzie of the March and Neidpath estates has been adjudged * to prohibit long leases. The word "alienate" occurs in the Buccleuch case in different parts of it, but here also I take it to be clear law which never must be departed from—I mean, unless it is authorized by decisions—that when the statute of 1685 has required prohibitory clauses, irritant clauses, and resolute clauses, those who state there is an effectual prohibition against onerous purchasers, must find the terms in which the prohibition is conveyed in all those clauses. Now it is quite clear that the word "alienate" is not in some of the clauses in the Buccleuch case; and that introduces another question in this case, likewise of considerable importance. Those who have had this charter to inter-[406]pret, may have given a sense to the word "dispone," which I cannot give to it; and if that sense of the word "dispone," which in my conscience I think belongs to it according to its meaning in the law of Scotland, is adopted by the House, it will affect not only this case of the Duke of Buccleuch, but some others which have reached judgment in the Courts below, and some of which are now before the House on appeal. But whatever may be the effect, it is our duty to give it the sense which belongs to it.

Upon the question as to the word "dispone," according to its sense in the law of Scotland, whether it is equivalent to the word "alienate,"—I have again and again read this case and all the former cases—I have again and again taxed myself to the duty of considering what is the meaning of this word "dispone," as it has been understood in text writers, in charters, in writs, in statutes; and in many of them, I am of opinion, that the word "dispone" is as effectual to prevent a lease of a hundred years, as the word "alienate" is.—That is my opinion. It would be pedantry in me to read all the doctrines which led me to express that opinion which I, for one, entertained on the word "dispone;" and I have the satisfaction to see, that the Judges below were not so much disturbed by that opinion, as they were by our notions of alienation in other cases.

The word "dispone" does not apply to leases as to duration, it only applies to leases in respect of grassums; and therefore it clears the way to the consideration, what is the effect of a grassum? because, if you held that the word "dispone" would not authorize such a decision as the word "alienate" [407] would authorize, it would have been difficult to get at the interpretation.

When this case was argued here before the remit, there was no argument at the bar, nor any thing in the papers, which induced the raising, much less the discussion, of a question, whether an heir of tailzie, where there was no prohibition, could diminish the rent? Whether he could let below the last coming rent? I now see (and that makes this case of infinitely greater importance than I understood it to be then) that it is introduced as a question by no means determined, although the notion that an heir of tailzie had no such power, was founded upon the opinions of great and eminent lawyers, and those who now quarrel with that doctrine were the persons who brought those opinions here for the assistance of this House. I think there is *one judgment* (Wakfield case, *post*, 417) at least, in which some Judges of great eminence in Scotland have gone the length of saying, that if the rent was lessened, particularly, if much below what it was, (and see what a state of law you are getting into, *much and little, long and short*), that they should hold that to be fraudulent. From this it appears, how very dangerous it is to determine any thing not before us for judgment; and it becomes necessary to consider, if it be the law, that a tenant in tailzie cannot let below the rent, independent of actual terms of prohibition, on what principle that is said to be law. It cannot be the law on strict construction,

* In the Wakfield case, D. P. 1813, MS. and 2 Dow, 90 and 206, et seq.

because there is nothing on which to put it; and therefore it must arise out of some principle, of which we ought to satisfy ourselves.

[408] In these papers, much is also said about what are supposed to have been treated as implied prohibitions. I cannot charge myself as the first to denominate the cases of the Mansion-house, of Policies of illusory rent, and other cases, as implied prohibitions. I expressed a doubt as to the proposition which was so broadly stated in argument, that a tenant of tailzie was "absolute monarch*" of his estate in every particular where he was not bound by express prohibition. I now venture to observe as to the law respecting the Mansion-house and the Policies, that if they are not implied prohibitions, I may take the liberty of stating them to be something like limitations of the powers of an absolute monarch. What is the principle here which binds a tenant in tailzie, although restricted by no words in the charter. When the act of 1685 gives a man power to comprehend in tailzie all he chooses to comprehend in that tailzie, and where he does comprehend the Mansion and the Policies, and where the prohibition does not strike at the Mansion-house and the Policies—what is the principle, I say, on which it has been held, both below and in this House, (particularly in the Roxburghe case—a case which may not form any precedent to decide this, but in that case in effect, if those feus had been held good, it was reducing the mansion-house of Roxburghe to the state of a stone quarry) that such a dealing as to the Mansion-house and policies was illegal, though not expressly prohibited. Such is the effect of the decisions, though I am not able to [409] satisfy myself on principle, why tacks of these Mansion-houses and Policies ought not, by the statute of 1449, to be made good, as against the future heirs of tailzie. I wish those who put it upon that ground, would tell us, why the act of 1685, if it authorizes an entail in terms which comprehend them, being subsequent to 1449, will not, upon the face of what is embodied in the expression, just as much affect the Mansion-house and Policies as other subjects. We must endeavour to ascertain what is the principle of the exception before the present appeal is decided.

So as to the cases of illusory rent, if I am to look at the statute of 1449, and what some of the Judges have said on that statute, I find it extremely difficult to say what is an illusory rent. There has been an attempt to determine what is illusory, but our decisions do not supply the principle upon which we can determine that to be illusory, provided we read the statute of 1449, as giving the power by which the effective lease is granted. When, therefore, this is stated to be an implied prohibition, and to be an implied prohibition destroying all the effect of strict interpretation, I ask those who say that nothing is out of the power of an heir of tailzie, except what is put out of his power by the intention and meaning of the entail, embodied in actual expression, to show how they account satisfactorily for the cases to which I have alluded. They may account for them very satisfactorily, for aught I know, upon the doctrine which lays this down as a general rule, without any exception whatever; and yet, on the other hand, I have been quite unable to discover what is the principle [410] which takes it out of that rule, unless it be some important principle arising out of the presumed intention of the author of the tailzie, that this shall not be done, whatever may be the apparent import of the expressions which he has used in his tailzie.

The great and important question remains, and undoubtedly it is a great and important question in every view that can be taken of it, if the doctrine with respect to grassums is allowed. If taking grassums is not to be considered as "*evident diminution of rental*," which are the words to be construed, we see what may be done with respect to estates tail in Scotland. We may indeed be surprised at what has not been done with such estates. On the other hand, if you do hold that taking grassums is, in the sense in which I speak of it, prohibited, you deny legal effect to acts which have been sanctioned by practice, and defeat the provision and the means of providing for wives and children; but, much as such consequences might be deplored, we cannot, with a view of avoiding them, venture, in judicial decision, to declare that to be the law which is not so. Those evils must be remedied, if necessary.

* An expression frequently used in the argument for the appellant, as to the powers of an heir of tailzie, so far as he is not expressly restricted by the prohibitory, etc. clauses of the entail.

by the Legislature. The question, therefore, comes round to this, What is the effect of grassums with respect to such leases as have been granted under these entails, having due regard to the principles of interpretation, as affecting the construction of these deeds; having due regard also to what has hitherto been done in practice, and to what has hitherto been established by decision?

It has been intimated to me, that the teinds in one of these estates were valued about the year 1720; [411] it does not appear to me in the view I take of this case, to be a circumstance that varies the principle on which we are to decide this case; because, one of those entails being made in 1705, and the other considerably before 1700, the circumstance of an after valuation of the teinds, would not shut out the consideration of any construction the Court of Session put upon that entail, either upon the interpretation of these deeds of entail, or any other deeds of entail. I have not forgotten that there may be, as contended, a very great difference between the rules of construction, as they may be applied to lands generally, and proprietors of teinds, and as they may be applied to heirs of entail: the rules have come very often under consideration, and I should be very sorry indeed if, in the result, we should not duly consider them.

With respect to the meaning of the word *dispose*, I found my opinion, not only on what I conceive to be the legal sense of the word, as contradistinguished from that strict and peculiar sense which belongs to an instrument known to the Scotch law by the name of disposition, but on looking at the meaning of the words *dispose*, and *dispose of*, in the two deeds of entail under our consideration, and all the parts and clauses of both the deeds, containing the words "dispose," and "dispose of," and "dispose upon," and "dispose thereupon," and so on.

I understand there has been a decision (*Elliot v. Pott*, March 10, 1814) of the Court of Session subsequent to this, by which a different construction has been put upon the word. There was a great difference of opinion upon it, and that with respect to setting tacks. In the case of *The Earl of [412] Elgin v. Wellwood*, now pending, on appeal,* the same point came under discussion. In that case, upon the 9th of October 1807, a proposition was made in a letter, the terms of which are as follow:—"On the part of the Earl of Elgin, I hereby offer to enter into a lease with you for 999 years from Martinmas next, of the farms of Wankirelu and Greenhill, possessed by Thomas Purves, excepting that part thereof lying on the north side of the road from North Queensferry to Torryburn of Craigs;"—the rent is a peculiar sort of rent, three bolls of oatmeal per acre, besides "a grassum of £12,000 sterling, bearing interest from Martinmas next, but the grassum not to be payable during your lifetime."—The grassum, therefore, was to be paid at a subsequent period.—"It is understood, that Lord Elgin is in the mean time to find security for that sum to the satisfaction of Mr. Thomas Adair, writer to the signet;"—and then there is a provision with respect to the quantity of acres:—"and it is further understood, that by your acceptance of this offer, you agree to enter into a lease with Lord Elgin for the same period of years, at the same rent, and for a grassum in proportion to the extent to be fixed, according to the grassum now offered, of all the land lying to the west of Pitliver House, and belonging to you, which you are at liberty to let for that period of years, in terms of the entail of your estate, but this only in case his Lordship should incline to enter into such a lease."

The power of leasing under the tailzie, in that case is expressed in these words: "and with this power and faculty, as it is hereby expressly pro-[413]-vided and declared, notwithstanding of the restrictions before written, with regard to the setting tacks, that the said Robert Wellwood, my son, and each of the heirs succeeding to the said lands and estate, shall have full power to set tacks of the same, excepting the house, offices, houses and gardens of Pitliver, and one hundred acres of ground next adjacent, and contiguous to the said manor-place, for such space of time as they shall think fit, provided that the same shall never be set at a smaller yearly rent than three bolls of oatmeal, at eight stone weight per boll, for each acre so to be set, and proportionably for any smaller quantity; and which rent or tack-duty shall always be payable in kind, and never be converted into money: Declaring, that in case the said Robert Wellwood, my son, or any of the said heirs of tailzie, shall set tacks of the said estate for any longer space than nineteen years, or in terms of the act of

* Since decided against the appellant. D. P. cases of 1820, *post*

Parliament before mentioned, except in the terms of the clause immediately before written, then such tacks shall be in themselves null and void;" and there were the usual resolute and irritant clauses. The general power was, "to set tacks or rentals of any part of the estate, except that they were not to do that (except in the terms after mentioned) for a longer space than nineteen years certain, or for the life of the setters, or in the terms of the power given to the proprietors of entailed estates in Scotland: and that none of the tacks or rentals shall be set *with diminution of the rental*, except the same be done without collusion, and by way of public roup, to the highest bidder;" a material passage in this case, as having [414] some application to the entails now under your Lordships consideration.

The Court below were of opinion that this tack for 999 years is a good tack: and the question to be discussed, whenever that cause comes for decision, will be of two kinds; first, with respect to grassum, upon which I observe, in the note I have taken, the counsel at the bar stated, not one word was said in the Court below; the next question will be, Whether a 999 years estate is really a tack? whether it is in Scotch law a tack? The Court were of opinion, it was a tack, under this power to set such tacks as the heir of tailzie thought proper, that this 999 years could be sustained. It was argued at the bar, that it was no such thing as a tack: and you will have to decide whether 999 years is to be considered as a tack under this power and faculty: and if it is, what is the effect of the grassum? I have thought it my duty to mention that case. Though it is a case subsequently decided, it contains the opinion of the Court of Session. It has so much of authority, (though subsequent to the case before your Lordships), as belongs to a case that is under appeal.

The Harestanes lease has been reduced and declared to be null, by the First Division of the Court of Session, upon two grounds, *first*, upon the ground of its duration: *secondly*, upon the ground of the grassum. If it is a bad lease on the ground of duration, it would not be necessary, in that case, to show whether it was a good or a bad lease on the ground of grassum: but if you hold it to be a good lease, notwithstanding it was for a duration of fifty-seven years, then it will become material to consider what [415] is the effect of the grassums. That consideration may be as well blended with the consideration of what belongs to the Whiteside case, as taken separately. With respect to a fifty-seven years lease being an alienation, in the Wakefield case it was decided in this House that a long lease was an alienation, confirming the opinion of the Court of Session, notwithstanding the practice in Scotland of granting such leases to a very great extent.

On looking at the grounds of the opinion, that a ninety-seven years lease was an alienation, and was not a tack, it appears the Court held, that according to the law of Scotland, except so far as the effect of the statute of 1449 is to be considered, a lease, though quite different from an infeftment, a disposition, and so on, and quite different from an alienation understood in the special sense of alienation, that is, a transfer of property, that a lease, although it is in truth nothing more, either in the law of England or in the law of Scotland, than a personal contract for the possession of land not transferred to another, and converted only into a real right, so far as the statute of 1449 does convert it into a real right: yet they were of opinion, not on any speculations of theirs, but on doctrine as it was to be found in their books, in their statutes and instruments, that a long lease was an alienation: and, when you look at what is to be found with regard to particular heads of law in the law of Scotland, (though I am not now stating this to afford a direct inference with respect to what should be the construction of a tailzie,) you will find that, with respect to forfeiture,* for instance, a long [416] lease is stated to be an alienation,—that with respect to forfeiture, if there is a grassum,† it is stated to be an alienation. So again with respect to deathbed‡,—so in respect to crown lands§, and church lands||, they have laid down in the language of their law, that a long lease is

* See *Home v. Oldhamstocks*, Dict. of Dec. 4684.

† *Dalziel v. Caldwell*, Dict. of Dec. 4685.

‡ *Chrystisons v. Ker*, Id. 3226; *Bogle v. Bogle*, Id. 3235.

§ Upon the question of alienation see *Stair's Inst.* l. 2, tit. 2, s. 25. and l. 3, tit. 3, s. 30; *Craig*, l. 2; *Dieg*, 10, e. See also a case as to tacks of Crown property, with diminution of rent, *A. v. B.* Dict. of Dec. 7854.

|| *A. v. B.* Dict. of Dec. 7938.

an alienation; and they give a reason for that, upon which many of the Judges proceed in their opinion in the Waketfield case. The reason which they give in the case of forfeiture that a long lease is an alienation, is because it is not of ordinary endurance, and because it is not a necessary and proper administration of the estate. Whether you are to apply this principle to deeds of entail or not is another matter. Great stress is laid on the difficulties which persons would be placed under, if you were to construe powers of leasing with reference to what is a necessary and fit and proper administration, I find the law has distinctly pointed out a variety of cases in which you cannot escape from that principle of construction. So it is in the cases which I have mentioned. In other cases also, they have held leases void, unless they were adapted to the necessary and proper administration of the estate, as, if they were too long, for that is the instance which they particularly point out, and therefore wherever a question arises whether the lease is too long, or in other respects such as to fall within the reach of that principle which would aim at its destruction, it must [417] necessarily become matter of judicial investigation, whether it is a lease of that description or not.

Sir Hays Campbell, upon the first advising and decision of the Waketfield case, says, "Long leases are alienations, and leases of ordinary endurance are not alienations. My opinion is just that of all your Lordships. All of us know, *first*, that a lease may be granted by an heir, which is not an alienation; and, *secondly*, that a lease may be granted which is really, substantially and truly an alienation. Now it is unnecessary for me to bring under your Lordships view, examples of the two extremes, because they must be obvious: for leases for one year or two years, or in Craig's time for ten years, or in the present day for nineteen years, are not alienations. But, on the other hand, will any man say with candour, or is it possible for a lawyer to maintain, that a lease for a thousand years or ten thousand years, for *something much below the present rent*, is not an alienation?" The difficulty commences when we come to inquire what is *long* and what is *short*, and what is *too long* and what is *too short*; and we find on this grave authority (for undoubtedly that of Sir Hays Campbell must be taken to be a grave authority, he being Lord President of the Court at that time, and having great occasion to consider these subjects), a judicial opinion, that nineteen years is not too long to be a lease, and not an alienation. This doctrine of Sir Hays Campbell led me on a former occasion to say, "upon what particular ground they found that he (the tenant) was to have a lease for nineteen years, I am not able to learn from the papers before us. I take for [418] granted, they must have gone in some measure upon a notion, that as upon a species of *præsumpta voluntas* a tenant in tail may make a lease for nineteen years, (whether with grassum is another question), the Duke of Queensberry could make a lease for nineteen years; and it is the law of Scotland, as I understand it, upon this head of *præsumpta voluntas*, that a nineteen years lease being considered (whether tacks of longer endurance can or cannot be said so to be) to be an act of necessary and ordinary administration, necessary for the cultivation of the land, that such a lease is good. The Court seems to hold that doctrine somewhat upon the principle which the courts of law in England have applied to leases granted by tenants in tail before the statute* about their leases, but with this difference, the Courts in Scotland I understand held the nineteen years lease to be good, as of the ordinary endurance; upon the grounds of policy and husbandlike management of the estate, the Judges in England would not hold a lease made by a tenant in tail for a term that endured beyond his life to be *ipso facto* void, but they would hold it voidable, if the heir of entail chose to have it voided;" and upon this sort of expression falling from me, it has been supposed that I had totally forgotten the difference between the heir of tailzie in Scotland and the heir of entail in England.

That an heir of tailzie in Scotland differs from an heir of entail in England in some respects, could not be unknown to me. An heir of entail in England has an estate that may endure for ever; an heir of [419] tailzie in Scotland is the absolute liar of the estate. Undoubtedly the whole fee is in him for the time. Those who may take after the heir of entail in England are considered as being remainder-men, having part of that fee which is vested only between the English heir of entail and

* 32 Hen. 8, c. 28, s. 1, 2.

the remainder-man. But since the whole fee, after the heir of tailzie is served heir of tailzie, is in that heir of tailzie for the time being, I ask, how it is that a lease beyond nineteen years is bad, and a lease of nineteen years good? It appeared to me impossible to decide, with any sort of justice, that there was any thing in the word *nineteen* that would make that lease rational, or that there was any thing in the words *fifty-seven*, or in the words *twenty-seven*, that would make the lease irrational. In every text writer, and in all the decisions in which it is stated that a *long* lease is an *alienation*, it is put on the ground that it is a dealing with the estate which is not for the proper and necessary management of the estate; but when they repudiate the longer leases as not being necessary for the proper management of the estate, and when they do that in the case of estates tail as well as other estates, to be sure I was led to think, that when they gave that reason for the destruction of long leases, they meant to say, that the short leases they sustained were to be sustained, because that reason which destroyed *long* leases did not apply to *short* leases. That is the only rule which I can find; and I was perhaps misled by the manner in which our own books treated this matter about the leases of tenants in tail, where they seem to have gone upon very much the same principle.

[420] In a Treatise upon Leases, which I believe was written by Lord Chief Baron Gilbert, and certainly is one of the best compositions on leases we have in our law, he says, "If a tenant in tail, after the statute *de donis*, had made a lease for years, and died, this lease was not absolutely determined by his death; but the issue in tail was at liberty either to affirm or avoid it, as he thought fit; and the reason why such leases for years were not holden to be absolutely determined by the death of the tenant in tail who made them, was either"—(see now how near this comes to a Scotch tailzie)—"because they were drawn out of an estate of inheritance, which by possibility might continue for ever; and this was but a reasonable liberty given to the issue in tail, because it might well be supposed that his ancestor was not qualified to keep all his possessions in his own manurance and occupation, but must necessarily let them out to farmers and husbandmen, who, by their skill and understanding in the arts of agriculture and husbandry, would be best able to preserve and improve the soil, and by their yielding an annual rent or income to the lessor or tenant in tail himself, would enable him equally to provide for the necessities and exigencies of himself and his family." Our Judges, who have not the power which belongs to the Judges of the Court of Session, upon this principle of policy would not hold the leases absolutely void, but voidable. The estate tail, being an inheritance which might endure for ever, was an estate out of which a nineteen years lease might be drawn. If the issue in tail, or those to take after [421] them, chose to complain of the lease, the Judges held it void; if they did not complain, upon that sort of policy which is, it seems, more open to the Court of Session to act upon than our Judges, they held them voidable. It was in this way I was led into this view of the case, whether it was a proper or an improper one.

A paper was handed up to us, stating a great deal both with respect to leases and with respect to grassums, from the same learned person, Sir Hay Campbell. You will see his authority both for and against any opinions that may be expressed to you to-day; and I consider it a document which sustains again the doctrine that long leases are bad, and that short leases are good. That imposes upon us the task of finding out what are long and what are short, and impels us to find the principle upon which the one is held *good*, and the other is held *bad*. In that paper it is stated, that "a lease without an ish at all is not good against singular successors, because it is truly not a lease, but an alienation of the subject, in an incomplete personal form, which cannot be sustained against an infertment. Suppose then that it is for a limited term of ten millions of years, can this be sustained?—It is impossible. This may be said to be an extreme case on the one side, and a lease for two or three years is an extreme case on the other side. The thing desiderated is to fix a precise line. This is a hard task to be imposed upon Judges, and is much fitter for the Legislature; but till a new law is made, they must necessarily exercise their powers of discrimination according [422] to the best lights they can obtain upon the subject. The act of the 10 George III. certainly does not decide the question, because it relates only to cases of entailed property where the tailzie contains special clauses limiting the power of granting leases to a small number of years;"—(I doubt whether that is correct;

because if it was intended that that act should apply only to such cases, there should have been a provision limiting its operation to such cases:—” but it contains a principle which deserves to be attended to, viz. ‘ We are willing to extend your power of leasing under certain conditions beneficial to the entailed estate; ’ ”—(Now what the meaning of this act was, I think Sir Hay Campbell must know as well as any man in the kingdom:—) “ but not beyond a certain moderate and reasonable endurance; because if you go farther, this might be held as bordering too nearly upon alienation, and exceeding the ordinary power of rational administration. Thirty-one years or two lives are generally reckoned very moderate terms, yet the Legislature seems to have been afraid to go farther, even when the interest of the entailed estate was to be forwarded, unless in the case of building leases, which were to be allowed for ninety-nine years. It was upon this ground that I could not venture, in giving my opinion as a Judge in the first of these Queensberry cases, to go farther than thirty-one years as a moderate endurance. I shall be better pleased with thirty-eight; neither should I object to fifty-seven years, in cases under the act 1449; but to go ”—(Now see the notions of this great and [423] experienced Judge, with respect to entailed property, the absolute dominion over which is supposed to belong to those in possession of it)—“ but to go that length in cases of entailed property, would in almost every such instance be over-reaching the life of the succeeding heir, which does not seem very consonant to the rational object and proper meaning of an entail:—” and then he proceeds upon the act of 1419, saying, (and this is matter of authority), “ see the 19th of February 1771, reported in the late volume of the Faculty Decisions, where there is a good deal of discussion upon the subject (Diet. of Dec. 15200). The case of *Jordanhill* (Decisions, tit. Tack, No. 18) is too shortly stated by Lord Elchies. The weight of his authority is great. He lays it down as the opinion of all the Judges in his time, that a lease must not exceed ordinary duration, to be protected against singular successors by the act 1449; but he still leaves it unexplained what *is ordinary duration*.”

In another part he states, that he can find no resting-place until he comes to thirty-one years, or two lives in being at the time of making the lease; and that none of the old lawyers framed out a tack of thirty-two years, because there it seems you get beyond the power of an heir of entail.

He then proceeds to the consideration of the grassums. His authority is undoubtedly of great importance in this matter; and it is quite decisive as to his opinion. He says, “ As to the question now raised about grassums, it is entirely new to me. [424] I had always considered it as indisputable, that so long as a tack was a tack,” (and whether a 999 years tack is a tack, is a question which must be decided in the cause of *Elgin v. Wellwood*; but you see that this learned person has thought it might be a question, whether a tack was a tack), “ the proprietor, whether entailed or not entailed, might let his farm as he pleased, and under any conditions he chose to annex, taking care always not to lower the current rent, to the prejudice of the heir of entail.” I remark again upon this passage as I pass along, that in the course of the former argument at your bar, neither authority, text-writer, case, nor dictum was heard, to assert that the heir of entail could let down the rent. I speak of cases where there is not authority under the entail to do it. It seems now, that is become matter of question. It is grave matter of question, for as there are a great many entails, I apprehend, (I think it right to use a word which shows that I do not mean to assert it, but only to state my apprehension,) in which *long* leasing would be held to be prohibited by the word “ alienation,” if under such a word short leases, which would not be alienations under the distinction which has been pointed out, may be made for any rent just higher than that which might be considered as an illusory rent, what would be the condition of persons having estates tail. It becomes material therefore to consider whether this can or cannot be done; for whether you call it implied prohibition, or whether you call it want of power, or whatever you call it, the incapacity to do it must be founded in some principle connected with the administration of the estate, if [425] an heir of entail has not this power, except in cases where it is necessary. No person entertains a doubt, that if an heir of entail could show, that when he let down the rent he did it of *necessity*, that would not be a case in which it would be said to be wrongly done; but supposing he cannot let down the rent in a case in which it is not necessary he should let down the rent, then the

next question is, What is the principle upon which he is prohibited from letting down the rent? It must result from this principle, that those who are to enjoy the estate which he is bound to take care of, shall not enjoy it in a state less beneficial than they would if the rent was not let down: and that proves the principle, that the heir of entail is bound at least to pay some attention to what is called the *rational and due administration* of the estate.

The paper then proceeds to state another principle, which likewise deserves attention on account of the authority from which it proceeds: "By the current rent I mean that which has hitherto been obtained, not a future possible rent which might be got by varying the stipulations, and rejecting all entry-money, or other advantage to the heir in possession. The maker of an entail might no doubt prohibit grassums;" (and there are unquestionably several entails in which grassums are prohibited; I take those to be of very modern date, when compared with the entails under our consideration, and stated in the cases before the House): "but even this would not always benefit the future heirs; for still the heir in possession might decline to raise the rent, and it would be extremely difficult to [426] force him, or even to prove the fact of grassum after his death." Then he takes notice of the decisions which have been made in the Court of Session upon the subject of grassums, and says "he is at a loss to see the ground of a question; for if the tack be too long it will cease to be a tack, and even without a grassum, it could not be sustained; if within the bounds of a tack, it must be sustained whether grassum or not."

He afterwards states, that this is the result of his experience upon the subject: "The question, What is a long lease participating of the character of alienation, and what is moderate, amounting to *administration* only, is no doubt attended with difficulty, because the limits have never yet been precisely drawn: but the question of grassum is of a very different nature, and it is astonishing to me how it should ever have been made a question at all. I have been now upwards of sixty years employed in studying, reading, practising, hearing and determining upon all sorts of questions in the laws of Scotland, and I declare I never heard from the mouth of any lawyer, old or young, or any Judge, nor ever read in any book, nor figured in my own mind till now, that an heir possessed of an entailed property, was or could be under the smallest restraint as to taking grassums upon the renewal of his leases, the entail itself saying nothing to the contrary, and the former current rent under a lease, which perhaps had been granted by the tailzie himself, *not being diminished*;" (so that his opinion certainly is, that where there was nothing said about it, the rent could not be [427] diminished.) "Tailzies very often say the rent shall not be diminished; and this is clearly proper, because otherwise it might be unfairly done, and the tailzie rendered illusory. One instance occurred where an entail prohibited raising the rent, 5th February 1794, Moir (Dict. of Dec. 15537). This was a mere whim, and laughed at by the Court, and it was got quit of upon a specialty." Then "the utmost length that any tailzie case has yet gone, is to prohibit taking grassums: and even this has not been done in many instances, and the effect of it is merely to serve as an inducement to let the farms, not by public auction to the highest offerer, but in a rational way, and for such an advance of rent as may with ease be obtained by a prudent landlord acting discreetly in his own affairs. In this way alone it is practicable, without involving the management of an estate in the greatest possible confusion."

This difficulty has been raised very high in argument. It has been said, no heir of tailzie can know, and no other person can know, when he lets for the best and most improved rent. That the difficulty of *knowing* that, is such that you cannot adopt it as a principle. An English lawyer may think there is no great difficulty in matters, in which those who are experienced in the Scots law think there can be nothing but difficulty. There is not a single marriage-settlement in England, that has been drawn for some centuries, where the tenant for life has not a power of leasing, and that power is given to him to lease for the best and most improved rent, and the lease is void if not so made: and yet I believe I [428] may challenge the experience of the oldest persons in Westminster Hall, to point out three or four instances of leases being held void upon that restriction. Our Courts have said, the best evidence that a man has let for the best and most improved rent is, that he has taken no more himself than he has taken care those who come after him shall

have. We may trust to the inclination of mankind in general, to get as much as they can get, and if the tenant for life provides for those who are to take after him, as he has provided for himself, (to be sure he may be under mistake as to them and as to himself, and he may take too little, but it is not very likely he should expose himself to that mistake, or willingly take too little,) this throws a burthen on those who mean to quarrel with such a lease, to prove that there was in the transaction that want of ordinary prudence which shows an inattention to the prescribed terms under which he was to let the lease. *Prima facie* a lease has been always held to be good against remainder-men, which made for them the same provision as for the tenant for life; and I believe, in ninety-nine cases in a hundred, that is the safe principle of decision. If the principle of leasing, either under powers of leasing in English deeds, or under the declared right of leasing in Scotch tailzies, does in law depend upon the lease being made with a due and rational attention to the administration of the estate, whatever difficulties there may be in applying that principle, you must come to the question, whether the lease, or whatever it is, is made upon the principle on which the law of Scotland will decide for its validity?

I will go no farther in the statement of this paper [429] there appears in it to be great authority in favour of grassum; and it helps to show what is the opinion of the Judges and lawyers of Scotland upon alienation, as being or not being the result of tacks of longer or shorter duration; and, as far as it goes, to show the principle upon which a prohibition of alienation has been held to prohibit tacks of a long duration, but not of a short duration.

The act of the 10th of Geo. III. is intituled, "An act to encourage the improvement of lands, tenements and hereditaments, in that part of Great Britain called Scotland, held under settlements of strict entail."

The recital is in these words: "Whereas, by an act of Parliament of Scotland, made in the year 1685, intituled, 'An act concerning tailzies,' all his Majesty's subjects are empowered to tailzie their lands and estates in Scotland, with such provisions and conditions as they shall think fit, and with such irritant and resolute clauses as to them shall seem proper; and which tailzies, when completed and published in the manner directed by the said act, are declared to be real and effectual against purchasers, creditors, and others whatsoever; and whereas many tailzies of lands and estates in Scotland, made as well before as after passing the said act, do contain clauses, limiting the heirs of entail from granting tacks or leases of a longer endurance than their own lives, for a small number of years only," (the printing is, *or* for a small number of years only, and the policy of the act is to encourage the improvement of lands, etc.) "whereby the cultivation of land in [430] that part of this kingdom is greatly obstructed, and much mischief arises to the public."

Upon this recital the act incapacitating those whom it prohibits by general words, or if not by general words, by the fact that they were either permitted to make particular leases, or prohibited from making other leases, goes on to provide, "that it shall and may be lawful to every proprietor of an entailed estate, within that part of Great Britain called Scotland, to grant *tacks* or leases of all, or any part or parts thereof, for any number of years, not exceeding fourteen years, from the term of Whitsunday next after the date thereof, and for the life of one person, to be named in such tacks or leases, and in being at the time of making thereof, or for the lives of two persons to be named therein, and in being at the time of making the same, and the life of the survivor of them, or for any number of years not exceeding thirty-one years from the term aforesaid."

Here the Legislature seems to consider a lease for fourteen years, and the life of one person, or a lease not for any certain number of years, but for the lives of two persons, or a lease not for any life or lives, but for thirty-one years, as being in some respect equivalent to each other in the ordinary and proper management of a Scotch estate. Then if they are made for two lives, there is to be a special clause about inclosing, etc. and if for nineteen years, the lessees are to fence and inclose the lands; and every lease of above nineteen years is to contain certain clauses for the proper administration of the estate, which it is not necessary for me here to mention: "And [431] all leases made or to be granted under the authority of this act, shall be made or granted for a rent *not under the rent payable by the last lease or sett, and without grassum, fine or foregift*, or any benefit whatsoever, directly or indirectly

reserved or accruing to the grantor, except the rent payable by the lease; and that no such lease shall be granted till after the end or other determination of any former lease of the same premises, or that such lease, if granted for a time certain, shall be within one year of being determined, and that all leases otherwise granted, shall be void and null."

Here it must be admitted, that the Legislature had in contemplation the practice of letting, under the rent last received; that they had in contemplation a species of letting with grassum, fine or foregift; that they had in contemplation that species of tack which occurs in this case, a letting in fact before the determination of a former lease: and that they likewise had in contemplation, that if a man let a lease under this act before the former lease was expired, and more than one year before the expiration of that former lease, it was an addition to that former lease, which under the authority of this act would be void.

Then follows this clause, which I apprehend must be supposed to take out of the authority of this act of Parliament the cases referred to in this clause: "That if any tailie shall, either expressly or by implication, contain powers of leasing more ample than are hereby given, the heirs of entail in possession shall be at liberty to exercise all such powers in the same manner as if this act had never been made."

This clause, in judicial construction, can mean no [432] more than this, as it seems to me, namely, that persons who had larger powers of leasing than are here given, shall not be prejudiced by the enactment of this act.

The act then proceeds to that part of it which relates to the encouragement to lay out money. In one of the cases of *Elliotts*,* where a tenant of entail had laid out money on improvements, and where by letting leases he had by grassum got into his pocket that sum of money which he had expended in improvements, and afterwards his estate tailie ceased, and another person under the effect of the entail came to the enjoyment of the estate; the Court of Session held, that under the true construction of the clause which followed, though that person had received in the shape of grassum so much for the improvements which he had made upon the estate, yet that he had a title under this act, as against the person who succeeded him, for three-fourths of those improvements, to be paid out of the rent reserved to the persons who were to succeed. Taking it for the present to be a right decision, consider what the effect of this act of Parliament is, if grassums are to be taken. The result would be, if a tenant under the tailie should lay out a large sum of money in improvements, (not exceeding such a sum, the act puts a limit to the amount of the improvements, but supposing that sum of money to be considerable, as in many estates it will be), if he afterwards lets the estate, getting a considerable sum as a grassum, in a case where he cannot let with a diminution of the rent, that a person succeeding to the estate is to pay such proportion [433] of those improvements out of the small rent reserved by a man who takes a large grassum. It is difficult to say that such can be the right construction of this act of Parliament.

With respect to the lease of Harestanes, which is for fifty-seven years, the question is, whether it can be supported, considering the principles on which the House has held a ninety-seven years lease bad, or upon the principle upon which, as it appears to me, they have always acted; (I mean in judgment—practice is a different matter)—can such a lease be sustained upon the principle of distinction between long leases and short leases? The Court of Session is of opinion that it is a term which amounts to an alienation, and cannot be supported. If your Lordships are of that opinion, which I humbly state to be mine, that would dispose of the lease of Easter Harestanes. By the list of leases which has been laid upon your table, with a view to show what grassums have been taken upon the Queensberry estate, it appears that it was at a very late period indeed before any body dealing with that estate got, even in a very few solitary instances, to a lease of nineteen years. They were of very short duration; and so were almost all the leases contained in the list laid before your Lordships with respect to grassums, leases of very short duration. They show, that the persons dealing with that estate thought they were justified in taking grassums, but not for leases of sixty, seventy, ninety, or a hundred years; and although there are to be found in Scotland very long leases, I find that with very few exceptions in judgment, such leases have not been sustained.

* *Trustees of Sir F. Elliott v. Sir W. Elliott*, 1793, Jan. 22. Dict. of Dec. 15622.

[434] It has been asked, if you do not sustain a lease for fifty-seven years, will you sustain a lease for fifty years? will you sustain a lease for thirty years? will you sustain a lease for twenty-seven years? Or, to put the question as the case upon your table requires us, as to what we call the alternative leases, what will you sustain, if you do not sustain fifty-seven? Sir Hay Campbell answers that question; but if I am to answer, I resort to the principle which cuts down one of those leases, because it is inconsistent with the fair and rational administration of the estate. I should be disposed to say, that with reference to ninety years, or such leases as are mentioned in the act of Parliament, it would be a lease of too long duration. If you ask me, why I say so, I can give you no more satisfactory answer, than that I think it is a rational application of the principle upon which they have held leases too long not to be good. But I do not know, with respect to this, and every other part of the case, any thing which appears to me to deserve so much and so strong recommendation to have these matters all settled by Parliament, as the state in which the power of leasing in Scotland exists.

In respect of other leases, it becomes extremely important that some such measure should be adopted: it would leave the law of Scotland in a cruel state, if on the one hand grassums cannot be taken in which the families of heirs of entail may be interested; I mean their widows and their children: for it is impossible, looking into the matter historically, to deny that this method of taking grassums has been frequently resorted to, to enable the heirs of [435] entail to make provision for wives and younger children, for whom, as in the Buccleuch cases, it would be found extremely difficult, on the construction that shuts out grassum, to make provision. On the other hand, it appears to me equally clear, that if grassums can be taken in the way in which they have been taken, the result may be, (and more especially where there is no prohibition that requires keeping up the old rent, and any rent may therefore be taken,) the consequence must be, unless there be some reasonable provision made about grassums, that the heirs of entail may be disappointed of their whole provision, supposing every one can so act with respect to his own posterity under a charter made by his ancestors for his and for their provision. Whether that is a desirable consequence—whether entails ought to be thus defeated—is a distinct question.

The power of judges, in this respect, may be doubted. Upon that subject, as it applies to English law, I have formed an opinion, which leads me to think, that the judges of this age, in England, would not have been permitted to get rid of the statute of English entails, as judges of that age did soon after the passing of the statute *de donis*.

The next subject is the alternative leases. The Division of the Court of Session, which has decided upon the alternative leases, seems to have been of opinion, that those leases, in the first instance, might be good for twenty-one years, or that they might be good for nineteen years; or in the first instance, for nineteen, and then for twenty-one years, (I do not recollect which) were it not that they were [436] affected by fraud. I cannot bring myself to think that such alternative leases can be good. The action of declarator has been stated in the papers before us, and most justly and truly stated, to be an extremely useful proceeding in the Court of Scotland. It enables a person to have it declared, whether there is or is not such a lease, as he contends there is, and as other persons contend there is not. Upon such a proceeding, it seems to have been thought, if the late Duke of Queensberry grants a lease for thirty-one years; if that will not do, for twenty-nine years; if that will not do, for twenty-seven years; if that will not do, for twenty-five years; if that will not do, for twenty-three years; if that will not do, for twenty-one years; and if that will not do, for nineteen years, agreeing also, that if the House of Lords shall decide in the Wakefield case, or in any other case, that a ninety-seven years lease is good, they shall not have a lease for nineteen, or thirty-one, or any other fixed period of duration, but for ninety-seven, or for fifty-seven, or the longest which the Court of Session or the House of Lords may approve, that such a lease could be good, if it was not affected by a general fraud—a general device, founded in fraud, which that Division of the Court of Session imputes to all those cases. Now, putting that general fraud out of the question, it appears to me to be a most extraordinary thing, that a lease of such a nature as this, with such an indefinite ish, as a contract of this kind provides for,

can be a good lease. It it can be a good lease, I have no conception how persons are to deal with each other, in respect of a lease of this sort, supposing no other person in-[437]-terested but the landlord and his tenant; for the rent of the lease frequently varies, according to the extent of the term which the party grants; the rent is set with express reference to the term. We have a rule in Westminster Hall,* that if a man has a power to grant for ten years, and he grants for twenty-one, the lease, although bad for the twenty-one, will be good for the ten: because, there both parties have before them a written instrument, which gives the power: and they both know what is the utmost extent for which it can be good. But how are we to deal with a contract of this sort, made liable to such alterations, where the contract itself is founded upon the necessity of limitation?—What is to be the state of law and property in Scotland, if the contract itself does not furnish the means to determine what lease is either to bind the lessor, or those to come after him, as personal representatives, or as real representatives, or the heirs of tailzie, in the case of a lease rental?—if no person is to know what burden there is upon that estate, in the shape of a tack, or rental, until the question has been pursued, (as this lease provides it shall be,) through the Court of Session and the House of Lords. According to English law, there may be a good lease for ten years, if A. B. shall not come from Rome in ten years, or for twenty years if A. B. shall not come from Rome in twenty years; but then there is a certain ish or determination in these cases; for you know it [438] must be at an end, on that certain fact taking place; but I cannot find out the principle of law upon which such leases can be held to be good.

Supposing these leases to be good in other respects, the next, and the most important question is, whether the taking a grassum is that which leads to the conclusions, which are to be found embodied in the interlocutors of the First Division of the Court of Session, with respect to the March and Neidpath estates: or to those which are to be found embodied in the interlocutors of the Court of the Second Division, with respect to the Buccleuch estate. What the principle is, upon which the First Division of the Court proceed, we know: for they, in their interlocutors, state expressly the grounds and principles upon which they proceed. What was the principle upon which the Court of the Second Division proceeded, is to be collected, as well as we can collect it, not from the terms of the interlocutor, but from such conclusion as may be found to arise out of the opinions delivered upon the subject. That interlocutor does not enter into a detail of the grounds of the opinion, in the same way as the interlocutor does with respect to the March and Neidpath estates.

Supposing the doctrine to be against grassum, you cannot apply that doctrine to the Buccleuch property, unless leases with grassum are prohibited in the true construction of that deed of entail, although the word "alienate" is not in the deed. If you are of opinion, that the operation of that deed of entail would be the same without that word as with it, then the question as to grassum arises with [439] respect to the leases made under those deeds respectively. The question must be considered, having regard to the different expressions, and the import of the different expressions which are to be found in those deeds, and as far, and no farther, than legal implication in construction will authorize you to attend to the several provisions, as manifesting the general meaning of the authors of these deeds of entail.

The Neidpath entail provides, "that it shall be noways lawful to the heirs of tailzie, nor any of them, to *sell, alienate, wadset, or dispose* any of the said haill lands," and so on, "or any part thereof, nor to grant infeftments of liferents, nor annualrents furth of the same, nor to contract debts, nor do any other fact or deed whatsoever, whereby the said lands and estate, or any part thereof, may be adjudged, appraised, or otherways evicted from them, or any of them, nor by any other manner of way whatsoever, to alter or infringe the order and course of succession above-mentioned." And after the irritant and resolute clauses, by a subsequent clause "it is provided, that notwithstanding of the irritant and resolute clauses above-mentioned, it shall be lawful and competent to the heirs of tailzie a-specified, and

* In the Courts of Equity. *Campbell v. Leach*, Ambler, 740; *Shannon v. Bradstreet*, 1 Schoales and Lef. 52. Excessive leases are held void at law. *Hardres*, 398. —As to the authority of *Leach v. Campbell*, see the observations of the Lord Chancellor in his judgment upon the case *Ex parte Smith*, 1 Swanst. 336.

their foresaids, after the decease of the said William Duke of Queensberry, to set tacks of the said lands and estates during their own lifetimes, or the lifetimes of the receivers thereof: the same being always set without *evident diminution of the rental*." There is then a power of providing for their wives, and for their younger children.

[440] In the other entail, after stating what it shall be lawful for the entailer himself to do, it proceeds to state, "That it shall not be lawful to the said Lord Charles Douglas, and the heirs-male of his body, nor to the other heirs of tailzie above mentioned, nor any of them, to sell, wadset or *dispose* any of the foresaid earldom, lands," and so on, "nor any part of the same, nor to grant infeftments of liferent or annualrent out of the same, nor to contract debts, nor do any other fact or deed whereby the same, or any part thereof, may be adjudged, appraised, or anyways evicted from them, or any of them, except so far as they are empowered in manner after mentioned, nor to violate or alter the order of succession foresaid, any manner of way whatsoever." These words, "any manner of way whatsoever," appear to me to have relation to every thing that is before prohibited: and when in an antecedent part of this entail, it is stated, that the author of this tailzie may *dispose* in any manner of way whatsoever, and the others are here prohibited to *dispose* in any manner of way whatsoever, it appears difficult to say, under such expression, that the word "dispose," meant only to prevent what is technically called disposition; and these words, "except so far as they are empowered in manner after mentioned," apply to a special prohibition, among other things, of granting leases, which special prohibition is in these words: "That the said Lord Charles Douglas, nor the other heirs of tailzie above specified, shall not set tacks nor rentals of the said lands for any longer spaces than the setter's lifetime, or for nineteen years, and that without [441] diminution of the rental, at the least, at the just avail for the time; nor to do any other fact or deed, civil or criminal, directly or indirectly, by treason or otherwise;" and so on.

The provision to be made for spouses by this deed went to the extent of a thousand pounds for one—to a larger sum for two—and if three, it might amount to about two thousand three hundred pounds: and there was likewise a provision for daughters and younger children, amounting to the sum of fourscore thousand pounds Scots, which would be between six and seven thousand pounds sterling.

Such was the nature of the instruments; and the question arises, (regard being had to the provisions contained in them,) whether, according to the law of Scotland, grassums could or could not be taken upon such leases as the Duke of Queensberry has thought proper to grant?

With respect to the practice as to leases of private property in Scotland, the counsel for the respondents have laid before you a list of leases which have been made with grassums. Those leases, I think, with respect to their duration, you will find to be generally very short; some of them certainly of considerable length; and with respect to the periods at which those leases have been made not going so far back by any means as the year 1685, when the statute of tailzies was made.

Those who encounter the argument drawn from this practice, say, that the list is not confined to leases of entailed estates, but that, on the contrary, by far the greater part of the lands mentioned seem to be unentailed; and it may be worth attention to look into [442] the list, with a view to see how far this observation is founded in fact. They say further, that a considerable number of the instances in the list are quoted without any statement except that the defenders are not informed concerning them. They further state, that in almost the whole, no more is taken by way of grassum than one year's value. In answer to which, this observation arises, and has been made, that the question, whether a grassum is to be taken or not, does not depend upon the quantity of the grassum—that if a large grassum is not lawful, a small grassum is not lawful; and that again is met with this observation, that the fact that no attempt has been made to set aside deeds which have been made partly in consideration of grassum, may be accounted for by the circumstance that the grassum was small.

With respect to the leases of the Queensberry estate, it certainly does appear that, although this estate was entailed in 1705, grassums were taken within a very few years of that date; and that the grassums continued to be taken upon it, (the leases being short, and the grassums in general not being large, except in some instances),

down to much later times : and it is to be observed, that this practice with respect to the estate of Queensberry, carries with it the authority which belongs to the circumstance, that two of the tutors or curators, or whatever they may be, of the Duke of Queensberry for the time being, letting these leases with grassums, were persons in the highest situation of the law in Scotland.

To answer the observation that these practices [443] passed without question, the appellants state, that it does not appear that the substitutes of entail, or any but the immediate successor, had an interest during the life of the actual tenant to question the lease, and that if questioned, the irritancy might be purged, with the consent of the tenant, so that the next heir would gain nothing during the life of the heir in possession. On the other hand, it is said, that if the taking grassums is unlawful, they may still be purged, notwithstanding the death of the Duke of Queensberry—a proposition which may call for your judgment. The appellants further represent circumstances which might induce the next heir not to question the lease—first, during the granter's life, it might be doubtful whether any declaratur of irritancy could be maintained, although grassum were taken, if the lease were short : for the tenant's life might endure beyond it, and that he might plead in defence ; secondly, he might be a near relation of the tenant, and perhaps answerable in his own person to indemnify the person who might have suffered by the supposed violation of the entail ; thirdly, he might have a wish to take grassums himself ;—and when I come to state the facts, you will see that the weight which belongs to such a suggestion is, that his predecessor may have left his disposable property to near connections, and the succeeding heir of entail could not therefore prosecute the irritancy without affecting such relations, if he were not himself, out of assets descended to him, answerable to repair the loss suffered by the effect of the irritancy. This thing happens perhaps nineteen times out of twenty in such successions ; and they point out in this list, [444] instances in which it has happened, and in which they therefore insist, that the person who could have challenged on account of grassum, had been prudent in not challenging on account of grassum, for that he would only have taken the burden of the grassum off the entailed to the unentailed estate, which would have been liable to it. Upon the whole, they say, therefore, that the list is by no means a formidable list on the head of the practice.

To this I think must be added, that the persons who now complain, Lord Wemyss himself, or that family at least, granted leases with grassums. On the other hand, it must be admitted, that great part of the entailed estates in Scotland do not appear, by any evidence we have before us, to have been in the hands of persons who have let leases for grassums. This circumstance, however, again, is to be taken into consideration with regard to the defenders, that there may have been very great difficulty on the part of those who were to endeavour to find out what had been the practice as to those entailed estates. It is quite obvious, undoubtedly, that the very importance of this point would lead persons to take a great deal of care, how they afforded the means of information to those prosecuting this cause, as to the circumstances in which their own estate stood.

On the head of practice, the respondents again refer to the practice with respect to Crown lands, and the practice with respect to Church lands. It is not my intention to go through all the reasoning upon that subject. I think it may be stated as to Crown lands, and also as to Church lands, [445] in that period the statutes * had not pointed out that the possessor was to reserve the rent subsisting at the time of his entry—if he did reserve that rent, he was not prohibited : unless you can argue from the case about teinds, as the Court of Session has done ; and with respect to Crown and Church lands, there has been a degree of irregularity in the management of them, which does not make the practice with respect to them of much importance. It is a consideration of some importance, however, because, particularly with respect to the Church lands, a practice did obtain in Scotland of taking grassums, which now obtains in England, and I believe in Wales, under the name of fines, not very much to the benefit, or with the approbation of those who have the good or bad luck to succeed receivers of those grassums or fines.

* As to the beneficed clergy under prelaties, by the Scots Stat. 1581, No. 101 ; and as to all ecclesiastical persons, including by name bishops, abbots and priors, by the Scots Stat. 1585, No. 11.

They have also stated many decisions of the Court of Session in Scotland, in which they represent that the right to take grassums has been established, and they cite a great many instances in which, as far as they go, there has been a general impression in the Courts of Scotland, in favour of the practice, as far as it is established by what the Judges have said, and what they have done, and what they have forborne to do or to say. In the case of *Sir Archibald Denham v. William Wilson* (Dict. of Decis.), writer in Edinburgh, as that case is stated in the papers on your table, and taken, as I understand, from the papers in the cause, "Sir William Denham of Westshiell, of the [446] date of August 11th 1711, executed a deed of entail of his lands of Westshiell, and burthened the same with an annuity of £4000 to Dame Katherine Erskine, spouse, afterwards Lady Schawfield. The pursuer, upon the decease of the late Sir Robert Denham, succeeded as heir of entail to the said estate, and soon found it absolutely necessary to bring a process against the defender, who for some time had been Sir Robert's factor upon that estate,"—(your Lordships will observe that),—"and likewise his agent and trustee, and had obtained an assignation to the rents that fell due during Sir Robert's life, to whom he had also confirmed himself executor-creditor.—The pursuer was advised, that it was the duty of the heirs of entail, out of the proceeds of the estate, to pay the lady's annuity, and keep down the annual-rents of the heritable debts of the tailzier with which the estate wa. chargeable."

Whether you are to call it an implied prohibition, or whatever else you may call it, it appears to me to be admitted in the papers before us, that the succeeding heir of tailzie was to keep down annuities out of the proceeds of the estate, and that he was likewise to keep down the annual rents of the heritable debts of the tailzier, with which the estate was chargeable, although in the tailzie there was no clause which ordered him to do so; and those duties of keeping down the annuity and the annual-rents by the persons representing the estate, are duties which one may venture to represent, as founded in an obligation which has some relation to the interest of those to come after him.

[447] The case continues thus: "It seems that Sir Robert's plan was to render the estate of as little value as possible to the next heir: for when the defender was factor, whatever payments of these burdens was made out of the rents of the estate, he, instead of taking discharges, took assignations in his own name; so that, had Sir Robert lived any number of years longer, by this scheme, the succeeding heirs of entail would have been quite cut off, and the tailzier's intention totally defeated."

But the matter did not rest here; Sir Robert Denham also fell upon a new, and what, with submission, appears a most unwarrantable device, to disappoint the heir of entail of a considerable part of the proceeds of the estate for many years after his decease, by letting leases for which he not only took considerable grassums,—(your Lordships will be pleased now to advert to the speciality of this case),—but also took bonds or bills from the tenants for part of their rents, payable by partial payments annually, for the same endurance with the tacks; to which bonds and bills it seems the defender had got assignation, and intimated the same some time after Sir Robert's decease.

When the process against the defender came before the Lord Bankton Ordinary, the pursuer insisted that the annual sums payable on these bonds and bills were part of the future rents of the estate of Westshiell, to which the pursuer, as heir of entail, had right, and therefore that his Lordship should, *ante omnia*, decern the defender to repay what he had uplifted since Sir Robert's death, by virtue of his assignation to these bonds and bills, and transfer [448] the same to the pursuer in so far as not uplifted. His Lordship, of the date of July 11th 1758, was pleased to make *avisandum* to the Lords with the above point, and to order informations to be given in for both parties: and then on the part of the pursuer, "*Primo*, It is contended, that these bonds and bills assigned by Sir Robert to the defender, could by no means be effectually conveyed to him for a longer endurance than Sir Robert's life; it might as well be pleaded, that Sir Robert could assign the whole rents of the estate for nineteen years, the term of the endurance of the tacks, as that part of the rents which is constitute by bonds and bills, than which nothing could be more absurd. *Secundo*, That there was no room to allege that the sums contained in these bonds or bills ought to be considered as grassums, which heirs of entail are frequently in use

to take without challenge,—seeing at letting the present tacks considerable grassums were paid to Sir Robert, quite distinct from these obligations, to the extent of about £300 sterling, and the amount of the sums in these same bonds and bills comes to no less than £637 1s. 1d. Scots per annum of rent, which at the expiry of the tack makes a total of £11,521 8s. Scots, which by this device the heir of entail would be disappointed of, should this new invented plan meet with success.” Then they state, “that this is a most illegal machination: for at that rate, supposing an entailed estate should improve from £500 to £1000 sterling per annum, nineteen years rent of £500 a year might be conveyed to a stranger, in direct violation of the intention of [449] the maker of the entail: a scheme which, at first sight, appears fraudulent, and inconsistent with the law, so long as entails are permitted to take place in this country.” Then they insisted, that these were to be considered as annual rents in the nature of discharges: and they proceeded to state upon the whole, and under the circumstances of the case, that whatever might be said about that which was paid at the commencement of the lease as grassum, it was, as with respect to these bonds and bills, to be considered as rent.

On the other hand, it was insisted, that there was not the least pretence for this,—both sides agreed that grassum might be taken,—there was no point, therefore, brought before the Court as to that, but it must be admitted, that both sides agreed that grassum might be taken; and your Lordships will hear what the Judges said on that point: but Mr. Wilson said this in effect—This is a very strange claim you make,—for the result of it is neither more nor less than this—here are (I forget what number, but I think twenty-one) tenants, who upon the renewal of their leases, a dozen of them being in good circumstances, say, here is a grassum,—(this was an entail, where it was to be without a diminution of rental.)—here is a grassum, let us have our lease at the rent last paid:—the heir in possession takes the grassum from them.—With respect to other persons, not in quite so good circumstances as the former, they say we cannot pay down the grassum, but our grassum shall be so much, and we will pay you that, *de anno in annum*, till we have satisfied you the whole of it. The grassum, if it be legal, must be paid, it is said, at the commencement [450] of the lease; but, argues Mr. Wilson, if it can be taken at the commencement of the lease, how can it be illegal for the parties to agree that the landlord shall give credit to the tenant for the grassum, till such time as it shall be convenient for the tenant to pay it; or that, instead of receiving that grassum in one payment, he will take it in different payments, in succeeding years; supposing, for instance, a person who could not part with his money, had been able to find some person to make up the money, and that other person had paid the money, and that the landlord had then given him back his bond to pay the grassum at a particular period, or at particular periods. This, it was contended, was in substance and effect precisely the same thing.

The Judges, as far as we have notes of their judgment, express themselves in the following terms:—My Lord Kames says, “A bond payable for sums at the terms the rent is paid, is presumed a part of the rent.” Here it must be remarked, that the sums were not payable at the time the rent was paid; that is a mistake. “But in this case, we should not go upon presumptions; a proof ought to be allowed, that these bonds were granted for rents—these bonds must be paid to Sir Archibald.”

Lord Coalston says, “There is no fraud in this case—a lawful act to take bonds for grassums, as the heir of entail is not restricted in setting tacks:” so that he considers all this as grassum. The bonds were taken for what he thought a grassum, just as much as any payments could in the consideration of the Judges be considered as having the character of grassum.

[451] Lord Minto says, “The question depends upon this fact, Whether this is a grassum or a rent.” Mr. Justice-Clerk says nothing.

Then follows Lord Alesmere, and what he states, will be well worthy your Lordships attention:—“A deception of this kind is not unlawful, but if not cleverly done, it cannot be sustained. Every bungling operator is not fit to execute such nice operations. This deception is not properly executed—this appears to be rent, not a grassum.”

Lord Nisbet says, “This a grassum, not a rent, it has not the qualities of rents—no hypothec.”

Lord Auchinleck says, "These bonds rent, not grassums."

Lockhart, the defender's counsel, observed, that the heir of entail could have discharged these bonds; he could not discharge rents.

Upon the report of the Lord Ordinary, "The Lords sustain the defences of William Wilson, defender, against that part of the pursuer's libel which concerns the bonds and bills granted by the tenants of Westshiell to the deceased Sir Robert Denham, to which the said defender has right, partly by assignation, and partly as executor decerned and confirmed to the said Sir Robert Denham, and remit to the Lord Ordinary in the cause to proceed accordingly."

So that, in the first instance, the parties and the Court proceed upon the notion of grassum not being subject to objection. There was a very good reason for that: the Judges, one and all, were taking grassum themselves: even my Lord Alenmore, who thinks the deception was not unlawful, so that it was cleverly [452] done; but that here the operator was a bungler, and the payment therefore appeared to be rent, instead of grassum. Upon the whole, however, they were of opinion it was to be considered as a grassum, and they sustained the defences, as far as concerned the bonds and bills.

This was brought before the Court again; and it was argued, that this was an attempt to evade; that it signified nothing, whether the bonds and bills could be sustained or not; that it must be considered as a rent; and the Judges were finally of opinion, and came to this decision in substance—That if you contract for grassum at the commencement, you may take it, and keep it; and that the lease is a good lease, provided it be made without a diminution of the rental; but that, on the other hand, if you deal with a tenant, who cannot immediately pay you a grassum, and you agree with that tenant to take annually from him sums, which are in discharge of the grassum; in fact, those annual sums are not to be considered as grassums, but to be considered as rent; in other words, that the grassum must be presently paid, and you cannot give time, in the manner in which it is here stated, to pay the grassum *de anno in annum*. I understand that this case did not come before the House of Lords; but it is a case which deserves a great deal of consideration. It seems to decide, that if a sum of money, before or at the time of granting the lease, is taken as grassum, the heir of tailzie has no right to complain; but, if you can see from the whole transaction that the sum taken was reserved as rent, although expressly in discharge or satisfaction of grassum, then it must be taken as rent. But why, because to be paid in [453] future, it was to be taken as rent, appears to me a proposition extremely difficult to be deduced from the principles which must be supposed to have governed this case. (*Vide post*, 465, the further discussion of this case.)

There are several other questions, which we shall be obliged, I think, to put to ourselves, before we come to a determination of this case; and they may be put some of them in this way. It is said, that by the law of Scotland the heir of tailzie cannot make a lease, which is to reserve to himself, during the first five years of lease, £800 a year, and then to reserve, during the remainder of the lease, £500 a year; that the lease must not be more beneficial to the person holding at the commencement of the lease, than to those who are to take after him. Now, if that can be sustained as law, which is hardly denied, then this question presents itself: If a man cannot for the first five years of a nineteen years lease, take £1000 or £1500 a year for himself, reserving to himself, and those who come after him, £250 a year, for the remaining fourteen years of the lease—I may be wrong, but there does not appear to be a great deal of good sense in saying, he may do that *per indirectum*, which he cannot do *per directum*; that is to say, that instead of reserving the £1000 a year, or £1500 a year, for the first five years, he may reserve throughout the whole of the lease only £500 or £250 a year; and, instead of the £1500 a year, or the additional rent for the first five years, he may take *in presenti* from his lessee as much as that £1500 a year, or the additional rent for the first five years, would amount to.

[454] Supposing the meaning of the words, "without diminution of rental," to be, that you might let at the last rent; I conceive it would be the same in point of law, even if we had no authorities so to inform us, that if there were no such words to be found in the Buccleuch entail, as "*the just avail at the time*," you might lower the rent, stating the reason. Then, suppose the rent having been lowered, there is a

third lere to be granted; what is the rent at which that third lease is to be granted? Is it the rent which was the last rent which had been so lowered; or are you to refer back again to that which was the rent before it was so lowered? I find, there is one case (*Elliott v. Curries*, Fac. Coll. Jan. 16. 1798)—(it was not a case where the last rent had been diminished on a subsequent lease, but) where the tenant who held, had ceased to hold, and the land was taken into the possession of the landlord himself, and he held it for a considerable time.—If the value of land, in the last year in which he so held it, had been asked, and it turned out that the value of the land to be let was £1000 a year; and, on the other hand, that the actual rent reserved, before that landlord took it into his natural possession, was only £500 a year—I understand there is one case, in which it has been held, that if the landlord chooses to let it again, he is allowed to let it, not at such a rent as the value at the period of his natural possession would justify, but at the low rent which the land was let for at the time when his holding commenced. If you consider what may be the effect of such a rule, I think you will see no small reason to doubt the principle upon which it stands.

[455] * In this case, the great and important question is, What is the effect of that thing, which in this case is called *grassum*, but which I apprehend must be called rent. With respect to the tacks made under this entail, sometimes inconsiderable sums were taken—one year's or two years rent, reserving sometimes the old rent, understanding the words, the old rent, to be rent recently paid before the lease is made. Upon this transaction, we are to decide what is the Scotch law applicable to the subject—we are to look at the practice—we are to look at the understanding of the Courts—we are to look at decision—and if an opinion should be ever so clearly entertained, that if the matter were *res integra*, it would be impossible to introduce the doctrine, that the heirs of tailzie may thus deal with estates; yet, if you find that doctrine at this day part of the law of Scotland; to any notion of the inexpediency of such law you ought to pay no attention, but to pronounce the law simply as you now find it to be.

On the other hand, as a lawyer, I do not shrink from stating, that there may be a great deal of practice in transactions of a particular nature; there may be a great deal of understanding, as to the legality or illegality of that practice; and there may be a great deal of decision, where the point decided is not the point in controversy; which understanding, it must be admitted, is important; [456] which practice is strong; and it must be admitted, that that general understanding is important testimony as to what the law is, and that the *dicta* of Judges, and what they have taken for granted in decisions not upon the point, are of great weight also, as testimony of what the law is; but nevertheless, the law may not be as that practice, or that understanding, or those *dicta* would *prima facie* import it to be.

The present case affords a very strong and cogent illustration of the doctrine which I have been stating. You see in this case, that from a particular period, long before the year 1600, and down to the year 1732, it was the constant doctrine, and the uniform decision of the Courts of Scotland with respect to teinds, that they were to be valued upon the rent constantly paid, and without reference to *grassums* taken by the person to whom that rent was constantly paid. If any person had asked prior to the year 1732, what was the law with respect to teinds, he would have been answered, Who can doubt it? Here are the doctrines and the decisions of the Courts; and yet in the year 1732 the Court of Session itself decided, that all this practice, and all this understanding, and all these decisions, were not according to the law of Scotland. I do not say, that the same principle as between the land-owner and the person who is entitled to the teinds, is to be applied in considering the effect of a deed of tailzie, as between the heir of tailzie in possession and the person to succeed; but I am only attempting to illustrate the observation, that both in England and in Scotland it has frequently occurred, that there is a great deal of practice, a [457] great deal of understanding, and many *dicta*, and yet when the thing came to be investigated, that practice, that understanding, and those *dicta*, were found to be without foundation.

With respect to long leases, what has been the practice in Scotland—what has

* At this part of his address to the House, the Lord Chancellor observed, that in the March and Neidpath case, there were one or two of the leases expressly granted for the lifetime of the receiver, and the lifetime of the grantor; and that the question upon them would be, how far *grassum* affects them?

been the understanding with respect to them—what have been the decisions sustaining them? It is but a few years since the Wakefield case was brought into the Court of Session, when they decided, that their practice, that their understanding, that their decisions were wrong; and when this House decided upon the question, whether long leases were or were not prohibited as “alienation,” under that word “alien,” although it was represented that the whole law of the country would be overturned; yet the Court of Session in the first instance, and this House on appeal, were of opinion, that notwithstanding all that practice, all that understanding, all those *dicta* and decisions, the law of the land was, that the word “alien” in a tailzie which had prohibitory, irritant, and resolute clauses, did prohibit long leases as alienations.

It is now stated in the papers upon the table, that “it is impossible not to admit, that there are grounds, both in principle and authority, for holding a long lease to be an alienation:” But they go on to state, “that the determination does not clash with the fundamental rules on which entails depend.” They further add, and in their words I had rather point out the distinction than in any of my own—“but the question with regard to the endurance of leases has no connection whatever with the question [458] of grassum, and it is impossible to deduce any analogy from the one, which can bear even remotely on the other.” If this be so, the powers of my mind are not equal to discover what is the principle upon which long leasing is alienation, and short leasing is not alienation. If we are to take it upon the strict rules of the interpretation of tailzies, then we must say, that alienation means transference of property; and a lease is neither in the law of England nor the law of Scotland, a transference of property. By the law of Scotland, until the statute of 1449, leasing, which in other words is called location, was a sort of right, (and so in the law of England), which the tenant had to enjoy the premises demised, or tacked, not by virtue of any transference of the property itself, but having a mere possessory right, or a mere personal right under the contract. In the year 1449, in Scotland, an act made it a species of real right; but though a species of real right, it is not a species of real right deduced from alienation in the technical and strict sense of the word, because alienation in the technical and strict sense of the word is transference of property.

If it be the law of Scotland, as it has now been *finally determined to be* (Wakefield case, *ante*), that under a prohibition to alienate, a long lease is prohibited, and if it be the law of Scotland, that a lease is not a transference of the property; yet, that in the construction put by the law of Scotland upon these deeds of tailzie, it applies strict construction to prohibit long leases; and yet it permits, upon grounds not of construction, but upon other grounds, [459] what are called short leases, or leases which are necessary for the manurance and profitable management of the land, however difficult it may be to declare that one lease is too long and another lease too short; yet we have at least got into this state, that every body seems to be agreed, that a lease of a certain duration is neither too long nor too short. I should say, if I were to lay down what I conceive is a duration of which that might be predicated, that a lease of nineteen years was neither too long nor too short; but whether I am right or not in saying, that a lease of nineteen years is neither too long nor too short, I know I am expressing myself according to the law of Scotland, when I say, that a lease of ninety years is too long; that it is an alienation, not because it is a transfer of property, but *because it operates as mischievously as a transference of property*.

If I am asked why short leases are not prohibited, I cannot answer.—I have read these papers, till I can hardly tell what is in them;—and I have not been able to find expressly, and in terms, why a short lease is allowed. I am obliged, therefore, to see why a long lease is not allowed, and when I find why a long lease is not allowed, I find why a short lease is allowed. The *dicta* and decisions with respect to forfeiture, with respect to deathbed leases, and so on, have this expression when they strike at long leases, “they cannot be considered as tacks, because they are not leases of necessary and ordinary administration;” some of them go so far as to say, because they have grassums. If this can be maintained that such is the principle upon which short leases are allowed, how can I be doing that [460] which is charged upon me, altering the law of Scotland, introducing a change into the law of Scotland, or striking at principles upon which deeds of tailzie have hitherto been construed.

With respect to those deeds of tailzie, it is impossible to overlook that which I find scattered in every author, that they are *strictissimi juris*, that they are considered odious. Yet it is difficult to deal with that proposition as applicable in the year 1685, or to affirm that the tailzies established by that statute are odious. I agree in this principle, that as, on the one hand, it would have been wrong in any Court of Justice to have added to that act of Parliament, so on the other hand, I think it would have been equally wrong in any Court of Justice to have taken away from the fair effect of it; and as to the effect of these tailzies, I do not, as a Judge, enter into the consideration of its placing the property *extra commercium*, if they happen to make an estate tail into what may be represented as a perpetuity.—I think it incumbent upon the Court to say, that what is complained of as an act which amounts to a breach of a tailzie, is a breach of the tailzie within that act of Parliament which sanctions the tailzie: and if the question is, whether a long lease is or is not an alienation within the meaning of the author expressed in the deed, it must also be considered whether it is an alienation within the intent and meaning of the act of 1685. Now that act has not one word about leases: it speaks of such provisos and conditions as you might think proper to insert in tailzies, but it has not one word about leases: and when they get the length of saying, that a long lease is an alienation, I cannot concur in the opinion [461] which I see expressed elsewhere, that it does not follow, that because a long lease is an alienation, a short lease is an alienation. It seems to me that every lease must be an alienation; but that it has been so long settled, and it is so necessary for the purposes of production and enjoyment that short leases should be endured, that it is impossible to disturb short leases, though you disturb long leases.

When we get to this point, there are many ways of considering the question with respect to those leases which were made by the Duke of Queensberry, and which are said to have been made for grassums. In this case there has been a considerable abuse in the application of that word "grassum." We have it said here, if you take a small grassum, you may take a large grassum, and it is very difficult to say why, if you take a small grassum, you should not take a large one: yet, I do not think it absolutely follows, that a sum may not be so very large as to be too large even to be a large grassum, so that that term grassum cannot be properly applied; and when I see the heir of entail on an old rent of 3s. a year, taking £300 by way of grassum, I should be glad to ask any lawyer in Scotland, of the century before the last, whether he had the least notion that the sum of £300 taken for a lease where the rental was only 3s. was in the law of Scotland *bona fide* a grassum?

This must be taken in two or three points of view. We must inquire first, what *is* the law—not what *should be* the law, if this were *res integra*. If the case is not touched by decision, we are next to ask what is the conclusion we are to come to, regard being had to the contents of these deeds of tailzie, and the [462] nature of that which has been done under these specific deeds of tailzie?

Now, inverting the order a little as to these considerations: first of all, I call your attention again shortly to what has been the practice; and although I think, that upon the analysis of the several cases in this list of leases which are here printed, the practice will prove to be infinitely less than it appears upon first sight to be, if you take for granted that all the leases stated in this list of leases were let for grassums; yet it is impossible for me to deny (and I ought to admit every fact which bears upon the question that will enable your Lordships to try the opinion I may give) that, even upon an analysis of these cases, looking at each and every of them, there is enough to form a considerable body of practice. I might also admit as probable, that no research can have been so effectually made, as to bring before you the full amount of this practice. There are many heirs of tailzie who are not inclined and will not be advised to assist such inquiries. I might also admit, that you have cases, in which parties have come into Court, not questioning grassum at all, in which Judges have stated certain *dicta* with respect to grassum, which must also be taken as evidence of the law; and where you have decisions, except those very lately indeed, in favour of grassum. To this I must add, that it is stated in these papers, and not denied, that the former possessor of this estate let many leases for grassums. The practice is also extremely weighty. Sir Hay Campbell, who states the result of his experience during a long professional life, in the course of which

he has been in every respectable situation of [463] the profession, where he has had occasion to advise and to give judgments upon leases, states his idea of grassum in such a way as to amount, I must admit, to very strong proof of what has been the practice, and to afford strong proof of what he considered to be the law; and there can be no doubt that his conceptions of what is law, are very much to be regarded by those who are called upon to pronounce the law judicially, although he merely gives an opinion, and was never called upon to pronounce judicially upon the very point in question; but if he had been called upon to pronounce it, there can be no doubt what his opinion and judgment would have been.

On the other hand, there are an infinite number of estates tail, in which, as it is represented, and without contradiction in these papers, leases have not been granted on grassums. But as to this tailzie of the Duke of Buccleuch having been made in 1705, it does appear that grassums, in the fair sense of the word grassum, on short leases, were taken by those who had the care of the Queensberry estates while the Dukes were minors, or while some Duke was minor, and that the persons who in succession had the care of the estate, were persons who, from their situation,—the judicial situations they held in the country,—were likely to know what they could and what they could not legally do in the administration of the estate of an heir of tailzie.

There is another circumstance, which is evidence of practice, and of the law: namely, that in many cases, heirs of tailzie are prohibited from letting for grassums. I believe that those prohibitions are not of very ancient date; but, whatever may be their [464] date, whether it is more remote or more proximate, the fact that there are such prohibitions in deeds of tailzie restraining heirs of tailzie from letting with grassums, is some evidence at least that at the period at which such tailzies were made, and such prohibitions inserted, it was thought necessary there should be such prohibitions, and therefore it was thought you might let with grassums, provided there was no such prohibition in the tailzie.

With respect to the decisions upon the subject, I pass over the Church cases and the Crown cases, with the observations which I have made upon them, as bearing or not bearing upon this question. You will find them all stated at large, in the cases upon the table, and I cannot add to them; but there is nothing which bears as decision upon the point which I am now putting. I pass over the case of *Leslie v. Orme*. In that case, there was a grassum, but the case was not decided upon the effect of grassum; and it must be admitted, that the fact that it was not decided upon the effect of grassum is a fact of some weight. In that case, the lease for four nineteen years was sustained by this House. I can do no more than refer you to the observations which were made upon it, in the cases formerly in discussion in this House.*

With respect to the Westshiels case (*Denham v. Wilson*, 15 Jan. 1761), so far from being an authority in favour of grassums, it is in principle an authority against them. In that case the pursuer did not complain of grassums, and the defender had no complaint about grassum to answer. It was an action which did not strike at a lease on which grassum had been paid. It was an action by [465] a succeeding heir of tailzie asserting that he was entitled to consider as rent certain payments, which were secured by bonds and bills; and that the person to whom those bonds and bills had been assigned, was not entitled to take the money secured by the bonds and bills, because the heir said that whatever their apparent nature was, they were really securities for rent, and the rent of course belonged to the heir of tailzie who had succeeded to the estate. In that case several tenants took leases from the heir of tailzie in possession. With respect to many of them, they were made according to what they considered good practice. They took leases, and paid grassums down. With respect to others, the lessees did not pay grassums down, but they said in effect, we have not money to advance, but inasmuch as the heir of tailzie, according to our notions (I am now putting language into their mouths which I think their acts spoke, if their mouths did not utter it,) is not prevented from letting without diminution of the rental, (for that was a case, as appears by the papers on your table, in which the heir of tailzie could let, provided he let without diminution of the rental,) therefore, though we cannot now advance the grassum required, we will do what comes to exactly the same thing—we will take the lease at the old rent; that is, we will take it

* As to this case, see the observations of Lord Redesdale, *post*.

without diminution of the rental, and you have a clear right to grant it, (as we say, and as you say,) without diminution of the rental, and instead of paying you a grassum, which is defined in some of these papers to be a sum of money paid at the commencement of the lease, we will not pay at the commencement of the lease, but we will give you [466] something payable not on the land leased, we will give you bonds and bills for so much money, (those, to be sure, were for annual payments,) and, (as they contended), it makes no difference either with respect to the validity of those leases, or the claims of the heirs of tailzie to come afterwards, whether we stand simply in the relation of tenant to you the landlord or not. The transaction creates between us the relation of debtor and creditor; the heir of tailzie has nothing to do with that transaction. If you look at the opinions of the Judges given upon the hearing of that case, some say this is grassum, others say this is rent, others say that it is a deception, and that it must not be performed by a bungling operator, and so on. Sir Hay Campbell's note of what passed, is a very curious testimony to show how clear the law was in that year 1761, with respect to the powers of heirs of entail.

In the first instance, they all decided, (and certainly there again it is authority to be regarded, both with respect to the practice and with respect to the law itself)—they all decided that it was not grassum, and deciding that it was not grassum, whether the lease was good or not good, being granted for grassum, was a question they had not in that case to determine—it was not before them. They found, that as the succeeding heir of entail had not sought to affect this lease on the head of grassum, the Judges had nothing to do with it; that if they could not bring the sums granted under these bonds and bills into the account as rent, they could do nothing. And they could do nothing;—why? because the parties had not upon that subject submitted any [467] thing to them; and therefore, all that is said about grassum in that case, appears to me to be *obiter dictum*. The argument, which was repelled upon the second hearing, was an argument submitting to the Judges in that action, that the sums due upon the bonds and bills were not sums demanded in the action. It is impossible for the mind of man to say, that there is any sound distinction between a grassum that is paid, and a grassum that is agreed to be paid, and secured.—If it be rent, that is another matter.—There are two most able papers on the subject; but notwithstanding the ability with which it was argued that this was rent, and notwithstanding the decision that it was rent, I must take the liberty of saying, that after looking at that case again, and again, and again—after paying all the deference I can pay to the judgment—and after admitting all the weight that appears to me to be due to the great authority of the counsel of that day who signed the memorial before the Court of Session, I never can agree to that decision.

I say further, that when I see in these papers that grassum is treated as a thing impossible to be rent, because you cannot apply the remedies to grassum which by law and by acts of sederunt may be applied for the recovery of rent, I should be glad, if any body would tell me how then it was possible to apply those remedies to the payments secured under those bonds and bills. I am very far from saying that is a reason why it should not be considered as rent. Mr. Cranstoun has satisfied me, there may be such a thing as a fraud upon an entail. He has given instances in the memorial addressed to the Court of Session, where [468] one thing appears, and another thing is that which is designed. There is therefore no doubt on my mind that there may be fraud upon an entail; and I agree, that if this was meant to be a fraud upon the entail, by taking these bonds and bills not *eo nomine* as rent, but really and truly as rent, the trustees using this device to prevent the heir of tailzie or the Court of Session from saying what was the real transaction, the fraud might be overreached by the Court. But then the difficulty I have upon my mind is this, if the heir of tailzie could take the grassum which he did from tenant A. B. and could take the grassum, which he did not instantly take from tenant C. D. but *bona fide* agreed with C. D. that grassum should be thereafter paid, and paid by certain instalments: if the parties make a lease, which upon the hypothesis of what the law was then, was a good lease independently of that collateral transaction, by reserving rent without diminution of the rental, it appears to me, that to say because they have thought proper to constitute the relation of debtor and creditor, therefore the fruits of that relation were to be considered as rent, and to be ascribed to the relation of landlord and tenant, is a consequence that does not follow at all. The Westshiells

case goes no farther than this, that the Judges of that day took it for granted that grassum was allowable where there was no diminution of the rent of the day, a proposition admitted by the pursuer, and not contended against by the defender; and they decided, that what was secured by these bonds and bills was rent, and was not grassum.

If that case had come before me as a Judge, I must have said I could make no distinction between [469] a grassum paid directly, and a grassum secured by way of future payment, that they are both of the same nature, and that unless both could be recalled (recalled is perhaps too strong a word to use, for there may be equities with respect to those grassums) but that unless they can both be objected to, he who admitted the right to take grassums upon that deed, ought in that case to have been held to have no right to call for the payment to him of the sums secured by those bonds and bills.

This brings to my mind the case now pending on appeal to this House, the case of the *Earl of Elgin v. Wellwood*. If nothing is grassum but what is paid at the commencement of the lease, how are your Lordships to deal with the case of the *Earl of Elgin v. Wellwood* *: there the grassum was no less than £12,000, which is not to be paid at the commencement of the lease, it is to be paid at the death of the landlord or the tenant; and that is a case which includes the other question, namely, whether, where there is a power or faculty to set tacks for such time as the party thinks proper, making such reservations as are thereby prescribed, letting for the term of 999 years is to be considered as setting a tack, or whether that was not to be considered as an alienation, notwithstanding the permission contained in the lease to which I am now alluding?

With respect to grassum, as with respect to long leasing, much difficulty has been introduced by some [470] late cases.—It is not my intention to go through them all; but I will call your attention particularly to the case of *McGill* (not reported); in the printed opinion of one of the learned Judges the following account is given of that case. He says, “the property was very considerable. As I was counsel in the cause, I can speak with some certainty. It was an action by the guardians of a minor heir of entail, whose father, on account of the very slender provisions allowed by the entail to his widow and younger children, had granted a lease of a part of the lands to a trustee for their benefit, with an expectation of its being afterwards let at a higher rent. The question was not very anxiously contested; the guardians, who were desirous that the additional provisions should be made good, having acquiesced in the first interlocutor that was pronounced, although some of the Judges expressed doubts as to the validity of the transaction. For this reason, I presume the decision is not mentioned in the reports, although a question of smaller pecuniary importance between the same parties is there noticed; and of this I am confident, that it was not considered by the Bar as a precedent upon which the country might rely. One case I remember, where an heir of entail in an estate yielding between five and six thousand pounds a year, was prevented from providing his widow in a jointure of more than £200 a year”—(I hope, that whatever may be the decision upon this case, something may be done by Parliament by way of regulation upon this subject, and without delay, for the purpose of giving security to what perhaps this decision might other-[471]-wise tend to shake, and prevent having effect)—“upon the authority of the decision in the case of *McGill*, he proposed to grant a trust lease of certain farms, which it was supposed might yield increased rents when the current leases were at an end. The answer by the counsel was, that there could be no objection to the granting of a trust lease; but that, as no certain reliance could be placed upon it in a question with the succeeding heirs of entail, the trustee should have it in view, out of the surplus funds, while the heir of entail lived, to accumulate such a sum as might be necessary.” I cannot conceive that this case can be considered, after what I have read, as a case of grave authority.

Your Lordships will obtain a very correct idea, which will enable you to be more precise in your views of this subject of grassum, from a paper printed in a case

* Since decided in favour of the respondent, principally on the nature of the rent to be reserved and the permissive clause by which the heir of entail was permitted to make such tacks as he *should think fit*, reserving ten bolls of *corn* per acre by way of rent. (D. P. July 1820, *post*.)

which I have now in my hand, and which has the name of "Blair, Solicitor-General, as to the mode of making a lease subject to provisions for younger children," undoubtedly with a view of avoiding what my Lord Almore calls a bungling operation. He puts it thus: "What occurs to me as the most unexceptionable mode of conducting a transaction of this kind, if the execution of it shall be found practicable, is this, that the new lease should be granted for a real grassum to be drawn by the memorialist at the time, not from the occupier of the land, but from some third party, or any other person who shall agree, in consideration of getting the new lease in his name, to advance a sum of money equal, or nearly equal, to [472] the value thereof, to be drawn back by him from a sub-tenant yearly, during the currency of the lease. For this purpose, it will be necessary, in the *first* place, to fix with certainty the value of the new lease, which can be done by previously making an agreement with a person who is to occupy the land in character of sub-tenant, at such rent as the land may be worth. The surplus rent, therefore, which is to be drawn by the principal tenant, being thus known, it becomes an easy matter of calculation to ascertain what is the present value of such surplus rent for the space of nineteen years, or whatever may be the endurance of the lease. If any person can be prevailed upon to advance a sum in the name of grassum equal to the present value of the lease so calculated, making however a reasonable allowance for the trouble and inconvenience of being reimbursed by yearly payments from the sub-tenant, the transaction I think would answer every purpose which the memorialist has in view. The person advancing the money would be the principal tenant, paying a grassum for a real lease granted in his favour at the old rent, and drawing an annual surplus rent from the sub-tenant, who would just be liable to pay the rent which he agreed for, without having any connection with the grassum, and the memorialist would draw a sum of money which would be entirely at his disposal. Upon the supposition that the heir of entail has the power of setting farms at the old rent and taking grassums, (which is understood to be a settled point), I do not see upon what grounds such a transaction could [473] be challenged.—There may be a difficulty in getting a person to advance money upon the security of a lease, and on the prospect of being reimbursed out of a surplus rent."

This is a mode in which a transaction of this sort is thought to be most advisably carried into execution; but when this mode is stated to have had the opinion of so learned a man as Mr. Blair, it must be admitted that it is "upon the supposition that the heir of entail has the power of setting farms at the old rent, and taking grassums; which is understood (as he says) to be a settled point." But upon such a transaction, if you are to look at the real nature of it, what in the world is it but anticipation of rent! The lease is to be let at the value of the land; there is to be a previous agreement for a lease at the value of the land; an estimate is then to be set upon such a lease, that is, in other words, having agreed for a lease upon the full value of the land, another lease is made to somebody else at the old rent with a grassum, and the heir of entail in possession is to have the disposal of this grassum if he has got it; or if he did not take the grassum, somebody else is to have the benefit of the lease, with regard to which a calculation is to be made of the grassum. If that is not anticipation of rent, there surely is nothing prohibited.

I have called your attention to what has been considered to be grassum, and contrasted that with what passed in the case of Westshiells, where bonds and bills were taken, it not being thought necessary that the rent should be increased, and those bonds and bills were held to be rent, because they said they [474] were connected with the transaction. But how it can be held that grassum is not anticipation of rent, consistently with the opinion given in the Westshiells case, is a difficulty I cannot get over.

Great as the name of Mr. Blair is—and there never did exist in the judicial state a man entitled to a higher character,—it is impossible to look into these papers without seeing how unsettled his notions were as to the question whether long leases might be granted of entailed estates.

The result of the whole in reference to *dicta* and decision, coupled with practice, will be, whether there is or is not so much of decision upon this point as to have become settled doctrine, hallowed and sanctified by time: so that if this case had been agitated some thirty or forty years ago, we must have come to the same decision. No one can state more strongly than I should be disposed to represent to you, that the

current of authorities in the Court below, standing on grounds that could not be shaken, must be considered to have been established on sound principles, in order that the law may be settled. But here the question at last would be, whether you have so much of decision upon this point as precludes you from examining what is the principle upon which you have acted in other cases, and particularly with respect to long leases, to which I have before alluded.

It has never been suggested that rent could be diminished under a tailzie. I must be understood to be speaking, not of tailzies containing express prohibitions, or under circumstances where it is of necessity that the rent is diminished; but of tailzies where there is nothing about diminution of rent in the tailzies [475]—of tailzies where the necessity of reducing it does not occur from the state of the times, and where you are therefore to look at the charter of tailzie, which prohibits alienation and long leasing, and that upon a principle which has been stated in all the cases in which that prohibition has been mentioned. Can it be said, notwithstanding long leases are prohibited by the prohibition to alienate, yet if there is nothing in the charter that prohibits diminution of rent, and if there is nothing in the circumstances of the times which warrants diminution of rent, the heir of tailzie, who cannot grant a long lease, because that is not for necessary and ordinary administration, may, nevertheless, sink the last rent to the lowest sum, which is a farthing above illusory rent. I beg to ask what a system of law must that be which says, you shall not let a lease for thirty years, (I take this duration for the purpose of illustrating what I mean, though we have got no lower than fifty-seven; your Lordships have said fifty-seven years is prohibited, because that is in its nature an alienation; and that it is in its nature an alienation, because it is placing on the tailzie an incumbrance, not of necessity and for ordinary administration), and yet, if there be no prohibition of that kind, that word “alienation” will permit you to sink the value of the estate for nineteen years, if that is the longest term which the word alienation will permit, whether grassum is paid or not, to such a sum as is just one single farthing above that sum, which will constitute an illusory rent. It is not immaterial that the question should be considered in this point of view, because I admit that if the law be so, if you can do that, it bears strongly upon your power with respect to the present question; but if [476] the law be so that you cannot do that, I will not call it an implied prohibition, but I do say that it is a non-capacity, imposed upon the heir of tailzie, represent him as much as you please as the absolute heir or manager of his estate—imposed upon him, not by the terms of the tailzie, but by the same principle which imposes upon him the restraint, not to let leases for ninety-seven or fifty-seven years, or any number of years not of necessary and ordinary administration.

There is certain evidence of what is the law upon that subject. In the first place, something is to be found upon the subject in these papers. Lord Meadowbank in one case states, that diminishing the rent much, he would call even fraud. There is one of the Judges who says, he would not permit a diminution of the rent. Sir Hay Campbell, according to the paper which I read to you, certainly supposes there could not be a diminution of rent; he conceives from the nature of a tailzie that a diminution of rent could not take place, unless there is a necessity for such diminution. Upon what grounds do these opinions rest, unless it be that such incapacity is imposed upon the heir, not for his own sake, but to preserve a just dealing with the tailzied estate.

I can never come to the decision of a Scotch cause, which involves an important question, without fear and trembling. It would be folly for any man in my situation, to suppose he is to deal with questions of Scotch law, as he would with questions of English law. I always recollect, that with respect to the judgments of the Courts of Scotland, it is our first duty to employ ourselves industriously in investigating those subjects which come before us, [477] and I know it would be ridiculous to suppose that the nature of our jurisdiction is not open to error, from the circumstance, that those who have to advise your Lordships can only occasionally inform themselves. But with much diffidence in myself, and great respect to others, I am bound to preserve my independence as a Judge, and weighing every circumstance, to enable me to form a solid and a right opinion, I advance to that point in which conscience will not permit me to speak other than the language of the law.

With these observations, I apply myself again to what is the law of Scotland with respect to mansion-houses and policies. It is admitted since the Greenock case,* the Roxburgh case,† and others which might be mentioned, that the heir of tailzie cannot disappoint his successor of the mansion-house and policies: yet the author of the tailzie has not prohibited him by a single word, for this doctrine applies to those cases, where the author of the tailzie has not prohibited him from doing what he pleases with those mansion-houses, and those policies: but yet the law has said they are the residences of the heirs of tailzie in succession, and we will imply the prohibition. But leases, they say, of mansion-house and policies are not protected by the act of 1449. Why are they not protected by the act of 1449? You find words by which lands and tenements are protected by the act of 1449, yet you find the cases mentioned in which as to lands and tenements that act is not applied to protect them.

[478] Tenants in fee simple, those who in the largest sense are absolute fiars, have an unlimited discretion as to mansion-houses and policies. This was strongly impressed upon the minds of Scotch lawyers in the Roxburgh cases, by the great professional talent of Mr. Clerk. When the feus were made, it was thought necessary to except and reserve for the succeeding heirs of entail, the principal mansions and many acres of land adjoining. Upon what principle was this?—it was thought to be contrary to the intention of the author of the tailzie, who had not said one word about his mansion-house, to permit it to be given out of the possession of those who he hoped would there maintain hospitality among their Scotch neighbours, and continue to receive the respect so justly due to the Scotch nobility.

As to the power of selling woods (to be cut down after the decease of the heir of tailzie), I never considered that as an implied prohibition; I said only that in such respect he was not the same monarch, having the same unlimited estate and power over his lands as an English tenant in fee simple, or the absolute fiar in Scotland. The tenant in pure fee can sell his wood to be cut, and this shows that the principle is not generally applied. There is no doubt, that the Scotch heir of tailzie may denude (to use the word) the estate of every stick upon it, timber, and saplings, and every thing else that should be permitted to grow; in short, he may do all the waste he can do in the course of his life. That is what our tenant in fee can do, but what our tenant in tail cannot do.‡

As to the objections arising from the difficulty and [479] uncertainty of the proposed rule of law in its application, the same occur in the Courts of this country when they are required to decide what is an illusory share of a sum of money which a man has a right to appoint. Mr. Selden was certainly wrong in saying, that the decision of the Court of Chancery depended on the length of the Chancellor's foot. But I may admit as an exception or qualification, that when the Court comes to decide what is an illusory share, that does very much depend upon what is the length of the Chancellor's understanding. Sir W. Grant was so sensible of the difficulty, that he came to the decision, that he never would hold any share to be illusory, which no former Chancellor had done (*Butcher v. Butcher*, 9 Ves. 399). The question comes to this, What is the principle which you are to apply to this case, and what does that principle require of you? Unfortunately that is open to what arises by way of observation, I mean according to legal opinions and criticisms, upon the words of the charters themselves.

I endeavoured, when I read in one of those charters, in the March and Neidpath entail the words, "without diminution of the rental," to see how I could deal, upon any construction which I could put upon those words, with a great variety of questions which may possibly arise. What does this word diminution of the rental mean with respect to time? Does it mean, that you are to look at the date of the

* *Catheart v. Shaw*, Jan. 31, 1755; D. P. March 19, 1756.

† *Ker v. Roxburgh*, D. P. 1813, MSS. cases, and 2 Dow. 149. See *Ante*, p. 408.

‡ There is the appearance of mistake in the opinion expressed by the Lord Chancellor as to the powers of an English tenant in tail. The Report agrees with the note of the short-hand writer, and the sense in which the passage is to be understood will appear by considering the point of comparison between the Scotch tenant of tailzie and the English tenant in tail.

charter, and that you are to preserve always the rent as it is stated in the charter? If that is the case, would it be called a diminution of the rental, supposing the rental of this estate [480] to be £10,000 a-year, if the tenant in tailzie in possession lets farm A. at £100 a-year more than it before let for, and farm B. at £100 less? In one sense, that is no diminution of rental. Suppose he lets farm A. for £100 a-year more, and lets farm B. for £50 a-year less than it was before let for, there being upon the whole a gain of £50 in the rental. Is that a diminution of the rental or not in the law of Scotland? I have no means of answering that question but by stating that a great authority (Mr. Blair) says, he thinks the heir of entail is not entitled so to deal with the estate, but that he is bound to raise the rents in proportion. So that you have to determine, if you take this limited sense of the word, "without diminution of rental," whether that means a diminution of the total quantity of rent upon the whole of the farms, admitting of a diminution of rental for parcel of the estate, but still preserving the whole quantum of rent upon the whole taken together. According to the opinion to which I have adverted, if you diminish the rent of farm A. though you still preserve the quantum of rent upon the whole, by raising farm B. in proportion, you do not answer the Scotch idea of the meaning of these words.

There is another case we must look to, in order to know what this means. Suppose, that when the author makes his tailzie, he is in the natural possession of a part of the estate, that other part of the estate is in possession of tenants:—he dies:—the next heir of tailzie makes a lease, and he is to make a lease without diminution of the rental; what is [481] the sense of the words "without diminution of the rental," with respect to those lands of which his predecessor was in the natural possession, and which perhaps never were let at any rent at all! or they may have been let at some rent, before the time of the author of the tailzie, who, during his time, was in the natural possession! If they never were let at any rent previous to that time, then the words "without diminution of rental," with respect to that estate, cannot, in the technical sense of the words, mean without diminution of rental; because, according to that construction, he would be empowered to let the whole estate, including all that part in the natural possession of the entailer, for the rent of that part not in the natural possession of the entailer. To get rid of that difficulty, you must take the true value of that which was never let before, and so the words, "without diminution of rental," do not necessarily bear the technical sense of those words; but in order to give a rational construction to those words, you must take into your consideration the value of that on which there can be no diminution of the rental.

Suppose again, that the land in the natural possession of the entailer had fifty years before been let at a rent. Could it be said, (something like it has been said lately, but I cannot assent to it,)—could the next heir of tailzie, being bound to let without diminution of the rental, say the author of the entail was in the natural possession of this part, which was worth £5000 a-year during his possession; but the last time this was let, which was fifty years ago, it was let at £2000 a-year; I will let farms A. B. [482] C. and D. which were not in the natural possession of my author, at the rent which they yielded when the entail was made; but with respect to that which was in the natural possession of my author, and which, if it had not been in the natural possession of my author, would, before his death, have increased from £2000 to £5000, it is no diminution of the rental to pass over the period of his enjoyment, in which the value of it had so much increased. I will take the £2000 a-year, as a ratio of the rent. I say that is impossible. I have therefore, when I read these words, asked myself what they can mean. Here is annexed in the papers, the rental to the tailzie—Is it then to be contended, that the manner in which it is to be discovered whether there is an evident diminution of the rental or not, is to put upon the heir of tailzie the obligation to see whether there is sixpence abated from the former rental. I cannot conceive that to be the meaning of the author of the entail. I am of opinion, that the words "without evident diminution of the rental," mean without diminution of such fair rent as may be obtained.

We are told no person can deal with this decision; that you put such a difficulty upon the heirs of tailzie, that they must go to what in this country we call auction, and what in that country they call roup; that it will not be safe for them to act at all.

To that I answer, I feel no difficulty in the world upon that subject. And when we are told, as we are told over and over again in the papers before us, that he who is not to diminish rent, is not bound to increase it. I apply the principle which appears to me [483] to be a very fair principle to apply. You are not bound to increase it, I admit: but you are not bound to increase it, for this reason, that it may be taken, if you do not, to be the just rent. In this country, (and do not let it be supposed I am confounding the powers of tenants in tail in this country, with those of tenants of tailzie in Scotland), in a similar case, the author of the power always imposes it as a condition, that the lease shall be made for the best rent which can be obtained. Then what is the evidence, upon the execution of the power? Show me that he takes no more for himself than he leaves for his successor, and that is evidence (Presumptive, *ante*, p. 428) that it is the best rent which can be obtained. Show me that he does for himself only that which he does for others, and no difficulty can arise.

Suppose a man of the age of eighty, (and the Duke of Queensberry was about the age of eighty when he made some of these leases,) calculates his own life, and says, I may live for five years—Now, I will let for nineteen years; at £1500 a-year for five years, and £500 a-year for the rest of the nineteen. It was positively asserted, but I really cannot give my assent to the proposition, that such a lease as that could not be set aside by the succeeding heir of tailzie. I will not say that it can be, but there has been no instance produced of such lease. What is the state of the law of Scotland if grassum can be so taken: such a contrivance would not be endured by the law of Scotland—What does it amount to? The heir in possession says, I will take a grassum of [484] £5000; my way of taking that grassum of £5000 is not to take it in one sum, but to divide it into payments for the first five years, and then, at the expiration of the first five years, those who come after me, instead of having £1500 a-year, shall have £500 a-year. No, says the law of Scotland, you shall not have it so; if you mean to take it at all, you shall have it once for all—you may not take such an advantage by instalments, but you may take it at once in the name of grassum. I should be very glad if those who are more conversant with this subject, would tell me upon what principle such a doctrine can stand. The case may be thus illustrated: Here is a farm called A, and another farm called B, each of them was let: the last rent was £100. I am obliged to keep up the old rent, at least it is contended that that is so, as far as I can judge, I think it is so, and upon my opinion that it is so, I must decide with respect to farm A, and I take £500, and let it for the old rent; but with respect to farm B, unless I can get that £500 paid down to me *in presenti*, I cannot apportion it on the first four or five years of the lease: for what I receive *de anno in annum* must continue. Now that this is the state and principle of the doctrine there can be no doubt.

If this view of the case be right, on the words "*evident diminution of the rental*," I think there is no difference with respect to the words contained in the prohibitory and irritant and resolute clauses of the Buccleuch case, "without diminution of the rental *at the least at the just avail for the time*."

Looking at the opinions which have been deli-[485]-vered, it is curious to observe the different views which the human mind takes of the meaning of words. Some of the learned Judges are clear of any doubt whatever, that these words mean, at all events at the just avail at the time: others of them are clear, without any doubt whatever, that it means no such thing, and that it means, that if you cannot get the last rent, you must not let the estate at all: others are of opinion, that you might let it at the last rent; and if you do let it for less than the last rent, you shall let it at least for the just avail at the time. These opinions are supported by many very curious and ingenious cases.—They say, if you hire a workman for twelve hours, or from sunrise to sunset, you must pay him, if he has employed the interval between those periods, if there are not twelve hours from sunrise to sunset. I say that is all very well; but you are dealing with other subjects. Another learned Lord says, if I order my servant to go with my corn and sell it at its value, that is, at the market price, at least at the market price the preceding day: what should I say to my servant if he came back again, and said, I did not sell it at the market price of this day, but I did sell it at the market price of the last day; but, Sir, I have to inform you, that when I went to market, I was bid three times as much for it as the price paid on such day. The master immediately

says, the servant cannot possibly have understood my meaning—My meaning was this; get the market price of the day if you can, at least get the market price of the former day; but do not conclude from my saying, you are to get the market price of this, or the market price of the last day, that [486] I mean to authorize you to sell my corn at half its price, if you get double the market price of either day.

The question then is reduced to this: What is the meaning of the provision which is made in favour of the succeeding heirs of tailzie? I think the meaning of it is this; by way of direction to the heir in possession—"get what you can—recollect what is the rent—do not let it be diminished, unless it is necessary it should be diminished; take the just avail at the time in all cases, not in that case only when the just avail at the time is less than was the rent before actually paid." The person making the entail could not have meant to say, "I have not the slightest wish or intention that my heir of tailzie should get the value of the estate; I mean to let him take less than the present rent, if he cannot get the present rent; but although I guard against his taking less than the just avail at the time, I do not mean that he should take the just avail at the time, when that is higher than the present rent."

If notwithstanding what has been the practice, and notwithstanding any thing that may be called decision, there is a principle upon which you are entitled to say that grassum is anticipated rent; if that is now the Scotch law, these leases cannot be maintained. God forbid you should say it is the Scotch law, if it is not so! I would not say it, if I were not convinced it is the Scotch law; but all law ought to stand upon principle, and unless decision has removed out of the way all argument and all principle; so as to make it impossible to apply them to the case before [487] you, you must find out what is the principle upon which it must be decided. After all the consideration I have been able to give to the case, my opinion is, that grassum is anticipated rent; what constitutes it so, and what may be the effect of such a decision, may require a good deal of consideration, with a view to apportioning that anticipated rent; or if the tack is such a tack as the heir in possession ought not to have made, to decide to what extent you will place in situations of inconvenience, persons exposed to all the inconvenience which may arise in consequence of such a decision.

I do not advert now to the alternative leases. With reference to the question whether they are good or not, I am not sure whether it would not be my wish to remit so much to the Court of Session, if the alternative leases steer clear of the objection which applies to the others; but I do not find that any of those leases are clear of the valid objection on the ground of grassums, if it be a valid objection, not even the cases of Crook and Flemington Mill.

Entreating your Lordships to believe that I have given to this subject a degree of painful attention, which I hope I shall be relieved from ever giving to any other, if I am in an error, I cannot extricate myself by the operations of my own mind; and the view my mind takes of the subject, that view my conscience obliges me in my judgment to express. With these observations, I conclude this matter to-day, and on a future day will propose to your Lordships some findings which may be, in my opinion, agreeable to the principles which I have stated.

[488] With respect to the leases of Flemington and Crook, and likewise a farm called Edstoun, it is insisted there were no grassums; it is likewise insisted, that if there was any diminution of the rent in point of fact, it was a diminution rendered absolutely necessary by the circumstances under which the heir of tailzie was placed—he not having the power of letting at the same rent. These are cases also in which the summons has the alternative conclusion, that if these very long leases are not good, certain leases of certain durations there mentioned may be permitted; and the Court seems to intimate an opinion, that the alternative leases might be good, provided there was no fault on the part of the tenant. With respect to the leases depending upon that question, both on account of the manner in which the title on the part of the tenants has been created, which seems to me not to have been sufficiently investigated; and likewise on account of the extreme importance of the question, Whether leases with alternative durations can or cannot be sustained as tacks? on reconsidering which question, I have not been able from the papers laid on your table, or on the search I have been able to make into books, to find sufficient reason to offer to your Lordships a decided opinion upon the point. With respect

to the Flemington and Crook case, I shall propose to your Lordships to remit these cases to the Court of Session, generally to review the interlocutors complained of, and to do therein what may be just.

As to the supposed matter of equitable consideration, which is proposed for the consideration of the [489] House, whether you can look at these grassums as taken generally for the benefit partly of the heir in possession and partly for the successor, and apportion them, there certainly is a passage which has been pointed to my attention since I last addressed your Lordships, which somewhat indirectly brings that forward for consideration.—On looking into the papers, it appears to me to be quite impossible that it should be disconnected with the question of purging the irritancy; and as this question has not yet been discussed and decided in the inferior Court, we cannot entertain it as a matter of original jurisdiction: and whatever, therefore, may be the decision with respect to that case, I am not aware that if your Lordships adopted an opinion as to the power to make tacks, and as to the validity of the tacks, that they should be shut out from proposing it to the Court of Session. With respect to my own opinion, I shall say no more than I intimated the other day, that I think it will be found extremely difficult indeed to sustain the leases.

I will now state, in a few words, the view which I have taken of the other cases, and the propositions which I shall have the honour of making with respect to them. With respect to the lease of Harestanes, in which case the Trustees of the late Duke of Queensberry, and Alexander Welsh, the tenant, were appellants, and the Earl of Wemyss respondent; that is a case which brings into question the validity of grassums, and is also to be determined upon other circumstances; and among others, the circumstance that the tack is for fifty-seven years. Conceiving that that tack of fifty-seven years is an [490] alienation within the meaning of the entail, it will not be necessary for me, in my view of the case, to say more as to this case, than to propose to affirm the interlocutors complained of.

With respect to the case of Symington, who is the tenant of the farm of Edstoun, it is a case which has an alternative ish, and it might have been necessary to reconsider that case, because it is case affected by that circumstance. But it may be disposed of upon other grounds. (See the minutes of the judgment. *Vide post*, p. 533.)

In the case of the appeal of the Duke of Buccleuch against the Executors of the deceased William Duke of Queensberry, I propose to reverse the interlocutor of the 7th March 1816, and to find, that the late Duke of Queensberry had not power, by the entail under which he held the land, to grant tacks for terms of years, partly for yearly rent and partly for a price or sum paid to the Duke himself; and that tacks granted by him, upon surrender of former tacks which had been granted partly for yearly rent and partly for prices or sums paid to the Duke himself, ought to be considered as partly granted for prices or sums paid to the Duke, and that such tacks ought not to be considered as let without diminution of the rental, or at the just avail, and are therefore to be considered, as between the parties claiming under the entail, as tacks which he had not power to grant by such entail; and with that finding, to remit the cause back to the Court of Session in Scotland, to do therein as shall be just and consistent with this finding.

[491] In the case of the Duke of Buccleuch against the Executors of the late Duke of Queensberry, and Hyslop, the tenant of Halscar, I propose, to reverse the interlocutor complained of in the appeal, and to find that the late Duke of Queensberry had not power by the deed of entail to grant the tack in question, the same having been granted upon the surrender or renunciation of a former tack then unexpired, and which former tack had been granted by the Duke at the same rent, and also for a sum or price received by him; and that the said tack having been granted, partly in consideration of the rent reserved thereby, and partly in consideration of a price or sum before paid to the Duke himself, and of the renunciation of the said former tack, therefore to find that the tack in question ought to be considered, in this question with Hyslop the tenant, as let with an evident diminution of rental, and not for the just avail; and with this finding, that the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.

With respect to the Whiteside case, I propose to find, that William late Duke of Queensberry had not power, under the entail, to let tacks, partly for annualrent and partly for sums and prices paid to himself; and that tacks granted upon the resignation of former tacks, which were granted partly for rent reserved and partly for sums and prices paid to the Duke himself, are to be considered as tacks made partly for rent reserved and partly for sums and prices paid to the [492] Duke himself; and that the tacks in question having been granted partly for rent reserved and partly for a sum or price paid to the Duke for a former tack renounced, for which a sum or price had been paid besides the rent reserved—the same is to be considered, as between the persons claiming under the entail, as a tack, partly for rent and partly for a sum or price paid to himself, and ought not to be considered, in a question with the tenants claiming under the said tack, as let without evident diminution of the rental; and with this finding, to remit the cause to the Court of Session, to do as it should deem just, consistent with this finding.

With respect to Edstoun, to adjudge precisely in the same terms as I have just proposed as to the Whiteside case.

The only other cases are those which relate to Crook and Flemington. I propose to your Lordships to remit to the Court of Session the interlocutors in both those cases to be reconsidered.

The orders and judgments of the House in the several cases were according to the opinions and proposals of the Lord Chancellor.*

[493]

LORD REDESDALE.†

My Lords: There are two entails now under consideration, applying to different estates, and with different limitations: One of them applicable to the March and NEIDPATH estate, with respect to which the Earl of Wemyss is the person contesting, with the Trustees of the late Duke of Queensberry and the tenants, the validity of leases granted by the Duke; the other, applicable to what is called the QUEENSBERRY estate, in which the question is between the Trustees of the late Duke of Queensberry and the Duke of Buccleuch, upon a proceeding somewhat of a different description from that in the former case, for the purpose of obtaining a declaration, that all the leases expressed in the proceedings to have been granted by the late Duke of Queensberry, of the Queensberry estate, have been granted according to the power vested in him by the entail of that estate. There is also this distinction betwixt the two cases. With [494] respect to the March and Neidpath estate, it is not contended that the leases which are now in question, were authorized by any power contained in the deed of entail; for the leases which have been granted are not either for the grantor's life, or the life of the receiver, which is the only species of lease expressly referred to in the settlement of the March and Neidpath estate. With respect to the Queensberry estate, the leases are of a different description; because, supposing the word "*disponi*," in the entail of the Queensberry

* The Lord Chancellor concluded by saying, that he had never been able to look at these cases without being satisfied, that in whatever way they were determined, it would be absolutely necessary for the stability and security of titles to property in Scotland, that some Act of Parliament should be passed.

The Earl of Lauderdale observed, that after this judgment, a declarator would lie against any heir of tailzie who took a grassum; and that being the case, this judgment would give rise to such a scene of litigation as absolutely to require an Act of Parliament to be brought in to declare what is the law.

The Lord Chancellor replied, that the proposition which he intended to make, would bring before the House that consideration; and he hoped, whenever that matter should be brought before the House, the peers would express more fully their opinions upon that subject.

† This speech was delivered before the conclusion of that of the Lord Chancellor, but it has been thought preferable to preserve the connexion of the Lord Chancellor's judicial opinion by postponing these observations of Lord Redesdale.

estate, to have the same effect as the word "*alien*," the leases impeached are sought to be supported under a power of leasing, which is contained in the settlement of that estate.

The *form* of the action which has been brought by the Trustees of the late Duke of Queensberry against the Duke of Buccleuch, to have this great number of leases declared to be good, was a subject of consideration of your Lordships when this case was before your Lordships upon a former occasion; and your Lordships directed the cause to be remitted* back to the Court of Session in Scotland, to review generally the interlocutor complained of in the appeal then depending; and special directions were given as to the points to be reconsidered upon such review.

Upon this remit the Court to whom it was made have pronounced an interlocutor repelling the defences, and finding, decerning, and declaring, in [495] *terms of the original libel*. The *terms of the original libel* required an unqualified declaration in favour of all the leases in question. It would have been to me somewhat satisfactory, if the Lords of Session had thought fit to express that they had considered the several subjects respectively to which their attention was particularly called by the remit, and had expressed that they had so done, in the decision which they have made upon the subject. At present, we are only enabled to form a judgment how far they took the particular subjects into their consideration, in consequence of the notes with which we have been furnished, importing to be notes of what fell from the Lords of Session respectively.

Upon those notes I feel myself compelled to state, that, as far as I can form any judgment, the Lords of Session have totally mistaken the object of the remit in one point—that object not being to obtain the opinions of the Lords of Session, whether, generally, an action of declarator respecting the validity of the leases could be entertained; but whether by the persons, and under the particular circumstances which are mentioned in the remit, such action could be entertained? Upon that subject the Lords of Session have given to your Lordships no satisfaction whatever. It appears to me strange, that these learned Lords should have so mistaken the terms of the remit: but, perhaps, it was much easier to mistake the terms of the remit, than to grapple with all the difficulties which the terms of the remit, not mistaken, might have imposed. We must, however, now deal with the decision such as it is. I cannot forbear [496] observing also upon the language used in some of the memorials upon the subject, with respect to what may have fallen from Noble Lords in this House. There is a style and a manner which are becoming upon such a subject; and I will only say at present, that I cannot apply *that* word to all that is to be found in some of these memorials.—I trust, my Lords, that the practice will not be continued.

With respect to the leases themselves.—In the Neidpath case, the first question which occurs, arises upon the length of the term which has been granted. It seems to be a very serious question, To what extent that can be carried? There is another case † upon your Lordships table, in which the question is, Whether a lease of 999 years may be granted of an entailed estate. I leave your Lordships to consider what may be the effect of leases for 999 years of an entailed estate. Your Lordships will recollect, that during that term of 999 years, the estate will nominally belong to one person, and really to another; that the consequence will be, that the power and influence of such property will be divided—divided, in a greater or less extent, according to the possible improvement of the property, or the difference in the value of money, from time to time; and at length, the lessee for 999 years may have an infinitely better property than the tenant who succeeds to the entailed estate, and the power and influence arising from the estate will be wholly in the lessee, and the tenant of the [497] tailzie will be a mere annuitant. One of the greatest evils affecting another part of the united kingdom, arises out of the leases renewable for ever, which have been granted in that country, where leases for 999 years have also been granted, to a great extent. Knowing all the political evils which have

* Lord Redesdale here recited the words of the remit, which are given before, p. 387 [I Bli.]

† The Elgin case, since decided in favour of the lease, on the words of the permissive clause of the entail. *Vide ante*, p. 412.

resulted from that practice, I take it upon me to say, that if a lease for 999 years can be granted of an entailed estate in Scotland, the consequences to the country would be infinitely worse than any which can result from the strictness of any Scotch entail. When, however, Judges in a Court of Justice take upon themselves to act upon what they conceive political evils, or political benefits; and when they hold that entails are odious, from political considerations, which is the only ground I know of upon which it can be contended that entails are odious; they should consider, whether, in endeavouring to defeat entails in this manner, they are not producing a greater political evil than that which they are attempting to avoid. But I do not understand what right a Court of Justice has to entertain an opinion of a positive law, upon any ground of political expediency. I have always been at a loss to conceive upon what ground a Court of Justice was entitled so to act. The Legislature is to decide upon political expediency; and if it has made a law which is not politically expedient, the proper way of disposing of that law is by an act of the Legislature, and not by the decision of a Court of Justice. It is true, my Lords, that in this part of the country, in very ancient times, contrivances have been resorted to to avoid the effect of a statute, also a very ancient statute, by which entails were counte[nanced]—I mean the statute *de donis*. This has been done gradually, and by various contrivances, and with some assistance too from the Legislature. The prejudices of those who conceived themselves interested to preserve entails, not admitting of a complete repeal of the statute *de donis*, it has been, in effect, partially repealed by such contrivances, and these contrivances have been in some degree countenanced by the Legislature. The effect of these contrivances has now been so long considered as established law, that it cannot now be questioned. We might almost as well question the constitution of the Legislature itself. Lately, it has been my duty particularly to consider that subject also, and I fear, your Lordships will be unable to find by what law a considerable part of the constitution of the Legislature of this country has been formed. It has been the work of time, and has been sanctioned by length of time; and length of time has given sanctity to the practice of barring entails in England.

The learned Judges of the Court of Session in Scotland seem to have supposed that those who attend the decision of appeals in this House, are disposed to judge of entails in Scotland according to the law affecting estates-tail in England; and that they consider estates-tail in Scotland as similar to estates-tail in England. On the contrary, it seems to me impossible to assimilate the laws of the two countries on this subject. In contemplation of the law of England, as it now stands, a tenant in tail has a *quasi* perpetual inheritance; he has powers, which certainly do not belong to a tenant of a tailzied estate in Scotland—I mean a [499] tailzied property, protected with all the clauses necessary for that purpose. The tenant in tail in England, if adult, is capable of rendering himself complete master of the land, and making himself tenant in fee-simple, unless it is an estate held under grants of the Crown of a particular description, where the reversion is in the Crown, and estates-tail, generally, where the reversion is in the Crown. In the latter case, a tenant in tail may bar all but the Crown, though he cannot bar the right of the Crown. A tenant in tail in England, who is an adult, being capable of barring the entail, is not bound to keep down the interest of a mortgage affecting the estate out of the rents of the estate; but with respect to an infant tenant in tail, the rule is otherwise, for an obvious reason, that in consequence of his infancy, he is not capable of making an absolute disposition of the estate, and therefore it is considered that those who receive the rents for him, are bound to keep down the interest during his infancy. A tenant in tail in England grants a lease, and does not bar the entail. The lease is not void, but it is voidable. If he grants a lease with warranty, and there are assets descending to the heir of entail, the lease is good; because the warranty will bind the heir of entail, if there are assets to answer that warranty; - if he grants a lease with a covenant binding the heir of entail, and there are assets descending to the heir to answer that covenant, the heir of entail is so far bound, as to be compellable to make recompence for the breach of covenant out of those assets. Therefore it is, as I conceive, that a lease by a tenant in tail in England [500] is not absolutely void, but voidable at the election of the heir, and that it will probably be avoided or not by the heir, according to

circumstances. The difference, therefore, between the condition of a tenant in tail in England and an heir of entail in Scotland, is such, that I do not apprehend that any person who has been conversant with the law of England is likely to fall into any of that confusion, as to the nature of estates-tail in England, and the nature of tailzies in Scotland, which the learned Judges of the Court of Session in Scotland seem to have supposed.

It is a very difficult task, unquestionably, for persons who are not familiar with the administration of the law of any country, to apply their minds so fully and effectually to the subject, as those who are familiar with it. No person can feel that more strongly than myself. Having been for twelve months only in the situation of Speaker of the other House of Parliament, and therefore absent from Courts of Justice, I certainly did not find myself, when I returned again to a judicial situation, so capable of applying my mind to the subject as I should have been, if there had been no interval between my following the profession at the Bar, and my holding the situation of Chancellor of Ireland. I have heard that one of the most able men who ever sat in the Court of Chancery in this country, (Lord Cowper,) having ceased for four years to be Chancellor, in consequence of a change in the Administration, when he afterwards came back to the office of Chancellor, often declared that he did not feel himself so ready in the discharge of his duty in that office as he had been before. Whenever, there-[501]-fore, I judge of a case of Scotch law, (being bound, nevertheless, by the situation in which I stand, to form a judgment upon it as well as I can, and as every one of your Lordships is bound), I always have a jealousy of myself upon the subject, and always endeavour most particularly to divest myself of any thing that can be called English prejudice. I hold that to be a most imperious duty, because I must admit that it is likely such prejudices should exist in my mind. But if I am to discharge my duty as a Lord of Parliament, in giving my opinion upon cases of appeal which come before this House, as long as the Court of Appeal shall remain in this House, (and most of your Lordships must be in some degree at least in the same situation), I must endeavour to make up my mind upon the subject in question as well as I can, and to give the best judgment I can form upon it.

In judging of any question of law, it has always appeared to me highly important to discover, in the *first* place, what are the principles upon which persons who have had to decide upon the same question of law have proceeded; because I do not apprehend that a Court of Judicature is to decide capriciously, or is to decide because it will have it so, or as has been said with respect to the Court of Chancery, facetiously, by a very learned person, Mr. Selden, that a judgment in the Court of Chancery was like taking measure of the Chancellor's foot, one Chancellor having a *long* foot, and another a *short* one. The object of every person in a judicial situation, and particularly of a person in the office of the noble Lord on the Woolsack, should be, and I conceive always has been, to establish certain principles, [502] by which, not only he shall guide his own decisions, but by which others may decide similar cases, and by which those who have to give advice on similar cases may be able to give proper advice. For if principles of decision are not established, it is impossible to say what will be the decision upon any case, or what advice ought to be given by those who are consulted on the subject. I have therefore been most anxious to discover what are the principles of decision which the Courts in Scotland have adopted in deciding upon the powers of tenants of tailzied estates in Scotland under strict entails. With respect particularly to their power of granting leases, (for that is the subject which is immediately under your Lordships consideration), I find, that it has been generally considered that a lease of a long duration is a species of alienation; and your Lordships have accordingly decided, in the Wakefield case, that a lease of ninety-seven years was a species of alienation, not permitted to a person who held an estate under strict entail; and that a prohibition of alienating prohibited such leases. It immediately occurred to me, to endeavour to discover upon what principle this was so determined. The principle, and the *only* principle which I have been able to discover, is this,—that the prohibition to alienate extends, generally, to any lease, the lease being, in itself, an alienation *pro tanto*, during the continuance of that lease, except so far as a rent is reserved upon that lease, payable during its continuance. I then pro-

ceeded to consider upon what ground any lease by a person holding under a strict entail, could be good against the successors in that [503] entail; and according to what has fallen, from time to time, from Judges in Scotland, and what is to be found in text-writers on the subject, the rule is this,—that a lease of a proper duration, and under certain circumstances, is to be considered as a fair administration of the estate, which it is necessary to allow to a person holding a tailzied estate, for the purpose of giving to him the fair benefit of the estate during his right to the enjoyment of it; because if he were utterly incapable of letting any lease whatsoever, the consequence would be, that he must either hold the property, however large it might be, entirely in his own possession, (a thing, in many cases, almost impossible), or he must dispose of the possession of it to persons whose interest would terminate with his life. That inconvenience, therefore, seems to have been considered as a sufficient ground for allowing some, but it may be difficult to say what power of disposition by leasing, to a tenant of a tailzied estate in Scotland. The language of all the persons who have spoken, and of all the persons who have written upon the subject, has been, that they considered the granting of leases by a person under the restriction of a tailzie, as a due administration of the estate, and a species of administration which was necessary for the enjoyment of the estate. It seems to me, that a power thus yielded to necessity, and yielded *only* to necessity, ought to be bounded by the necessity which compels it to be yielded:—that is, by that which, generally speaking, is compatible with the future as well as with the present enjoyment of the estate. The future possession of the estate might be injured, [504] if the land were let without the means of insuring the proper management of it, in consequence of the lessee not having a certain term and interest, and particularly in a country in the state in which the greatest part of Scotland was a hundred years ago. Where a country was capable of great improvement, it would have been highly injurious to have prevented persons, holding estates under strict entail, from granting any leases whatever, that should endure beyond their own interest in those estates. The limitation which I have stated seems to me to be one which necessarily arises from the principle on which, as I conceive, an indulgence in making leases to bind the successor has been allowed to tenants in tail; and that the grant of a lease, for what may be deemed a long term, (whatever may be the length of term that may be allowed), is not permitted to a person holding an estate strictly entailed, being prohibited by the prohibition of alienation: the alienation by lease being prohibited where the extent of the term granted is beyond that which was necessary for the proper administration of the estate. When I am asked, what is to be the limitation of a lease under such circumstances, I confess there is a great difficulty in drawing any line precisely; but if there is to be no limitation, it is perfectly clear that the property may be, in effect, alienated; and when it has been decided that a long lease may be an alienation, as in the Wakefield case, it appears to me perfectly clear, that you must consider the question upon every lease to be, whether that which has been done is alienation or administration, according to circumstances.

[505] In judging, therefore, of the Neidpath case, the first question to be considered is the length of duration of the lease of Harestanes, which is a fifty-seven years lease, not qualified by any circumstances; not for instance, a building lease. Was it, or was it not necessary to the administration of the estate, that a fifty-seven years lease should be granted? What line is to be drawn between fifty-seven years and ninety-seven years? A ninety-seven years lease your Lordships have determined to be not sustainable, on account of the length of time; a fifty-seven years lease is a lease that may, probably, endure much beyond the life of the granter. It may be made by a person at a very advanced period of life: his immediate successor, (his son perhaps) may also be at an advanced period of life; and a fifty-seven years lease in such case likely to endure during the whole time of the successor's holding. If it should so endure, what is the consequence? The administration of the estate during the time of the succeeding tenant in tail, is not in the hands of that tenant in tail; it has been preoccupied by the person who preceded him in the enjoyment of the estate. The consequence necessarily is, that the person who so succeeds under the tailzie, has not the same power of administration as the person who preceded him had: and, generally speaking, has no chance of having the same power, considering the ordinary term of human life. We are told, that threescore

years and ten is the ordinary term of human life; and if threescore years and ten be the ordinary term, consider how large a portion of that ordinary term a lease of fifty-seven years will occupy: and what is the probable state of a succeeding heir of [506] entail coming to the possession of the estate under a lease of fifty-seven years, granted in the latter years of his predecessor. That consideration also called to my attention the leases with covenants to renew; for, if a man may grant leases for fifty-seven years, and may covenant to renew those leases for fifty-seven years, yearly, as long as he lives, what is likely to be the situation of the succeeding heir of tailzie, if that covenant should be acted upon? Has the successor, generally speaking, any chance whatever of having the administration of the estate in any degree? It appears to me, that, considering the case upon no other ground but the length of time, the lease of Harestanes is one that cannot be supported upon any principle upon which I have heard it asserted, that an heir of tailzie, who is prohibited from alienating, and who has not a power to grant leases expressly given to him, can grant a lease; and upon that ground alone, I should be of opinion that that lease is capable of impeachment. But there is upon that case another consideration, which is, the question of *grassum*. I cannot understand what the Lords of Session in Scotland conceive *grassum* to be. In my mind, *grassum*, as taken on the leases in question, is nothing more nor less than anticipation of rent—it is taking rent beforehand. A noble Lord, whom I see in his place, will recollect the common expression in Ireland, of *fining down the rent*. What is a *grassum* but fining down the rent? Is there any distinction? I can find none. Then, if *grassum* is fining down the rent, what is *grassum* but rent? rent paid beforehand to the grantor of the lease, instead of being paid annually to whoever should be [507] owner of the estate. But the objection which I state does not depend upon this reasoning alone: the Courts in Scotland have determined that *grassum* is rent; they have determined that it is rent with respect to teinds, and with respect to superiors; and in all cases, except in the case of tailzied estates, *grassum* is admitted to be rent. Such have been the decisions of the Courts in Scotland. Now, what can be the distinction between the same thing with respect to an heir of tailzie, and with respect to other persons? When an heir of tailzie in possession receives a sum of money on granting a lease, for what does he receive it? He receives it, because the rent reserved upon the lease which he grants, is so much less than the value of the land. *Grassum* would not be given to him, unless the land was let by the lease at an under rate. It is therefore neither more nor less than rent received by anticipation, and received by one heir, instead of being received by a succession of heirs. In the Westshiells case, a very extraordinary distinction was attempted to be made. The Court of Session held, that though what was granted by the name of *grassum* was not rent, yet what was given, not by the name of *grassum*, but in the shape of bonds for the payment of money at future periods, was rent. It appears to me that both were the same thing. What difference is there betwixt my receiving, upon my granting a lease, £100, or my receiving £100 in ten years, at the rate of £10 a year, with interest? Therefore, in the Westshiells case it appears to me, that the bonds which it was determined should go to the succeeding heir of entail as rent, were just the same thing as the *grassum* taken in the [508] same lease. I cannot distinguish between the two. In that case no question was made with respect to the *grassum*; and I believe there were reasons why the person who claimed the benefit of the bonds did not think fit, either to resort to his father's assets, for the purpose of demanding a proportion of the *grassum*, or to attempt to set aside the leases which had been granted, provided he received the bonds remaining due in lieu of rent. The effect of *grassum* is also to be considered in another point of view, which more particularly relates to the case of the Queensberry estate than to that of the Neidpath estate; and yet, to a certain degree, it respects the Neidpath estate also, if the opinion that the rent to be reserved upon a lease to be granted by a person in possession of a tailzied estate in Scotland must be the last reserved rent, is well founded. Upon what principle that opinion is founded, I am utterly unable to discover; for, if nothing is said in the deed of entail upon the subject of rent, I cannot see why the person who is in possession of an entailed estate cannot grant a lease for half the last rent, as well as for the last rent. I can see no just ground of distinction: I see nothing upon which I

can found a principle of decision, to make a distinction between these two cases; and therefore I so far agree with those Lords of Session who held that the tenant of an entailed estate may let down the rent. They must so hold, if they mean to be consistent, where there is no express prohibition to the contrary; for if the tenant of a tailzied estate has power to grant a lease for any term, where there are no express words in the deed of entail to prohibit it, if there is nothing in the deed [509] of entail to prohibit granting for less than the old rent, there is nothing to limit the terms on which the lease may be granted; and consequently to be consistent, those who hold that, where there is no express prohibition, a lease may be granted for any term, must also hold that the rent may be let down, and that the lease may be granted at any rent. Most of the Lords of Session, however, are of opinion, that the old rent must be reserved; and a very distinguished person, whose sentiments upon that subject have been read by the noble and learned Lord, seems to have conceived that there can be no question but that the old rent must be reserved. But upon what principle? I can see none. If a person who is in possession of an entailed estate can defeat his successor, by granting a lease upon a grassum, I can see no ground for holding that the rent reserved must be the *old* rent, or that it may not be any rent however small. But, if the lease is granted upon a grassum, and the old rent is nominally reserved, is the rent so reserved in effect really and truly the old rent? Does it produce the same thing? Certainly not. Your Lordships know, from what has been stated in the case of the Queensberry estate, the effect of the grassums taken, and the consequent burdens brought upon the estate, if with respect to others, grassum is to be considered as rent; but, between the Duke of Buccleuch and the late Duke of Queensberry, is it not to be considered as rent, and that, consequently, the net rent now to be received is not the same net rent which was received previous to the leases in question.

Looking at the cases which have been decided, it [510] strikes me, that the case of *Leslie v. Orme*, which came before this House during the time Lord Thurlow held the office of Chancellor, has established certain principles upon which I should wish to decide the present case. The case of *Leslie v. Orme* was this: An entail had been created in the year 1692, by a person of the name of Patrick Leslie, by which he disposed of lands in entail, (with the usual words prohibiting alienation,) to his second son George Leslie. The words of prohibition contained in the deed of entail were, "that it should not be lawful to the said George Leslie, and the said heirs of tailzie, to sell, annaillzie, or dispone the lands and others, or any part thereof, provided to them, heritably or irredeemably, or under reversion, nor to grant infeftments of annual rent, or yearly feu-duties thereof." There followed in the deed of entail these words: "Nor to let tacks in diminution of the true worth and rental they paid before the said tack." This deed of entail therefore generally prohibited alienation, and expressly prohibited, not the setting tacks for any duration of time, but the setting tacks "in diminution of the true worth and rental they paid before the said tacks." A subsequent deed was executed according to the power vested in the party for that purpose, taking notice of the former deed of the 8th November 1692, and reciting, that by that deed it was prohibited, conditioned, and declared, "that it should be nowise leisome and lawful, nor in the power of the heirs of tailzie therein named, to set tacks of the lands therein specified, in diminution of the true worth and rental they paid before the said tacks;" and that [511] for the reason stated, he was disposed to change this clause, and that he had power to do so; and therefore he did, with consent and advice of his son George Leslie, "dispense with, and annul the clause above specified, as freely in all respects as if the same had never been conceived or insert in the bond of tailzie above deduced:" the effect of which was, to strike out of the former deed of entail the words prohibiting leases: But these words were added: "So that, in all time hereafter, it shall be leisome and lawful to any of my said heirs of tailzie, to grant tacks and assedations on any part of the lands contained in the said tailzie, and that under the present rental, if they shall think fit and expedient, without incurring any hazard or danger in and through the foresaid irritant clause, which is hereby abrogate and taken away." Now, my Lords, taking these two instruments together, it seems to me that there is a general prohibition of alienation; and that there is an express power of granting leases, and of granting those leases without limitation of term, and at any rent, under the present rental. Unless the prohibition of

alienation extended to prohibit long leases, there was in these instruments nothing that prohibited long leases; but it is perfectly clear, that not only the granter of the entail, but the Court of Session, did conceive that there was something prohibiting long leases; for, when they came to decide upon the leases granted, they declared themselves to be deciding upon the supposition that the person in possession under the deed of tailzie acted in the execution of the power of leasing so granted; and they expressed [512] this to be their construction of the settlement, in the words of their decision.

The first person who came into possession of the estate under this entail, was a person of the name of Peter Grant, who took the name of Leslie; and he having had a litigation with respect to his title, was involved in considerable expense; and a person of the name of Orme, who had been employed by him to direct that business, had considerable demands upon him for money on that account. Part of the property consisted of a house called Fetternear, which had been a *mansion-house*, but at that time was in great decay, and not capable of being inhabited. Mr. Orme obtained a lease, dated the 29th March 1769, of *that part* of the estate for the term of four nineteen years, at the rent which had been before reserved upon a former lease. The consideration for this lease was part of the debt due to Orme; and the remainder of that debt was to be satisfied by means of another instrument, enabling Orme to withhold a part of the rent reserved by the lease till the whole of that debt should be discharged. Orme also obtained other instruments after mentioned from Mr. Leslie Grant. At length, the property comprised in the entail came into the hands of the person who disputed the lease, and sought to reduce all the instruments obtained by Orme from Leslie Grant, as contrary to the powers which were vested in Leslie Grant by the deed of entail; and he likewise endeavoured to reduce them, upon the ground of frauds practised upon Leslie Grant by Orme. The question of fraud was a distinct question, and it was determined that it was not compe-[513]-tent to the person who then sought to investigate the transactions, to impeach them on this ground; and the question which finally came before the Court was upon the effect of the instruments executed by Mr. Leslie Grant. The Lord Ordinary, in his interlocutor, found, with respect to the tack dated 29th March 1769, whereby Leslie Grant, in consideration of the sum of £992 15s. 6½d. sterling of premium or entry-money, discounted and allowed to him out of a larger sum due by him to Orme, conform to accounts settled between them, set in lease the lands and baronies of Balquhain and Fetternear to Orme, for the space of four nineteen years, from and after the term of Whitsunday 1769, for a rent or tack-duty of £9062 8s. 3d. Scots: That as by the two deeds of entail, the heirs of entail were put under no restriction as to the number of years for which leases might be granted, they were at liberty to grant leases for any term of years they thought proper, and therefore sustained the defence, and assolizied the defender from the reduction of his tack, in so far as challenged on account of its being granted for such an unusual term of years, "seventy-six years;" and in so far as this tack was challenged on account of its being granted for a rent or tack-duty *below what the lands and estate were worth, and did or might have paid*. The Lord Ordinary found, that though, by the tailzie of said estate, in 1692, the heirs of entail were restrained from setting tacks in diminution of the true worth and rental they paid before the said tacks, as the entailor by another deed in 1707 did dispense with and annul that clause, sicklike and as freely as if the [514] same had never been conceived nor insert in the bond of tailzie; declaring the same to be void and null in all time coming, so that in all time thereafter it should be leisome and lawful to any of the said heirs of tailzie to grant tacks of any of the lands, and that under the present rental, if they should think fit and expedient, without incurring any hazard or danger in and through the aforesaid irritant clause, which was thereby abrogate and taken away. The Lord Ordinary then "found that the tack in 1769 was not liable to challenge by the pursuer as granted for an under rent or tack-duty; and *separatim* found, that the said tack-duty of £9062 8s. 3d., with the discount given of £992 15s. 6½d. sterling, in name of premium or grassum, was superior to any rent these lands did then pay or had formerly paid, and therefore upon that ground also sustained the defence, and assolizied the defender from the reduction of that tack." The latter part of this finding shows, that at the time of that decision, there was not so

perfectly clear an opinion of what was the construction of the words "the true worth or rental," contained in the first deed of entail, as is now alleged; and the pursuer had attempted to impeach the lease, as granted for a rent or tack-duty below what the estate and lands were worth, and did or might have paid. The third deed under challenge, was an obligation and assignation of even date with the tack thus granted by Leslie Grant to Orme, whereby, for the causes therein expressed, Leslie Grant assigned to Orme, his heirs, etc. for his own behoof and that of the other creditors of Leslie Grant, therein mentioned, the [515] sum of £4470 1s. 9d. Scots, being the balance of the above tack-duty over and above £3600 reserved to Leslie Grant; this instrument containing a discharge of the said £4470 1s. 9d. of the said tack-duty, until such time as the debts above mentioned should be satisfied; and with this proviso, that in case any of the heirs of tailzie should refuse to ratify these his deeds, the aforesaid tack-duty of £9062 8s. 3d. Scots should be restricted to £3600 until the aforesaid debts should be paid. Upon this the Lord Ordinary found, that the assignment and restriction of the tack-duty, for the purposes therein mentioned, viz. for payment of the debts contracted by Leslie Grant, who held the estate under the foresaid entail prohibiting the contracting of debts, the restriction of the tack-duty, and the assignment of the surplus of the tack-duties to Orme in payment and satisfaction of the debts due to him and the other creditors mentioned in the deed, could not be effectual beyond the life of Leslie Grant, and such of the other heirs of entail as should ratify and confirm the same; and as it was accordingly ratified and confirmed by the pursuer's father, the Lord Ordinary sustained the defence, and assoilzied the defender from the reduction of the said deed, so far as respected the restriction of the tack-duty and assignment of the surplus over and above the £3600 during the lifetime of Leslie Grant and of the pursuer's father; but reduced the same, so far as regarded the restriction and assignment of the tack-duty from and after the death of the pursuer's father, and reduced the same accordingly. The reducing the rent for the purpose of paying [516] debts was not within the power of leasing which had been granted, and was a mode of charging the estate with those debts, which was expressly restrained by the deed of entail; and yet Leslie Grant might have done the very same thing in another way, if he might have granted a lease at a less rent, instead of granting it for the larger rent, and thus might have given the benefit of the depression of the rent, to the extent in which a benefit was intended to be given by this deed, which was found not to be according to the powers which he had. I mention this, particularly with this view, that it is perfectly clear that the Court of Session, at that time, did not consider that what a man might have done in one way, he therefore could do in another. The interlocutor farther noticed, that the tack of the 29th of March 1769, reserved to Leslie Grant, his heirs and assigns, a faculty or privilege to resume the possession of the *mansion-house, offices, and gardens*, and mains of Fetternear, upon twelve months premonition, upon an abatement from the tack-duty of £430 4s. 10d. Scots, but that that reservation had by deed in August 1769 been discharged and annulled, so far as respected assigns, and was, by deed of the 7th September 1773, again restricted and limited to Leslie Grant himself, and the heirs male of his body. Upon this the Lord Ordinary found, that as the said Leslie Grant was under no restraint or limitation from granting tacks of all or any parts of the said estate, and for such rent or tack-duty as he thought proper, there laid no challenge at the pursuer's instance, either of the tacks themselves, as comprehending what was denominated the mansion-[517]-house, offices, etc. of Fetternear, or restriction of the aforesaid reserved faculty to the exclusion of the heirs and assignees of Leslie Grant, other than the heirs male of his body, and therefore assoilzied the defender from the reduction of the several restrictions of the said faculty. The Lord Ordinary then, after noticing that the pursuer insisted that the unlimited power of granting tacks, for any number of years, without limitation, ought not to comprehend the mansion-house, offices, etc. of Fetternear, as being the principal mansion-house of the family, found that there was *no evidence that it was the mansion-house of the family*, or had been occupied and possessed as such, for many years before, but was, in a great measure, ruinous and waste, and as the tailzie itself made no such exception, repelled that reason of reduction. The last deed under challenge, was a tack or contract 11th September 1773, whereby Leslie

Grant did, for the causes and considerations therein mentioned, not only ratify the aforesaid tacks, but prorogated the same for the further term of nineteen years, upon receiving payment of a premium or grassum of £25 sterling, and the Lord Ordinary sustained the defence against the reduction of this tack, and assailed the defender. The case afterwards came before the Lords of Session, and the Court so far differed from the Lord Ordinary, that they sustained the reasons of reduction of the deed of restriction granted by Peter Leslie Grant to Orme, dated the 5th day of August 1769, and of the deed of restriction and tack granted by Peter Leslie Grant to Orme, dated 7th of September 1773, and also of the tack granted by the said Peter Leslie [518] Grant to Orme, dated the 11th of September 1773; and remitted to the Lord Ordinary to proceed accordingly. The Lords of Session, therefore, agreed with the Lord Ordinary with respect to the power of granting leases at any rent, and without any restriction as to the term, under the words contained in the second deed of entail, but held that, notwithstanding the terms of that power, and although that power was granted in general words, extending to all the estate, without any exception of the mansion-house, the mansion-house and lands could not properly be considered within the terms of that power, because they were the mansion-house and residence of the family, the Lords finding that Fetternear was a mansion-house, against the finding of the Lord Ordinary. They also considered the subsequent lease, by which an additional term of years was added to the first term of four nineteen years, as not within the power; and the decision of the Court of Session was affirmed, on appeal, by this House.

I conceive, therefore, that in this case of *Leslie v. Orme*, the Court of Session, and this House affirming what was done by the Court of Session, have established by their decision, as far as that decision has any authority, that the lease in question, in the case of *Leslie v. Orme*, was to be sustained under the express power given by the deeds of entail; and that, therefore, it was to be in all respects in conformity with that power; that it was the express power under that settlement which enabled Leslie Grant to grant a lease of that long endurance, and at the rent reserved, and to take the grassum which he did take. I cannot conceive how there could [519] otherwise be a question with respect to the lease which was sustained. If Leslie Grant could have made that lease, though every thing had been thrown out of the entail which expressly gave that power, would first the Lord Ordinary, and then the Court of Session, have expressly sustained the lease as good by force of the power, the Court of Session, in construing that power, holding by implication, contrary to the express words, that the mansion-house, and the lands adjoining it, were not within that power. Under these circumstances, therefore, I conceive that the case of *Leslie v. Orme* tends to show that that which is now said to have been the old law of Scotland, was not considered as the law at that time. It seems also clear, that the power which an heir of tailzie has to grant leases, so far as he has that power, is subject to the exception with respect to the mansion-house, and the lands which belong to it; an exception which indeed is pretty generally admitted. That exception was understood both by the Lord Ordinary and the Court of Session; for though the Lord Ordinary did not determine, as the Court afterwards did, with respect to the house and land, it appears that he considered the house as not the mansion-house, but waste, though he also relied on the general words in the power, including all the estate without exception. The Court, on the contrary, considered that Fetternear was properly the mansion-house of the estate, and therefore not properly comprised within the leasing power, notwithstanding the words of that power, which extended to the whole property. The result appears to be, that it was then understood that an heir of tailzie cannot grant a lease of the entailed [520] mansion-house and lands occupied with it, but that they shall be reserved for the use of the next heir of tailzie, when he comes to the enjoyment of the estate. Upon what principle can that have been determined? It can only have been determined upon *this* principle, that the heir of tailzie who is in possession has generally no right to grant a lease but for the purposes of his own enjoyment of the property; and therefore he has no right to grant the mansion-house, because that is not necessary for his enjoyment of the property, according to the view of the creator of the entail, who is supposed to have intended that the person in possession, as heir of tailzie, should have the mansion-house, and the lands belonging to it, for his own occupation. This appears to me to show decisively what is the principle upon

which any lease by the heir of entail must stand, unless granted under an express power; for I cannot imagine on what ground the mansion-house and the lands adjoining it are excepted from the general power of leasing attributed to the tenant in possession of an entailed estate, without any express words for the purpose, unless the power of leasing is to be considered as arising from the necessity of leasing for the purpose of enjoyment, and therefore not extending beyond that necessity. For what reason was it determined in *Leslie v. Orme*, that the lease for four nineteen years was not a lease struck at by the prohibition of alienation? because the power of leasing given to the tenant in tail, gave him a right to grant a lease at any rent he pleased; and if the lease was *good* at any rent he pleased, the reason for avoiding the lease, on the ground of alienation, did not apply.

With respect to the case of the Queensberry estate, [521] in which the Duke of Buccleuch is the person complaining to your Lordships, the word "alien" is not contained in the deed of entail, but the prohibition uses only the word "dispone;" and the question is, Whether the word "dispone" is equally effectual for the purpose as the word "alien?" I will not trouble your Lordships by going through all that is to be found in Acts of Parliament, and in text-writers, upon the effect of the word "dispone." It appears to me, that it is fully equivalent to the word "alien," and that, in this very settlement of the Queensberry estate, it is unquestionably used, as already stated by the noble and learned Lord, as equivalent to the word "alien." Upon that subject I am relieved from difficulty by the opinions of the Lords of Session, because a great majority are of opinion, that the word "dispone" has in this deed of entail the same effect.

The next consideration respects the alternative leases;—the leases which are to endure for so many years, if such be the power, and so on, till reduced to nineteen years. It appears to me, that such a letting of an estate cannot be deemed a proper administration: for how is the person who succeeds to the estate tail to ascertain for what term the lease is to endure? By the terms of the lease, the endurance is to be, *first*, decided by the Court of Session, and, *lastly*, by this House. In the mean time, what is to become of the rent? How is the property to be managed? How is the rent to be paid? Upon a lease which is to bind the succeeding heir of entail, that succeeding heir of entail ought to know immediately to what extent he is bound: [522] he ought to have the power to go immediately to the person who is the tenant, and say,—“Give me the rent reserved by that lease.” But the succeeding heir of entail under these leases must wait until the decision by the Court of Session, or by this House, shall have ascertained their validity and extent, or he must receive under some convention between the parties, or under a protest, to avoid affirming the leases; and until such decision, he cannot know to what extent he is bound by the leases. Is *that* the state in which the succeeding heir of entail is to be placed? And can that be deemed a *legal* disposition of the estate, which has such an effect? It appears to me, therefore, that these alternative leases cannot be good, because the term is not certain. What is a lease for a term? A lease must have a certain *ish*, according to the law of Scotland. What is the *certain ish* of these alternative leases? Will any of your Lordships be able to tell me, until this House has decided the case?—Can any of your Lordships say what is the *ish*? Is it a good lease according to the law of Scotland, independent of any other consideration, not having a certain *ish*?

There is another question which arises upon the covenants to renew, from time to time, by annually granting leases for nineteen years. These covenants to renew have no operation beyond this,—they obliged the person who entered into these covenants, to renew, at the rent agreed upon between the parties, from time to time, during his life, however long the duration of that life might be. Supposing a lease upon a grassum with a covenant of that description by a person of two or three and twenty, who [523] might live fifty or sixty years afterwards. The grassum to be paid upon such a lease ought to be calculated according to the value of the life of that person, as the lease would be, in effect, a lease for nineteen years, and for as many additional years as the life of that person would probably endure, which, upon the contingencies of lives, is an operation of calculation.

The question of *grassum* is in some respects a distinct question, though it operates both with respect to the alternative leases and the covenant to renew.

The question with respect to grassum applying to the Neidpath estate, is a question not depending upon any particular words in the deed of tailzie, but simply upon the right which a tenant in tail has to make leases of the estate tailzied; for although there is a particular power contained in that entail, that power does not apply to any of the leases which have been granted; and consequently the question in the Neidpath case is, What is the effect of the grassum upon a lease granted by the tenant of an entailed estate, with respect to whom there is no particular prohibition of granting the lease in question, but where the lease in question can only be effected by the prohibition of alienation. What is the effect of grassum? As a lease is a disposition of the property for a certain period, the effect of taking a grassum is, to give to the person who grants the lease a rent for the estate *different* from the rent which the person who succeeds him in the estate will receive during the continuance of that lease. What is "*rental*?" What is "*rent*?" What is "*grassum*?" Grassum is taking, beforehand, that which otherwise would be taken half yearly, or annually, according to the terms [524] of a lease: It appears to me that "*grassum*," "*rental*," "*rent*," or whatever word may be used, are, in reality, one and the same thing.

The disposition which is contained in such a lease made by a tenant of tailzie, restrained only by words prohibiting alienation, is a disposition of property during the period for which that lease is granted, in which there is a reservation of annual rent, for the benefit of the person who succeeds him; but that reservation does not convey the same benefit as that which he stipulated for himself. If a lease were granted for nineteen years, or any other term, reserving, for ten years, or so long as the granter should live, £100 a year; for the remainder of the term, £10 a year, I have not heard it asserted that that would be a good lease against a succeeding heir of entail. If a lease is granted at £10 a year for the whole term, and a grassum is taken equivalent to £90 a year during the first ten years, what is the difference? This would be, what was called in the Westshiells case, a contrivance, which, it was said, if dexterously executed, was to be sustained, but if not dexterously executed, was not to be sustained. If therefore the words prohibiting alienation affect any lease granted by the person in possession of the tailzied estate, they must affect a lease which does not reserve to the person who may succeed, the same benefit which the person who granted the lease derived from it, according to the term of his enjoyment of the estate; because, whatever benefit was so derived from the lease by the person granting it, would be exactly the same thing as the benefit derived from reserving a large rent for the life of the [525] granter, and reducing it, at the period of his death, for the remainder of the term: which no person has contended would be a good lease.

With respect to the Queensberry estate, the words of the entail as to the power of leasing are these: "That the said Lord Charles Douglas, nor the other heirs of tailzie above specified, shall not set tacks nor rentals of the said lands for any longer space than the setter's life, or for nineteen years, and *that without diminution of the rental, at the least, at the just avail for the time.*" It has been said, that this gives a power to let leases at the old rent. Under these words, it is not contended that leases might be let under the old rent, or that there are no words prohibiting the letting under the old rent: it is admitted that the letting must be without diminution of the old rent. The first question to be asked upon that is, What is the meaning of the word "*rent*?" It is said that it means, the rent reserved upon the prior lease of the same lands. I do not know upon what ground that stands; for it might just as well be asserted, that it meant the rental at the time the deed of entail was executed; and this must be general; so that if at the time of the execution of that deed, and long after, the lands had been in the hands of the creator of the entail, and the several tenants of tailzie in possession, and the value had been increased, so as to be quadrupled, or increased in any greater proportion, you must resort to the old lease prior to the entail. The words are "*without diminution of rental,—at the least, at the just avail for the time.*" It is said that the meaning of the words is this, "*without diminution of* [526] *rental,*" meaning by "*rental,*" the rent last reserved before the granting of the lease in question; but that, if it should so happen that *that* rent could not be obtained, then that the lease might be made at such rent as could be obtained. This appears to me to be a very arbitrary interpretation of the words. The fair construction of the words, taking the whole

together, and using the latter words as explanatory of the former, appear to me to be this,—that the creator of the entail shall be taken to have said, “I mean by the words ‘without diminution of the rental,’ that you shall let, at least, for the fair avail at the time; that is, I do not desire you to get the utmost you can possibly obtain for the estate, but that you shall get the just avail for the time.” This strikes me as the fair interpretation of the words, taking the whole together.

But it is said, that in this entail there is another clause, which interprets the meaning of this,—a direction that when any lady of the family should succeed to the estate, she should marry a person of the name of “Douglas,” or at least a person who would take the name of Douglas. But what is the meaning of these words? That he wished the lady to marry a person of the name of “Douglas?” That was, in his mind, the preferable measure; but that, if she should *not* marry a person of the name of Douglas, she should marry a person who should take that name. Does not that, if it operates at all, rather show the meaning in which the words respecting leases are used as I have interpreted them? That the entailor did not mean, by the words “the just avail at the time,” a worse thing than that [527] which he had proposed to require under the former words?—If, therefore, the clause respecting marriage is to be used as interpreting the other clause respecting leases, it appears to me to have directly the contrary effect to that which has been contended for. It shows, that by “rental,” he meant the *best rent*, but that he then added,—“I do not desire you to reserve the best rent that can possibly be obtained, but take the just avail at the time; and *it* shall be sufficient.” If a construction is to be put upon the words “at the least,” in the leasing clause, by a reference to the same words used in the other clause, it seems to me that, instead of having the effect which is contended for, they have directly the contrary effect; that by the words “at the least, at the just avail for the time,” the entailor meant something less, and not something greater than he intended to express by the words “without diminution of the rental.” But taking the leasing clause by itself, when the entailor says, that the tenant of tailzie shall not set tacks nor rentals of the lands for any longer space than the setter’s lifetime, or for nineteen years, “and that without diminution of the rental,” adding, “at the least, at the just avail for the time;” can it be said, in an honest interpretation of the deed, that he meant that *less* than the just avail at the time should be taken? And do not those words, “at the least, at the just avail for the time,” interpret what he meant by the word “rental?” Do not they show, that by “rental,” he meant the best rent that could be obtained? and that he then meant to qualify the expression he had used, by adding, “but I do not insist upon your [528] getting the extremity of the rent that might be obtained; take the just avail at the time, and I shall be satisfied.” That seems to be a much more fair and reasonable interpretation of the clause, than that attempted on the part of the representatives of the late Duke of Queensberry. But construe this clause even in the way in which the representatives of the late Duke of Queensberry contend it ought to be construed;—is there no diminution of the rental by means of the leases in question? is it not clear the payment of grassum is in effect a diminution of rental, taking the rental to mean the former rent? What is the meaning of “rental?” Is it *nominal* or *real* rent? Is it that which a man is to receive for his own benefit, or that which is nominally held out to him as rent, but a part of which only can be beneficial to him? The nominal rent may be £10; but if the consequence of the grassum taken by the grantor of the lease is, that the deduction from that rent, instead of £2 becomes £5 is there not, by the operation of the grassum, a diminution of the former rental, in any reasonable sense of the word? Is there not a diminution of the rental, in the view that this entailor seems to have had upon the subject? Why did he insert this clause? Did he not insert it, that there might be fair dealing between the tenant in tail in possession, and the succeeding heir; that both might have equal benefit from the lease? And is *this* fair dealing? Have both an equal benefit? It seems to me that, considering the effect of grassum, with respect to the clear sum to be received upon the rent reserved, it is impossible to say that a lease so granted, is not a lease granted with diminution of [529] the rental. See the effect the grassum has upon the rent before reserved. As to all the world except the heir of entail, the grassum is considered as part of the rent; and all the charges upon the estate are assessed accordingly. It is admitted that the grassum

is to be considered as part of the rent, with respect to all but the succeeding heir of entail. What is there in the law of entails that makes the condition of the heir of entail different from that of other persons with respect to the meaning of the word "rental?" I am not able to comprehend how it is possible to say that the grassum is *not* a part of the rent with respect to the heir of tailzie, when, with respect to every other person, it *is* a part of the rent. If it is part of the rent—if the grassums previously received are to be considered as part of the rent, when the land is let again (whether with another grassum or without a grassum) at the same nominal rent, the land is let at *less* than the rent that was before actually received, though the same rent is nominally reserved. The rent before taken by the granter of the lease, was compounded of the grassum and the reserved rent. When the lease which was so granted was either surrendered, or expired, if the grassum was not taken into consideration in fixing the reserved rent on a second lease, then the land is set with diminution of rent, in the strictest sense of the words, independent of the additional charge brought upon the actually reserved rent, by means of the grassum.

Upon these grounds, therefore, I do conceive that the effect of taking grassums is, to make all leases which have been granted at the old rent upon gras-[530]-sums, or upon the surrender of leases granted upon grassums, not within the power of leasing given by the deed of entail; and that the lands comprised in such leases have been set with diminution of the rental, even if the word "rental" in the deed of entail is not to be construed, as I insist it ought to be construed, as meaning the rent which might be obtained for the estate at the time, and not the rent which was before reserved.—There are no words in the deed of entail expressing that the word "rental" meant the rent before reserved.

In the act prohibiting the alienation of lands of the Crown, except under particular circumstances, and except by way of exchange, by which the last rental should not be diminished, if a question had been raised upon an exchange, what was the meaning of the word "rental," it must, unquestionably, have been construed to mean, that the value of the lands given and received in exchange should be the same; that the value of the land which the King should exchange with another person, should be no greater than the value of the land which he should receive in exchange. That act was intended as a restriction upon the power of the Crown to alien lands; and therefore, if the King exchanged lands with another, the act required that the lands which he should receive in exchange should be of equal value; that is, that the exchange should be without diminution of the rental of the Crown—the word "rental" there clearly meaning real annual value. The words of the statute must clearly and unquestionably mean the real value, and not the rent actually reserved.

[531] Taking the whole of the circumstances of these cases together, (upon which I should not have addressed your Lordships so long, in all probability, had the noble and learned Lord been able to have proceeded to-day, as he would most probably have anticipated much that has fallen from me upon the subject,) I can only add, that it appears to me that a fifty-seven years lease cannot be good, under the entail of the Neidpath estate;—that under the entail of the Queensberry estate, the word "dispono" is a word operating a restriction upon the granter of leases, as much as the word "alien;"—and that in respect to the leases in question in that case, they cannot be sustained under the power of leasing which is contained in the deed of entail, because they have been granted upon grassums, and at rents reserved on leases before granted on grassums, and therefore with diminution of the rental, and certainly not at the just avail at the time.

JUDGMENTS BY THE HOUSE OF LORDS IN THE PRECEDING CASES.

DUKE OF BUCCLEUCH *v.* Sir JAMES MONTGOMERY, *etc.* *In action of Declarator.*

Die Lunae, 12 Julii 1819.

It is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, That the said interlocutor complained of in the said appeal, be, and the same is hereby reversed: And the Lords find, That William late Duke of Queensberry,

had not power by the entail founded on by the parties in this cause, to grant tacks for terms of years, partly for yearly rent, [532] and partly for a price or sum paid to the Duke himself; and that tacks granted by him upon surrender of former tacks which had been granted partly for yearly rent, and partly for prices or sums paid to the Duke himself, ought to be considered as partly granted for prices or sums paid to the Duke, and that such tacks ought not to be considered as let without diminution of the rental, or at the just avail, and are therefore to be considered, as between the persons claiming under the entail, as tacks which he had not power to grant by such entail: And it is further ordered, That with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this finding.

(signed) *Henry Couper*,
Dep. Cler. Parliamentor.

DUKE OF BUCCLEUCH *v.* HYSLOP. *In the Reduction.*

Die Lunae, 12 Julii 1819.

It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That the said interlocutor complained of in the said appeal be, and the same is hereby reversed: And the Lords find, That the late Duke of Queensberry had not power, by the deed of entail founded upon by the parties in this cause, to grant the tack in question, in this cause, the same having been granted upon the surrender or renunciation of a former tack then unexpired, and which former tack had been granted by the Duke at the same rent, and also for a sum or price received by him; and the said tack in question, therefore, having been granted partly in consideration of the rent reserved thereby, and partly in consideration of a price or sum as before paid to the said Duke himself, and of the renunciation of the said former tack: And find, therefore, That this tack of the 30th of December 1803, ought to be considered *in this question with Hyslop*, as let with diminution of rental, and not for the just avail: And it is farther ordered, that with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.

(signed) *Henry Couper*,
Dep. Cler. Parliamentor.

[533] Sir J. MONTGOMERY *et al.* *v.* EARL OF WEMYSS. *Lease of Harestanes.*

Die Lunae, 12 Julii 1819.

It is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of be, and the same are hereby affirmed.

(signed) *Henry Couper*,
Dep. Cler. Parliamentor.

Sir J. MONTGOMERY *et al.* *v.* EARL OF WEMYSS. *Whiteside Liferent Leases.*

Die Lunae, 12 Julii 1819.

The Lords Spiritual and Temporal in Parliament assembled, find, That the said William late Duke of Queensberry had not power, by the entail founded upon by the parties in this cause, to grant tacks, partly for yearly rent and partly for prices or sums of money paid to himself, and that tacks granted by him upon the surrender of former tacks which had been granted partly for yearly rent, and partly for prices or sums of money paid to himself, as between the persons claiming under the entail, ought to be considered as set with evident diminution of the rental: And it is ordered, That with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as may be just and consistent herewith.

(signed) *Henry Couper*,
Dep. Cler. Parliamentor.

SIR J. MONTGOMERY *et al. v. EARL OF WEMYSS. Edstoun.*

Die Lunae, 12 Julii 1819.

The Lords Spiritual and Temporal in Parliament assembled, find, That the said Duke of Queensberry had not power, under the entail founded upon between the parties in this cause, to let tacks partly for rents reserved and partly for sums and prices paid to himself, and that [534] tacks granted upon the renunciation of former tacks, and were made partly for rent reserved, and partly for sums and prices paid to the Duke himself, are to be considered as tacks made partly for rent reserved, and partly for sums and prices paid to himself, and that such tacks are not to be considered, in questions between the parties claiming under the entail, as let without evident diminution of the rental: And it is ordered, that with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.

(signed) *Henry Cowper,*

Dep. Cler. Parliamentor.

EARL OF WEMYSS *v. HUTCHISON et al. et e con. Crook.*

Die Lunae, 12 Julii 1819.

It is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the said causes be remitted back to the Court of Session in Scotland, generally to review the interlocutors therein complained of. (signed) *Henry Cowper,*

Dep. Cler. Parliamentor.

EARL OF WEMYSS *v. MURRAY et al. et e con. Flemington Mill.*

Die Lunae, 12 Julii 1819.

It is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the said causes be remitted back to the Court of Session in Scotland, generally to review the interlocutors therein complained of. (signed) *Henry Cowper,*

Dep. Cler. Parliamentor.

[535]

IN THE HOUSE OF LORDS.

THE REV. ARCHIBALD M'LEA, Doctor in Divinity,—*Plaintiff in Error*: JAMES WALKER, Sheriff's Officer, in Rothsay,—*Defendant in Error* [7th April 1819].

[See *Forbes v. Gibson* 1850, 13 Dunlop 341: *affd.* in H. L. 1 Macq. 106; *Hogg v. Parochial Board of Auchtermuchty* 1880, 7 Rettie 986.]

The stipendiary clergy in Scotland are liable to the payment of duties on their manse, parsonages, and glebes, by the stat. 43 Geo. III, c. 122, and 46 Geo. III, c. 65, and the assessed taxes imposed by the 48 Geo. III, c. 55; and are not exempted generally from taxation by the general laws of Scotland, nor by the Scots act 1593, c. 166.

Semble that they are also liable in respect of stipend, although by the stat. 1593, c. 166, it is ordained, "that all minister's stipends, in time cumming, be free from all tacks, pensiones, *taxations*, or impositiones quhatsoever, notwithstanding of onie gift or disposition made in the contrair," etc.

The word "taxation" in the act 1593, c. 166, is to be construed by considering the recital of the act: the occasion of the enactment and the other words which are coupled in the same clause, with the word "taxation."

This cause arose out of a claim advanced on behalf of the clergy of the church of Scotland, that their order was entitled in law to a privilege of exemption from taxes.

In order to try the validity of this claim, the plaintiff in error brought, in the Court of Exchequer in Scotland, an action of trespass against the defendant in error, to recover damages for the seizure of a horse which was taken in execution under the circumstances stated in the special verdict subjoined.

The defendant pleaded the general issue, and the [536] case having been tried by a jury, the following special verdict was returned: "The jurors, upon their oaths, say that the defendant took, etc. That when the defendant so took the said horse, he acted in execution of two warrants granted by the sheriff substitute of the shire of Bute, on two certificates and petitions at the instance of Archibald M'Lea, collector of taxes for the burgh of Rothsay, against the plaintiff, both of which warrants were dated the 25th May 1811, and authorized the poinding of the goods and effects of the plaintiff, for the recovery of the sum of £26 5s. 7d. being the amount of property duty for the year, from the 5th day of April 1809 to the 5th day of April 1810, assessed upon the plaintiff by the commissioners for putting in execution the act 46 Geo. III. cap. 65, for the burgh of Rothsay; for and in respect of his manse, glebe, and stipend, as minister of Rothsay; and for recovery of the sum of £4 3s. being the amount of assessed taxes for the year ending at Whitsunday 1811, upon the following articles: to wit; one occasional servant the sum of 6s. one riding horse the sum of £2 13s. 6d. and hair powder duty the sum of £1 3s. 6d. amounting in whole to the aforesaid sum of £4 3s. and the expenses allowed by the law for making the same effectual; and to which last mentioned sum the plaintiff had been assessed under the provisions of the statute 43 Geo. III. cap. 156, and 48 Geo. III. cap. 55.

"And the jurors further say, that the plaintiff is a clergyman of the established church of Scotland, etc. and that the sum of £26 5s. 7d. was assessed [537] upon the plaintiff in respect of the profits arising to him from his said living as minister of Rothsay.

"And if upon the whole matter," etc.

Upon this special verdict the case was argued before the Court of Exchequer in Scotland, and on the 4th of July 1812, the Court gave judgment for the Defendant.

Against this judgment, the present writ of error was brought.

On behalf of the Plaintiff in error.

By the law and practice of Scotland, from the Reformation downwards, neither the stipend, glebe, nor manse of the ministers of the established church is chargeable with any public burden. This immunity is part of the public law of the land, which has not been altered by any of the statutes referred to in the verdict upon the record.

Before the Reformation, the clergy of Scotland possessed all the tithes, and one fourth of the lands of the kingdom. They paid one-half of all the taxes imposed upon the land and its fruits. They also made the contributions required of them to the Pope. They paid a fifth penny of their benefices to the King, and on extraordinary occasions they paid tenths.

When the Reformation made its way into Scotland, all the popish establishments were swept away, the King and the aristocracy of the country appropriated all the property and revenues of the clergy, and it was some time before the protestant ministers acquired right to any permanent provision.

The first act that appears upon the subject is one [538] of the Privy Council, and bears date in the year 1561. It was afterwards confirmed by act of parliament 1567, cap. 10, which, upon the preamble, that "the ministers have been long defrauded of their stipends sua that they are becomin in great poverty and necessity; statutes and ordaines that the haill thrills of the haill benefices of this realm sall now instantly and in all times to come, first be payed to the ministers of the Evangel of Jesus Christ and their successors; ay and quhill the kirk come to the full possession of their proper patrimonie quhilk is the teindes. Providing always, that the collectors of the saidis ministers make zeirlic compt in the checker of their intronmissions sua that the ministers may be first answered of their stipendis apperteyning to everie one of them. And the rest and superplus to be applied to our Sovereign Lord's use."

By statute 1572, cap. 52, an act of secret council was ratified, setting apart all benefices not exceeding 300 marks, as a provision for qualified ministers.

In the year 1581, an act was passed, according to which the whole kingdom of Scotland is divided into certain parishes, which were intended to be of moderate bounds, and for every one of which a minister was to be appointed, having a suitable stipend. The words of the act are (1581, c. 100), "It being found maist ditficil that in the charge of plurality of kirks any one minister may instruct mony flocks, therefore it is thochet expedient, statuted and ordained, be our Sovereign Lord and his three estates of this

present parliament, that every parish kirk and sameikle bounds as sall be found to be a sufficient and competent parochin, therefoir sall have their [539] own pastour with a sufficient and reasonable *stipend* according to the stait and habilitie of the place."

The teinds of the benefices in which the parish is locally situated were in almost all cases burdened with the stipends here referred to, which were granted to the clergy in the form of warrants called assignations by the commissioners of teinds against the titulars of the respective benefices, authorizing and requiring them to make payment to the minister of a certain number of bolls, or a certain sum of money in name of stipend. Under these warrants, the minister had no right to any teind; but merely to a certain quantity of victual or a certain sum of money, while the titular remained proprietor of the whole teinds, and continued to draw them either in his own name or by means of his tacksman. These stipends form the principal part of the income of the clergy at this day. They have no other but that which arises from their glebes, which have their origin in the operations of the same aera.

By statute 1587, cap. 29, parliament upon the preamble that the church owed their temporalities to the improvident and profuse liberality of the crown, that the church had no longer any use for that part of their property, while on the other hand the crown stood much in need of it, "unities, annexies, and incorporates to the crown of this realm to remain therewith annexed, and as it were propertie thereof in all time cumming, and with our said Sovereine Lord and his successors for ever, all and sundrie lands, lordshipes, baronnies, castles, towres, fortalices, mansions, manour places, milnes, multures, wooddes, schawes, parks, fischings, townes, villages, [540] burrowes in regalities, and barronie annual rents, tenents, reversions, customes, great and small feu farmes, tennents, tennandries, and service of free tennents. And all and sundrie utheris commodities, profitis and emoluments quhatsumever, alsewill to burgh as to land (except as hereafter sall be excepted in this present acte) quhilkis at the day and daif of their presents, viz. the xxix day of July the zeir of God 1587 zeirs, perteinis to quhatsumever archbishoppe, bishope, abbote, prior, prioreses, etc. Except and alsua foorth of the said annexation, all and quhatsumever mansiones of parsonages and vicarages annexed to parochie kirkes with four aikers of glebe maiste west to the kirk, and commodious for the minister serving the cure theirof for his better residence thereat, quhilk sall not be nor ar comprehended in the said annexation. But sall remain with the minister, parson or vicar or uthur quha sall be provided thereto for serving the cure according to the actis of parliament maid thereanent of before."

These were the first glebes in Scotland after the Reformation. They were part of the church lands reserved to the ministers upon the new establishment, and it was provided that they should not be liable either in teind or feu duty. Later statutes have authorized the designations of glebes out of lay-lands, but they have always been held in law entitled to the same privileges as the original glebes set apart by the former statutes. They are allodial, neither paying any feu duty nor acknowledging any superior. No teinds are exigible out of their fruits, and they have neither been valued in the cess books, [541] nor charged with cess or any other burthen imposed for behoof of the state or of the parish: in respect, as the stat. 1621, c. 10, expresses it, "that the same is dedicated and appointed *ad pios usus*."

These provisions for the clergy were from the beginning privileged. The act 1587, c. 29, declares they shall "be free of first year's fruits and fifth penny." The act 1592, c. 123, narrates that by several previous statutes which are not now extant, they were preferable to the king upon the benefices burdened with the stipend. Finally, in the year 1593, an act was passed in the following terms: "For saemeikle as sundrie ministers quha has been in long possession of their stipends be verteu of their assignations, are troubled be pensioners or tacksmen, quha hes tane in tack gift or pension, either their haill stipends or an great pairt thereof, and hes obtained ratification in parliament thereupon. Therefore our Sovereine Lord with advice of his estates of this present parliament, ordaines that all ministers stipends in time cumming, be free from all tackes pensiones *taxations* or *impositiones quhalsumever*, notwithstanding of onie gift or disposition made in the contrair to the effect that the ministeres may bruike their stipends peaceably in all time cumming, without any trouble according to their assignations."

The first taxation imposed after the passing of this act was in the year 1597.

Parliament grants 200,000 merks to the King, 100,000 of which is to be paid by the spiritual estate, £66,666 8s. 10d. by the barons freeholders, and £33,333 4s. 6d. by the burghs of the realm. The portion falling on the spiritual estates is to be paid by the bishops, abbots, [542] and beneficed persons, and by them alone. In this list ministers having stipends are not included. Further, these beneficed persons were required to pay not only for what was in their own natural possession, but for the income drawn by those possessing under them; and while for their relief it is provided that they shall have recourse against "their vassals, feuars, tacksmen, and pensioners," it is not provided that they shall have relief from ministers possessing part of the teinds by the assignations before-mentioned; and it is not alleged that they ever had any relief from this body.

In the year 1633, the lay members of parliament granted to King Charles the First, thirty shillings in the pound upon *the old extent* * for six years, beginning with the year 1634, and "the archbishops and bishops for the spiritual estate, granted a proportional supply out of all archbishopricks, bishopricks, abbaies, priories, and other inferior benefices, as they have been accustomed to be taxed, in all time bygone whensoever, the temporal lands of this kingdom were stented to thirty shillings the pound land, of old extent." That act further contains the following general revocation of all privileges and immunities; "And further his Majestic and the said estates annul and discharge all privileges and immunities whatsoever, whereby any persons may think themselves free of payment of their present taxation; the privileges granted to the ordinary senators of the colledge of justice, and the taxation of benefices given, disposed, and mortified for the entertainment of the universities, [543] colleges, and hospitals within this kingdom only excepted."

Neither stipends nor glebes were ever charged with any portion of this tax; it appears, however, that *benefices* such as parsonages and vicarages, though set apart for the sustenance of the reformed clergy, and at the same time not greater than an ordinary stipend, in respect of their being *benefices*, were burthened with this or similar taxations. For among the rescinded acts there appears a statute (1641, 2d Sept.), the preamble of which bears, that the clergy holding vicarages and other small benefices had been grievously oppressed by the collectors of the revenue, that such exactions were contrary to law as well as equity, and declaring stipends, and *benefices* similar to stipends, free of all taxation. The act is entitled, "An act for freeing of vicarages provided to ministers for their stipends of taxations;" and the preamble is, "Our Sovereigne Lord, and estates of parliament, considering the distractions that ministers are brought into, and other prejudices and losses sustained by them, by taxations *craved of vicarages* which are assigned and provided to them, as a part of their stipends in so far as they are assigned and provided, and that *it is against all reason and equitie, and former acts of parliament*, that ministers' stipends should be burthened with impositions and taxations; therefore statutes and ordaines (for eschewing of these inconveniences and prejudices,) that no vicarage teinds, nor rents thereof assigned or provided, or to be assigned or provided, to ministers as a part of their stipends, be burthened or affected with any taxations of impositions bygone, owing, unpaid, or in time coming," etc. Upon this [544] preamble, vicarages, provided they make part of the modified stipend, are declared to be free of all taxations, in the same manner as all other stipends were admitted to be in virtue of the previous acts of parliament. As to stipends not in the predicament of a benefice, there was no occasion to make any enactment, because they never had been charged with any tax.

During the civil wars, and afterwards during the usurpation, full effect was given to these previous statutes, and in particular in the execution of a measure of Oliver Cromwell, the express purpose of which was, to make a fair and equal valuation of all the property in Scotland, for the purpose of a general taxation, without regard to any private privilege whatever. The legislative provisions were as comprehensive as general terms can make them; and yet the stipends and glebes of ministers were considered as protected by the public law of the land, and held to be free of all burden. (See Wight, vol. I. p. 182.)

On this occasion, every county proceeded by itself to value its own lands. The

* For an explanation of the old extent, see *ante*, p. 164, note.

proceedings of several counties are still extant; and, for all Scotland, the rent thus valued, as it stood in the year 1656, is the rule according to which the cess is levied at this day. Yet there is no instance of teinds forming part of a modified stipend, or of glebes, being valued or subjected to any part of the burden.

The words of Cromwell's act (1656, c. 14) are, "And for the more equal and right proportioning of the several sums before mentioned, be it further enacted by the authority aforesaid, that the several sums of money to be rated, assessed, and levied, in virtue [545] of this act, shall be taxed and assessed by a pound rate on the several parishes in the respective counties, cities, and places aforesaid, *for all and every their lands, tenements, hereditaments, annuities, rents, parks, warrens, goods, chattels, stock, merchandizes, office, or any other real or personal estate whatsoever, according to the value thereof*; that is to say, so much upon every twenty shilling rent or yearly value of land and real estate, and so much upon money, stock, and other personal estate, by an equal rate, (wherein every twenty pounds in money, stock, or other personal estate, shall bear the like charge as shall be laid upon every twenty shillings yearly rent or yearly value of land,) as will raise the monthly sum or sums charged upon the respective counties, cities, and towns aforesaid. For the better effecting whereof, it is hereby enacted, that the several and respective commissioners hereby appointed for the several and respective counties, cities, and towns aforesaid, shall meet together at the most common and usual place of meeting in each of the said counties, cities, and towns respectively, on or before the 15th day of July, in this present year 1657.

"And the said commissioners, or so many of them as shall then and there attend and be present, shall cause this present act to be put in execution, according to their best discretion and judgment; and having agreed amongst themselves of some general rules and directions for the doing thereof, and appointed another time for the second general meeting, which shall be on or before the 30th day of July aforesaid at the furthest, to receive the returns from the several counties, stewartries, cities, bur-[546]-roughs, parishes, and places: and there with all convenient speed, they, or any two or more of them, shall nominate and appoint two or three of the honest and able inhabitants in the several and respective parishes to be surveyors and assessors, who (or any two of them) are to ascertain and rate the yearly value and profits of the said parishes and places for which they shall be appointed surveyors and assessors, and shall return the same to the said commissioners, or to such person or persons as shall be appointed to receive the same." The act also contains the following clause, abolishing all privileges: "And be it hereby enacted by the authority aforesaid, that *no privileged place or person, body politique or corporate, within the cities, counties, towns, and places aforesaid, shall be exempted from the said assessments and taxes*, but that they and every of them, and also all fee farm rents, and other rents of the late king's revenues, all rents and other sums received by the late court of ward, out of any infants or lunatique estates, and all other manner of rents, payment, and sums of money and annuities issuing out of any lands within any city or county, shall be liable towards the payment of any sum by this act to be taxed and levied."

The act also contains the following exception: "Provided also, that nothing contained in this act shall be extended to charge any of the masters or scholars of the universities or colleges in Scotland, or any other officer in the said universities, colleges, or schools of any hospital or alms-houses for and in regard of any stipend, wages, or profits whatsoever arising or growing due to them in respect of the several places and employments in [547] the said universities, colleges, schools, hospitals, or alms houses, for or in respect of any rents or revenues being to be received or disbursed for the immediate use and relief of the same." It was necessary expressly to exempt the masters and scholars of the universities, because their income was by the general law of Scotland subject to taxation; but it was held unnecessary specially to exempt the clergy, because under the general law they had an immunity.

This enactment was carried into full effect during the Usurpation. But the stipends and glebes of the established clergy in Scotland continued, notwithstanding this statute, and the taxation which followed upon it, free of all imposition whatever. After the Restoration, from antipathy to all Cromwell's measures, the rule of valued land (see Vol. 2. p. 1, note) was abandoned, and that of the previous extent adopted in the levying of the land-tax.

Afterwards it was thought expedient to return to the new valuation, and in

order to raise the next supply that was granted, which was by act of convention * in the year 1667 (23d Jan.), commissioners were appointed, with power "to call for and consider the valuations [548] of all lands, *teinds*, and other real estates within their respective shires and burghs; and such as they shall find just and equal, that they approve thereof and appoint the same to be the rule for levying and raising this present supply." Where estates have been split among different proprietors since Cromwell's valuation, or "when they shall find any just cause by inequality, the commissioners are to value of new again."

Notwithstanding these comprehensive words, ministers stipends were not valued, or taxed in any way; and there is a clause in this act, from which it appears that the general expressions above used could not be extended to glebes or stipends. Power is given in these terms: "As also to value the rent of all archbishopricks, bishopricks, and other benefices *in so far as they exceed the ordinary value of modified stipends*: provided always, that notwithstanding of the valuation thereof within the shire where there is any such lands, teinds, or other real rent, the total and proportions above specified of the said shires continue without any alteration." This shows clearly that stipends, and benefices not better than modified stipends, were not to be valued; and accordingly they were not valued.

The valuations made in virtue of this act have regulated such taxations ever since. The heritable property, exempted under that act, has been exempted ever since; and the property burdened, whether lands or teinds, have ever since been burdened according to the valuations then made.

The next supply which was granted, was in the year 1670, by act of parliament, which appoints it [549] "to be raised and paid out of the land rent, in the same manner, according to the same proportion, and with the same exceptions that the former supply granted to his Majesty by the convention of estates, in January 1667, was raised."

A new supply was granted in the year 1672, to be raised and paid according to the valuation of the same act of convention.

In the year 1678 a further supply was granted by an act of convention, which it is declared shall be levied "according to the present valuation."

In the year 1681 an act of parliament was passed, granting an additional supply, which in like manner is to be levied in the manner and proportions prescribed by the act of convention. This was a large supply, amounting to £1,800,000 Scots, and it was thought proper to give the landed proprietors some relief from the vassals, feuars, tenants, subtenants, and inhabitants in their lands. In particular, they were to have relief from each gentleman, of a sum not exceeding £6 Scots, for each tenant £1 Scots, and for each tradesman, cottar, or servant, 20s. Scots.

After these acts, the mode of levying the supply became established, and so much understood as a matter of course over the whole nation, that in many acts of parliament the supply is granted without specifying how it is to be levied, while in others the rule of the convention 1667 is especially prescribed.

This however made no difference in practice: for, whether the act of parliament was express or silent on the subject, the will of the legislature was understood to be, that the rules of the act of convention [550] 1667 should be observed, and both stipends and glebes left unburdened.

After the revolution all personal privileges were expressly recalled. By statute 1690, c. 6. a new supply is granted; and it is declared, "That no person or persons shall be excused from payment of their proportions of this supply for their lands upon any pretext whatsoever, excepting mortified lands alienarily notwithstanding of any former law, privilege, or act of parliament in the contrary." These terms are

* This was one of those "*Conventions of Estates*," which were occasionally called upon sudden exigencies, real or supposed. The formal citation of all those who had right to sit in parliament, was on these occasions omitted. The king, on the plea of emergency, called together as many of the three estates as could be speedily assembled. By a statute of James IV. (1503, c. 85.) it was ordained, that "the commissaries and headsmen of boroughs be warned quhen taxes or contributiones are given, etc." The powers of these conventions were limited to the particular business for which they were called.

sufficiently comprehensive, to take away any privilege whatever; but yet they were not held sufficient in law to take away the exemption in favour of stipends and glebes, which by the public law were held not to be taxable subjects. Accordingly the very same parliament (Cap 9), while it gives the heritor relief against gentlemen, tenants, feuars, tradesmen, and cottars, gives him no relief against clergymen.

A new supply was granted in the parliament, 1693, c. 2. which in like manner declares in the most peremptory terms "that no person or persons shall be exempted from payment of their proportions of this supply for their lands upon any pretext whatever."

Even these words were not held sufficient to affect the right of the clergy to immunity, in respect of their glebes, mansions, and stipends.

In the same session of parliament (Cap 9), however, a poll-tax was imposed, by which it is ordained that all persons of "whomsoever" age, sex, or quality shall be subject and liable to the poll-tax of six shillings Scots per head, except poor persons who live upon [551] charity, and children under the age of sixteen years. Persons of higher rank are ordained to pay according to their presumed wealth, and in particular *all ministers* having benefices or stipends, and parish kirks not planted, shall pay twelve pounds of poll. Here the clergy are burdened, because the tax has no connection with land or teinds, or heritable income of any kind, but is a personal tax not falling under the general law by which the property of the clergy is exempted.

Another poll-tax was afterwards granted by parliament (1695, c. 10), but it was conceived to be unconstitutional to subject the clergy even to a personal tax, and accordingly they were omitted, which could not have happened *per incuriam*, while every other description of person is burdened.

The same immunity was preserved by the clergy, notwithstanding the revocation of all previous personal exemptions in several subsequent statutes (1702, c. 6; 1704, c. 4; 1705, c. ; 1706, c. 2.). In all of these it is declared, that no person or persons shall be exempted from payment of their proportion thereof, for their lands, upon any pretence whatever, excepting mortified lands; and yet, no contribution whatever was levied on the clergy. Under all the land-tax acts above mentioned, although the magistrates of royal burghs are empowered to assess the inhabitants, without exception, in relief of the burghs quota, no assessment has ever been imposed on manse or glebes within burghs.*

[552] The plaintiff does not insist upon any *personal* privilege: but so far as respects the house and window duty, and the property duty, levied upon his manse and glebe and stipend, there is no law to justify the warrant specified in the pleadings. That the expressions used in the statutes are universally comprehensive, is not denied. They include all houses, lands, and annual income, which by the law of Scotland are subject to taxation; but the houses, glebes, and stipends of the clergy have not been in that predicament for more than two hundred years. It is extremely questionable whether after the act of union it was within the power of parliament to burden these subjects with any tax; and supposing that parliament had the power, the ancient immunities of the church could not be taken away without a formal repeal of the law conferring them, which is not to be found in the statutes referred to by the defendant.

According to the public law of Scotland, the manse, glebe, and stipend of the clergy were not taxable. If the most comprehensive form of words imposing the burden, accompanied with a revocation of all existing privileges, could have burdened these subjects, the commissioners under former acts must have included them; but they never did, and for this no reason can be assigned but that by law the subjects [553] were free of all imposition whatever, and not taxable. There may be countries

* See the observations of Sir George McKenzie, upon the acts 1578, c. 62. 1587, c. 26. and 1593, c. 166. In the discussion of the act 1597, c. [] which directs the supply to be levied according to the actual value of the lands, he says, "this can be of no consequence to stipendiary ministers, seeing by act of parliament, 162 James 6, parl. 13, they are freed and exempted of all taxations and impositions." See also Forbes on Tithes, Erskine, b. 2, tit. 10, s. 50; Kaim's Abridgment of the stat. 1593, c. 162; Spottiswood on Hope's Minor Practicks, tit. 2, s. 16; Craig, Feud. lib. 1, diæg. 12, s. 14

where the property and the income of the clergy are subject to taxation, and there may be other countries where the churches and courts of justice, and all public property, are subject to taxes, payable by those who take benefit from it. But this never was the law of Scotland.

According to the articles of the union, that law is unalterable. The constitution of the church of Scotland, with all the rights and immunities belonging to it, was the object of great anxiety at the union, and it was not considered as expedient that the united parliament should have power to alter it. It was therefore made a condition of the union, that this should not be competent even to parliament. The only question is, whether it is not to be considered as part of that constitution, that the property set apart for the subsistence of the clergy should have an immunity from all taxation; in other words, whether any portion of it can be taken from the church, and used for the purposes of the state.

As to the particular expressions used in the property duty act, it may perhaps be maintained that they prove that parliament understood that there were teinds in Scotland belonging to ecclesiastical persons falling under the general provisions of that statute: for there is no doubt that in the rule for assessing the duties imposed, *teinds in Scotland* belonging to any ecclesiastical person are mentioned. But these expressions do not occur in the clause imposing the duty; and that clause does not contain a repeal of the previous law, declaring the property of the clergy free of all taxation. Neither the common nor [554] the statute law of Scotland have been altered. The courts in Scotland will administer this statute to the subjects of Scotland precisely as they would have done if this union had never been made. This act could not have included the property of the clergy at any previous period, for it has been shown that a long succession of statutes containing still broader and more comprehensive clauses were never so interpreted.

This is no new question. It occurred in every reign from James VI. down to the union: and during the whole of that period there is not to be found a lawyer who ever maintained that such expressions could affect the property of the clergy: while, on the other hand, every lawyer who has had occasion to speak upon the subject, gives it as his opinion, that such enactments do not embrace that property: and in practice the commissioners of the revenue never did charge either the stipend, glebe, or manse of the ministers with any tax. They held them free, not because the expressions of the revenue statutes did not embrace teinds, and lands, and houses, for as to that there could be no dispute; but because by the general law of Scotland, the teinds, lands, and houses of the clergy were held to be *public property*, and not subject to any tax.

The expressions used in the rule for assessing the property duty, do not apply to the property of the Scotch clergy. That they do not apply to their glebes and manses is obvious; and it is equally certain that they do not in general apply to their stipends. By the decrees in the Teind Court, a certain sum of money, or a certain number of bolls of [556] corn and meal, is modified as a stipend, and the minister has a right to demand that money and that quantity of victual from the titular, but he has nothing to do with the teinds of the lands. These belong to the titular or heritor whoever he be, who draws them, and he becomes personally responsible to the minister for the stipend modified. When therefore this rule speaks of teinds belonging to ecclesiastical persons, it can have no meaning, unless it holds the titulars, as the successors of the ancient clergy, to be entitled to this appellation. There may be eight or ten cases in Scotland, where the minister succeeding to the whole of an old benefice is the titular, but in general he is no more than a stipendiary, who has nothing to do with the teinds, but draws annually a sum of money, or a quantity of victual, from the titular or heritor. Accordingly Mr. Erskine says, "they are all stipendiaries."

Even private rights, in virtue of which individuals have enjoyed immunity from particular taxes, have never been held to be revoked by implication. If parliament found them inconvenient, and thought it necessary to take them away, they did so by an express act, and then they granted compensation.

A company of soap-boilers in Glasgow, for certain reasons, obtained an exemption from duties on soap, and although they were never mentioned in any subsequent act of parliament, yet they constantly enjoyed their exemption till they were deprived

of it by special act of parliament, when they obtained £6000 as a compensation for the loss.

Mr. Forbes of Culloden, by two unprinted acts of parliament, obtained an exemption from duties upon [556] the spirits and malt made from grain which grew upon his estate. He was not particularly exempted in any excise acts afterwards made, yet he enjoyed his privilege till lately, when the act depriving him of it, provided a compensation to him of about £20,000 after the case had been submitted to a jury.

The Duke of Richmond's tax upon coals is an illustration of the same principle.

The statutes imposing the property and assessed taxes, contain no provision excluding this privilege. The maxim of law must therefore prevail—*Generalia non revocant specialia*. *Greer v. Mitchell*.*

The word "stipend" in the schedule to the act 46 Geo. III. c. 65. is not applicable to the Scotch clergy: for it is not payable by his Majesty or out of the public revenue.† Nor does stipend come [557] under the word "teinds," they are rather a burden upon the teinds.

As to personal taxes, such as that on the wearing of hair-powder, the plaintiff does not claim exemption. Those taxes stand on a different principle.

On the part of the defendant in error.

There is no evidence that the legislature of Scotland ever contemplated an exemption from taxes as a part of the provision of the reformed clergy. On the contrary, the maintenance of the clergy was always recognized to be a burden to which the holders of teinds were in justice subject, as the condition of their right; and a grant to the church of an exemption from taxes, of which the burden must evidently have rested on the nation at large, would have been contrary to this universal understanding. The exemption of the clergy from first fruits and the fifth penny, was of quite a different nature. These were parts of benefices which had been seized [558] by the Pope; and, in his stead, had fallen to the King. These, therefore, formed a most natural subject for appropriating to the provision of the reformed clergy; and when the corruptions of Popery were in every respect overthrown and reprobated, it was reasonable, that the few protestant clergy who had obtained benefices, should

* D. P. 27 April 1814, and see Co. Litt. 115 a. Comyns' Digest, tit. Parliament, R. 23. and Prescription, F. 3. *Rex v. Pugh*, Douglas's Reports, 1st edit. p. 179; Faculty Decisions, App. to vol. 10, Jan. 29th 1788. The Magistrates of Edinburgh against the College of Justice. The Duke of Queensberry and Earl of Hopetown.

† The word "stipend" occurs in schedule E. of the statute 43 Geo. III. c. 122. under the following title and context:

"Schedule of the rates and duties payable by persons having, using, or exercising any public office or employment of profit.

"Upon every publick office or employment of profit, and upon every annuity, pension or stipend payable by his Majesty, or out of the public revenue of Great Britain, etc."

Schedule D. seems more comprehensive. By it, duties are imposed upon "the annual profits arising to any person resident "in Great Britain, from any profession, trade or vocation."

The same words are repeated in the schedules set forth in the subsequent statutes, and re-enacted with additional and special directions as to the mode of assessment, etc.

The statute of 46 Geo. III. c. 65, s. 74, provides, "that the duties thereby granted, including the duties contained in the schedule marked A. (which is a transcript from the former act.) shall be assessed and charged under rules which shall be construed to be a part of the act, and to refer to the said duties as if the same had been inserted under a special enactment." The rules are then given under numbers. No. III. contains rules for estimating lands, etc. therein mentioned, which are not to be charged according to the preceding general rule. It then provides that the annual value of all the properties after described shall be understood to be the full or average amount for one year of the profits, etc. And in the second head of this rule are specified "all teinds in Scotland belonging to any ecclesiastical person."

not be subjected to this papal encroachment. The exemption of glebes from teind, was as little similar to the privilege under consideration. Teinds were no public tax, but a private property. The holders of teinds too were liable to maintain the clergy; and it would therefore have been absurd to draw teinds out of the legal provision of land modified to the clergy. Nor had it been ever agreeable to the canon or ecclesiastical law, that glebes should pay tithe. *In every respect, therefore, exemptions of glebes from teinds was totally dissimilar from a general exemption from national taxes.* These are not instances of an intention in the legislature of Scotland to provide for the clergy, by giving them a general privilege of exemption from taxation.

The act of 1593 (c. 166) cannot be construed to contain any general exemption of the clergy from taxation. It cannot be held to exempt them from any thing more than taxations or impositions from their stipends. The statute 1663, c. 21, imposed a part of the expense of maintaining the universities *on the clergy alone*, which at that time were episcopal. The equity of this arrangement consisted in this, that the universities were regarded as part of the church establishment; and there is no reason to doubt, that the clergy had consented to it. The statute says, [559] "there being an expedient proposed." And it is to be presumed it was proposed by the clergy. When this was done, it was thought reasonable to declare, that it should not afford a preparative or precedent for imposing peculiar burdens on the clergy without their own consent. The reason of this evidently was, because the burden was imposed on the clergy alone, and might be supposed to afford a dangerous example to a parliament, in which they had little influence. That it did not allude to any general exemption of the clergy from taxation is sufficiently evinced by the act of convention, 1667, granting a supply or land-tax, in which the clergy are subjected. It is true, that stipends and benefices not exceeding a sufficient stipend, are exempted from this tax. But this is not by any reference to a general privilege previously existing in law. It is by a special expressed exemption; and it follows after similar exemptions of a much broader nature given to the members of the college of justice, to universities, colleges, schools, and hospitals. In the act 1667, there is a personal or poll-tax, from which, in like manner, the clergy are exempted. But here also the exemption follows after that of noblemen, barons, heritors, and life-renters; and it is followed by that of schoolmasters, readers, precentors, their wives and children; and also the college of justice, officers of the mint, and their wives, children, and servants. This affords no evidence of a general privilege of the clergy to be exempted from all taxation.

In the act of parliament 1693, chap. 9, imposing a poll-tax, it is confessed that the clergy are in-[560]-cluded, even stipendiary ministers, being set down as a class liable to a distinct duty. In the other acts, imposing poll-taxes, the clergy are also included. Even the stipendiary clergy are not exempted, although they are not subjected to a rate of poll-tax as a distinct class; but by act 1695, chap. 10, they are liable as "*gentlemen*." And even if they could have degraded themselves by repudiating that character, they are still liable to the lowest rate, which applies "to all persons of whatsoever age, sex, or quality, except poor persons, who live upon charity, and children under the age of sixteen." And by act 1698, chap. 12, they are liable as "*unlanded gentlemen*." It is said that a supplication was presented by the episcopal clergy for exemption; but it appears, that this claim was rejected, on the ground that clergy in general were *not* exempted. It appears by the records of parliament, that in 1701, Mr. Campbell and others, tacksmen of the poll-tax, 1695, gave in an account with regard to it, containing the total charge against them, and also the discharge. In this discharge, they stated the following article: "By the poll of the *episcopal* clergy £6000." This was stated as a discharge, on the ground that they were not entitled to levy it. But on this article, the committee of parliament made the following observations. "There should be no allowance for the poll of those clergymen, except their number be mentioned, in respect that no exemption subsists, except for clergy of Edinburgh, *all other clergy being liable*." In what way the clergy of Edinburgh were exempted does not appear; but it cer-[561]tainly was not by any general privilege possessed by the clergy at large. The observations of Mackenzie and Forbes cannot be supposed to relate to any universal exemption from taxation enjoyed by the clergy. Accordingly, it will not be said, that in practice the clergy ever pretended to any exemption from *customs or excise*, though customs

were ancient in Scotland, and excise was introduced there in 1644 (Kaimes' Stat. Law, *vide* Customs, Excise). The treaty of union, if the clergy held any such privilege, would certainly have taken it away; or the subsequent revenue statutes, in which there is no trace of such a privilege, but clear proof that none existed. In the 48th Geo. III. chap. 55, there is expressly given to the clergy an exemption from hair-powder duty; but it is limited to such clergy whose incomes do not exceed £100 per annum. There is a multitude of statutes imposing duties, from which it was never imagined that the clergy of Scotland had any privilege of exemption. As to the pretended exemption in practice from the window-duty, it appears from the minute-books of the exchequer, that the clergy never pretended to demand it as of right, but obtained, as a favour from the lords of the treasury, a delay of levying. They were put *insuper*, as it is called, until there should be time given to apply to parliament, for an express and special exemption or other relief to the clergy from that tax. But no existing right of exemption was either recognized or pretended.

The claims of the plaintiff to exemption from property-tax on his manse and glebe, and from assessed taxes on his horse, servant, and hair-powder, [562] is void of foundation; for it cannot be pretended that there exists any *special* privilege in regard to these taxes. It is not pretended that the acts imposing them bestow any exemption from them upon the clergy of Scotland; nor can it be pretended, that any ancient statute affords any argument for such a privilege, by a prospective regulation.

As to the property-tax on the plaintiff's stipend, it appears to be said that a special exemption exists, in virtue of the Scotch statute of 1593. The clergy had no privilege of exemption in general, or from any one tax, land-tax, poll-tax, customs, or excise. But yet it is said the Legislature had given them a privilege of exemption from all taxes which could affect their stipends. It is said this exemption is still in force, and that it applies to the property-tax.

This argument is founded solely on the statute 1593, cap. 166. But the evils to be remedied by the statute, were claims made on the stipendiary clergy by private parties in virtue of tacks, gifts, or pensions. These might be ratified in parliament, but still were private rights. Not a word occurs in the act as to public taxes, of which indeed there existed none at that time which could be said to affect stipends. It is evident that the word "taxations," which in the statute is thrown along with tacks, pensions, and impositions, alludes only to burdens imposed on the stipends in favour of private parties, and was used just as the word "impositions" was used to exclude grants under forms that might have been pretended not to be tacks or pensions. That is demonstrated by the words following; [563] "notwithstanding of onie gift or disposition maid in the contrair." This shows it was only taxations or impositions by gift or disposition, that were contemplated, and it will not be said that a national revenue statute is a "gift or disposition." There is no doubt in what sense the word "taxation" is used in this statute, the context removing all ambiguity. The word may perhaps have been in other parts of the Statute-book applied to public taxes; but such was not its meaning in the statute 1593, chap. 166. The plaintiff is driven to contend, that under "gifts or dispositions," public statutes are included; and then he must contend, that the act 1593, was a law that ministers stipends should be free notwithstanding future public statutes made "in the contrair;" an attempt to annul, by prospective provision, future statutes. No legislature has power so to bind itself.

The acts of supply, 1665 and 1667, which grant certain exemptions to the clergy, do it not by reference to any pre-existing privilege, but in express words as a new enactment. Nor is the privilege given limited to the clergy, but extends to other classes, particularly the College of Justice. The poll taxes, which in one instance specially, and in others by general expressions, affect stipendiary ministers, may be regarded as taxes affecting stipend, and is one instance to disprove the existence of such a privilege. The expression of Mackenzie and Forbes, of whom even the former wrote at the distance of near a century from the statute 1593, and both of whom are very accurate writers, are much too loose to afford authority of any value; but [564] such as they are, they are by no means favourable to the plaintiff. In the other writers on Scotch Law, it is not said that any idea of such a privilege existing, or ever having existed, is to be found. There is therefore no reason to suppose it existed previously to the union. But if such a privilege had then been in existence, it must at that time have been taken away.

The treaty of union was made on the footing of equalizing as much as possible the privileges and advantages on the one hand, and the burden on the other hand, of each part of the United Kingdom. By the fourth article, as contained in the Scotch act of parliament ratifying the treaty, it was provided, "that all the subjects of the united kingdom of Great Britain shall, from and after the union, have full freedom and intercourse of trade and navigation to and from any port or place within the said united kingdom, and the dominions and plantations thereunto belonging, and that there be a communication of all other rights, privileges, and advantages, which do or may belong to the subjects of either kingdom, except where it is otherwise expressly agreed in these articles." Then follows Article V. equalizing the right of Scotland and England, in regard to ships. Then Article VI. equalizing the customs, but containing an express provision, "excepting and reserving the duties upon export and import of such particular commodities from which any persons, the subjects of either kingdom are specially liberated and exempted by their *private* rights, which after the Union, are to remain safe and entire to them in all respects as before the same." Article XIV. [565] "provides, that there be no further exemption insisted upon for any part of the united kingdom; but that the consideration of any exemption beyond what are already agreed on in this treaty, shall be left to the determination of the parliament of Great Britain." And Article XXV. the concluding article, provides "that all laws and statutes in either kingdom, so far as they are contrary to, or inconsistent with the terms of these articles, or any of them, shall, from and after the union, cease and become void, and shall be so declared to be by the respective parliaments of the said kingdom." Under these Articles XIV. and XXV. taken in connection with the others, it appears that, if a privilege of exemption from taxation of a public, not private nature, had existed in Scotland, it must necessarily have been held in fairness to be repealed. And this is the more strengthened by the consideration that in the act for securing the protestant religion, and presbyterian church government, there is no mention whatever made of any privilege of the Scotch clergy of this nature. It is plain therefore, that while a variety of privileges and exemptions, both public and private, are secured in the treaty of union by express reservation, no privilege of the sort contended for by the plaintiff is there mentioned. And therefore, if it had existed, it must in equity have been held to be taken away. But the true inference is, that no such privilege existed.

For the Plaintiff in error—Mr. Thomson, and Mr. Brougham.

For the Defendant in error—The Lord Advocate [566] (The Solicitor-General of Scotland), and Mr. Mackenzie.

In the course, and at the end of the argument, Lord Redesdale made the following observations:—

The glebe and manse are not mentioned in the act of 1593. The stipend issues out of the teinds; and the act 46 Geo. III. c. 65, directs the teinds to be assessed according to their value. The language of the act appears to be a little confused. In the printed case for the plaintiff in error, it is not insisted that there is a special exemption for the manse and glebe. It is put by way of argument, that the land-tax was never charged upon the manse and glebe. But that practice furnishes no inference as to the property-tax, which is of a different nature.

Lord Redesdale: *—Upon a fair construction of the statute 1593, it is impossible to hold that the clergy are thereby exempt from public taxes and impositions.

The recital of that statute states a grievance by "pensioners and tacksmen" having in tack, gift, or pension, the stipends of the ministers. This cannot be intended of collectors of taxes, and when it proceeds to recite that the acts of these "pensioners and tacksmen who have taken (the stipends) in tack, gift or pension," that clearly applies to some *grant* made in the form of tack, gift or pension. Upon the recital of this grievance, of charges at [567] tempted to be made upon the stipends, it is enacted, "that all ministers stipends in time coming be free from all tacks, pensions, *tarations* and impositions."

The word "taxation" in the enacting clause is peculiar.

In the construction of acts of parliament as of all instruments, where general

* Upon the hearing and moving judgment in this case the Lord Chancellor was absent; the C. J. of England was present at the hearing.

words are annexed to or follow particular words, they are taken to be of the same kind and meaning.

The words immediately following explain the sense in which the word "taxation" is used.

It is enacted that the clergy shall enjoy their stipends free from all tacks, etc. "notwithstanding any gift or disposition made to the contrary." This cannot be construed to allude to any public charge imposed by act of the legislature.

As to grants by the clergy in convocation, they could only bind the clergy who made the grants, not the portion allotted for stipends.

In *Grier v. Mitchell*,* there was some error in the verdict, and a *venire facias de novo* was ordered. The House of Lords thought it was a case of private right, and came under the reservation by the act of [568] union. There was no finding of the law in that case. In this case, if the stipend is exempt by virtue of the act of 1593, yet the minister is liable in respect of the manse and glebe. So far, the warrant for seizure was legal, and sufficient to justify the proceedings. The finding of the jury distinguishes between the manse, glebe and stipend, and the assessed taxes, and the defender in this action could not be found guilty. But I desire to have time to look into the acts, and to consider the case.

Lord Redesdale:—In a case of this description, where the decision affects a large body of persons, I was desirous to look minutely into the acts on which it depends.

It is immaterial to consider how the act of union might bear upon this subject. If the exemption claimed did not exist before that act, the provisions of that act cannot affect the question. The practice of not charging the stipendiary clergy of the church of Scotland, will not raise a right to exemption from charge.

What happened before the Reformation must be put out of consideration. Before the Reformation, the clergy, under the famous bull of Pope Boniface, claimed to be entirely exempt from all charges which they did not impose upon themselves. Pope Boniface carried the matter still farther, for he prohibited their imposing charges upon themselves without a licence from the pope. That prohibition was not much observed for some years before the Reformation, but it was the foundation of the exemptions claimed both in England and Scotland.

[569] After the Reformation, the whole character of the church was changed; for the exemptions which the clergy had before enjoyed, in respect of their spiritualities, upon that event ceased. At the time when episcopacy was restored in Scotland, the archbishops and bishops formed a part of the legislature of the country. They made to the king grants for themselves as in a separate state. The lords granted for their own body, including the freeholders, who were of the same estate as the titled lords; and the burgesses made a separate grant for themselves.

After the whole property of the church had been seized, two thirds were given back to the clergy, and one third was reserved by the Crown, out of which the stipends of ministers were to be provided. The revenue was charged upon the two thirds. It probably would have answered no purpose, in point of revenue, to have charged the remaining third, which was either in the Crown or applied in the payment of stipends.

It is impossible to apply the words of the statute, as contended for the plaintiff in error. The statute 1593, exempting stipends from taxation, does not relate to personal impositions on the clergy. There may be a doubt what particular taxation is intended.

It appears that stipends, issuing out of the third of the teinds, had been charged in various ways by acts of the Crown; that is the grievance which is to be prohibited in future; and all existing charges are annulled. The word "taxation," introduced

* D. P. 27th April, 1814. The exemption claimed in this case was under an act of the Scottish Parliament, passed the 12th of July 1661, by which a coarse salt, worked and manufactured out of sea sand, by the poor inhabitants of Annandale, was exempted from the duties of excise. The proceeding was by information in the Court of Exchequer in Scotland, claiming a certain quantity of salt so made and seized as forfeited. The appellant claimed, and upon issue tried, a special verdict was given finding the facts. The Court of Exchequer, on argument, gave judgment for the respondents, and that judgment was reversed in the House of Lords.

in the midst of other words, cannot be extended in construction to all kinds of taxation. According to [570] the ordinary rules of construction, it must be understood in the same sense as the words with which it is coupled. Taxation in that clause must mean something of the same kind with those other things which are expressly and specifically prohibited. If this act has not the effect of exempting the clergy of Scotland from taxation of stipend, no such exemption is to be found in any other statutes. That in other respects the clergy have not been charged where other persons have been charged, furnishes no reason to extend the exemption to this case. Nor is there any ground to contend, that the words of the act imposing the property-tax are not sufficient to extend to the stipends of the clergy. By that act "*tiths, stipend, annuities, and all profits whatsoever* (*ante*, note, p. 556), are made chargeable. The party has been properly charged under the three acts specified. There can be no doubt as to the personal duties, and as to the other charges, I think the judgment ought to be affirmed. Judgment affirmed.*

* This question, as to the claim of the clergy to be a privileged order, in different ages of the law has been viewed in different lights. In early times, the general doctrine was, that spiritual persons, in respect of their benefices, were not chargeable as the laity, by charges imposed on the realm generally. Their goods were exempt from purveyance, 2 Inst. 3. And by the common law of England every parson was held to be free from the payment of tolls in all fairs and markets for all goods, etc. gotten upon or bought to be spent on their church livings. 2 Inst. 3; Reg. 260 a. So they are quit of pavage, pontage and murage (which were duties of the most universal obligation), and if they be distrained for, etc. may have a writ, etc. 2 Inst. 4; [571] Reg. Brev. 260 a.; F. N. B. 227. If the sheriff or collector of tenths or fifteenths distrained them in the lands belonging to their churches, they had a like writ to discharge them. Reg. Brev. 188 a.; Fitz. N. B. 176 a.

Statutes expressed in general words, were not held to extend to the clergy, as the statute of Winton, 13 Ed. 1.

Where a robbery was committed, and the hundred charged, though the words of the statute were *gentes demorantes* (all dwellers) yet the clergy were not held chargeable. See 2 Inst. 569; case of the Bishop of Coventry *semb. contra*. So the statute of highways, 2 and 3 Ph. and Mary, charges all householders, yet the clergy were held exempt. Again, the statute 33 Hen. 8. c. 2, empowers the justices to tax all "*resiants*" within the county where there is no gaol, etc. yet the clergy were formerly held not taxable. But in a case which occurred in the reign of Charles the Second, where a parson had brought an action of trespass against an officer who had taken his cows by way of distress under a warrant of a justice, and by authority of an act of the same reign, (22 Car. 2. c. 12.) requiring all *parishioners* keeping carts, etc. to assist in repairing the ways, it was held that he was a parishioner within the meaning of the act; and the court laid it down generally, that the clergy are liable to *all public charges imposed by act of parliament*; adding, that it had been so resolved (as Hale said) upon debate before all the Judges. So the case is reported by Ventris, 1 Vent. 273. According to the Reports of the same case by Keble, (3 Keb. 176. 507.) who states the trespass to have been by taking *horses*, and the plea in justification to have been under the 2 and 3 Phil. and Ma. c. 8. (which is enforced by 22 Car. 2. c. 12.) The words used by Hale were, "Parson is not exempt from any *new* charge for *repairing highways*; and by Hyde, C. J. in his Reports, P. 5. Ca. 1. there is no difference between clergy and laity in assesse for poor maimed soldiers or *B. R.*; but the dean and chapter and glebe must pay, and so resolved by all the Judges of England then, and so agreed by all the Judges now, being for constable rates and the like, and the parson of B. etc. was convicted on this very stat. of Ph. and Ma. for not sending his cart, about forty years since, and so the court conceived here." Levinz, who states the trespass to have been in taking *beasts*, (2 Lev. 132.) gives the words as used by Hale and [572] the court thus: "The *new* charges by statute, the lands of the church are subject (as other lands) unless they are excepted." Upon the stat. 22 Hen. 8. c. 5, for the repair of decayed bridges, as to the words "tax every inhabitant," Lord Coke observes, "By these words all privileges of exemptions and discharges whatsoever, from contribution, etc. are taken away, although the exemption were by act of parliament." 2 Inst. p. 701.

By the 43d Eliz. c. 2, clergymen are made liable to the poor rates for their glebe and tithes.

By the General Highway Act, 13 Geo. III. c. 78, s. 34, 35, 45, 46, they are expressly made liable, in respect of their tithes, etc. The 57th Geo. III. c. 99, s. 62 and 65, provides, that stipendiary curates, where the stipend appointed by the bishop equals the whole value of the benefice, and the curate is empowered to live in the parsonage, he shall be liable to all the same charges, deductions, taxes, parochial rates and assessments, as if he held the benefice.

This seems to be one of those cases in which the law has undergone a silent revolution. The general exemption of the clergy from public impositions, is acknowledged by the expression and implication of many statutes and decisions. But the privilege has ceased, in many instances, without legislative enactment, by the unseen progressive legislation of manners and opinions. The reasons for exemption as to matters of public taxation, imposed by the legislature, have been, no doubt, seriously affected by the disuse of convocations, in which the clergy were accustomed to assess their own contributions to the public charge of the state. Now they are taxed without representation as a distinct order of persons, but certainly not without vote or influence in the election of representatives.

[573]

SCOTLAND.

COURTS OF ADMIRALTY AND SESSION.

JAMES HUNTER & CO.,—*Appellants*: ARCHIBALD M'GOWN and others.—
Respondents [12th July 1819].

[*Mews' Dig.* viii. 79, 328. See now Merchant Shipping Act 1894, Part viii. s. 502 (i.) and *Morewood v. Pollok*, 1853, 1 E. & B. 743.]

The statute 26 Geo. III. c. 86, relates only to ships usually occupied in sea voyages, and not to small craft lighters and boats concerned in inland navigation.

A gabbert (Anglicè a lighter,) is not "a *ship or vessel*" within the meaning of the statute 26 Geo. III. c. 86, s. 2.—If goods on freight are shipped on board such a vessel and destroyed by fire accidentally, or through the negligence of the master, etc. the owners, etc. are not protected by that statute, but are responsible as at common law.

As to the general liability of carriers by the law of Scotland, *Quære*.

The respondents were owners of the gabbert *Janet*, a species of lighter navigated between Glasgow and the ports in the Clyde, and having a register in terms of the navigation act.

Upon the 7th day of January 1807, the appellants shipped, at Greenock, cotton wool on board the gabbert *Janet*, to the value of £1345 16s. 8d. for which they took the master's receipt, acknowledging the delivery in good condition, and obliging himself to deliver the same in Glasgow, "in like good order, danger of navigation excepted, on being paid customary freight."

By the regulations of the harbour of Greenock, the kindling of fire on board any vessel, while in the harbour, is prohibited under a penalty. Notwithstanding this regulation, the master of the *Janet* [574] (as it was alleged by the appellants,) kindled* a fire on board of her while in the harbour, which communicated to the vessel and her cargo. Part of the cotton wool was consumed, the remainder damaged; and a loss sustained of £572 17s. 2d.

For this sum, with interest and expenses, the appellants brought an action against the respondents, as owners of the gabbert, before the High Court of Admiralty. The Judge Admiral pronounced the following interlocutor: "Having advised, etc. finds, that the pursuers have condescended on no law, bye-law, fact, or circumstance which

* It does not appear that this fact was proved: it became immaterial, according to the view taken in the judgment delivered by the House of Lords.

can have the effect of subjecting the owners of the gabbert or lighter in question, in any part of the damages pursued for: therefore in respect of the statute 26th of his present Majesty, cap. 86,* assolzies the said owners, finds them entitled to their expenses, and decerns." "Note.—This interlocutor has nothing to do with M'Gibbon, the master."

This judgment having been brought under the review of the Court of Session, the Lord Armadale, Ordinary, pronounced the following interlocutor: "Having considered the mutual memorials, and whole proceedings in the reduction, repels the reasons thereof; and in the suspension finds the letters orderly proceeded, and decerns: Finds expenses due, and appoints an account thereof to be given in." To this interlocutor his Lordship afterwards adhered. The Appellants having presented a petition, reclaiming against these several [575] interlocutors to the First Division of the Court, on the 16th May 1811 the following interlocutor was pronounced: "The Lords having heard this petition, refuse the prayer thereof, and adhere to the interlocutors of the Lord Ordinary."

Against these interlocutors of the Judge Admiral on the 1st of January, 1808, of the Lord Ordinary on the 22d January, 14th February, and 7th March 1811, and against the interlocutor of the First Division of the Court of Session of the 16th May 1811, this appeal was presented to the House of Lords.

For the Appellants:—Mr. Wetherell, and Mr. Adam.

Carriers of goods by sea or land are bound to make good all loss or damage sustained on goods entrusted to them, unless such loss or damage is produced by the act of God, or the King's enemies.

It is argued that the loss claimed was occasioned by fire; and by the 26th of the King, cap. 86, owners of ships or vessels were exempted from loss arising from fire on board such ships or vessels. But it is plain, as well from the preamble as from the enacting clauses in the statute, that it is applicable to ships and vessels employed in general commerce, and not to craft employed in transporting goods upon canals and navigable rivers.

It requires a large capital to fit out a ship of considerable size for sea, and it was a great discouragement to invest money in this way, that when owners were, by accidental fire, deprived of their own property, they were liable to others for the value of such property as might at the time be on board their vessels. To remove this discouragement, which was [576] supposed to operate against the increase of our shipping, was the declared object of the Legislature in passing the statute in question, and similar motives have induced the Legislature to pass several other acts for the relief of ship owners. But had it been the intention of the Legislature to extend this statute to common carriers by water, the same policy must have induced them to extend it to carriers by land also; in so far as the fitting out a waggon of the first class, with a suitable team of horses, requires the investment of a larger sum of money, than fitting out a gabbert, flat, or lighter, of the first class; and the same observation applies to waggons and gabberts of smaller dimensions. When, however, it is considered how many millions worth of property is annually transported by means of inland navigation, and how very much the safety of that property depends upon the judicious selection of servants to conduct it, owing to the continual opportunities such men have of neglecting their duty, it can never be supposed, that if the legislature had intended to release, to so very great an extent, the responsibility of common carriers, it would have been left to courts of law to have made this out by implication.

If there was at any time room to doubt the intention of the legislature in passing the act, it is now removed; for in an act passed in the 53d Geo. III. cap. 159, for the farther relief of ship owners, and for amending the act of the 26th Geo. III. *and in which the same precise terms are used to describe the persons for whose benefit the act is passed, it is expressly provided* by "sec. 5th, that nothing herein contained shall extend, or be construed to extend, [577] to the owner or owners of any lighter, barge, boat, or vessel of any burden or description whatsoever, used solely in rivers or inland navigations, or any ship or vessel not duly registered according to law."

Although the act of the 26th Geo. III. had extended to the owners of gabberts or lighters, it would have been altogether inapplicable to the present case. For, as by

* See the terms of the act, *post*, p. 576.

the regulations of the harbour of Greenock, made under the authority of an act of parliament, the kindling of fire on board of vessels in the harbour is prohibited, there is therefore an implied contract between the owners and masters of all vessels, and the shippers of goods on board of such vessels, that fire shall not be unlawfully kindled, while such vessels remain in the harbour; and as the loss in the present case can be directly traced to the breach of this contract, the respondents would not be entitled to shelter themselves under an act of parliament, intended only to protect innocent sufferers from extraordinary loss by accidental fire.

For the Respondents:—Sir Samuel Romilly, and Mr. ———

The defence is founded in this case entirely on the clause in the act of parliament of the 26th Geo. III. cap. 86, s. 2, which is an effectual bar to the appellants claim. This clause is in the following terms: "And be it further enacted by the authority aforesaid, that no owner or owners of any *ship or vessel* shall be subject or liable to answer for, or make good to any one or more person or persons, any loss or damage which may happen to any goods or merchandize whatsoever, which from and [578] after the 1st day of September 1786, shall be shipped, taken in, or put on board of any such ship or vessel, by reason or means of any fire happening to or on board the said ship or vessel."

When the words of an act of parliament are ambiguous or equivocal, an inquiry may be made into the objects of the legislature in passing the act, for the purpose of ascertaining its meaning. But when the language of a statute is clear and intelligible, it is altogether incompetent to refuse effect to the enactment by reference to any supposed views of the legislature in making the law. In this instance it cannot be said that there is any ambiguity in the clause, unless the appellants can make out that a gabbert is not a *ship or vessel*.

The express object of the statute as set forth in the *preamble*, is, "to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein, which is likely to happen from the responsibility to which they are now exposed." It is clearly within the policy of the act, that the provision should extend to gabberts. It is certainly an object of policy to increase the number of such vessels. Seamen may be both trained and employed in such vessels. In truth, the men who navigate them, might be, and frequently have been, of the most essential service on the coast of the Clyde. Besides, an establishment of lighters is necessary to support the trade and business of larger vessels. And therefore it would be peculiarly inexpedient to impose such a responsibility on the owners of gabberts as would discourage them from [579] entering into this species of trade, and throw the transport of goods from place to place into the hands of *land carriers*.

In the next place, the owners of gabberts stand in as much need of this protection from the statute as the proprietors of larger vessels. If the act was intended, as it unquestionably was, to protect the owners of vessels from a heavy responsibility on account of the inattention and negligence of their servants, the benefit of it must be given to every owner whose vessel is not actually under his own charge. The accident by which a vessel is set on fire must always happen in a moment. But an owner residing in Glasgow, while his gabbert is in Greenock, Dumbarton, or at many miles distance from him, has plainly as little control over the master or crew as if the ship were in the West Indies.

The regulation of the magistrates of Greenock could not (in whatever terms it had been conceived) alter the enactments of a public statute: and, in the present case, merely imposed a small pecuniary penalty upon the master in case of non-observance.

The Lord Chancellor, after having stated the facts and the pleadings in this cause, as before set forth, proceeded thus:—

Several points were argued in this case: first, what was the law of Scotland with respect to the liability of carriers in general? In the next place, that whatever might be the liability of carriers in general, the regulations, with respect to the harbour of Greenock, which prohibited the kindling of any fire on board any vessel, would make the owner of [580] any gabbert liable, whatever might be the liabilities, according to the general law of Scotland. The decision proceeded expressly upon the supposition that the statute of the twenty-sixth of his present Majesty had exempted the owners of this sort of craft, as falling under the denomination of a vessel, from damages, in

respect of the loss sustained. There was a great deal of argument at your Lordship's bar, upon the meaning of that statute of the 26th Geo. III. and after hearing that argument, it was conceived, that it was a case in which it might be proper to have the assistance of his Majesty's Judges, and to have it argued before them. The case has therefore stood over a considerable time; but it has been found utterly impossible, such is the pressure of business on the Judges in the Courts below, to procure their attendance upon this cause. I have, however, looked very anxiously into the acts of parliament on this subject, and I have had the assistance (though not of all the Judges,) of the Chief Justice of the King's Bench, who happens, in the course of his practice, to be particularly conversant with the meaning of this act of parliament, relating to ships and vessels, and I have no hesitation in saying, that I am of opinion, that that act of the twenty-sixth of his Majesty, cap. 86, relates only to ships and vessels usually occupied in sea voyages, and that it is not an act of parliament which gives protection in case of small craft, lighters, and boats, and so on, concerned in inland navigation. The result is, (if that is a right opinion, and I really do not entertain any doubt about it), that if the judgment in the Court below has proceeded upon the supposition that this [581] statute protected the persons against whom the claim of damages was made, from being liable as owners of a gabbert, in that respect this judgment must be considered erroneous.

There remains behind, the question, what is the extent and nature of the liability of Scotch carriers? Our law, with respect to English carriers, cannot decide that, nor the point how far the regulations of this particular harbour of Greenock, would make the master or owner of a vessel liable. It appears to me that the right course will be, to find that the gabbert or lighter called the *Janet*, mentioned in the pleadings in this cause, is not to be considered a ship or vessel, within the intent and meaning of the statute of 26th Geo. III. cap. 86, and with that finding, to refer the cause to the Court of Session, to review the interlocutors complained of, and to do what is just and right, consistent with this finding; that will enable the Court of Session to find, whether, by the law of Scotland independent of this statute, or any regulation relating to the harbour of Greenock, it will come to a different result.

Die Lunae, 12 Julii 1819.

The Lords find, that the gabbert or lighter, the *Janet*, mentioned in the pleadings in this cause, is not to be considered as being a ship or vessel, within the intent and meaning of the statute of the twenty-sixth of his present Majesty, cap. 86. And it is ordered, That with this finding, the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of, and to do therein as may be just, and as is consistent with this finding.

[582]

ENGLAND.

IN ERROR FROM THE COURT OF KING'S BENCH.

WILLIAM EYRE.—*Plaintiff in Error*; THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND,—*Defendants in Error* [8th July 1819].

[See Bills of Exchange Act, 1882, ss. 9, 57.]

In actions upon bills of exchange, containing counts in contract upon the bills, and a separate count for interest, not expressed to be by contract, but apparently sounding in damages, if the plaintiff obtain interlocutory judgment upon demurrer to the replication, it is not necessary that the damages should be assessed by a jury. The Court, on motion of course, may refer it to the Master to compute, or without reference may itself compute the damages in respect of interest; and the plaintiff may enter up judgment, upon the respective counts in contract and for interest, without *remittitur* as to the excess of the aggregate sums laid in those counts beyond the sum of principal and interest computed, and for which he enters up judgment.

This was an action brought in the Court of King's Bench by the defendants in error, against the plaintiff in error, upon two bills of exchange. The declaration consisted of seven counts: the first, on a bill of exchange for the sum of £973 4s.; the second, on a bill of exchange for the sum of £1278 13s. 6d.; the third count was *indebitatus assumpsit* for £2500 for money lent and advanced; the fourth, *indebitatus assumpsit* for £2500 for money [583] paid, laid out and expended; the fifth, *indebitatus assumpsit* for £2500 for money had and received; the sixth, *indebitatus assumpsit* for £300 for interest; and the last, *indebitatus assumpsit* for £2500 for money due on the balance of an account stated. The defendants in error obtained interlocutory judgment in the Court below, on demurrer to the replication; and after an assessment made under a reference to the Master by order of the Court below, and without the intervention of a jury, entered up judgment, on the first, second and six counts, for the sum of £2299 9s. 3d. damages, and £56 0s. 9d. costs, remitting all damages on the third, fourth, fifth and last counts of the declaration. Against this judgment a writ of error was brought upon the following grounds; first, that the different sums claimed by the two first and sixth counts of the declaration, upon which the judgment was taken, amounted to the sum of £2551 17s. 6d. whereas the judgment was only taken for £2299 9s. 3d. leaving a sum of £252 8s. 3d. parcel of the several sums claimed by the said two first and sixth counts of the said declaration, without any adjudication whatever; whereas the defendants in error (the plaintiffs in the Court below) ought either to have taken judgment for the whole of the sums mentioned in the three counts upon which they have taken judgment, or have entered a *remittitur* as to the balance, as they have done as to the third, fourth, fifth and last counts of the declaration, or have released such balance: so that if this judgment be not erroneous, there is nothing to prevent the defendants in error from bringing a new action for [584] the sum of £252 8s. 3d. and subjecting the plaintiff in error to the costs of such new action. Secondly, that as the sixth count of the declaration is not founded upon any written instrument or express contract, but sounds in damages only, such damages ought to have been assessed by a jury, and that the Court below had no authority to assess the same without the consent of the plaintiff in error, the defendant in the Court below.

For the Plaintiff in error, Mr. Denman.

Every judgment given in a court of law ought to be final and conclusive between the parties, as to all matters which appear to be in dispute, and claimed by the party suing in the action in which such judgment is given; but the judgment given in this case in the Court below is not final and conclusive as to the matters which appear, by the pleadings in this cause, to have been in dispute between the parties in this suit; but on the contrary, a sum of £252 8s. 3d. which appears to have formed part of the matters in dispute between the parties in this cause, remains undisposed of by the judgment.

Although the Court below might have assessed damages on the two first counts of the declaration, they being and appearing to be upon contract by written instruments, and for the payment of specific sums of money, it had no power to assess damages of its own authority, and without the intervention of a jury, upon the count of the declaration which sounds entirely in damages.

[585] For the Defendants in error, Mr. James Parke and Mr. Winter.

The count for interest may be by contract, for any thing that appears in the declaration. The question is, whether the Court below has the power to assess damages for interest without inquiry by a jury? That they have such power generally, appears by many authorities; inquiry is only to inform the conscience of the Court. The plaintiff in error *confounds the power with the practice* of the Court. In *Holdipp v. Otray*, 2 Saund. 106, it was decided to be the course of the King's Bench, in an *action of debt*, where the plaintiff has judgment by default or confession, to tax the damages for the detention of the debt, as well as the costs, and that interest may be included in the damages. In the note to that case by Serjeant Williams, the subsequent authorities are collected; and upon the ground of those authorities the practice has been established. The last case was in the Exchequer Chamber, 4 Term Rep. 148, *Gould v. Hammersley*. Upon interlocutory judgments, the Court will grant an order of reference to the Master to compute interest, in cases similar to the present.

In reply: The defendants in error might have had damages for interest; they need not have taken judgment on the count for interest, or they might have entered a *remititur* on that count.

During the argument the Chancellor expressed some doubts as to the practice, and put the following [586] case: Suppose the declaration had consisted of one count for £100 for interest only,* and after *non assumpsit* pleaded, there had been judgment by default, could the damages in such case have been assessed by the officer of the Court? The counsel for the defendant in error answered, that in such case the Court might refer it to the officer to compute the interest.

On the 8th of July 1819 the judgment of the King's Bench was affirmed, without observation.

[587] The first ground assigned for error was but slightly noticed in the argument for the plaintiff in error, and the counsel for the defendants in error merely asserted that there could be no *remititur*.

The principal and interest, for which judgment is entered up, exceed the amount of the sums laid in the two first counts. If, therefore, the damages for interest could not be taken under the general breach, at the close of the declaration, (which was not suggested in argument,) and if the Court had no power to assess damages on the count for interest, the course, it seems, would have been to enter a *nolle prosequi* upon the count for interest, and a *remititur* of all damages assessed beyond the amount laid in the two first counts.† But the Court having power to assess damages on the count for interest, then it is similar to the common case, where the jury give less than the damages laid in the declaration, in which case no *remititur* is ever entered for the excess. It is only in cases where the jury give larger damages than the plaintiff has claimed by his count, that a *remititur* is required, as ‡ where damages were laid at £10 in the declaration, and the verdict was for £13, the judgment was reversed: But the Court said, that if the plaintiff had released the excess of damages beyond the sum laid in the declaration, and entered up judgment accordingly, that would have been good.§ So where several damages were assessed against the defendants, it was held in judgment that the plaintiff might enter a *remititur*, or take judgment *de melioribus damnis*, which operates as an election of the greater and waiver of the lesser damages.||

[588] The second point was argued, and *apparently* decided upon the authority of *Holdipp v. Otway*, and the precedents cited in the note to that case by the late learned editor of Saunders. But the jurisdiction asserted in that case and the

* See the dictum in the Anon. case, 1 Ventr. 330. (cited *post*. 599.) which seems to warrant the doubt expressed by the Lord Chancellor, unless the practice can be sustained upon something less available than the extensive authority of ancient precedents. The certainty of the demand is the criterion suggested by that case. Upon the ground (as stated in the report), the Court in that case observed, that the damages being uncertain, could not be set in a court of equity, *but by a jury*; and as to their own powers to assess damages on judgment by default, they took a distinction between actions of *debt*, where the *demand is certain*, and actions of trespass or upon the case, where the matter lies *wholly in damages*. In the former case they said the Court had such power, but not in the latter.

If, therefore, the action, in the case put by the Lord Chancellor, can be said to lie wholly (*i.e.* substantially) in damages, the Court, according to the authority of this precedent, has no power to assess the damages. If it is in a technical sense only nominally, and not substantially, that the action is said to lie in damages, being in fact in the nature of an action of debt (*in deb. assumpsit*) for a sum certain, or which becomes certain by mere computation, then the power of the Court is founded upon the certainty of the demand, as contradistinguished from a demand which lies wholly in damages.

† Tidd's Prac. 589: 2 Smith's Rep. 16-7 *in notis*.

‡ *Percival v. Spencer*, Vely. 15. The jury may give less damages than laid in the declaration, but not more. Dict. of Lutwyche, in *Fairly v. Roche*, Lutw. 271.

§ *John and Robinson v. Dodworth*, Cro. Car. 192, and *Salin v. Long*, 1 Wils. 30.

|| See also *Wray v. Lister*, 2 Stra. 1100.

notes, is much larger than required for the decision of the case now reported, and extends far beyond the modern practice of the Courts. According to that case and the notes, the Court has unlimited power in actions of *trespass* and *assumpsit*, as well as covenant and debt, where judgment is taken upon demurrer, by default, confession, etc. to assess the damages, with the assent of the plaintiff, if they think fit. The writ of inquiry is said to be merely gratuitous, to inform the conscience of the Court, and the Judges may dispense with that information, from pre-knowledge or other cause, or at discretion. This doctrine is rested upon ancient authorities, which if now to be considered as law, warrant the proposition to the full extent in which it is stated, and other authorities are not wanting to carry the doctrine to the extreme of uncontrolled jurisdiction, as to the power of assessing damages without the interference of a jury in all actions where the defendant does not take issue on the facts and conclude to the country, and in cases of assault, mayhem and trespass, of increasing and abridging damages after a verdict.

In the argument for the defendant in error, the practice of the Courts is said to be *confounded with their power*. The proposition is a little obscure; but it may be conjectured from the authorities cited in the argument, that it was intended to intimate, that the powers of the Courts are much more extensive than might be supposed, from the limits within which the Judges have in practice bounded their jurisdiction. It is therefore highly material to ascertain the boundaries of these dormant powers, as they are supposed to exist upon the authority of ancient precedents. If the cases cited in the note to *Hollipp v. Otway*, as suggested by the argument, are [589] authorities for the power as distinguished from the practice, then in trespass for breaking and entering a dwelling-house, accompanied with circumstances of great aggravation,* where judgment passess by default, or confession, or upon demurrer, the Courts have power to assess the damages; and if they have such power in trespass, there seems to be no reason why the power should not be universal.

The law of England, where it is not regulated by statute, stands upon the decisions of the Courts; and it is a point of the highest consequence to the subject, to be able to distinguish, among ancient precedents, which have the force and authority of law, and which have fallen into abeyance by disuse.

The practice of the Courts is adapted to the convenience of suitors, and is perfectly understood. But it is suggested that there is a latent undefined power, not to be confounded with, and therefore not controlled or abrogated by this practice. If such a power exists, it may be exercised. It is therefore expedient for those who are concerned in the administration of justice, to inform themselves as to the extent of this impending power, and the authorities upon which it rests.

In *Hollipp v. Otway*, an action of debt was brought upon a bill obligatory. Error was assigned, that the Court had taxed damages, on occasion of the *detention of the debt*; but it was decided, that upon a judgment in *debt* by default, such damages might be so taxed with the assent of the plaintiff. The cases cited by the learned editor are, *Bruce v. Rawlins*, 3 Wils. 61, 62, which contains the dict. of Wilmot, C. J. on judgment by default in *trespass for breaking*, etc.; *Hewitt v. Mantell*, 2 Wils. 372-4, dict. of same Judge upon *assumpsit*; *Thelluson v. Fletcher*, Doug. 316, dict. of Buller, J. as to actions upon *covenant* for payment of a sum certain; *Blackmore v. Fleming*, 7 T. R. 446-7, where in an action of debt, Lawrence, J. [590] said it was at the option of the plaintiff to refer it to the Prothonotary to tax interest by way of damages, or to have a writ of inquiry of damages; *Roe v. Apsley*, 1 Sid. 442; where upon a judgment of debt, after some doubts raised by the Chief Justice, an order was made in the Court of Common Pleas, referring it to the Secondary without a writ of inquiry to tax damages; 11 H. 7. 5, 6; Bro. Default, 105; 1 Roll. Abr. 571-3; Ognell's case, 3 Leon. 213; and in actions on the case upon promissory notes, where judgment passed by default, *Rashleigh v. Salmon*, 1 H. Blac. 252; *Andrews v. Blake*, Ib. 529; *Longman v. Fenn*, Ib. 541; and *Shepherd v. Charter*, 4 T. R. 575, where the same practice prevailed.

These are the cases cited in the note upon *Hollipp v. Otway*, and they seem to be confirmed by *dicta* and practice in other cases.

In the case of *Sir Francis Goodwin v. Welsh and Over*, Yelv. 151, upon a declara-

* See *Bruce v. Rawlins*, 3 Wils. 61, 62, *post*. 591.

tion in trespass for goods taken, concluding for damages, *non sum informatus* pleaded, and judgment for plaintiff, the damages were assessed by a jury upon writs of inquiry; and upon motion to prevent filing the writ, because the property in the goods was not proved on the inquiry, the Court held that the value only was material to be proved, according to the requisition of the writ; and they added, *that they themselves as Judges, if they so pleased in these cases, might assess damages without directing any writ of enquiry, for the writ issued only quia nescita quae damna; but if the Judges will trouble themselves with the assessment of damages, they have the power to do so.*

So in actions of debt on a judgment, and for damages *pro detentione debiti*, the jury or the Court assess interest on the sum recovered by the first judgment, up to the time of the judgment in the new action; as in equity it is computed to the time when it is supposed the Master's report will be confirmed.

In *Mallory v. Jennings*, Fitzg. 162. it was held that [591] the omission of a writ of inquiry after judgment by default, was cured by the statute for the amendment of the law 4 Anne, c. 16, s. 2. See also the Year Books, 14 H. 4. 9; 3 H. 6. 29; 19 H. 6. 10; *Green v. Heurne*, 3 T. R. 301; 2 Stra. 1145; *Dufroy v. Johnson*, 7 T. R. 473.

According to these authorities, consisting of decisions as to the action of debt, and the dicta of Judges in cases of trespass and other actions, the power of the Courts, as distinguished from their practice, appears to extend to actions of assumpsit and trespass, as well as debt for a sum certain.

In *Bruce v. Rawlins*, (which is one of the cases cited in the note to *Holdipp v. Otway*), the action was for a violent trespass committed by custom-house officers, who wantonly entered the house of the plaintiff, broke open his boxes and drawers, and caused great alarm to his wife and family. After a verdict upon a writ of inquiry, application was made by the defendant for a new writ. Upon that occasion, Wilmot, C. J. said, "This is an inquest of office to inform the conscience of the Court, who, if they please, may themselves assess the damages."

If this *dictum* is not to be questioned, the power must be still further distinguished from the practice; for by other cases, not cited in the note to *Holdipp v. Otway*, nor in the argument of the case now reported, but of equal efficacy in point of authority as precedents, the jurisdiction is extended to almost every species of civil action; and if the authority of old cases will justify the exercise of such a power, similar authorities might warrant the exercise of powers by the Courts to diminish or increase damages after a writ of inquiry executed, and even after a verdict given by a jury upon trial of an issue.

The early reports furnish many precedents to show that damages assessed upon a writ of inquiry may be increased or abridged at the pleasure of the Court. Two reasons are given—First, "For that as the Justices might [592] have awarded damages without the writ of inquiry, the inquisition thereupon is nothing more than an inquest of office for their information."—Secondly, Because an action of attainder does not lie against the jury on account of the damages assessed upon a writ of inquiry. 14 H. 4. 9; 3 H. 6. 29; Bro. Abr. Dam. pl. 7; 19 H. 6. 10.

Upon the same principles it was held, that if the plea be sent to be tried in a foreign county, damages might be increased by the Court, because the jury there have not full knowledge of the fact. 1 Rol. 572. l. 50. So in account, 10 H. 6. 24 b. and in debt upon obligation, 1 Roll. Abr. 572. l. 50. It was held also, 1 Rol. 573. l. 5, that where the Court may assess damages without a writ of inquiry, they may increase them after a writ of inquiry, upon demurrer, or judgment by default, or upon the view of any Justice of the Court in *petis*, 1 Rol. 572. l. 22; and where they can increase, they may mitigate damages. 1 Rol. 572. l. 25, 28; 573. l. 7.

These doctrines, and most of the examples of the power of the Court to increase and diminish damages, are collected and stated by C. B. Comyns, in his Digest, tit. *Damages*, as existing law. In other sections of the same title (*Damages*, E. 1 and 2) he states the law (so far as appears, upon his own authority or experience,) with this distinction:—"In all cases where the issue is tried by a jury, and damages are recoverable, the damages ought regularly to be assessed by a jury; if they do it not where damages *only** are recoverable, the verdict shall be void; but where there is

* See the dict. *Anon*, 1 Vent. 330. post. 599.

judgment without any issue tried, damages shall be assessed by the Court, *or by a writ of inquiry.*" In the doctrine, as thus qualified by Comyns, it does not distinctly appear how far it is in the option of the Court either to issue the writ of inquiry, or in every species of action where there is judgment without issue tried, to assess the damages themselves.

In actions for battery, amounting to mayhem or tres-[593]-pass for a great wound, and even common trespass, the Courts not only after assessment upon a writ of inquiry, but even after a verdict limiting the damages, have exercised a power of abridging or increasing the damages. Their powers, therefore, as distinguished from their practice, if ancient authority stands unaffected by disuse, is much more extensive than the argument for the defendant in error supposed or contemplated.

In Jones's Rep. B. R. 183, it was held that the Judges, even of inferior Courts, have the power to increase the damages upon a view of mayhem; although Justices at Nisi Prius were held to have no such power. 1 Roll. Abr. 573. pl. 1. In a series of cases, extending from the Year Books to the reign of Geo. II. it was held, that the Judges of the superior Courts, having before them a certificate of the evidence indorsed upon the postea by the Judge before whom the issue was tried, and upon report, if tried, by one of the Judges of the Court, and a view of the wound, may increase the damages assessed by the jury; Bro. Dam. pl. 47; 1 Roll. Abr. 572. pl. 8; *Cook v. Beal*, Ld. Raym. 177; and even without view, if a Justice of the Court in which the action is depending has had a view and reports. Bro. Dam. 49; 1 Roll. Abr. 572. pl. 9.

It is said also, admitting that the Court have no direct power yet even *in trespass*, if the damages assessed by the jury are excessive, the Court may stay judgment until the plaintiff enters a remittitur as to part, or releases them, and reduces the damages to a reasonable sum. Bro. Dam. pl. 7; Bro. Judges. pl. 22; and the Year Books, *qua supra*.

In a great variety of other cases, the Courts have exercised the power, directly or indirectly, of reducing or increasing the damages after inquiry, or verdict by a jury. In trespass for taking goods after verdict for £20 they increased them to £40. 1 Roll. Abr. 572. pl. 1. So in cases of mayhem, the power has been exercised frequently, and without hesitation; as in 1 Roll. Abr. 573, upon appeal of mayhem, the damages assessed by the [594] Jury at 20 marks, were, upon view and information of surgeons, increased to £100. In another action, the verdict being for £18 at the day in Bank, the plaintiff showed the mayhem in Court, and prayed an increase of damages; and they were increased to £40. Bro. Dam. pl. 86; 39 Ed. 3, 20. In trespass for cutting off a right hand, the damages upon view were increased from £50 to £100. Tripcony's case, Dyer, 105. For a thumb cut off, they were increased from £40 to £100. *Mallet v. Ferrers*, 1 Leon. 139. In trespass for a wound in the hand, upon affidavit of a surgeon, and certificate of the Judge who tried the cause, that it was the same wound as alleged and proved at the trial, the damages were increased. Latch, 223. For a broken arm the Court refused to increase the damages, because the manner of the beating was not set out. Sty. 345. So it is said, unless the Judge certifies, or there is proof that the wound is the same for which the action is brought, the Court may refuse. 1 Sid. 308. But where battery and mayhem were alleged, though the manner not set out, the damages were increased from 10s. to £40. *Hardres*, 408, by Hale, C. J. For the loss of two fingers, upon a view, the damages were increased from £5 to £100. *Freeman*, 173. The Court refused to increase the damages, where the word *maihemavit* was omitted in the declaration. 1 Vent. 327. *Semb. contra Hard. 408*. But the doctrine was overruled in *Cook v. Beal*, 1 Ld. Raym. 176, where it was said to be sufficient, if, by the description, the wound appears to amount to mayhem, or even if it amount to a corporal hurt which is apparent. In that case it is stated that the plaintiff had nearly lost the sight of one of his eyes.

The most modern case, in which such a power has been exercised, is *Burton v. Baynes*, Barnes, 153. It was an action for an assault, battery and mayhem. On the trial a verdict was given for the plaintiff, damages £11 14s. In Mich. term, 7 Geo. II. the Court was moved to [595] increase the damages. A rule to show cause was granted, and upon view of the party, examination of a surgeon, *ore tenus* in open Court, and hearing counsel on both sides, the damages were increased by the Court

to £50. In *Theale v. Faughan*, 1 Wilson, 5. 16 Geo. II. upon a similar application in a similar action, the Court refused to increase the damages; but Lee, C. J. said, "There is no doubt the Court can increase the damages in this case upon view of the party maimed."

These are decisions and dicta too recent, perhaps, to permit us to consider the law as entirely obsolete or abrogated by disuse: and in a recent book of practice, (Tidd, p. 903.) which the practitioners at common law are accustomed to quote, (and justly) with the highest respect, this doctrine, as to the power of the Court to increase the damages upon a view, etc. in mayhem, is stated as existing and unabrogated law. The counsel, for the defendant in error, in arguing the case now reported, seem to have had in theory some sort of basis to ground their suggestions as to the powers of the Court, since decisions upon this head, and judicial assertions of law, are yet standing unimpeached on the records of the Courts, and no otherwise affected as rules of law, than by modern disuse, and the adoption of a new practice.

If ancient authorities, therefore, selected partially or taken promiscuously, are to decide what are the powers of Judges to assess, abridge or increase damages, those powers, according to theory and former practice, appear to be alarmingly extensive; for the decisions above cited show that the Court, or a Judge, in the special cases stated, after a writ of inquiry, or after trial and verdict, may, upon examination and view, without further trial or a new writ of inquiry, increase the damages assessed upon the former trial or inquiry. The law is undoubtedly so existing, if ancient authority and assertion of authority are sufficient to sustain such a jurisdiction, or unless it can be maintained that those authorities are contradicted by better precedents, either of decisions upon the [596] points at issue in those cases, or principles stated by the Judges who decided them; or finally, unless those extraordinary powers have been abridged by contrary practice or lost by disuse.

If we are to consider the practice as distinguished from and controlling the power, the jurisdiction of the Courts to assess damages, has, for a great length of time, been confined to cases where the demand of the plaintiff in the action is certain, or depending upon a mere computation of figures. In all other cases damages are assessed upon writ of inquiry, where the defendant does not take issue on the facts. Where by the form of pleading, the action is brought to a trial, and a verdict given; from the reign of George the 2d, (and early in that reign) it has been the practice of the Courts to grant a new trial if the damages appear to be excessive; and where the damages are alleged to be too small, it is said to be a settled rule with the Courts not to grant a new trial, except under very special circumstances, as mistake of law by the sheriff or jury, miscalculation, etc. See *Mauricet v. Brecknock*, Doug. 494; *Markham v. Middleton*, 2 Stra. 1259; *Woodford v. Eades*, 1 Stra. 125. 1 Chitty's Rep. 644. and 729; 2 Chit. 219. In the course of the last ninety years, there is no recorded instance of any exercise of power by the Courts to increase or abridge the damages assessed by a jury upon verdict or writ of inquiry. And in a modern case, the Court of King's Bench has refused to alter verdict to increase the damages in respect of interest upon a promissory note. *Du Belloy v. L. Waterpark*, 1 Dowl. and Ryl. 16.

How far the authority of ancient decisions has been affected by desuetude, it might be hazardous to assert. The decisions in *The King v. Woolff*, 2 B. and A. and other recent cases which might be cited, are sufficient to show that mere disuse furnishes no ground to infer that ancient decisions are obsolete. Contrary practice, and the frequent refusal of the Courts to exercise the powers, put the matter on a different footing.

[597] If neither disuse, nor long practice, nor the self-denial of the Courts, has been sufficient to affect the right to exercise these singular powers, it becomes expedient to examine the precedents upon the authority of which the right is supposed to rest, and the power as distinguished from the practice of the Courts.

The decisions are various in their character, and to a certain extent, inconsistent with each other. The question then occurs, whether any consistent principle of jurisdiction can be extracted from the decisions, notwithstanding this apparent discordance. The doctrine that the Court, with the assent of the plaintiff, has the power to assess the damages where there is judgment upon demurrer, by confession, default, etc. seems to rest upon a principle of pleading. In the case of judgment

by default, as the defendant does not, by pleading to issue upon the facts, appeal to the decision of a jury, he is supposed to acknowledge, or not to controvert, the demand of the plaintiff, as stated in his declaration: and when he takes issue upon the law, i. e. demurrer, he admits the facts, and among the rest the damages laid in the declaration, to the whole of which, in theory of law, the plaintiff may be considered as entitled. But if the plaintiff assents to a fair estimation of his damage (which by many authorities is held to be an indispensable condition), the Court may assess the damages by their own judgment, or direct a writ of inquiry to issue. This is stated to be the conclusion of law, where the defendant *confesses the action*. 1 Roll. Abr. 578, pl. 6, referring to 29 Ed. 3. 13: Bro. Dam. pl. 25. So it is laid down by ancient authorities, that if there be judgment *upon demurrer* the justices may award damages without a writ of inquiry. Bro. Dam. pl. 194, referring to 14 H. 4. 39, 40. And upon a plea in justification of a rescous, damages to a certain amount having been alleged in the declaration, judgment was given for the plaintiff *upon demurrer to the plea*, the Court deciding that the plaintiff [598] was entitled to the damages alleged, *because the defendant did by his plea confess the trespass, and did not deny the damages to be as alleged*. 1 Rolle's Abr. 578, pl. 1. 5: 21 Ed. 3. 4 b. and 40 b. In some cases, however, the Courts, even in ancient times, have refused to act upon this principle, where the action was of such a nature as to make the claim of the plaintiff to damages a matter of opinion. See Bro. Dam. 55, 56. This principle of pleading seems, therefore, by the authority of many cases, to have been so far qualified, that the plaintiff was compelled by the Courts to waive his theoretical damages in cases where the inquiry and compensation were matter of opinion, and to submit the estimation of the real damage suffered to the decision of a jury, or the judgment of the Court.

Upon a careful examination of the ancient precedents, it will be found, that with the exception of the cases of assault, battery and mayhem, the jurisdiction of the courts to assess damages in actions where the damages are uncertain, has been exercised with much doubt and hesitation: and the right to such jurisdiction has not, unfrequently, been denied by the Judges.

Notwithstanding some decisions and many sayings to the contrary, it might, perhaps, without much hazard, be asserted, that the sound principle to be extracted from the best of the old authorities is, that *the certainty or uncertainty* of the plaintiff's demand, arising out of the nature of his declaration, and appearing upon the record as to the amount of damages, are the true tests by which the question is to be decided, whether the Court may assess the damages, or whether the case must be referred to a jury. That such a principle existed and was acknowledged in early times, appears distinctly exemplified by the following cases.

In the Year Book, 10 H. 6. 24 b. 84, it is said, damages may be increased by the Court, where the principal demand is *certain*, as in account; so in debt upon an obligation [599] where the deed is denied. 1 Roll. 572; 14 H. 4. 19 b.

In an action of debt for foreign money, which was averred to be of a certain value, a verdict was given for the plaintiff, but no damages were assessed. The Court awarded a writ of inquiry: and gave, as their reason, that the value of foreign money is no more known to the Justices than the value of twenty quarters of wheat would be. But they said, that if the action had been for money current, they might have awarded damages without a writ of inquiry, the value of current money being known to them. *Bagshaw v. Playn*, Cro. Eliz. 536.

In another case, (*Anon.* 4 Ventr. 330.) where application was made to the King's Bench for a prohibition to restrain proceedings in the Marches by English bill, to recover upon the promise of the defendant to pay the debt of a stranger, being in the nature of an action upon the case; notwithstanding a custom alleged, and the reservation of such customs by the stat. 33 H. 8. the prohibition was granted, upon the ground that where damages are *uncertain*, they cannot be set in a Court of Equity, *but by a jury*; and upon that occasion it was said by the Court, that if there be judgment by default in an action of debt, the Court, as the *demand is certain*, does sometimes award damages without a writ of inquiry, *but never in actions of trespass or upon the case*, because these two actions will lie *wholly* * in damages.

* See Comyns Dig. *quâ supra*, p. 592.

So it has been decided, that in all actions where the demand of the plaintiff is *certain*, as an action of debt, the damages assessed by the jury, who tried the issue joined in the action, may be increased by the Court. Bro. Dam. pl. 137, 139; Bro. Costs, pl. 28.

In *Thorngate v. Reeve*, 29 and 30 Eliz. B.R. cited in a note to Dyer, 105 a. it is said, if in debt on bond, etc. the jury give no damages, the Court may assess the [600] damages, because *the debt is certain* and the plaintiff's loss apparent.

In other cases where the demand was uncertain, the power of the Court to assess damages has been denied upon the same principle.

In a case of local trespass the power of the Court was denied. 27 H. 8. 2.* So where the Court *has not certain knowledge* of the cause by the record or other apparent matter, as in an action for *slander*, though the defendant justify, it was held that the Court could not increase damages. 1 Roll. 572, K. 2. D. 2. Ma. 105. 15. So in trespass for trees cut. Id. 572, K. 13; 3 H. 4. 4;* 1 Brownl. 204. So in replevin. 3 Leo. 213. *Ognell's case*,* where the Court take the distinction, by declaring that for the avowant they might assess damages without a writ of inquiry, because it is for delay in nonpayment of rent: but for the plaintiff in replevin, they said they could not do so, since he is to recover for the taking of his cattle, of which the Judges could take no notice: for the damages might be greater or less, according to the value of the cattle, and the circumstances of the taking and delaying them.

In Bro. Abr. Dam. pl. 40; 3 H. 4. 4. it is suggested, that in trespass for cutting trees there is no direct power in the Court to increase or abridge damages, because the Court cannot come *at a certain knowledge* of the damages; and upon this principle the Court refused to increase the damages in trespass for cropping trees. So it is said that damages upon verdict cannot be increased or abridged by the Court, for that the remedy is by attain. Bro. Abr. Dam. pl. 7. In some cases, however, it appears that the Court did not adhere to the principle with perfect consistency, or being aware of a defect of authority, they resort to contrivance, and assert a power to directly to compel the plaintiff to remit part of his damages, by refusing to give judgment but upon the terms of reduce-[601]-tion, if *in the opinion* of the Court the jury have given excessive damages. Bro. Abr. Judges, pl. 22. The right, however, to exercise such powers, as sometimes assumed by the Courts, has frequently been denied (obviously upon the ground of uncertainty) in actions upon the case for words, as well as other actions. Jenk. Cent. 68,* pl. 29; Dyer, 105, *Bonham v. Lord Stourton*; *Harkins v. Sciety*,* Pabner, 314; and in *Tong v. Formaby*, E. 43 Eliz. B.R. the Court refused to increase damages in an action for trover and conversion; Sayer, 77; but they said it would have been otherwise if it had been of money, the value of which is known to the Court.

In modern cases the principle has been more distinctly avowed.

In *Robinson v. Bland*, after argument upon special verdict, interest was given by the Court up to the time of the judgment, the action being upon a contract for repayment of a *sum certain*. So upon judgment by default, in an action of covenant upon a deed of indemnity, the Court considering that it was not a *mere question of computation*, because the defendant might, before the sheriff and jury, show satisfaction or part satisfaction of the debt, from securities and effects of the principal, the reference to the Master was refused, and a writ of inquiry awarded. *Denison v. Mair*, 14 East, 622.

Among the ancient authorities, being so numerous and so little consistent,† if those last selected may be considered as furnishing the true principle of jurisdiction, the cases cited in the note to *Holdipp v. Otray* tend to establish a doctrine with too much latitude; for if the Courts have now power to assess damages in an action of trespass for a forcible entry into a house, and illegal outrage committed by officers of the revenue, according to the precedent cited in the notes to that case, there seems to be no reason why they should not assess damages in [602] actions for assault, libel, slander, or criminal conversation, nor why the doctrine founded on

* See these Cases inserted at the end of this Note, at large.

† See the Abridgments of Fitzherbert, Brooke and Rolle, tit. Damage, Judges, Inquest, etc.

the principles of pleading should not prevail, that when judgment passes after demurrer, confession, default, etc. the plaintiff is entitled to the full damages laid in his declaration. In such case he may choose to retain them without inquiry, (for it is only with his assent that the Court can interfere,) although it were in an action for words, and £10,000 are claimed for damages by the count.

It seems, therefore, a point of some doubt whether the power can now with propriety be distinguished from the practice of the Courts, and whether, on the principles avowed in the best of the ancient authorities, the power ought not to be confounded or identified with that practice.

The decision in the case now reported, as no observation was made in giving judgment, might be supposed to proceed upon the authorities cited in the argument for the defendant in error, and to establish the unqualified proposition advanced or suggested in that argument, or to be inferred from the authorities on which it rested. But in *ex parte Greenway*, 1 Buck. 418, the Lord Chancellor, in the course of his observations, is reported to have said, "During the late sessions (1819) there was a very learned argument before the House of Lords, in which it was clearly made out, by the authority of cases of great antiquity, that a Judge, where it is a *matter of mere computation*, may give interest, but yet such interest is in *the nature of damages*." In this observation, the Lord Chancellor, with that circumspect discretion which is the consummation of his great legal erudition, seems to limit the generality of the proposition within the narrow compass of actual practice. But the authorities as they were cited, and the inevitable result of the argument for the defendant in error in the case reported, is to establish a much broader position.

The extent of jurisdiction which belongs to the several Courts is a subject of most important inquiry; and it is [603] highly material to ascertain to what extent the doctrine in question is applicable or may be carried. Ancient authorities ought to be equally binding in all cases where they are not abrogated by contrary decisions. If the precedents cited in the argument of the case reported, and other similar precedents of equal authority, are to furnish the rule of law, and fix the boundaries of jurisdiction, the Courts of common law are now in possession of most extensive and alarming powers. But if we are not to be launched upon the wide ocean of obsolete precedents in search of the true principle and doctrine—and the jurisdiction is limited according to the restricted terms used in the observation of Lord Eldon, in *ex parte Greenway*: If the anonymous case, 1 Ventr. 330, and other precedents before noticed, are sufficient to prove that *the certainty of the demand* depending upon computation and not upon variable opinion, is the circumstance which creates the authority, or if practice, as the measure of power, is made the criterion and boundary of the jurisdiction to be exercised by the Courts, a more safe, convenient, and consistent principle of jurisdiction is established.

By the case of *Hollipp v. Otway*, and the authorities cited in the note of Serjeant Williams (if they are to be considered as existing law), the jurisdiction must, in theory at least, be carried far beyond the limit which modern Judges have prescribed to themselves in practice, but far short of the extent, to which, upon the authority of ancient precedents, as valid and efficient as that principal case, and those cited in the note, the Courts are entitled to exercise jurisdiction.

Such is supposed, *arguendo*, to be the theory of the law concerning the powers of the Courts, as distinguished from their practice; but the doctrine is founded upon inferences too partially drawn from unsifted authorities.

In modern practice, the exercise of the power has been confined to cases of interest upon bills of exchange or promissory notes, or in actions where the sum due appears [604] with certainty upon the face of the contract, as stated on the record, or is mere matter of computation. This power, in the case of bills and notes, is equally exercised by the Court, whether interest is expressly reserved or not. The interest is given, indeed, in contemplation of law, as damages for detention of the debt; but this proceeds upon mere technical reasoning. The expression of the Chancellor in *ex parte Greenway* is, that it is *in the nature of damages*.

Interest upon a bill, when over due, by the custom of merchants, is due upon the contract by implication at least; and by the custom, interest upon a bill is as much a part of the contract, though not expressed, as the principal sum. The computation directed by the Court to be made by its officer in the cases of bills of exchange, in

substance, undoubtedly proceeds upon this implied contract for interest at the legal or current rate; otherwise the damages, in such case, would vary according to circumstances, and the certainty which furnishes the ground of reference would not exist. Taking the contract, independently of the custom of merchants, to be for the payment of a sum certain at a given day, or upon demand, interest, according to the rule of law, is due from the day when the money is payable, or from the demand.

Upon this principle, in *Robinson v. Bland*, 2 Burr. 1085, where a bill of exchange was given for money lent, Lord Mansfield said, although it was void in law as a security, it showed the intention and agreement of the parties, that the money should carry interest if not repaid within the time expressed in the bill; and the Court, upon a special verdict, gave interest to the time of the judgment.

If these may be assumed as the true grounds on which the power of the Court to assess interest is exercised, an inquiry important *in principle* arises with respect to the practice in bankruptcy, not to permit proof of interest upon bills of exchange in which interest is not expressly reserved, and the late decisions resting upon that practice (in *Cameron v. Smith*, [605] 2 B. and A. 305; and *ex parte Greenway*, 1 Buck. 418), in which it was held that interest, accrued upon a bill of exchange before the act of bankruptcy, cannot be added to the principal, so as to constitute a valid debt, for a petitioning creditor.

If the two questions depend upon the same principle, and if they were untouched by decision, and unaffected by practice, it might appear surprising that such doctrines should ever have been established. The main objections to the admission of proof of interest, where it is not reserved by the contract, seem to be the following: viz. that interest, being a compensation for the use of money, or detention of a demand, where it is not matter of express contract, is not a *debt*, but in the nature of *damages*, to be assessed by a jury, and that Commissioners of bankrupt have no power to assess damages.

As to the first branch of the objection, in the case of *Herries v. Jamieson*, Lord Kenyon appears almost in terms to lay down the general proposition, that an action of debt is maintainable for interest, notwithstanding the decision of Lord Hale in *Searman v. Dee*, 1 Vent. 198. "that no action of debt lies for interest of money, but it is to be recovered by *assumpsit* in damages;" and supposing it to be recoverable by *assumpsit*, according to the admission of that case, it seems that the technical rigour of pleading has been relaxed since the days of Lord Hale; and now it is held, that wherever *indebitatus assumpsit* is maintainable, debt is also maintainable. *Walker v. Witten*, Doug. 1. It might therefore, not without some show of authority, be said, that interest is, in contemplation of law, as much in the nature of debt as of damages; and so in fact the matter seems to be treated by the Courts in the cases above cited, where judgment passes by default, etc. For if interest upon a bill of exchange were not regulated by the custom of merchants, and by that custom reduced to a matter of certain computation; if it were truly and substantially, in such sense, a question of damages as to depend on variable opinions, the Court in practice [606] would decline the office of giving their opinion as to the damage, and, according to many cases, have no authority to do so.

Again, debt is said to lie upon every contract in deed or *in law*. Com. Dig. tit. Debt. A judgment, therefore, being by implication of law (not otherwise), a contract by the defendant to satisfy the plaintiff, according to the terms of the judgment, debt is the form of action in such case. So if the judgment be, in a Court of London, by special custom, debt lies in the superior Courts, although the original action could not have been brought there. 1 Roll. 600, l. 45. So debt is said to lie, although there be only an implied contract, as upon a balance found due to one of the accounting parties upon account taken. 1 Roll. 598; l. 47. So if a bailiff pays more than he has received, debt lies for the surplus. Id. ib. l. 50. So for money paid by A. to the use of B. (though without his command) 1 Roll. 597, l. 25. Yelv. 23. (*Sed vide semb. contra*, 1 Roll. 597, l. 25.) So debt lies upon various customs. See Com. Dig. Debt, A. 9. and Lord Hale said, (Hard. 486.) that debt lies for every duty created by the common law or by custom. Now interest, by the custom of merchants, and by the acknowledged rules of law and equity, is due upon bills of exchange from the time when they are made payable; such interest, therefore, is due by custom, and it is due by implied contract.

But suppose the technical difficulty to be valid in law, and insuperable, the next objection is, that Commissioners of bankrupt cannot assess damages. This is not strictly accurate: for to a certain extent they do assess damages: where interest is reserved upon a promissory note, and the rate of interest is not expressed, but left to the implication of law or custom, the Commissioners are driven to the exercise of their powers of computation. The parties, to a certain extent, have agreed as to what shall be the liquidated damage for the detention of the debt, that is to say, that interest shall be paid: but there is no express agreement as to the rate. [607] In such case, the Commissioners supply that which the parties have in words omitted, viz. the rate of interest: they exercise a judgment, therefore, to imply the rate; and when they compute the sum due in respect of the rate and the time, (two points not expressed or settled on the face of the contract,) they so far assess damages, if mere calculation is rightly so called. The implication of a rate of interest, where no rate is expressed, is founded upon custom and statute, which constitute the law. The same custom and the same law give interest upon a bill from the day appointed for payment. If the cases are similar in principle and fact, the results should be similar; yet in one of the cases an implication is raised, and a power of computation is exercised, in the other it is refused. So although there be no contract, yet if the payment of interest in particular trades and transactions is customary, as upon a settlement and balance of account, and especially if on former settlements interest was paid, a contract is implied, and interest is calculated by the Commissioners from the time of the settlement, and at a rate assumed to be according to the contract of the parties. In such cases, interest upon interest has been allowed. *Ex parte Champion*, 3 Bro. C. C. 436. The Commissioners, therefore, do not seem altogether to want those powers of computation, which are exercised by the Courts, or their officers, in similar cases; but they refuse to put their powers in action, unless the creditor has stipulated for interest *nominatim* or unless there be a custom or transaction, or custom *and* transaction, from which an agreement can be implied.

Suppose, that upon a balance of account bearing interest by custom or implication, the debtor gives to the creditor a bill of exchange in the common form; according to the present practice, no proof is allowed upon the bill which represents the balance; but if the bill is lost, destroyed, or cancelled, and there is no evidence of its existence, interest immediately becomes proveable. Surely this is a singular inconsistency.

[608] The creditor holding a bill which is over due has a right to interest by his implied agreement, founded on the custom of merchants and the principles of law. This right being, in case of bankruptcy, the amount of the dividend in respect of that interest, by means of the practice in question, is transferred from him to the whole body of creditors, who profit by his exclusion, and the bankrupt himself, if there is a surplus, pockets that amount of interest which, by implication and custom, he contracted to pay, and which, from him at least, is certainly due. Many cases might be put, as where a trader is largely indebted upon bills and notes actually due, in which he might be a gainer by bankruptcy to a very large amount, and at the expense of his creditors. This does not appear to be fair dealing with the bill-creditor, or equal justice as between him and his fellow creditors, or as between him and his bankrupt debtor.

The question, as unprejudiced by practice, whether the law is fairly exercised, as regards such bill-creditor individually, and without regard or relation to others, must be tried by a review and consideration of the statutes relating to this subject: by the operation of a commission of bankrupt: the mode in which it affects the right of creditors: and what benefits and privileges are conferred by these statutes upon the bankrupt and the creditors respectively.

The act 34 and 35 H. 8. c. 4, only barred the creditor of such portion of his debt as should be paid under the provisions and powers of that statute, and left him in possession of his remedies for the recovery of the residue. The same provision is made by the 13 Eliz. c. 7. s. 10: and the 1 Jac. 1. c. 15. s. 3, re-enacts the like orders, benefits and remedies as to the traders therein described, as were provided by the 13 Eliz. c. 7. s. 11. The 21 Jac. 1. c. 19, reciting that divers defects were daily found in the former statutes, etc. in the power given to the Commissioners for *distributing the bankrupt's estate, &c.* to the undoing of many clothiers [609] (by whom the subjects are set on work), etc. for remedy thereof, it is enacted that the

former statutes, etc. shall be in all things largely and beneficially construed and expounded, for the aid, help and *relief of creditors, etc.* and by sect. 3 of this act, the same benefit and remedies are provided as by the former acts. By sect 9, of the same act, for the better distribution of the bankrupt's property among his creditors, the Commissioners are empowered to examine them on oath as to the truth and certainty of *their debts*.

So that the *early* statutes relating to bankruptcy appear to have the interest of the creditors only in contemplation. They treat the bankrupt as a fraudulent debtor and criminal; and in the title, preamble, and body of these acts, the relief intended and proposed to be given is for the creditor only. Every doubt as to his rights is to be expounded in his favour, if possible; and after receiving a dividend upon his debt, he is left in possession of his legal remedies for what remains unpaid.

By the provisions of the two first statutes, which are re-enacted by the third, the effects of the bankrupt are to be sold, and ordered for the payment of the creditors according to the quantity of their *debts*. (34 and 35 H. 8. c. 4. s. 1. 13 Eliz. c. 7. s. 2.) Here it is to be remarked, that the provision is for payment of *debts*, and no other word being used in these acts, it is material to ascertain whether this was intended in a technical sense. That it could not be so intended, is almost conclusively proved by the reservation of the rights and remedies of creditors after payment of dividends, and until their whole demand is paid. If any part of the claim of a creditor, as interest upon a bill of exchange over due, or upon money lent, remained unpaid by distribution of the effects under the commission, or provisions and powers of these recited acts, the creditor might have brought his action for the amount. It would therefore, so far as the bankrupt was concerned, have been nugatory, whilst such right and remedy existed, to have made a [610] distinction between principal and interest in assorting the dividend, as if the one were a debt contemplated by the statute, and the other only a demand or unliquidated claim, in respect of the detention of the debt, to be compensated in damages; and in truth, if nothing but debts, technically so called, were to be considered in distribution, a bill of exchange, and many other claims then and now undoubtedly proveable under a commission, were not debts in a technical sense, but choses in action, and according to this strict construction of the word, could not have been proved at all.

In this state the law of bankruptcy, as it regarded the rights and remedies of creditors, continued from the reign of Henry the 8th to that of Queen Anne.

The stat. 4 and 5 Anne, c. 17, reciting that bankruptcies happen not so often from losses or misfortune, as from the fraudulent design of evading the just "*debts and duties*" of creditors, after providing that bankrupts not surrendering and conforming, as required by the statute, shall suffer death as felons, enacts (s. 7.), that those who do surrender and conform shall have an allowance out of the effects, and be discharged from all *debts* due and owing at the time (of the bankruptcy); and in case such bankrupt shall be arrested, prosecuted, or impleaded for any *debt* due before (the bankruptcy), such bankrupt shall be discharged upon common bail, etc. This act has expired, but the clause is repeated verbatim in subsequent statutes also expired, and is re-enacted in the same words by the 5 Geo. 2. c. 30. s. 7.

Now in all acts made *in pari materia*, and particularly in all the clauses of one and the same act, the same word must have the same meaning. It would be a singular rule of construction to establish, that in one clause a word should have a given meaning, and in another clause of the same act, being used with the same unqualified context, might have a different meaning. In the preamble to the 11th and 5th Anne, c. 17, the *debts and duties* due and owing to creditors are mentioned as the [611] subjects in contemplation, for the securing which, a remedy is to be provided by that act. But all the other statutes of bankrupt, in the clauses which relate to the investigation and proof of the claims of creditors, speak only of "*debts*." The 5 Geo. 2. c. 30, being in most respects a transcript and compilation of the former statutes, adopts the same enactments in the same words. In the preamble it speaks of bankrupts by extravagance, etc. having contracted great *debts*, and absconding with their effects in order to oblige their creditors to accept a composition for their *debts*, etc. By section 25 of the same act, creditors are allowed to prove their *debts* without contribution, etc.; and the bankrupt, by section 7, is discharged from all *debts*, etc. in the same terms as by the expired statute of the 11th and 5th Anne.

Here I presume it cannot be disputed, that the *debts* contemplated in the preamble of these acts, and the debts in the clauses relating to proof and discharge, are the same things in *genere et specie*. If debts are technical things in the preamble, they must be technical also throughout the act: and if interest due upon a bill of exchange, before and at the time of the bankruptcy, cannot be proved, because it is held not to be a debt technically, but to sound in damages: then as the bankrupt is discharged only from *debts* (technically also) due and owing at the date of the bankruptcy, a very serious question might have arisen, whether interest due upon a bill of exchange was a claim discharged by the certificate, and whether, if debts are not held in construction of the act to comprise such damages as are due for the detention of money, an action might not be brought for interest due upon a bill after the bankruptcy, and notwithstanding the certificate, especially as it has been pronounced by a Judge of considerable authority, that "debts proveable under the commission, and debts discharged by the certificate, are convertible terms." See *Barnford v. Burrell*, 2 B. and P. Dict. of Buller, J.

[612] Considering this as a point of practice, all questions may now be precluded by decision: but, for the sake of consistency in construction, there was a time when it deserved better consideration in courts of justice: and it may even now be not undeserving of the attention of the legislature, upon a revision and consolidation of the bankrupt laws. That interest upon bills of exchange under the earliest of the statutes concerning bankruptcy, should not have been admitted to proof, may not be surprising, because the law-merchant, as it relates to bills of exchange, was, at that time, strange to our courts of justice, and not very clearly understood or recognized. In the days of Lutwyche it was held that none but actual merchants could draw a bill of exchange. 891. 1585. And at the time when Ventris and Salkeld reported, it seems to have been seriously debated, whether a person, not a merchant, making a bill of exchange, should be bound by it according to the usage of merchants. In the King's Bench the decision was in the negative: but upon argument in the Exchequer chamber, that judgment was reversed: and this judgment of reversal was reversed upon writ of error in Parliament. The decisions, therefore, in these early times, as to bills of exchange, and the interest due upon them, whether by Courts of justice or Commissioners of bankrupt, ought not to excite our surprise. But that no provision should have been made upon the subject in the comprehensive statute which was framed and passed in the commercial age of George the Second, is truly matter of astonishment.

If the claim of the creditor, in respect of interest, although recoverable only as *damages*, is discharged by the certificate under the term "*debt*," then it must be supposed, that the legislature, which took away the remedy of the creditor by action, intended to deal justly with him by substituting an equal or a better statutory remedy. It is in this sense, probably, that a commission [613] of bankrupt has, by the highest authority, been frequently described as *uno flatu*, an action and an execution. If it were so intended for the benefit of creditors, as a more speedy and certain remedy against failing traders than the slow process of a suit at law, ought it not, in the construction of the statutes, to be intended with respect to all debts (or claims) discharged by the certificate, that the creditor is to have the same right of proof under the commission, as if he had commenced and prosecuted his action through all its stages, till he had obtained its fruit by execution executed. If the statute had not deprived the creditor of his legal remedy he would, in the course of process, have obtained the usual reference to the Master to compute interest, etc. upon his bill: or, according to the authorities cited in the case now reported, the Judges themselves might have assessed the damages without reference. If this be so, and the statute gives to the creditor, as it must be admitted, the substituted remedy of a commission, and empowers him to prove his debt, how could it be supposed that the debt contemplated was any other than that for which an action might have been brought, and for which, by virtue of the statute, the creditor has execution at once?

So the Commissioners having power to investigate and admit (if genuine) the debts of creditors, under a statute which transfers to them and their assignees all the effects of the bankrupt, to be distributed among the creditors rateably, as if they had brought their actions and obtained execution, ought it not to have been intended that they had the same power as Judges have in actions prosecuted by creditors? or

that the statute, in giving the effect of execution, supplied by intendment of law all the intermediate necessary steps to make the claim of the creditor effectual.

There is another point of view in which this subject may be considered. Commissioners of bankrupt, as well as the Chancellor, are held to have an equitable [614] as well as a legal jurisdiction, which they exercise in various cases; as where a verdict has been obtained at law for a pre-existing debt, if the Commissioners have reason to doubt the propriety of the verdict, or if there be equitable grounds sufficient to intercept the fruit of the verdict, though *per se* unimpeachable, they may reject the proof of the debt standing upon such verdicts. *Ex parte Butterfill*, 1 Rose, 172. So (probably) as to a judgment also, if equity would restrain execution against the bankrupt defendant. These are large powers which Commissioners of bankrupt habitually exercise—powers with which the computation of interest upon a bill of exchange is hardly to be put in competition; and it has been decided by a Judge of great eminence, that notes and bills of exchange payable on a certain day, or upon demand, not being paid on that day, or upon demand, shall carry interest in equity. *Per Grant, M. R. Lowndes v. Collins*, 17 Ves. 27. Here the objection will be renewed, that Commissioners, though they may exercise a judgment as to the validity of a debt, cannot assume a jurisdiction to assess damages. But in truth, it is, in the latter case, the mere exercise of the faculty of numeration, and this is the ground, and the only ground in practice, upon which the Judges assess damages (if it must be so termed), by reference to their officer in the case of judgment by default, etc. in a suit upon a bill of exchange. To assimilate the assessment of damages in such a case, with the assessment of damages in cases of assault, libel, slander, trespass, or any case of *tort*, may be sheltered under the technical definitions of law, but is an affront to common sense and to the established practice of the Courts.

It is, moreover, to be remarked, as applicable to the equitable jurisdiction of the Commissioners, that where there is any impediment to the remedy at law, equity removes it, or administers relief. Now if the claim of interest is barred by the certificate, and cannot *legally* be admitted [615] to proof under the commission, because the Commissioners have no power to assess damages, might not a creditor, without incurring the charge of gross sophistry, contend that the statute and commission are impediments to his legal claim by action, and under the authority of *Lowndes v. Collins*, appeal to the equitable jurisdiction of the Commissioners, to admit his proof for interest?

Of the debts usually proved under a commission, some carry interest by contract: Upon some, interest is allowed by implication from former transactions, or from the custom of trade. In the case of other debts, as by bond, etc. interest (if not provided) is obtained under the shelter of penalties imposed by the instrument of contract; and in those which, perhaps, in all commissions are the most numerous class, viz. debts for goods sold and delivered, the tradesmen-creditors have taken care, in the price charged, to have ample remuneration for interest and profit, sometimes to the amount of cent per cent upon the prime cost—all these debts are admitted to proof without scruple. But if the words "with interest in case of nonpayment when due" (which are never inserted, because by the custom of merchants they are implied upon all bill transactions) are not to be found in a bill of exchange, the unfortunate holder, upon a technical fiction, which is evaded or surmounted by another technicality in the Courts of Justice, is excluded upon a commission of bankrupt, from his claim of interest for which, by the law-merchant, and the law of the land, an implied contract was made in the formation of the bill.

The injustice done to the holder of a bill, as between him and his fellow creditors, is obvious; but as between him and the bankrupt, in case of a surplus, it is flagrant injustice. Let it be supposed that a trader is indebted £200,000 to creditors, upon bills of exchange in the ordinary form, which are overdue, and his only debts: let it be further supposed that he holds notes and other securities, bearing interest, to the amount of £200,000, which are his only effects; upon all these [616] securities interest is received for him by his assignees; then, after discharging the debts, and paying the expenses of the commission, the bankrupt pockets the surplus, composed of interest, which, if the commission has been long in operation, will be a considerable sum, and the bill-creditors are left, perhaps, to supply their necessities, occasioned

by the bankruptcy, by borrowing money to the amount of their respective debts proved under the commission, and paying interest upon the loans from the time when their respective bills became due to the time when they receive their dividend. Can such a result have been intended by statutes made professedly for the benefit of creditors?

Lord Hardwicke, according to the report in *Ex parte Bennet*, 2 Atk. 527, said, that "the fund (in bankruptcy) was a dead fund; and in such a shipwreck, if there is a salvage of part to each person, it is as much as can be expected." But here is a case, occurring partially in many bankruptcies, where the fund, in respect of interest, is dead to the creditors, but living to the bankrupt; where the creditors suffer shipwreck, and the bankrupt looks on with complacency from his retreat on the shore.

That the Commissioners of bankrupt should now, after inveterate practice, undertake to begin so important an alteration in the administration of the bankrupt law, is not to be expected or desired; but when the statutes of bankruptcy are under revision, the subject may deserve consideration.

The following are some of the Cases cited in the foregoing Note. The two first are close Translations from the Year Books.

Year Book, 3 H. 4. 4. Trespass was brought against a man for trees cut, who pleaded that he was not guilty; and he was found guilty to the damage of 40s. and they taxed the costs of the writ at 5s. Whereupon [617] Culpepper, for the plaintiff, prayed that the damages might be increased; and then Thirning said, that he had spoken of this matter to all his companions, and also to the Justices of the King's Bench, and it seemed to them that it lay within our cognizance and discretion as to the costs of the writ, and this we may well have full power to increase: but as to the damages for the trees cut, by no means; for that this lies not within our cognizance.

At the end of the case as it stands reported, the following observation and authorities appear: "Where the Judges increase and abridge damages, see M. 19 H. 6. 16; T. 32 H. 6. 1; M. 38 E. 3. 30; M. 39 E. 3. 26; M. 22 E. 3. 11. 30; 20 Lib. Ass. plac. 30; P. 8 H. 4. 23; 7 H. 4. 31."

Year Book, 27 H. 8. 2. In trespass *quare clausum fregit*, the defendant pleaded in bar. Whereupon the plaintiff demurred, and it was adjudged no plea. Wherefore a writ issued to inquire of the damages, and damages were found to the value of five marks. Wilby prayed the Court that they would abridge the damages, for (as he alleged) the truth was, that the plaintiff was not dammified to the value of twelve pence, and this proceeding being only an inquest of office, he said the Court may increase or abridge the damages at their discretion. But Fitzherbert, Shelley and Englefield interposed, and said, "that cannot be done as to the damages; you have never seen this in your life: as to the costs, it lies in our discretion, but damages cannot be increased upon a local trespass." Wilby again suggested that the Court might have assessed the damages to the plaintiff without any writ of inquiry, and would have inferred the power from that circumstance. But Englefield interposed, and repeated, "this cannot be done upon a local trespass which is done in pais," and assigned as a reason that they could have no knowledge of it; and this doctrine Fitzherbert and Shelley did not deny.

Hawkins v. Sciety, Palmer, 314. In an action upon the case for calling the plaintiff a bankrupt, upon the general issue it was found for the plaintiff, and £150 damages given. And because of these great damages, the Court, from some circumstances, reduced them to £50; but afterwards, upon great advice, they revoked this, and were not willing to [618] change the course of law, and resolved to leave such matters of fact to the finding of a jury, who better know the quality of persons and their condition, and the damage they may have sustained by such disgrace. But otherwise where the action is grounded upon a cause which may appear to the view of the Court, upon which they may judge, as in mayhem, etc. and Dyer, 105. acc. and so they gave judgment for £150, according to the verdict.

In *Jenkins*, Cent. 68. ca. 29. the law is thus laid down: In a writ of trespass *de clauso facto*, the jury found damages: the Judges can neither increase nor abridge

them. So it is where there is a writ to inquire of damages in trespass; 27 H. 8. 2. So it is in an action on the case for slander, where the jury taxes damages. So in an assize. But it is otherwise upon a writ of inquiry of damages in debt, mayhem, detinue, covenant, battery, the Court may increase or diminish the damages assessed by the jury. 9 H. 6. 2; 19 H. 6. 18; 11 H. 4. 10. 61; Dyer, 105; 14 H. 4. recordare; 13 E. 3; Fitz. Damage, 28; 41 E. 3. 19.

In the margin is the following entry: 3 H. 4. 4; 22 E. 3. 1; 19 E. 3. 65; 8 H. 4. 17. by all the Judges of England.

Ognell's case, P. 30 Eliz. 3 Leon. 213. In replevin, the plaintiff being nonsuited, the Court were of opinion, upon a question made, that they might assess damages for the defendant without a writ of inquiry, because they accrue to the avowant for the *delay in nonpayment of the rent*. But if *judgment had been given for the plaintiff*, the Court said they could not assess the damages, for he ought to recover for the taking of his cattle, of which the Judges could not take notice; for the damages might be greater or less, according to the value of the cattle, and the circumstances of the taking and delaying of them.

REPORTS OF CASES heard in the House of Lords, upon Appeals and Writs of Error, and decided during the Session, 1820. By RICHARD BLIGH, Barrister-at-Law. Vol. II.

ENGLAND.

WRIT OF ERROR FROM THE COURT OF KING'S BENCH BETWEEN

RICHARD JESSON, JOSEPH HATELY, WILLIAM WHITEHOUSE, JOSEPH WALTON, EDWARD DANGERFIELD, the elder, and THOMAS DANGERFIELD, —*Plaintiffs in Error*; and JOHN DOE, on the several demises of EZEKIEL WRIGHT, JOHN WRIGHT, THOMAS WRIGHT, GEO. WRIGHT, ISAAC WRIGHT, WILLIAM WRIGHT, the younger, LUCY WRIGHT, MARY WRIGHT, DANIEL WRIGHT, ELIZABETH MOSLEY, and THOMAS STOKES,—*Defendants in Error* [15th June, 1820].

[Mews' Dig. xii. 1112, 1127. Discussed and followed in *Doe d. Atkinson v. Featherstone*, 1831, 1 B. and Ad. 944; *Roddy v. Fitzgerald*, 1858, 6 H. L. C. 823. And see Shelley's case, 1579-1581, 1 Rep. 93 b.; *Allgood v. Blake*, 1872, LR. 7 Ex. 339, 353; affirmed; LR. 8 Ex. 160; *Hampton v. Holman*, 1877, 5. Ch. D. 183, 191; *Bowen v. Lewis*, 1884, 9 A. C. 890, 917; *Van Grutten v. Foxwell* (1897), A. C. 658, and *Pelham Clinton v. Duke of Newcastle*, 1900, 49 W. R. 12.]

[2] DEVISE.—To W. (a natural son of the testator's sister) for life, and after his decease to the heirs of his body in such shares and proportions as W. by deed, etc. shall appoint; and for want of such appointment to the heirs of the body of W. share and share alike *as tenants in common*; and if but *one child* the whole to such only child, and for want of *such* issue to the heirs of devisor. Held—that an *estate tail* vested in William by this devise.

The rule is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is clear that the testator meant otherwise.

Semble—that under such power an appointment to an only child, before others born, is effectual.

Whether a power, under which all children have an interest, can be destroyed by forfeiture. Quaere.

Doe v. Goff, 11 East, 668, held not to be law.

This was an ejectment brought in the Court of King's Bench against the Plaintiff in Error, to recover the possession of tenements in the county of Stafford.

This cause came on to be tried at the assizes for the county of Stafford, holden at Stafford, on the 16th day of March, 1815, before the Honourable Mr. Justice Dallas, when the jury, by the consent of the parties, found a special verdict.

The special verdict states,

That one Ezekiel Persehouse, being seized in fee of the premises set forth in the declaration, made and published his last will in writing, on the 24th of April, 1773, executed and attested as the law requires, for passing real estates by devise, and that thereby, among other things, he gave and devised [3] the premises in the declaration mentioned, with the appurtenances, in the words following:

"I give and devise unto William, one of the sons of my sister Ann Wright, before marriage, all that messuage, tenement, or dwelling-house, malt-house, stable, buildings, garden, hereditaments, and premises, with their and every of their appurtenances, situate and being in the parish of Tipton, otherwise Tibbington, and county of Stafford, now in my own possession: and all those two dwelling-houses, barn, shops, buildings, gardens, hereditaments, and premises, situate in the said parish of Tipton, otherwise Tibbington, now in the occupation of John Law, and

Timmins: and also all those seven closes, pieces or parcels of land, or ground, to the said two dwelling-houses and buildings adjoining, or nearly adjoining, and belonging, with their and every of their appurtenances, now in my own possession: to hold the same premises unto the said William, son of my said sister Ann Wright, for and during the term of his natural life, he keeping all the said dwelling-houses and buildings in tenantable repair: and from and after his decease, I give and devise all the said dwelling-houses or tenements, buildings, garden, lands, hereditaments, and premises, with their and every of their appurtenances, unto the *heirs of the body* of the said William, son of my said sister Ann Wright, lawfully issuing, in such *shares and proportions* as he the said William, in and by any deed or writing, deeds or writings, or in and by his last [4] will and testament, in writing, to be by him duly executed, in the presence of three or more credible witnesses, shall give, direct, limit, or appoint the same: and for want of such gift, direction, limitation, or appointment, then to the *heirs of the body* of the said William, son of my said sister Ann Wright, lawfully issuing, *share and share alike*, as *tenants in common*, and if but *one child*, the whole to *such only child*. And for want of such issue, I give and devise all the said dwelling-houses, buildings, lands, hereditaments, and premises, to my right heirs for ever, charged and chargeable, nevertheless, with and for the payment of one annuity or yearly sum of £20, of lawful money of Great Britain, half yearly, to my said sister, Ann Wright, and her assigns, for and during the term of her natural life: the first half-yearly payments thereof to begin and be made by the said William, son of my said sister, Ann Wright, at the end of six months next after my decease, or by such other person or persons, who, according to the true intent of this my will, may be seized of the said dwelling-houses, buildings, lands, hereditaments, and premises: and when and so often as the said annuity, or any part thereof, shall be behind and unpaid by the space of twenty days, next after the same ought to be paid, as aforesaid, that then, and at any time then after, it shall and may be lawful to and for my said sister, Ann Wright, or her assigns, into and upon the said dwelling-houses, buildings, lands, hereditaments, and premises, or any of [5] them, or any part thereof, to enter and distrain: and such distress and distresses to sell and dispose of to satisfy and discharge all such arrearages, with the costs and charges of taking, keeping, and disposing of the same."

The special verdict then states, that the said Ezekiel Persehouse died on the same day, seized of the said premises, without altering his will; and that, upon the death of the said Ezekiel Persehouse, Thomas Stokes, Ann Wright, and Elizabeth Persehouse, were his co-heirs, of whom Ann Wright and Elizabeth dying, respectively, Daniel Wright and Elizabeth Mosley succeeded, as heirs, which said Thomas Stokes, Daniel Wright, and Elizabeth Mosley, are three of the lessors of the Plaintiff.

The special verdict further states, that immediately after the death of the said Ezekiel Persehouse, the said William Wright named in his will, entered in the said premises, and became seized of such estates as legally passed to him under the will of the said Ezekiel Persehouse: and that, afterwards, on the 13th December, 1774, he married one Mary Jones, by whom he had issue, Edward Wright, Elizabeth Wright, Lucy Wright, Ezekiel Wright, John Wright, Thomas Wright, George Wright, Isaac Wright, Mary Wright, and William Wright, the younger, born in the above order, of whom Elizabeth, afterwards, on the 23d February, 1798, died without issue: and Lucy, Ezekiel, John, Thomas, George, Isaac, Mary, and William, the younger, are the other lessors of the Plaintiff.

The special verdict further states, that *after*-[6]-wards, by certain indentures of lease and release, executed respectively, on the 16th and 17th January, 1800, the said premises were conveyed by the said William Wright, and Mary, his wife, and the said Edward Wright, *their eldest son*, to Robert Long, as tenants, to the precipe.

to the intent that a common recovery might be suffered, for the purpose of barring and extinguishing all estates tail, and all remainders and reversions, of and in the said premises; and, that a recovery accordingly was afterwards suffered as of the Hilary Term following, wherein the said William Wright, and Mary, his wife, and Edward Wright, were vouched to warranty, and entered into the warranty, and defended their right in the usual way; whereupon a writ of seizin afterwards issued and was executed.

The special verdict then states the entries of the several and respective lessors of the Plaintiff, on the premises, and their seizin, according to law; and the several demises to John Doe, the Plaintiff in Ejectment, who entered and was possessed, until the Plaintiffs in Error entered on the premises and ejected him thereout.

This special verdict was argued in Court in Easter Term, 1816, the Plaintiff below arguing that William Wright, the devisee, took an estate for life only, with remainders to his children for life, respectively, as tenants in common, while the Defendants below contended that the said William Wright took an estate tail. The Court gave judgment for the Plaintiff below.*

[7] Against this judgment a writ of error was brought. The principal error assigned was, that the Court below, by their judgment, had decided, that "William Wright took only a life-estate under the will of, etc., with remainder to his children for life; and that the recovery suffered by William Wright, Mary, his wife, and Edward Wright, was a forfeiture of their estate. Whereas the Plaintiffs in Error contended, that the testator intended to embrace all the issue of William Wright, which intention could only be effected by giving William Wright an estate tail, for which purpose the words of the will are fully sufficient."

For the Plaintiffs in Error—Mr. Jervis and Mr. Sugden.

It was the intention of the testator to include all William's issue, and sufficient appears on the face of the will to enable a court of law to effectuate his intention. The decision in the Court below attributes this meaning to the testator.—That if William had only one child born who survived him, such child should take the whole estate *for life*; but if he had twelve (for example), and eleven died in his lifetime, the surviving child should have only a twelfth of the estate for his life. Is this a probable intention?—Again, if he had twelve children, and they all died in his lifetime leaving issue, according to this decision none of the issue could take? If their parents, indeed, had lived, they might have been supported out of the estate, but if their parents chanced to die in William's lifetime, they could derive no benefit from [8] the estate. William was an illegitimate child, and yet the testator thought fit to provide for him and all his unborn children. If we consider the probable duration of their lives, it is not likely that the testator intended to stop there, with all the risks attending such a limited bounty, and then to give the estate to his heir at law. What is the value of such a gift? To the devisees it is highly important, that the estate should not go over until a total failure of all their issue, but to the heir the value of a reversion in fee after a life estate to a young person with remainders for life to all his children is trifling. Suppose that twelve children had survived William, is it a probable intention, that upon the death of each a share should fall to the heir, who would thus perhaps be a long series of years acquiring all the shares in the property.

The testator has given the estate to the heirs "of the body of William lawfully issuing." Those words clearly include all the posterity of William. But it is said that he has *translated* his words to mean children. There is no doubt but that he intended the children to take. But the translation is too narrow. It makes the testator say that William's children shall take only for life, and that none of their children shall take after them. What warrant is there for this in the will? Can it be argued, that because under the latter words in the will, *had they stood alone*, William's children would merely have taken estates for life, therefore, they shall in this case take only that quantity of interest, although the testator has *expressly* given the property to [9] the heirs of William's body, which would include all his possible heirs? The testator intended William to take for life, and he intended all his issue to take. But he intended his children to take as purchasers; and it is

* See the arguments and judgment, 5 Mau. and Sel. 95.

manifest that he considered, (although erroneously in point of law,) that his intention to include all William's possible issue would be effectuated if the children did take as purchasers. The argument assumes this shape, that because he intended the children to take as purchasers, and has not repeated words of inheritance, they can only take for life as tenants in common.

It seems impossible to contend, that William under this power might not have appointed *an estate of inheritance* * to a grandson, or more remote issue, born in his lifetime, and this of itself decides the case. This, it is argued, the rule of perpetuity forbids. It may be admitted, that he could not appoint to a child, with remainder to the issue of that child, to take as a purchaser; but where, as in this case, the power is to appoint to heirs of the body a class of unborn persons as [10] purchasers, it may be exercised by appointing, in the first instance, to a grandchild as a purchaser. The rule of perpetuity forbids only a possibility upon a possibility—as an appointment to an unborn son, with remainder to an unborn son of the son. Appointments to grandchildren as purchasers, under powers in marriage settlements, are of every day's practice. It is immaterial that in this view of the testator the children, etc. must take by purchase—that must be of necessity: they could not take under the power from William.† It is indeed said, that as issue taking under a power must take by purchase, this shows the words were used in that sense. If this were conceded, it would remain to be shown, that *used as words of purchase*, they were not intended to include more than the first line of generation, and merely to give to them life estates as tenants in common.

Let us consider this proposition. A devise to A. and the heirs of his body; of course he takes an estate in tail. A similar devise with a power to A. to appoint to any of the heirs of the body. Is it possible to contend that this right to defeat the estate so given to him, and to make those take by purchase, who, *if the power remained unexercised*, would take by descent, can [11] vary the construction of the devise to A. in tail? The supposed case is not different in principle from the present. In the one the estate tail is given in the first instance, but defeasible by exercise of the power; in the other the limitation in tail follows the power. It is immaterial whether it precedes or follows. In the former case the children would take by purchase when the power should be executed in their favour. If the power remained unexercised, the heirs of the body would take by descent. So in this case—where the first limitation is to William for life, with remainder to the heirs of the body of William, according to his appointment, remainder, in default of appointment, to the heirs of his body, etc. If the power is exercised, the heirs being appointees take by purchase; if no appointment is made, the estate descends to the heir to whom it is limited. The words, notwithstanding the power, may operate as words of limitation.

This case was decided in the Court below, upon its own merits, without reference to authorities; but the decided cases are strong authorities against the judgment. In the case of *Scale v. Barter* (2 Bos. and Pull. 485), which was a devise of all the testator's lands to his son, John, *and his children* lawfully to be begotten, with power

* The power is to appoint to heirs of the body of William in such share and proportions as William shall appoint, not in such *manner and form*, (as well as in such shares and proportions,) according to the power in the *King v. the Marquis of Stafford*, 7 East, 521; nor for such *estates* according to the power of devise given in Leonard Lovie's case: nor is it a power to *dispose* of the estate, as the donee should think fit, as in *Liefe v. Saltingtone*. It may be said, that an appointment to a living grandson of William, and the heirs of the body of the grandson, would be an appointment to the heirs of the body of William. In this sense of the argument, "*estate of inheritance*" means estate tail. On this point see farther, [2 Bli.] p. 23, and note.

† At this part of the argument, the Lord Chancellor observed, as to the distribution under the power, that, although the words heirs of the body, in a legal construction, could apply to one person only, it might be contended, where a power was given to appoint to heirs of the body, that it meant a class of persons. The ulterior limitation to one child, in default of appointment, might operate as a description of the person, and would not conclusively prove that no estate tail was intended to be given.

to settle the same, or any part thereof, by will or otherwise, to them or any of them as he should think proper; and for default of such issue, over—it was held that John took an estate tail, and that this construction [12] was not weakened by the power. The power, it was said by Lord Alvanley, in delivering the judgment of the Court, had some operation, since it enabled the devisee to dispose of the estate to his children without going through the forms of a recovery. But the power, because it enabled John to make his children take by purchase, did not make it imperative on the Court to give the estate to the children by purchase in all events, and to confine them to life estates as tenants in common. So in the case of *Doe, d. Cole v. Goldsmith* (7 Taun. 209. 2 Marsh. 517), which is reported by Taunton, vol. vii. p. 209, but more strongly to the point in question in 2 Marshall, 517; upon a devise to F. G. and his assigns for life, and from and immediately after his decease to the heirs of his body in such shares, etc. manner and form as he should appoint, and in default of such heirs of his body then from and immediately after his decease to J. G. it was held by the Court, as matter beyond doubt, that the testator intended that all the heirs of F. G. in a line of succession, should be extinguished before J. G. should take by the limitation over, and, therefore, that an estate tail by implication must be held to arise to F. G. because there was no other way to perpetuate the succession in the manner intended. There was no distinct limitation, as in this case, to the heirs of the body of the tenant for life in default of appointment. That expression occurred only in the clause giving the power, and the words introducing the devise over, and the referential word *such* is to be found in that case as in this. In *Doe v. Goldsmith*, the intent to give an estate tail was implied from the words preceding the limitation over. Here is a distinct gift in words having a fixed legal operation.

The Lord Chancellor. The gift is to the heirs of the body share and share alike as tenants in common.

Mr. Sugden. If it can be made consistent with other words in the will, to give the children estates for life only,—then they must take by way of purchase, as tenants in common. But the words, share and share alike, may be construed by reference to the power which contains an implied or possible gift, under which they would take as tenants in common.

Lord Chancellor. If I had lived 200 years ago, I should have had no doubt that such limitations, as we see in this will, would have given an estate tail. But your argument supposes, that the donee of the power might appoint among grandchildren, etc. to the remotest posterity. That I should have thought impossible, if I had lived 200 years ago.

Mr. Sugden. Keeping within the rule of perpetuity, he might have appointed to any the remotest heir of the body.

It may be admitted, that if “heirs of the body” means children,—such heirs or such issue, must mean the same thing. The same words cannot have different meanings, in the different parts of a will. But the supposed virtue of the word *such*, [14] did not avail in *Doe v. Goldsmith*, where it must have been held an executory devise;—whereas, in this case, it is clearly a contingent remainder.

The inconvenience of the supposed intention has been already noticed. If only one child should be born, they imagine the testator meant that he should take the lands for life. If twelve children, and eleven died infants, according to one construction, the survivor would take the whole:—according to another construction, he would take only a twelfth part. If the eleven died, leaving families, the families would take nothing. It was argued in the Court below, that under the will, cross remainders for life were to be implied, as among the children of William. But this argument was adverse to the interest of the heir at law, by whose counsel it was urged. It may be necessary to ascertain on which of the counts in the declaration they have entered up the verdict.—Some are on the demise of the children, some on that of the heirs at law. The judgment itself does not furnish the information.

Mr. Taunton. Lord Ellenborough said, that as there were counts on the demise of the heir at law, as well as the children, it was unnecessary to enter into the argument, as to the cross remainders, which might be material, as between the two sets of Plaintiffs; but was immaterial, as between them and the Defendants.

Lord Redesdale. Is Edward Wright living?

Mr. Sugden. Edward the son is living as well as the father. They put it as a forfeiture of the life estate.

[15] Lord Redesdale. If it is a forfeiture by Edward the son, it must be because he took under the appointment; and so it must be argued as a forfeiture of the whole.

Lord Chancellor. Were other children living at the time?

Mr. Sugden. That appears only by inference to be drawn from the special verdict. The word "afterwards" in that part of the verdict which states the conveyance, does not conclusively mean in point of time, after all the facts before stated in it.

Lord Redesdale. Could the power be destroyed by forfeiture where all the children have an interest?

Mr. Sugden. Such a question is now depending before the Vice-Chancellor,* and probably will go farther.

Lord Redesdale. How could it be destroyed by such instruments as these? It must be by some instrument expressly renouncing it. How can a man, having a power for the benefit of children, destroy it?

Lord Chancellor. The appointment ought to be stated. It appears by the verdict, that Edward [16] was the son of William. How does it appear that the appointment did not take effect in his favour before any other child was born?

Mr. Taunton. In the special verdict there is no appearance of appointment.

Lord Chancellor. We sit here to decide on cases as they appear on the record.†

Mr. Taunton. On the trial, the appointment could not be proved; and it was agreed that it should be put out of consideration. The recital of a fact in a deed is no evidence against strangers. *A fortiori*, the mere description, cannot be evidence against the Plaintiffs in the action.

Lord Redesdale. Would not this instrument (in the absence of any other) operate as an appointment?

Mr. Taunton. It was executed *alio intuitu*, merely to make a tenant to the praepice.

Lord Chancellor. The making Edward a party to the deed, is evidence that they did not choose to deal with William, as having an estate tail; and therefore took in Edward as having such estate. The question is, whether William so acting towards Edward, the deed of William must not operate as an appointment.

[17] Mr. Sugden. A recital has in Chancery been held to be an appointment. (*Wilson v. Pigott*, 2 Ves. J. 351.) A covenant to levy a fine has been held not to operate as a destruction of the power,‡ because the court looks to intention. So even where a fine has been levied,§ A deed of covenant cannot so operate, because it imports an intention that something more should be done. And where a deed, declaring the uses (after the fine levied), was executed, in the manner required by the power, it was held, that the deed and fine taken together, operated as an appointment.¶ Admitting that the description alone does not make the son appointee, yet it may operate to show an intention of appointment, and being followed by the declaration of uses in the deed of recovery, they altogether operate as an execution, and not as a destruction of the power. This is a stronger case than that of Lord Leicester, and others of that class. There the ground was intention, to be inferred from the nature of the transaction. But here is an express declaration, operating as

* *Smith v. Death*, before the Vice-Chancellor, who delivered his judgment on the 19th of June, 1820. The decision was that the power could be destroyed. The same question was argued, but not decided, in *West v. Berney*, before the Vice-Chancellor in Hilary Term, 1819.—See Sugden on Powers, pp. 80, 81, third edition.

† No appointment is stated in the special verdict; but, in the printed case of the Plaintiff in Error, William is described as *appointee in tail general*. Upon this point see the observations of the Lord Chancellor in giving judgment, pp. 51, 52. This part of the argument is preserved on account of the judicial observations.

‡ The Earl of Leicester's Case, 1 Vent. 278. It is also reported under the name of *Wigson v. Garrett*, or *Garrad*, 2 Lev. 119. Raym. 239. 3 Keb. 366, 189, 510, 536, 572.

§ *Herring v. Brown*, 2 Shower, 185. 1 Vent. 368, 371. Skinner, 35, 53, 71, 181. Carth. 22. Comb. 11.

an appointment to the son. There is nothing on the face of the verdict to show that any other child was living at the date of the appointment. The subsequent birth of issue, in such circumstances, could never defeat the estate of the son. The difficulty which occurs in other cases, where there [18] are not contingent remainders, does not arise in this case.

The argument that the children took mere life estates, is sufficient to destroy the Respondents' case. There is no authority extant, in which the words, "heirs of the body," in such a case as this, have been cut down to life estates. The children have always been held to take the inheritance.

The authorities cited in support of the adverse claim are not applicable to this case. In *Goodtitle v. Herring* (1 East, 264), the limitation to the "heirs male of the body," was in a subsequent part of the will clearly explained, nay, even expressed to mean sons. In this case we have no such expression or explanation. In Archer's case (Rep. 66), the limitation was to the *next heir*, in the singular number, and words of limitation were superadded, viz. *to the heirs of the body of that next heir*. In *Cheek v. Day*,* the devise was to the heir in the singular number, and words of inheritance in fee were grafted upon that limitation. In *Walker v. Snow* (Palm. 359), the same circumstances occurred, and it was, moreover, clearly a description of the person. *Lisle v. Gray* (2 Lev. 223. Raym. 278) was nearly similar to *Goodtitle v. Herring* (1 East, 264), where the words heirs male of the body, were explained by the will, to mean sons successively. So in *Lawe v. Davies* (2 Ld. Raym. 1561), occurred the [19] same explanation by subsequent words of the limitation to the *heirs lawfully to be begotten*. In *Doe v. Laming*,† not only were there superadded words of limitation in fee grafted on the limitation, to the *heirs of the body*; but, moreover, the devise was to heirs of the body, as well *males as females*; and being of lands in Gavelkind, those words could not operate by way of limitation, but must of necessity, in order to effectuate the intent of the testator, operate by way of purchase. For the limitation, as it stood expressed, included issue who could not take by descent.

In this case the testator by the word *such*, might mean to refer to children: children might have been the *issue* contemplated. But he had before expressed, and it must be presumed he intended an entail that all the issue of William might inherit. Here, therefore, are incompatible intentions, and the general must prevail against the particular intent. So in the case of *Coulson v. Coulson* (2 Stra. 1125. 2 Atk. 246, *et vid Hodgson et ux v. Ambrose*. Dougl. Rep.), it was argued, from the interposition of trustees, to preserve contingent remainders, that the testator contemplated, and intended to raise contingent remainders to be preserved, and probably it was so. But the general rule prevailed in that case, notwithstanding such probable particular intent to be inferred from that provision and limitation.

William being an illegitimate son, he and his children were strangers to the testator. This has in all [20] such cases furnished an argument upon the gift, over in default of issue. The words operate as a gift to the heir at law. But when vested, he is in at law by descent. The question is, whether the testator ever intended it should go to his heir at law, whether by descent or by devise, until all the issue of the illegitimate son were extinct.

As to the words "among the heirs of the body, share and share alike, as tenants in common, etc." they have in many cases been rejected, where it has appeared that the testator intended to give to the whole line of the issue. It is necessary in such cases, to hold it to be an estate tail, to guard against the inference from the want of any express limitation or implication of cross remainders among the children, so as to give the estate of a child dying without issue, to the survivors. The cases show that it ought not to be implied that the father takes for life only, unless the court can raise such further implication, as to give the whole estate to all the children. In *Doe v. Smith* (7 T. R. 531), the devise was to M. A. and the heirs of her body, as *tenants in common*, which was held to give an estate tail, notwithstanding those

* Moor. 593. 2 Roll. Abr. 417. (G.) pl. 7. Cro. Eliz. 313. Ow. 148. (cited Ld. Raym. 295. and Fitz. Gib. 24). See also *White v. Collins*, Com. Rep. 289.

† 2 Burr. 1100. 1 Black. Rep. 265. Et vid Durnf. and East. Rep. a note on this case.

latter words, and the reasoning of Lord Kenyon in delivering judgment in that case, is applicable to, and decisive of this case. Again, in *Doe v. Cooper* (1 East, 229), the devise was expressly to R. C. for life *only*; and after, etc. to the *issue* of R. C. as tenants in common; and in case R. C. should *die* without *leaving lawful issue*, to E. H. and her heirs. The court held [21] that an estate tail by *implication* vested in R. C., because cross remainders among the children could not be implied; and although it was admitted by the judges, that it appeared to be the particular intent of the devisor that R. C. should take only an estate for life; yet that intent, being inconsistent with the general and paramount intent, that all his issue should inherit the entire estate before it went over, was disregarded. The words of the will in that case were, on the one hand, much stronger for a tenancy for life; on the other, much weaker for a tenancy in tail, than the words of this will. In *Frank v. Storen* (3 East, 548), which was a devise to B. F. for *life, without impeachment of waste*, and with *power to jointure*; and after, etc. to the *issue male of his body and their heirs*; and in *default of such issue*, to R. F., etc. It was held an estate tail in B. F., although the issue or children, apparently were made the stock of a new line of heirs, and the first estate was given expressly for life, with powers not wanted by a tenant in tail. In that case also, the particular intent was disregarded; and the recovery was upheld, by which the children were disappointed. So in *Franklin v. Lay*,* lately decided, although superadded words of inheritance occurred in that case also, the same principles of decision were upheld. In *Mogg v. Mogg* (1 Meriv. 654. Some of the children were unborn), where the first devise was to children for life, and the remainder to the *issue* of the children [22] and their heirs, as *tenants in common*; and in *default of such issue* over,—it was held on the doctrine of *Cy-pres*, where the limitations would otherwise have been void as a perpetuity, a devise to the children, as tenants in common in tail, with cross remainders. In *Mogg v. Mogg*, the limitation was void, as against the policy of the law, and the Court might on that account have refused to interfere. Here is no such impediment, and the children cannot otherwise than by giving an estate tail to the parent, take such interest as the testator intended. If, according to the argument, the children would take estates only for life, the necessary consequence is, that the parent must take an estate tail; otherwise the intention of the testator is frustrated. He intended to provide for the issue, and they would have no provision.

If the gift had been to "*children*," instead of "*heirs of the body*," the same argument would have arisen. The word *children*, when used as a *class*, gives the same interest. That appears by the authority of the Court of K. B. in *Doe v. Webber* (1 B. and A. 713), a case in which there was a devise to M. H. and her heirs; and in case M. H. should die and leave no child or children to J. B., etc. The Court held that child or children meant issue, not confined to immediate, but extending to the remotest descendants. Such was the opinion of that Court upon a question, whether it was an estate tail, or an executory devise; whether the words child or children, in the contingent clause, introducing the remainder over, reduced the fee before [23] given to an estate tail. Upon which point, nothing is to be collected in that case, except from the words introducing the devise over itself. But in this case, it is an express devise in tail; and the intention clearly appears not to give any estate to the heir at law, until the remotest issue of W. are extinct.

As to the intention, the Respondents have argued nothing. They rely on the rigid legal construction of the words. They contend, 1. that under the power, the heirs of the body must take as purchasers; and if so, as children. 2. That in default of appointment, they take as tenants in common; again, as they argue, as children. Lastly, they say, the limitation introducing the remainder over, viz. in *default of such issue*, directly refers to "*child*," the last antecedent; and therefore issue in that place means children as before. To the first argument, the answer is, that the donee might have appointed to any of the heirs of the body, considering them as a class. Which of the words come first, and which last, is immaterial. The power is to appoint to heirs as purchasers, and not as descendants. Such a power cannot break the estate tail; it would not do so if the devise were to children.

* Before the Vice-Chancellor, 3rd May, 1820, not reported.—See the note at the end of the report of this case.

Taking the word to be "children," according to their construction, he might appoint to any of his descendants. *Liefe v. Saltingstone*.^{*} Under the power in this case, William might have [24] given the estate in fee † to a person filling the character of heir of the body. It is said that there are no words empowering such appointment. But the authority last cited proves that words of inheritance are not necessary, even if the devise had been to "*such children*," etc. In *Doe v. Goldsmith*, ‡ the devise was to F. G. for life, and after, etc. to the *heirs of his body*, etc. as F. H. should appoint; and in default of *such heirs of his body*, then immediately after his decease to J. G. In that case *heirs of the body* must mean children, if they do so in this; and so it was argued. Yet the court held it to be an estate tail by implication. Such a power was never adjudged to defeat an estate tail. §

As to *Doe v. Goff*, where the devise was to M. and the heirs of her body, as tenants in common, and not as joint tenants: but if such issue should die before he, she, or they respectively attain the age of twenty-one, then to J. M. and his heirs, it was held an estate in the children, in common in tail, chiefly upon the effect of the [25] words preceding the limitation over. As to *Gretton v. Howard* (6 Tau. 94), the devise was to A. H. she first paying all my just debts, etc.; and after her decease, to the *heirs of her body, share and share alike, if more than one; and in default of issue, to be lawfully begotten by me, to be at her own disposal*. The case was decided on the peculiar language of the will importing that the gift was not after an indefinite failure of issue. *Doe v. Corey* (in the K. B.), which is not yet reported, depends on the principle of *Doe v. Laming* (2 Burr. 1100). The children themselves, in each of those cases, by the effect of the superadded words, took a fee as the stock of a new inheritance. In *Seward v. Willoch*, || the estate was given to the issue expressly for their lives only. The ground of decision was, that the will shewed a single intent to create a succession of estates for life, not warranted by law. And it could not be modelled as an executory devise, as in *Humberstone v. Humberstone*, ¶ in Chancery. But here the devise does not confine the estate to the children, to an interest for life; but, on the contrary, clearly means to give an inheritance.

It is argued, that he meant the children to take, if more than one, because he gives to one child, if there should be but one. No doubt that was his [26] intention, and that they should take as purchasers; but he also intended that children's children, to the last generation, should inherit before the estate should go to the remainder-man. In the case of one child, he meant that the one child should take

* 1 Mod. 189. In that case the devise was to the wife for life; and "by her to be *disposed* of to such of my children, etc.;" and the judges being a majority who decided the case, relied on the word "*dispose*," as implying such a power as the testator himself had, which was to dispose of the fee.—See the next page.

† Upon the general question, whether a fee simple may be given under a power to appoint among the heirs of the body, issue, children, etc. without any additional words to extend the power. See Sugden on Powers, 9. c. s. 10. In the *King v. Marquis of Stafford*, the Court said they would not determine the general question, but relied on the efficacy of the words *manner and form*. The power in *Phelps v. Hay* had the same words. Sugden on Powers, Appendix, No. 18.—See *ante*, p. 9.

‡ 7 Tau. Rep. 209, and 2 Marsh. Rep. 517. Mr. Sugden added, *arguendo*, that the case was free from prejudice, because *Doe v. Jesson* was not cited or noticed. V. Post, 44.

§ That remainders in default of appointment are not suspended or kept in contingency by powers annexed to, or which accompany preceding estates. See *Cunningham v. Moody*, 1 Ves. 174, *Doe v. Martin*, 4 T. R. 39.; and the same doctrine as to personal property, 1 Ves. 210. 2 Ves. 208. Amb. 365.

|| 5 East 198. This was a devise to A. for life; and after him to his eldest, or any other son after him for life; and after them, to as many of his descendants, issue male, as shall be *heirs of his or their bodies*, down to the tenth generation, during their lives.

¶ 1 P. W. 332. This was a devise to trustees *to convey*, etc. to children of unborn children for life, which the Court, upon *doctrines of equity* modelled, by decreeing conveyances to existing children for life, and to unborn children in tail, etc.

the inheritance; and a limitation to children, or a child, as a class, is sufficient to give such interest. It is said, that in the power enabling appointment to the heirs of the body, there are no words of inheritance; and that, therefore, the appointment of an estate of inheritance is not authorized by the power. But it is settled, that where there is a devise to the *heir*, although there are neither words nor intent expressed to give him the inheritance, and although the estate vests in him by purchase, as a person described, yet he may take the whole inheritance. *Burchett v. Durdant* * was decided on this principle. The objection was taken in that case, for the want of words of inheritance; but the [27] Court held it was *a fee* † in the person described, as heir of the body now living. Such limitation operates doubly; first, to point out the person, then to give the inheritance. That is an authority depending upon three judgments in the courts below, and two in this house. The children, therefore, in this case, must take an estate of inheritance, and for that purpose, William must take an estate tail. In *Wharton v. Gresham* (2 Black. Rep. 1083), although the devise was to *sons*,‡ one branch only of issue, the Court held, that the tenant for life had an estate tail. In *Hodges v. Middleton* (Douglt. Rep. 415.—See *post*, p. 38), the words child or children are used throughout the will, the limitation over is on failure of children, not issue. The Court collects the intention to give the parent the inheritance, from the use of these words as a class. So in *Jones v. Morgan* (1 B. C. C. 206), Lord Thurlow held, that where children are to take as a class, they must take as heirs.

As to the argument founded on the word *such*, and its reference to the immediate antecedent *child*; the words are "for want of such issue;" and the fair construction, even grammatically, is not by a narrow reference to the last preceding object designated, but generally to all the limitations, to "heirs, issue, or children." Reading all the clauses of the will together, it means in default of all the issue before named or specified. It is said, the testator himself has explained what he means [28] by heirs of the body. But he does not say that children only are to take as heirs of the body; but that they are to take in the first instance, the first in the order of succession. So in *Robinson v. Robinson* (1 Burr. 38, and 2 Ves. 225), and *Pierson v. Vickers* (5 East, 548), the word *such* occurred, following the word "son" in the first, and "sons and daughters" in the latter case. Yet the Court held in both those cases, that the word "such" referred to issue generally, and was not restricted to sons and daughters. So also in *Doe v. Goldsmith*.

The question, whether cross remainders are to be implied between the children as tenants for life, ought to be decided for the satisfaction of the Plaintiffs in Error, if the judgment is against them. It ought to be ascertained by the judgment, which of the Plaintiffs below are entitled, that the Plaintiffs in Error may know the grounds on which they are deprived of the estate, if that should be the result.

The words *heirs of the body* having, in the present case, been considered to mean *children*, the subsequent words, "and for want of *such* issue," were held by the

* This case is reported in a former proceeding between different parties, but upon the same question and title, in 1 Ventr. 334, under the name of *James v. Richardson*. Upon the writ of error in the second proceeding it is reported, 2 Ventr. 311, under the name of *Burchett v. Durdant*; and upon the point urged in the above argument, the Court certainly held that G. D. took an estate tail, upon the ground that *heirs* is *nomen collectivum*. But the Court further held, "that in case the first words, (viz.) *heirs* of the body now living, would carry but an estate for life to G. D. yet the subsequent words would make an entail in him, (viz.) *and to such other heirs*, male and female, as he should hereafter happen to have of *his body*. This would clearly vest an entail in G. D. he being heir of the body of Robert, and surviving Robert." This case is also reported by Keble, 3, 832. Pollexfen, 457, Jones, 99, Levinz, 2, 232, and Raymond, 330, as between James and Richardson; and in Carthew, 151, Skinner, 205, and Comberbach, 153, as between *Burchett v. Durdant*.

† This must be understood fee-tail, for such was the decision.

‡ It was to A. and his sons in tail male; and for want of such issue over, and A. had no issue at the date of the will, or at the death of the testator.—See *Wilde's* case, 6 Rep. 16.

judges in the Court below to refer only to children; for *such*, it was said, is a word of reference. But why, it may be asked, not extend it to the *heirs of the body*, to whom the estate was expressly given? There is certainly considerable evidence, on the face of the will, that the testator intended that William's children should take by purchase; but there is stronger evidence that he meant them to take such an estate as they could transmit to their issue, so as to include all, "the heirs of the body of William issuing," for want of which [29] only he intended the estate to go over to his own right heirs. Some stress was laid upon the circumstance that the estate was expressly devised to William for his life. But that circumstance has been disregarded in similar cases, even where the strong negative words *only* and *no longer* have been superadded. But it is material in this view, that it shows, by opposition, that he did not intend the *children* to take life estates only. "To William for life, and after his decease to his children." Had he intended them also to take for life only, he would, of course, have said so. Lord Mansfield often truly observed, that when a man gives a house to one, he always means to give the entire interest in it, the same as if he had given him a horse. To effect this intention the Courts have gone great lengths, to supply by other words and implications, the want of express words of inheritance. This is the only case in which express words of inheritance have been cut down to life estates only, and this in order to effectuate a supposed intention, which in itself is absurd, and evidence of which is wanting on the face of the will.

It is said, the provision and devise, if one child, to that one, includes the other case, viz. of there being more than one, in which case they were all to take. Granted. But still it remains to show, that, because the children were to take, they were to take life estates only. "If but one child, the whole to that one child," i.e. the whole estate, and also the testator's interest in it. This is what the testator meant, although his meaning cannot in *this way* be effectuated. The gift over, "for want of such issue," afforded irresistible evidence of the [30] intention that the estate should not go over until a general failure of William's issue. The force of those words was taken away by considering them to apply only to children. The will, as it stands by force of the decision in the Court below, is certainly a very different disposition from that which the testator intended to make.

The will made by the judgment in the Court below is to William for life; remainder to his *sons and daughters* as he shall appoint, *but not giving them more than life estates*: in default of appointment, to his *sons and daughters* share and share alike *for their lives*; and if there shall only be one child *born*, the whole to that one *for life*; and *after the death of each child, his or her share over*.

It was only by this construction that it was possible to weaken the force of the words "for want of such issue." Lord Northampton has observed, that "for want of such issue," means for default of such issue. There is something, he adds, of peculiar force in this expression, and the law supposes the inheritance already attached in the first taker, but liable to be defeated by a subsequent event, his dying without issue (T. R. 227, note). So Mr. Justice Lawrence said, in *Pierson v. Fickers* (5 East, 552), that these words are always construed to mean an indefinite failure of issue, unless restrained by other words. In this case there are no such words, nor any authority in the books for the construction which has been put upon the words actually used by the testator.

It is immaterial whether the words were *heirs of the body or children*, in either case the intention [31] would be equally apparent to pass the inheritance. A tenancy in common is incompatible with an estate tail in the parent, but that does not prove that the testator intended the children to take for life only.

The following rules may be safely laid down:

I. That a devise may, in favour of the intention, include all a man's possible issue, although in terms only a particular class is included.

II. That if words are used which denote an intention to give the estate to the children by purchase, they shall take in that character, where they can take by force of the will, such an estate as will include all the issue, so that the estate may not go over before a total failure of issue.

III. That although such an intention is apparent, yet where the general intention, viz. to include all the issue, can only be effectuated by vesting an estate tail in the

parent, he shall take that quantity of interest in opposition to the words of the will. The particular intent of the testator shall be sacrificed in favour of his general intent.

The leading authority on the first rule is *Robinson v. Robinson* (1 Burr. 38, and 2 Ves. 225). There the testator devised his estate to Lancelot Hicks, for and during the term of his natural life *and no longer*, provided that he altered his name to Robinson, and lived at his house of Bodlyne. And after his decease to *such* son as he shall *have* lawfully to be begotten, taking the name of Robinson; and for default of *such* issue then, I bequeath the same to my cousin, Wm. R. and his heirs for ever. The judges certi-[32]-fied that Lancelot must by *necessary implication* to *effectuate the manifest general intent* of the testator, be construed to take an estate in tail male, he and the heirs of his body taking the name of Robinson, notwithstanding the *express* estate devised to him for his life *and no longer*.* This cause was decided the same way in the Court of Chancery; and afterwards, upon great consideration, was affirmed in the House of Lords (3 B. P. C. 180). It was the leading authority upon which Lord Kenyon decided many similar cases, all of which will be over-ruled, if the children in this case shall be held to take for life only.

The power in this case is in favour of the Plaintiff in Error; but we may strike out the power, without weakening the effect of the other words, upon the authority of *Seale v. Barter* (2 Bos. and Pull. 485).

In *Robinson v. Robinson*, the limitation, after Lancelot Hicks' decease, was to such son as he shall have lawfully to be begotten, taking the name; and for default of such issue over.

Will any lawyer attempt to distinguish the cases, with a view to show that Mr. Robinson intended to include all Mr. Hicks' issue, and that Mr. Pershouse did not intend to include all Mr. Wright's issue.

The case of *Robinson v. Robinson* is a decisive authority also in favour of the general construction of the words "for want of *such* issue." According to the decision of this case in the Court below, the will in *Robinson v. Robinson* [33] should have been construed as giving an estate for life in Lancelot, with remainder to his first son for life, with remainder over. There no words like *heirs of the body* intruded themselves. It was not necessary to take away the force of any words, but merely to put a plain construction on the words which the testator had actually used; and they were simply to Lancelot for life, then to such son as he should have, and for default over.

In the case of *Picerson v. Fickers* (5 East. 548), which was decided by Lord Ellenborough, C. J. Lawrence, J. Grose, J. and Le Blanc, J. the limitations were to the testator's daughter, Ann, and to the heirs of her body lawfully to be begotten, *whether sons or daughters*, as tenants in common, and not as joint tenants; and in default of *such* issue, to his sisters for their joint lives; remainder to a trustee to preserve contingent remainders: and after the decease of either of them, to all and every the child and children of, etc. *whether sons or daughters*, and their heirs and assigns for ever, as tenants in common, and not as joint tenants; it was held that Ann took an estate tail, notwithstanding the argument, that the testator had explained heirs of the body to mean children, viz. sons and daughters. How, said Lord Ellenborough, do you get rid of the words, "in default of *such* issue?" *Such*, it was insisted, had reference to sons and daughters. The testator, it was said, meant the estate to go over, if Ann left no sons or daughters living at her death. But [34] Mr. Justice Lawrence asked, what is there in the will to confine the words, "in default of issue," to issue living at the time of Ann's death? Because, (it was answered,) a fee was before given to the children;† but the learned Judge added, "these words are always construed to mean an indefinite failure of issue, unless restrained by other words." This is a decisive authority. Where is the distinction between the cases! The devise here, it may be said, is expressly to W. for life; whereas, the other devise, is in one sentence to Ann and the heirs of her body. But we have seen, that an express devise to a man for his life *and no*

* And (it should be added, to complete the proof of the proposition,) the express devise to his son.

† Not so expressly to the children of the daughter.

longer, is in these cases immaterial. It is immaterial, Lord Thurlow observes, in *Jones v. Morgan*, that the testator meant the first estate to be an estate for life. "I take it that in all cases the testator does mean so. I rest it upon what he meant afterwards. If he meant that every other person, who should be his heir, should take, he then meant what the law could not suffer him to give, or the heir to take as a purchaser. All possible heirs must take as heirs." If then we discard as utterly unwarranted by law this distinction, the next difference is, that the testator, in the supposed explanation of what he means by "heirs of the body," in the one case speaks of *children*, in the other of *sons or daughters*. *Children* is a stronger expression in favour of an estate tail than *sons or daughters*. Sons or daughters, it may be said, mean males or females. No doubt [35] they do; but considered, as the words in our case have been in the judgment below, they mean males or females *who are* "sons and daughters," not males and females who are grandsons and granddaughters. Besides, in *Pierson v. Fickers*, the testator had expressly in a subsequent part of the will said, that, when speaking of sons or daughters, he meant *children*, and children only. For in the devise over to the *children* of his sisters in fee, (who took strictly by purchase,) he says, "to their children, whether sons or daughters." Did this mean whether grandsons or granddaughters? If not, how was that meaning collected in the prior part of the will, except from the very words which are found in the present case, and lead to the same construction. But in our case, it may be urged, that the testator says "if only one child," etc. The same thing is implied in *Pierson v. Fickers*, for it is quite clear that if there had been only one child, he was as competent to take as an only child in our case would be. In both of the cases there was a manifest intent to include all the issue. In the case of *Pierson v. Fickers*, that intent was effectuated in the face of obstacles which do not occur in this case. It is impossible that the decisions in the two cases can stand together.

The case of *Doe and Burnsall* (6 Term Rep. 30) was relied upon as supporting the judgment in the Court below, but there the children *took the fee*; the words being large enough for that purpose; and therefore that case, like many others, must be classed under the second rule above noticed, and cannot govern a case [36] in which, if the children do take by purchase, the consequence may be, that neither they nor their issue may ever derive any benefit whatever from the devise.

The only cases which were relied upon in favour of the words "for want of such issue," being construed "and after the deaths of the children," were *Hay v. Lord Corentrey* (3 Term Rep. 83), and *Denn v. Page* (and the note). But those cases differ, *toto calo*, from the present. There, after a regular provision for sons in tail, a limitation was added to daughters without words of inheritance; and for want of such issue over. That is not an improbable disposition, and cannot be compared with this case. Upon the judgment in *Denn v. Page*, Lord Kenyon has made the following observations (in *Dacre v. Dacre*, 8 T. R. 116):—"The case of *Denn d. Braddon v. Page*, has been relied on by the Plaintiffs in Error, where Lord Mansfield intimated an opinion that there was a blunder in the will. I find myself pressed by whatever fell from so great a judge, and it is always with doubt and distrust of my own mind that I differ from him in opinion; but I am not prepared to say that there was any blunder in that will. There the deviser gave to S. Nash, the son of T. and M. Nash, for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of S. Nash, and the heirs male of his and their bodies; then having provided for the male heirs (who are generally the favourites in cases of land-[37]-ed property), it is not improbable that it should occur to the testator to provide for the present generation, and therefore he devised to all and every the daughters of the body of T. Nash, by his then wife, and for default of such issue, to the right heirs of T. Nash for ever. Now, when there is nothing in the will to lead to such a supposition, why should it be supposed that that was a blunder which brought forward the daughters of sons in preference to the issue of the sisters. I have known many cautious testators make limitations in their wills like that." In the above case clearly all the children took by purchase; the sons express estates of inheritance, the daughters estates of freehold only. It was not a gift to *children* generally, but to daughters, a particular class of issue. And the words, "for want of such issue," were satisfied by the previous estates of

inheritance in the sons, and the life estates in the daughters. It never occurred to any judge that that case clashed with *Robinson v. Robinson*, or *Pierson v. Vickers*, which are clear and decisive authorities, that in a case like this, the words, "for want of such issue," mean a general failure of issue.

This is the first case in the books in which the force and operation of the words "heirs of the body" have been so frittered away; but even if it be conceded, that the testator has explained the words *heirs* of the body to mean *children*, yet it would equally follow, that all the posterity of William were intended to take.

In Wilde's case (6 Rep. 16, Mo. 397) there was a devise to A. for life, [38] remainder to B. and the heirs of his body, remainder to Rowland Wilde and his wife, and after their decease *to their children*, Rowland and his wife then *having a son and a daughter*, it was ruled that "they took joint estates for their lives: but if A. devised to B. and his children or issues, and he hath not issue at the time of the devise, the same is an estate tail." According to Moore's report, Popham, and Gawdy, held that Wyld took an estate tail, notwithstanding that he had children living at the time of the devise, though Fenner and Clench thought it was only an estate for life, all agreed that it was an estate tail if no children. In the present case William had no children at the time of the devise or at the death of the testator.

So a devise "to William for the term of his life (as in the present case), and after his decease to the men children of his body; and if William die without man child of his body," then over was held to be an estate tail in William (1 And. 13). There are other authorities to the same effect.

The case of *Hodges and Middleton* (Doug. 431), bears closely upon this, if the words, heirs of the body, are to be read as children. There the devise was of real estate to A. and *at her death* to her children, and in case of failure of children, over. A. had issue living at the death of the testatrix, and at the date of the will. The Court inclined to think that A. took in tail, but if she took only for life, they held that the children would take in tail. It is a powerful authority against the decision in the present case.

So in *Seale v. Barter* (2 B. and P. 485), where the devise was [39] to the testator's son John and his children, lawfully to be begotten, with power for him to settle the same on them; and for default of such issue, over. John had no issue at the date of the will, and it was held that he took an estate tail.

No answer was attempted to be given to these authorities, which directly prove that William Wright became entitled to an estate tail under Pershouse's will.

It is not necessary to demonstrate that the intention cannot be effectuated under the second rule. It is clear, that, if the children are to take by purchase, they cannot take all the interest which the testator intended. The very decision in their favour gives them merely life estates as tenants in common, which in event might not give to them *any* beneficial interest. In all the cases which it is possible to cite from the books, where the heirs have been held to take by purchase, the words of the will were sufficient to give them an estate, which would include all the issue for whom the testator intended to provide. There are several cases accordingly, in which, although the children taking by purchase, would take an estate tail; yet that construction was not adopted, because cross remainders could not be raised between them.*

The consequence of the exclusion of the case from the second rule, is, that it falls within the third. Certainly the intention that the children should take as tenants in common is incompatible with an estate tail in the parent; but it has long been the settled law of the land, that that circumstance shall give way to the general [40] intention to include all the issue. *King v. Burchall* (Ambl. 379, 4 T. Rep. 296), *Doe v. Applin* (4 T. Rep. 83), *Doe v. Smith* (7 T. Rep. 531), *Doe v. Cooper* (1 East. 229), and *Pierson v. Vickers* (5 East. 518), have decided this point beyond the reach of controversy. It will be conceded, that all William's possible issue can only take through him. He therefore, to effectuate the testator's manifest general intent, must be held to take an estate tail.

For the Defendants in Error: W. E. Taunton and C. Puller.

The ejectment was brought on behalf of the children; and an attempt was made

* As to implication of cross remainders, see *post*, [2 Bl.] p. 17, note

to argue the case, on the ground that cross remainders were to be implied among the children. But as the heirs were made parties to the action in a distinct count, the Court refused to hear that argument; and the judgment was entered up on the count for the heirs, which might be applied in favour of the children. If cross remainders can be implied, the entry of the judgment is wrong. But this does not affect the substance of the case. The proposition to be maintained is, that William took only an estate for life, with remainder for life to the children. On the other side they contend that the testator had two intentions, and that one is paramount; viz. that the estate shall not go to the ultimate remainder man, until after an indefinite failure of issue. There is no such paramount intent. The testator designates the class of persons among whom the power is to be exercised, and gives the estate over, on failure of the ob-[41]-jects of the power, if they should not be living at the death of the tenant for life. That the words "heirs, or heirs of the body," have not always their strict technical meaning in so extensive a sense as the Plaintiffs in Error contend, it is sufficient to quote Archer's case (1 Co. 66). That case is not indeed applicable in terms, which can rarely happen in the case of a will. But it may be cited to prove that there is no such essential virtue in the word heir, that it must carry the estate to all generations. *Walker v. Snow* (Palm. 359), *Lisle v. Gray* (2 Lev. 223, Raym. 278), *White v. Collins* (Com. Rep. 289), *Lawe v. Davies* (2 Lord Raym. 1561), *Doe v. Laming*,* and *Goodtitle v. Herring* († East. 264), may be adduced in proof of the same proposition.

In *Lawe v. Davies*, the devise was to B. and his heirs, lawfully to be begotten, that is to say, to his first, etc. sons successively to be begotten of the body of the said B.; and the heirs of the body of such first, etc. sons successively, etc. remainder over. That was held an estate for life in B. notwithstanding the subsequent limitation, to the heirs of the body of, etc. In the cases before cited, the words *heirs of the body*, or words equivalent, were contained in the instrument creating the limitations. Yet persons designated by those words were held to take by purchase. These words therefore may give less than the inheritance. In *Goodtitle v. Herring*, Lord Kenyon, speaking of [42] the technical force of those words, in delivering judgment, says, "it never has been decided that those words might not be otherwise explained in a will by the testator himself. They were so explained in *Lawe v. Davies*:" and afterwards he adds, "In former times indeed, greater strictness was attributed to the meaning of the words, 'heirs of the body.'" Here those words, as they are explained by the testator, are descriptive of the class of persons among whom the power was to be exercised; and it is the manifest intent of the testator, that if no such objects should be living at the decease of the tenant for life, the estate should go to the remainder-man.

The words of the will are to be weighed and considered, and also the fact that William was a natural son of the sister of the devisor. If the will had ended at the words "heirs of the body," where it occurs in the limitation over, for want of appointment, William, though the previous estate is to him expressly for life, would undoubtedly have taken an estate tail. As to the argument founded on *Seale v. Barter* (2 B. and P. 485), if it is supposed to show that such a power of appointment is sufficient to give an estate tail, no such thing was decided in *Seale v. Barter*; nor do we argue that such power of appointment cannot possibly subsist with an estate tail, or that it is inconsistent with its nature. The limitations in *Seale v. Barter* are very different from the limitations in this case. In *Seale v. Barter* the question arose upon the codicil, which the Court held ought to be construed without reference to, or not to be [43] controlled by, the will. By the codicil the estates were devised to J. S. and his children, lawfully to be begotten, with power for J. S. to settle the same on such of them as he should think proper; and for default of such issue, to, etc. Such a devise, without doubt, gave an estate tail to the son, no child of J. S. being in existence at the date of the will, or the death of the testator: and the Court properly held, that the power given to defeat or abridge the estate tail by appointment, did not of itself destroy that estate.

In this case there is no paramount intention that the estate should not go over,

* 2 Burr. 1100. † 1 Black Rep. 265. *et vide* 3 Durnf. and East's Rep. a note on this case.

but upon indefinite failure of issue. The words "heirs of the body" must receive a limited construction. The testator himself translates the words, and shows what persons he means by "heirs of the body." In the first instance, clearly he must mean the *children*. If so, can he in the subsequent use of the same words mean something different? To make the will consist with the construction attempted by the Plaintiffs in Error, a multitude of words must be struck out of the instrument, "*Share and shure alike, as tenants in common; and if but one child, the whole to such only child.*" All these words must be expunged. According to their construction, the former clause of these words is inconsistent, and the latter superfluous.

The words, "in default of such issue," must refer to the issue contemplated, as objects of the power of appointment, not issue indefinitely. Between a devise over to right heirs, and to a stranger, there is a material distinction. In the former case the party dies virtually intestate: for the devise is in-[44]-operative; the heir takes by descent. But where the devise is to A. B. and then over to a stranger, he can only take in the event specially provided by the testator. An heir at law is not to be disinherited, but by express words or necessary implication. A special object of bounty must bring himself within the intent of the testator. Here the plain intent is, that if there should be no children of William, the estate should go over to the sister. "Heirs of the body" cannot here consistently mean all generations of issue, as in case of an estate tail. The donee of the power could not have appointed so as to give indefinitely to his issue for ever. William, (for instance,) could not have appointed to his eldest son, grandson, great grandson, etc. The clear intent was, that he should limit to the children living at or before his death. Could he pass by the existing generation, and appoint to a future descendant, however remote? That is forbidden by the law against perpetuities.

The provision in default of appointment for the special event, if there *should be but one child*, that he should take the estate, manifests the intent of the donor, that the power should be exercised among *children*. There is but one case adverse to this construction, *Doe v. Goldsmith* (7 Taunt. 209). It is an extraordinary argument to say that case is free from prejudice, because former cases were not there cited. That is rather a ground to impeach the authority of that case. If there is plain demarcation of the objects to which the words *heirs of the body* are applied, the power of appointment cannot be extended beyond them. The [45] limitation over, is not in default of the issue of William, or generally, but in default of *such* issue, *i.e.* the particular objects of the appointment.

"Heirs of the body," in the clause conferring the power, and the limitation in default of appointment, means such heirs within a limited time, the life of William, the donee of the power. In default of *such* issue, can only mean such specific issue as before designated. There is, therefore, a total absence of the supposed paramount intention to give the estate over, only upon indefinite failure of issue. If so, the secondary, as it is called, being in fact the only intent, must prevail.

There are no words of limitation superadded, and consequently the children must take for life, according to the doctrine established in *Hay v. Earl of Coventry* (3 T.R. 83). There the limitation was to F. C. for life, remainder to her first and other sons in tail male; and in default of such issue, to the use of all and every the daughters of F. C. as tenants in common; and in default of such issue to his right heirs. That it is to "children" in one case, and daughters in the other, makes no difference in principle, and the limitation, over, is in the same words. The argument in that case, was not that it was to be presumed the testator did not mean to give an estate tail to the daughters, because he had expressly given one to the sons; but on the contrary, that the gift to the sons furnished a presumption of a similar intention as to the daughters, as appears by the judgment of Lord Kenyon, in which, upon this point he says, "I cannot find any words in the will to warrant [46] such a construction. If indeed, the word *such* had not been introduced in this clause, we might, perhaps, have said, that as issue is *genus generalissimum*, it should include all the progeny. But here the word *such* is relative, and restrains the words which accompany it."

In *White v. Collins* (Comyns. Rep. 289), the first limitation was to F. for life, and after his death to the heir male of his body for life; and the limitation over was for default of *such* heir male. It was held to mean such as before mentioned, that is,

an heir male who was to take for life. In the present case, for want of words of inheritance, it is, by construction of law, an estate for life in the children. That circumstance does not, in principle, make it different from the case of *White v. Collins*, where the estate is given to the heir expressly for life. These are cases directly applicable, as authorities to the words of this will.

In the cases cited on behalf of the Plaintiff in Error, there was a paramount intent sufficient to over-rule the secondary intent. *Robinson v. Robinson* is the strongest of that class of cases, having words clearly indicating the intent, that the remainder should not take effect, but upon failure of all the issue of the particular tenant. The word used in the devise in that case, was *son* in the singular number. It was argued that the word was intended as *nomen collectivum*, meaning all the heirs for ever, and that the limitation over was to be construed and guided by that intent. In the certificate that argument was adopted: and it is to be noticed that in *Robinson v. Robinson*, the tes-[47]-tator at the end gave to L. H. the *perpetuity* of certain presentations *in the same manner* as he had given his estates.

In *Wharton v. Gresham* (2 Blac. Rep. 1083), there was an express limitation in tail.

As to the dictum quoted from *Jones v. Morgan*, there is no doubt that to enable all the heirs to take by descent, the ancestor must have an estate of descendible quality. That principle is not denied; but the words of the will in that case were different from the words in this.

In *Bunnet v. Lord Tankerville* (19 Ves. 170), the limitation over was in case of dying *without issue of the body*, referring to the words *heirs of the body*, which had been used before. The intent that all the issue should succeed in turn, could not be effectuated without giving an estate tail to the parent, which necessarily enlarged the estate for life. In *Doe v. Aplin*, *Chandler v. Smith*, *Doe v. Cooper*, and *Pierson v. Fickers*, the intent is clear, that the estate should not go over, but upon indefinite failure of issue. And it is to be observed, that in all those cases, the limitation over is to a stranger, who is a gratuitous object of the testator's bounty, and must bring himself within the clear intent. In this devise the limitation over is to the heir.

Frank v. Storin is the case of an estate tail by implication. So in *Colson v. Colson*, *Mogg v. Mogg*, and *Doe v. Webb*,* which were decided on special [48] grounds. In *Burchett v. Durdant*, the first question was whether the first limitation by way of use was executed. The decision was, that the use was not executed. But the authority of the case on that point has since been questioned.† A limitation to permit A. to receive, etc. would be a use executed. The second point in that case was, whether the remainder was contingent or vested, it being to the heir of B. *now living*. There was a son living at the date of the will and death of the devisor. Under such circumstances, the court held it a description of the person, and a vested remainder.

In *Hodges v. Middleton* (Doug. 431), the word "estate" occurred in the first limitation, and it was given over on failure of *children*, that is, of *children* indefinitely, which creates an estate tail by implication, upon the same principle as the words *issue*, etc. *Lief v. Saltingstone* is not applicable. The power in that case was altogether different. The decision in that case established only this doctrine, that a power of appointment may extend to an appointment in fee. That is not inconsistent with an estate for life in the donee, but the contrary. By a decision in favour of the Plaintiff in Error, the doctrines of implication would be carried beyond all former bounds. Here the words of the will clearly import the immediate children of the tenant for life. These were manifestly the heirs of the body in the [49] contemplation of the testator. He has so explained himself.

* 1 Tau. Rep. 231. The question in this case was upon a devise to F. and M. and A. and the heirs of their bodies respectively as tenants in common, whether cross-remainders could be implied between three devisees. It was decided in the affirmative, on the ground of manifest intent appearing in the will that the estate should not be divided, but upon the limitation over go as an entirety.—See *Roe v. Clayton*, 6 East. 668, 1 Dow. 384.

† By Lord Holt in *Broughton v. Langley*, 2 L. Raym. 873, 2 Salk. 679.

Gretton v. Haward (6 Tau. 94), *Goodtitle v. Woodhull*,* *Doe v. Goff*,† are all authorities in favour of the Defendant in Error, applicable generally in language and in principle, if not in precise circumstance. As in those cases, so in this, "such issue" must mean such descendants of William, to whom he might, and by the will it was intended, he should appoint, that is, children. No paramount intent is to be collected from the circumstances of the case. The fact that William was an illegitimate son, is adverse to his claim.

The Lord Chancellor (at the conclusion of the reply). "It is a general rule of law, to be collected from a consideration of all the cases, that a particular intent expressed in a will, must give way to a general intent. It is surprising that so much pains should have been taken to establish such a rule, the effect of which is, usually, to enable the first taker to destroy both general and particular intent. The words *heirs of the body*, *prima facie*, mean all descendants; and it is likewise a rule of law, [50] that all descendants should take under these words, unless they are clearly qualified and restricted by other words so as to give them a more limited sense. The great judicial difficulty arises in the application of these rules to the words of each will. I cannot admit that all the cases cited have been well decided: but it was hardly to be expected that judges should agree in the decision of all these cases; for the mind is overpowered by their multitude, and the subtlety of the distinctions between them. These difficulties make it the more necessary that we should deliberate before we determine this case. The decision ought to accord with former authorities, if possible; but, at all events, we must adhere to the established rules of legal construction." *Cur. adv. vult.*

The Lord Chancellor (on moving the judgment). The question to be decided in this case is expressed in the words to be found in the errors assigned, the principal of which is, that the Court, by their judgment, have decided "that the said William Wright took only a life estate under the said will of the said E. Pershouse, with remainder to his children for life; and that the recovery suffered by the said William Wright, and Mary his wife, and Edward Wright, was a forfeiture of their estate. Whereas, the said R. Jesson, J. Hatley, W. Whitehouse, J. Watton, E. Dangerfield the elder, and T. Dangerfield, allege for error, that the testator intended to embrace all the issue of the said William Wright, which [51] intention can only be effected by giving to the said William Wright an estate tail, and the words of the will are fully sufficient for that purpose." I will not trouble the House by going through all the cases in which the rule has been established; that where there is a particular and a general intent, the particular is to be sacrificed to the general intent. The opinion which I have formed concurs with most, though not with every one of those cases. A great many certainly, and almost all of them coincide and concur in the establishment of that rule. Whether it was wise originally to adopt such a rule might be a matter of discussion; but it has been acted upon so long, that it would be to remove the landmarks of the law, if we should dispute the propriety of applying it to all cases to which it is applicable. There is, indeed, no reason why judges should have been anxious to set up a general intent to cut down the particular, when the end of such decision is to give power to the person having the first estate, according to the general and paramount intent to destroy the interest both under the general and the particular intent. However, it is definitively settled as a rule of law, that where there is a particular, and a general or paramount intent, the latter shall prevail, and courts are bound to give effect to the paramount intent.

This is a short will. The decision in the Court below has proceeded upon the notion, that no such paramount intent is to be found in this will. Here, I must remark, how important it is, that, in preparing cases to be laid before the House, great [52] care should be taken not to insert in them more than the words of the record. In page 3 of the printed case delivered on behalf of the Plaintiffs in Error,

* Willes, 592. The devise, in that case, was to a son for his life, and to his male children for their lives, and to the male children descending from them. The Court held, it was a life estate only in the son.

† Upon the citation of *Doe v. Goff*, Lord Redesdale observed, that the words there, "if such issue should depart this life before twenty-one," etc., were insensible, if the estates are given to the children for life. The estates in such case would go over, whether they die before or after.—See the judgment, *post*, [2 Bli.] p. 58.

are to be found the words "appointee in tail general of the lands, etc. thereafter granted and released of the second part." These words are not to be found in the record. I mention the fact, because, if this is to be quoted as an authority in similar cases, it may mislead those who read and have to decide upon it, if not noticed. According to the words of the will, it is absurd to suppose that the testator could have such intention as the rules of law compel us to ascribe to his will. "I give and devise unto William, one of the sons of my sister Ann Wright before marriage, all that messuage, etc. to hold the said premises unto the said William, son of my said sister Ann Wright, for and during the term of his natural life, he keeping all the said dwelling-houses and buildings in tenantable repair." If we stop here, it is clear that the testator intended to give to William an interest for life only. The next words are, "and from and after his decease, I give and devise all the said dwelling-houses, etc. unto the *heirs of the body* of the said William, son of my said sister Ann Wright lawfully issuing." If we stop there, notwithstanding he had before given an estate expressly to William for his natural life only, it is clear that, by the effect of these following words, he would be tenant in tail; and, in order to cut down this estate tail, it is absolutely necessary that a particular intent should be found to control [53] and alter it as clear as the general intent here expressed. The words "*heirs of the body*" will indeed yield, to a clear particular intent, that the estate should be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator: but that must be clearly intelligible, and unequivocal. The will then proceeds, "in such shares and proportions as he, the said William, shall, by deed, etc. appoint." This part of the will makes it necessary again to advert to the extraneous words inserted in the case of the Plaintiffs in Error, and to caution those who prepare them. "*Heirs of the body*" mean one person at any given time: but they comprehend all the posterity of the donee in succession: William, therefore, could not strictly and technically appoint to heirs of the body. This is the power, and then come the words of limitation over in default of execution of the power: "and for want of such gift, direction, limitation, or appointment, then to the *heirs of the body* of the said William, son of my said sister Ann Wright, lawfully issuing, share and share alike as tenants in common."

It has been powerfully argued (and no case was ever better argued at this bar), that the appointment could not be to all the heirs of the body in succession for ever, and, therefore, that it must mean a person, or class of persons, to take by purchase: that the descendants in all time to come could not be tenants in common; that "*heirs of the body*," in this part of the will, must mean the same class of persons as the "*heirs of the body*," among whom he had before given the power to ap-[54]-point; and, inasmuch as you here find a child described as an heir of the body, you are therefore to conclude, that heirs of the body mean nothing but children. Against such a construction many difficulties have been raised on the other side, as, for instance, how the children should take, in certain events, as where some of the children should be born and die before others come into being. How is this limitation, in default of appointment in such case, to be construed and applied? The Defendants in Error contend, upon the construction of the words in the power, and the limitation in default of appointment, that the words "*heirs of the body*" mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted that it must be children, because, in the concluding clause, of the limitation in default of appointment, the whole estate is given to one *child*, if there should be only one. Their construction is, that the testator gives the estate to William for life, and to the children as tenants in common for life. How they could so take, in many of the cases put on the other side, it is difficult to settle. Children are included undoubtedly in heirs of the body: and if there had been but one child, he would have been heir of the body, and his issue would have been heirs of the body: but, because children are included in the words heirs of the body, it does not follow that heirs of the body must mean only children, where you can find upon the will a more general intent comprehending more objects. Then the words, "*for want of such issue*," which follow, it is said, [55] mean for want of children: because the word *such* is referential, and the word *child* occurs in the limitation immediately preceding. On the other hand, it is argued, that heirs of the body being the general description of those who are to take, and the words "share and share alike as tenants

in common," being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation "if but one child, then to such only child," being, as they say, the description of an individual who would be comprehended in the terms heirs of the body; for "want of such issue," they conclude, must mean for want of heirs of the body. If the words children and child are so to be considered as merely within the meaning of the words *heirs of the body*, which words comprehend them and other objects of the testator's bounty, (and I do not see what right I have to restrict the meaning of the word "issue") there is an end of the question. I do not go through the cases. That of *Doe v. Goff* is difficult to reconcile with this case—I do not say impossible; but that case is as difficult to be reconciled with other cases. Upon the whole, I think it is clear that the testator intended that all the issue of William should fail before the estate should go over according to the final limitation. I am sorry that such a decision is necessary: because, when we thus enforce a paramount intention, we enable the first taker to destroy both the general and particular intent. But it is more important to maintain the rules of law, than to provide against the hardships of particular cases.

[56] Lord Redesdale. There is such a variety of combination in words, that it has the effect of puzzling those who are to decide upon the construction of wills. It is therefore necessary to establish rules, and important to uphold them, that those who have to advise may be able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult, for a professional adviser, to say what is the estate of a person claiming under a will. It cannot at this day be argued, that, because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown. In *Colson v. Colson*, it is clear that the testator did not mean to give an estate tail to the parent. If he meant any thing by the interposition of trustees to support contingent remainders, it was clearly his intent to give the parent an estate for life only. It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression, or necessary implication. In this case, it is argued, that the testator did not mean to use the words, "heirs of the body," in their ordinary legal sense, because there are other inconsistent words; but it only follows that he was ignorant of the effect of the one or of the other. All the cases but *Doe v. Goff* decide that the latter words, unless they contain a clear expression, or a necessary implication of some intent, contrary to the legal import of the former, are to be rejected. That the general intent should over-rule the particular, is not the most accurate expression of the prin-[57]-ciple of decision. The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise. In many cases, in all, I believe, except *Doe v. Goff*, it has been held, that the words "*tenants in common*" do not over-rule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to over-rule the meaning and effect of similar words. It has been argued, that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed. This only follows, that, having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and the words of modification are to be rejected. Those who decide upon such cases ought not to rely on petty distinctions, which only mislead parties: but look to the words used in the will. The words, "for want of *such* issue," are far from being sufficient to over-rule the words "heirs of the body." They have almost constantly been construed to mean an indefinite failure of issue, and, of themselves, have frequently been held to give an estate tail. In this case the words, "such issue," cannot be construed children, except by referring to the words "heirs of the body," and in referring to those words they show another intent. The Defendants in Error interpret "heirs of the body" to mean children only, and then they say the limitation over is in default of children; but I see no ground to restrict the words [58] "heirs of the body" to mean children in this will. I think it is necessary, before I conclude, to advert to the case of "*Doe v. Goff*." It seems to be at variance with preceding cases. In several cases cited in the argument, it had been clearly established, that a devise to A. for life, with a subsequent limitation

to the heirs of his body, created an estate in tail, and that subsequent words, such as those contained in this will, had no operation to prevent the devisee taking an estate tail. In *Doe v. Goff* there were no subsequent words, except the provision in case such issue should die under twenty-one, introducing the gift over. This seems to me so far from amounting to a declaration that he did not mean heirs of the body, in the technical sense of the words, that I think they peculiarly show that he did so mean—they would, otherwise, be wholly insensible. If they did not take an estate tail, it was perfectly immaterial whether they died before or after twenty-one. They seem to indicate the testator's conception, that, at twenty-one, the children would have the power of alienation. It is impossible to decide this case without holding that *Doe v. Goff* is not law.

In this case even admitting it to be the general intent of the testator, to give to William an estate only for life, the remainders to the children, might as easily be defeated, because William might, by agreement with the heir, have destroyed their estates before they arose. Suppose he had had a child who died, and then he had committed a forfeiture, the devisee over would have entered and enjoyed the estate. Suppose he had several children, and some had died, and some had been living, the [59] proportions would have been changed, and after-born children would not have come in to take the shares of those who were dead. These are absurdities arising out of the construction proposed. If the testator had considered the effect of the words he used, and the rule of law operating upon them, he probably would have used none of the words in the will.

Judgment reversed.

Franklin v. Lay. My friend, Mr. Sugden, has kindly furnished me with the following note of this case:—

"I give to my grandson, John Franklyn, all that my moiety or half part of and in all that messuage, tenement, and farm, lands and premises, situate, lying, and being in Great Bromley, in the county of Essex, called the Brush Farm, as the same is now in the occupation of my nephew, Wm. Barnard, of Lawford, in the same county, farmer, to hold the said moiety of the said farm, lands, and premises unto my grandson, John Franklyn, and to the issue of his body lawfully to be begotten; and to the heirs of such issue for ever, but subject and chargeable with the payment of the mortgage of £400 and interest to my brother-in-law, Thomas Barnard, of Lawford aforesaid, farmer. But if my said grandson, John Franklyn, shall die without leaving any issue of his body lawfully begotten, then I give and devise the said moiety of the said messuage, farm, lands, and premises, with the appurtenances, unto my said nephew, Wm. Barnard, and to his heirs for ever. Held to be an estate tail in John." *Franklin v. Lay*, Vice-Chancellor, May 3, 1820.

[60]

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

MARIA ARABELLA Dowager Marchioness of LANSDOWNE,—*Appellant*; The Most Noble HENRY Marquis of LANSDOWNE, and WILLIAM Earl of WYCOMBE, a Minor, by the said HENRY Marquis of LANSDOWNE, his Father and Guardian,—*Respondents* [3d July 1820].

[*Mews'* Dig. iv. 258; viii. 219, 280, 502. Cited in *Holmes v. Holmes*, 1830, 1 Russ. and My. 660, at p. 662. See also *Graham v. Koble*, 1820, 2 Bli. at p. 126 With reference to *obiter* of Lord Redesdale (2 Bli. at p. 97); see note to *Lidwill v. Holland*, 2 Bli. at p. 100.]

POWER in a marriage settlement to grant to a wife any annual sum of money, or yearly rentcharge to be tax-free, and without any deduction, and to be issuing out of and chargeable upon lands in Ireland, so that such rentcharge

do not exceed, in the whole, the yearly sum of £3000 of lawful money of Great Britain. Held—that a rentcharge appointed under this power is payable in Ireland in the currency of England. But that the appointee is not entitled to have the sum transmitted to England free of the charge of conveyance and exchange properly so called. The *lex loci contractus* and the law applicable to cases of money charged as a rent payable out of land, where no provision as to the place of payment is made by the instrument, are inapplicable to a case where the instrument itself furnishes the means of interpretation.

In ambiguous contracts the domicile of the parties, the place of execution, the purpose and the various provisions and expressions of the instrument are material to be considered in the construction.

Courts of equity are not bound to adopt the opinion of the courts of law to which a case is sent for advice.

This was an appeal against an order and decree of the Court of Chancery in Ireland, in a suit instituted by the Appellant, for recovery of the arrears of her jointure charged upon the *lands* of the Respondents.

[61] William Marquis of Lansdowne, the father of the Respondent, Henry Marquis of Lansdowne, being seized, for the term of his life, of several estates situate partly in England and partly in Ireland, with a remainder in tailmale to John Henry Petty, commonly called Earl of Wycombe, his eldest son, by deeds* of lease and release, bearing date the 16th and 17th days of May, 1794, and made between the said William Marquis of Lansdowne, of the first part; the said John Henry Petty, Earl of Wycombe, of the second part; John Cross, of Lansdowne House, in the county of Middlesex, gentleman, of the third part; John Willmott, of Bedford Row, in the said county, Esq., and Sir Francis Baring, of London, of the fourth part; and the Right Honourable Henry Richard Lord Holland, and Benjamin Vaughan, of London, Esq., of the fifth part; the greater part of the Lansdowne family estates, situate *partly in England* and partly in Ireland, (except certain lands in the barony of Ballycowen and King's County, Ireland,) were limited and assured, subject to certain incumbrances, then and still affecting different parts thereof,

To the use of trustees, for a term of five hundred years, upon certain trusts thereby declared, with a proviso, that the said term should cease when the trusts thereof should be satisfied; [62] which trusts have since been satisfied: and subject to the said term:

To the use of the said William, then Marquis of Lansdowne, and his assigns for his life, subject to impeachment for waste, except such waste in cutting down timber as should be committed with the consent of his son, then Earl of Wycombe, previously given by writing under his hand Remainder

To trustees to preserve contingent remainders Remainder

To the use of the said John Henry Earl of Wycombe, and his assigns, for his life, without impeachment of waste Remainder

To trustees to preserve contingent remainders Remainder

To other trustees, for a term of years, to raise portions for the younger children of the said Earl of Wycombe Remainder

To the first and other sons of the said Earl of Wycombe successively in tail male Remainder

To the Respondent, Henry Marquis of Lansdowne, then Lord Henry Petty (second son of the said William Marquis of Lansdowne, and half-brother of the same John Henry Earl of Wycombe), for his life Remainder

To trustees, to preserve contingent remainders Remainder

To the first and other sons of the said Lord Henry Petty successively in tail male, with divers remainders over.

* It has been thought expedient to set forth this settlement with particulars as to the parties, their description, and domicile, and parts of the limitations and provisions not immediately in question, which, at first sight, may appear superfluous. The reason and excuse, for so full a statement, will be found in the arguments adduced in support of the judgment.

In this settlement, after reciting, in effect, that £22,150 remained due to the said Marquis, on [63] account of certain purchases, valuations, and expenses therein mentioned or referred to (*and which purchases, valuations, and expenses were all calculated and made according to the currency of money in England*), it is further recited:

"That the said Marquis and Earl had valued the manor of Readingstown, otherwise Rahan, the towns and lands of Ballineur, and other lands, situate, lying, and being in the barony of Ballycowen, in the King's County, in the kingdom of Ireland, theretofore the estate of Robert Reading, Esq., at the sum of £28,000 of *lawful money of Ireland, of the value of £25,846 3s. 1d. English*: and that the said Marquis of Lansdowne and Earl of Wycombe had agreed that the said premises in the said barony of Ballycowen, so valued as aforesaid, should be conveyed to the said Marquis of Lansdowne, his heirs and assigns, in discharge of the sum of £22,150 remaining due to him, subject to the sum of £3696, the surplus of the said sum of £25,846, for which the said premises were valued as aforesaid, beyond the said sum of £22,150: and that the said sum of £3696 should be secured to trustees, to be by them applied in such manner as the said Marquis of Lansdowne and Earl of Wycombe shall direct." And the premises were accordingly so conveyed.

The settlement also contained recitals and confirmations of two mortgages both of lands in Ireland: the one to the Drapers' Company to secure the repayment of £30,000 advanced by them, and secured upon lands in Limerick; the other to a [64] Mr. Mills, to secure £12,000 advanced by him, and secured upon lands in Kerry.

The powers to appoint by way of jointure, upon which the immediate question in this case arose, appear in the following terms:

"Provided also, and it is further declared by and between the said parties to these presents, that notwithstanding any of the uses or limitations hereinbefore limited or contained, it shall and may be lawful to and for the said Earl of Wycombe from time to time, and at any time or times either before or after his inter-marriage with any woman or women he may happen to marry, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by him in the presence of, and to be attested by, two or more credible witnesses, or by his last will and testament, to be signed and published by him in the presence of, and to be attested by, three or more credible witnesses, to grant, limit, or appoint to or to the use of any woman or women with whom he the said Earl of Wycombe shall intermarry or take to wife, for the life or lives of such woman or women, and in full, or in part only, of or in the nature of her or their jointure or jointures, and in bar of her or their dower, to take effect immediately after the death of the said Earl of Wycombe, *any annual sum or sums of money, or yearly rentcharge or rentcharges, to be tax-free and without any deduction, and to be issuing out of, and chargeable upon, all or any part of the said manors, messuages, farms, lands, tenements, [65] hereditaments, and premises, hereinbefore mentioned, and intended to be hereby granted and released, which are situate in the said kingdom of Ireland* (other than and except the said manors, hereditaments, and premises in the said county of Kerry, mentioned in the said second schedule hereunto annexed, or hereunder written), so that such rentcharge or rentcharges do not, during the lifetime of the said Marquis of Lansdowne, exceed in the whole the yearly sum of two thousand pounds of *lawful money of Great Britain*, and do not, after the decease of the said Marquis of Lansdowne, exceed in the whole the yearly sum of *three thousand pounds of lawful money of Great Britain*, and so that such rentcharges be subject, and without prejudice to, the aforesaid term of five hundred years, and the trusts thereof. And it is hereby further provided and declared, that in case the said Earl of Wycombe shall, by virtue of the power hereinbefore to him reserved, grant, limit, and appoint to or for the use of any woman or women with whom he may happen to intermarry, any such rentcharge or rentcharges, annual sum or annual sums, as aforesaid, he the said Earl of Wycombe shall have full power, by the same or any other deed, or by his last will, as aforesaid, to give or grant to such woman or women, and her and their assigns, the usual powers and remedies, by distress and entry, for recovery of such rentcharge and rentcharges when in arrear, and to limit all or any of the said manors, messuages, farms, lands, tenements, [66] hereditaments, and premises, chargeable

therewith, to any trustee or trustees for any term or number of years, for the better securing the payment of such rentcharge or rentcharges as aforesaid, as to him the said Earl of Wycombe shall seem meet; so as such term and terms of years, in case any such shall be limited, shall be made defeazable on the full payment of the rentcharge or rentcharges thereby secured, and all arrears thereof, and all costs and charges relating thereto.*

To this settlement were annexed three schedules, containing the names of the tenements conveyed, and of the occupiers, and the rents at which they were respectively held, valued in Irish and English currency. This settlement was executed in England.

William Marquis of Lansdowne died in May, 1805; and upon his death, John Henry, Earl of Wycombe, became Marquis of Lansdowne, and succeeded to the family estates under the limitations of the settlement.

John Henry Marquis of Lansdowne married the Appellant in his father's lifetime. By a deed of appointment, bearing date the 20th of February, 1809, executed by him in the presence of, and attested by, two witnesses, after reciting the settlement of 1794, and the power of jointuring contained therein, and also reciting that he had resolved to exercise the said power of jointuring, and by virtue thereof to settle upon the Ap-[67]-pellant during her life, if she should happen to survive him, a clear annuity or yearly rentcharge of three thousand pounds English money for her jointure, and in bar of dower and freebench; and to secure the payment thereof, by the means and in the manner therein mentioned: it was witnessed, that the said John Henry Marquis of Lansdowne, in consideration of his love and affection for the Appellant, his wife, and to make a suitable provision for her maintenance and support, if she should happen to survive him, and by virtue and in exercise of the power or authority given or reserved to him by virtue of the said settlement, and of any other power or authority whatsoever vested in, or enabling him in that behalf, did grant, limit, and appoint, that from and after the death of him the said John Henry Marquis of Lansdowne, the Appellant, his wife (in case she should happen to survive him), or her assigns, should and might have, receive, and take, during the term of the natural life of her the said Appellant, and for her jointure, and in lieu, bar, and recompense of her dower and freebench, of and in all or any of the freehold, customary, or copyhold estates of the said John Henry Marquis of Lansdowne, one annuity or yearly rentcharge of *three thousand pounds of lawful money of Great Britain, to be issuing out of, and charged and chargeable upon, all and every the manors, messuages, towns, lands, tenements, and hereditaments whatsoever*, which the said John Henry Marquis of Lansdowne had power to charge with a jointure, under, or by vir-[68]-tue, or in pursuance of the said settlement of 1794 (except such hereditaments contained in the said settlement, if any, as had been sold or exchanged, in execution of the power in that behalf contained in the same settlement): to be payable and paid to the Appellant, or her assigns, at the common dining-hall of Lincoln's Inn, in the county of Middlesex, by four equal quarterly payments, etc. in every year, tax-free, and without any deduction: the first payment thereof to begin and be made on such of those days of payment as should happen next after the death of the said John Henry Marquis of Lansdowne; and also, that in case and so often as the said annual rent or clear yearly sum of £3000, or any quarterly payment thereof, should happen to be behind or unpaid, in part or in all, by the space of fourteen days next after any of the said days of payment whereon the same ought to be paid as aforesaid, then and from time to time, as often as it should so happen, it should and might be lawful to and for the Appellant and her assigns to enter into and distrain upon all and singular the said hereditaments and premises thereby charged with the same yearly rentcharge or sum of £3000 or intended so to be, and every of them, or any part or parts thereof, in like manner as in the case of distress taken for rent, reserved by landlords on common demises for years; to the intent that the Appellant and her assigns might be fully satisfied and paid the same annual rent or clear yearly sum

* The settlement also contained a power for Lord Henry Petty to charge lands in *England or Ireland*—with, etc.

of £3000, and every part thereof so in arrear [69] and unpaid, and all costs, damages, and expenses attending the taking such distress and distresses, or to be sustained by reason of the non-payment thereof, contrary to the true intent and meaning of the said appointment.

And for the considerations before expressed, and for the more effectually securing the payment of the jointure, the said John Henry Marquis of Lansdowne, in further exercise and execution of the power given or reserved to him by the settlement of 1794, did, by the deed now stating, grant, limit, and appoint, that all the manors, messuages, towns, farms, lands, tenements, hereditaments, and premises thereinbefore charged with the said annual rent or sum of £3000, or intended so to be, with their and every of their rights, members, and appurtenances, should, from and immediately after the death of him the said Marquis, remain and be (subject nevertheless and charged with the said annual sum or yearly rent, and the said powers and remedies for recovering the same) to the use of Sir Thomas Tyrwhitt Jones and John Dent therein described, their executors, administrators, and assigns, for the term of three hundred years, to commence and be computed from the death of him the said Marquis, upon certain trusts thereby declared, for better securing the payment of the jointure on the days whereon the same was thereinbefore made payable.*

[70] This deed also was executed in England; and at the time of the execution thereof all the parties interested therein were domiciled and resided in England.

John Henry Marquis of Lansdowne died without issue on the 14th November, 1809, leaving the Appellant his widow; and upon his death Lord Henry Petty, now Marquis of Lansdowne, his half-brother, succeeded to and entered upon and took possession of all the said estates in Ireland, under the settlement of 1794, the net rents of which estates produced about £30,000 a year.

On the 26th day of October, 1813, the Appellant filed her bill of complaint in the Court of Chancery in Ireland against the said Henry Marquis of Lansdowne, William Earl of Wycombe, his eldest son, the Right Honourable Richard Lord Holland, and Benjamin Vaughan, Esq. Sir Thomas Tyrwhitt Jones, and John Dent, Esq. setting forth the deed of settlement, the appointment, and facts beforementioned, and stating (among other things) that, since the decease of the said John Henry Marquis of Lansdowne, four years of the said jointure of £3000 had become due to the Appellant under the said deed of appointment of the 20th day of February, 1809; and that all payments which the Appellant had hitherto been able to obtain on account of it amounted only to a sum of £4350; and further stating, that the said William Earl of Wycombe was tenant in tail, under the said deed of the 17th of May, 1794; and that the Appellant had frequently requested the said Henry Marquis of [71] Lansdowne to pay the arrears of her said jointure, which he had declined doing; and that the Appellant had requested the said Sir Thomas Tyrwhitt Jones and John Dent, to raise and pay the arrears of the said annuity; and charging that the said William Marquis of Lansdowne, and the said John Henry, late Marquis of Lansdowne, resided in England at the time of the execution of the said deed of the 17th of May, 1794, and had always resided, and then intended to reside there, and used the words lawful money of Great Britain where they occur in the deed of settlement in their strict technical meaning; and also charging that in and by the same deed, where mention is made of certain lands in the King's County, which were assigned to the then Marquis of Lansdowne, at a valuation made in Ireland, the amount of the said valuation is expressed to be money of Ireland, in contradistinction to money of Great Britain; and it was by the bill submitted, that, if there be any ambiguity on the face of the said deed, the same ought to receive a liberal construction in favour of the Appellant, and of the powers given to the said late Marquis, who was the owner of the said estates; and that the said William Marquis of Lansdowne and the said late Marquis must have contemplated that the widow of the said late Marquis would continue to reside in Great Britain, and therefore have intended that her jointure should be payable there, and should not be chargeable with the costs of remittance or other expenses attending the payment of it in Ireland; and that, had they in-

* The appointment also contains the usual power of entry and perception of rents in the event of the jointure being unpaid for twenty-one days.

tended to depart from the usage, [72] they would have expressed their intention so to do: and therefore praying, that the Appellant might be decreed entitled to the said jointure of three thousand pounds, as money is valued in Great Britain, and to be paid in London, according to the currency of that part of the said United Kingdom called England; and that the jointuring power created by the said deed of the 17th of May, 1794, might be decreed to be well executed by the late John Henry Marquis of Lansdowne, by the said deed of the 20th of February, 1809; and to that end, that it might be referred to one of the Masters of the said Court of Chancery in Ireland, to take an account of what was due to the Appellant upon the foot of her said jointure of £3000 yearly; and that the said Henry Marquis of Lansdowne might, by the decree of the same Court, be compelled to pay the same to the Appellant, when so ascertained; and that the said Sir Thomas Tyrwhitt Jones and John Dent might be compelled to aid and assist the Appellant in recovery of her just rights, according to such powers as they should have, or to permit the Appellant to proceed in their names, as she should be advised, indemnifying them against all costs; and that a receiver might be appointed to receive the rents, issues, and profits of the lands and premises in the said deed mentioned, or a competent part thereof, for payment of the Appellant's said jointure; and that, if necessary, the lands so subject to the Appellant's said jointure, or a competent part thereof, for the said term, might be sold for payment of the said arrears so due to the [73] Appellant; and that all necessary parties might join in making out a title to a purchaser.

The Respondent, Henry Marquis of Lansdowne, by his answer, admitted the marriage of the Appellant with the said John Henry late Marquis of Lansdowne, and the due execution of the settlement of 1794; and he believed that a deed appointing a rentcharge to the Appellant, by the said John Henry late Marquis of Lansdowne in 1809, had been executed in pursuance of the power given him by the said settlement of 1794, and that the same deeds were respectively to the purport stated in the Appellant's bill; and he further admitted, that, on the death of the late Marquis in 1809, he became possessed of the said settled estates, the net profits of which amounted to a considerable sum, and more than sufficient to answer the demand of the Appellant; and that applications had been made to him to pay in British money the charge claimed by the Appellant; and the said Respondent further admitted, that the said Earl of Wycombe, deceased, resided in England when the said deed of 1794 was executed, but denied that he had always resided there.

The Respondent, the Earl of Wycombe (the first tenant in tail of the said estates, under the settlement of 1794, expectant on the decease of his father, the said Henry Marquis of Lansdowne), being an infant by his answer submitted his rights to the protection of the Court.

The answers having been replied to, and issue being joined in the cause, witnesses were examined on behalf of the Appellant and Re-[74]spondents respectively, to prove the execution of the deeds, out of which the question arises, the marriage of the Appellant, and the domicile of the parties.

The cause came on to be heard before the Lord High Chancellor of Ireland, on the 27th of May, 1814, when his Lordship was pleased to order and direct, "That the cause should stand over, with liberty for the parties to proceed to obtain the opinion of the Court of Common Pleas in Ireland, on the question, whether the annuity or jointure so payable to the Appellant, were payable in English or Irish currency, and where the same was to be paid."

A case was accordingly prepared, and argued before the Court of Common Pleas in Michaelmas Term, 1814; and the judges of the said Court, during the same Term, certified their opinion as follows:

"That the jointure of the said Marchioness of Lansdowne, in the said case mentioned, being a rent charged on lands in Ireland, is payable in Irish currency; and that the same is payable in Ireland."

The cause came on to be heard before the Lord Chancellor, on the certificate of the judges of the Court of Common Pleas, upon the 8th day of December, 1814, when his Lordship made the following decree:

"That, according to the true intent and meaning, and the legal operation of the deed of the 17th of May, 1794, in the pleadings mentioned, the Appellant is entitled to be paid the rent-[75]charge of three thousand pounds per annum, therein men-

tioned, according to the currency of money in Ireland, and not according to the currency of money in Great Britain, and is entitled to be paid the said rentcharge in Ireland, and not elsewhere; and the Defendant having, by his answer, offered to pay the same, it was referred to the Master to take an account of what was due upon the foot of the said rentcharge, after all just allowances; and it was further ordered, that all parties should abide their own costs."

Against this decree, and the order upon the original hearing, the appeal was brought praying that the House would so far reverse the said decree, as to direct, "That, according to the true construction of the said deed of the 17th of May, 1794, the Appellant shall be paid her said jointure of *three thousand pounds yearly, according to the currency of money in England*, and not according to the currency of money in Ireland, and that she shall be paid the *same in England*."

For the Appellant—The Attorney General and Mr. Heald.

It is a general rule, supported by many authorities, that money is to be paid according to the currency of, and at the place where, the contract is entered into, unless the parties to the contract specially agree otherwise.

In this case the parties to the deed of 17th May, 1794, so far from specially agreeing otherwise, have thereby provided that the annuity shall [76] be paid in lawful money of Great Britain, which must mean English currency. That they had their attention directed to the difference between English and Irish currency, appears from some of the provisions of the deed.

The annuity being charged on lands in Ireland, does not alter the rule before stated: if so, the 14th Geo. III. c. 79,* would appear to be unnecessary. Contracts must be interposed according to the law of the place where they are executed.

John Henry Earl of Wycombe was a purchaser under the deed of 1794, for valuable consideration; and such deed is to be construed in the manner most beneficial to him.

The contract in this case, it must be presumed, had a reference to the country where the parties resided, and for that special reason the words "Great Britain" were introduced. The marriage was, in part, in consideration of the power, and the appointment was according to the power. The Court below seems to have considered the single circumstance that it was a rentcharge payable out of lands in Ireland. They disregarded the fact that the parties were resident in England, and [77] gave no effect to the words "of Great Britain."

The Lord Chancellor. Have you the case sent to the Court of Common Pleas in Ireland? If it states no more than the printed cases it was not worth sending. The deed of settlement speaks of sterling English money, and of money of Ireland, showing an advertence to the distinction. Whatever may be the effect of the *lex loci contractus*, or that the money is to be paid, as a rentcharge issuing out of lands, in cases where no provision is made by the deed, or instrument of contract: the rules of law arising out of those circumstances are inapplicable to a case where the instrument itself furnishes the means of interpretation. Upon looking at the various expressions of the deed, the first striking question which occurs is, whether *sterling English* and *lawful money of Great Britain* do not mean the same thing?

Lord Redesdale. The provision with respect to the £22,150, and the same for £3696, the surplus of the valued estate is clearly English money. There is one respecting the money payable out of the Buckinghamshire estate, which is not expressed to be either English or Irish.

For the Appellant. The contract may be, and apparently is, for lawful money of Great Britain payable in Ireland. By this construction the distinction taken in

* The act was passed to remove doubts which had arisen from the statute, 12 Anne, St. 2. c. 16, as to the legality of contracts made between parties resident in Great Britain, for monies lent at interest beyond 5 per cent. upon the security of lands, etc. in Ireland and the West Indies and the assignment of such securities. It enacts that such contracts and assignments made and executed in Great Britain shall be as valid as if executed in the place where the lands, etc. lie—provided the money lent does not exceed the value of the lands, etc. mortgaged—and it provides that no penalties under the statute of 12 Anne shall be incurred upon such contracts for interest at the rate established in the country where the mortgaged premises lie.

Phipps v. Lord Anglesea (5 Vin. Abr. Condition Q. b. 8. v. post, p. 88) is [78] avoided. The Lord Chancellor of Ireland was of opinion that the money ought to be paid in English currency, but thought himself bound by the certificate of the judges of the Common Pleas. No one of the sums to be paid under the settlement were of Irish currency. The only passage, in which the expression occurs, is in the valuation of lands, where nothing is expressed as to currency. In the provisions for younger children, and power to jointure wives resident in England, it is to be implied that the parties meant English money. In the absence of special provision, it might as well be argued, that the English money lent in England, upon the mortgage to M. is to be repaid in Irish currency. What will be said of the power to Lord H. Petty, which extends over English as well as Irish estates. That cannot be construed to mean Irish currency, and how lawful money of Great Britain can be so construed is difficult to conceive.

Lord Redesdale. There is no lawful money of Ireland; it is merely conventional. There is neither gold nor silver coin of legal currency—nothing but copper.

For the Appellant. The valuation of the lands having been made in Irish currency by Irish surveyors, was afterwards, for the purposes of the settlement, calculated in English currency: that fact appears by the deed itself.

For the Respondents—Mr. Horne and Mr. Abercrombie.

The question turns entirely on the power.

[79] Lord Redesdale. What is the difference between lawful money of Great Britain and sterling money? In the statute (12 Geo. III. c. 105, s. 1), under which the Lord Chancellor receives his salary, the amount is fixed in English money, which is called sterling: that amount is afterwards computed and expressed to be £10,833 6s. 8d. Irish currency. There is no such thing as Irish money: it is Irish currency.

For the Respondents. No distinction is to be taken between lawful money and sterling money. In the case of *Phipps v. Lord Anglesea*, the clause, providing the jointure for the wife, directed* that the payment should be *without abatement*, which words are omitted in the provision† as to portions for the daughters; and that part of the case was decided upon the ground that it was to be considered as a sum in gross, and not as a rent *issuing out of the lands*.‡

The question is not always decided by the place of contract. In *Robinson v. Bland* (2 Burr. Rep. 1077), where the question was upon a bill of exchange, a contract [80] of a transitory nature, the judges held, that it was demandable only in England, because the parties had a view to payment in England. In this case, it appears, from the very circumstance of limiting the power of charging to lands in Ireland, that the parties had a view of payment in Ireland, although they were resident in England. In *Wallis v. Brightwell* (2 P. W. 88), the testator demised his lands in Ireland to a trustee for a term of years, in trust, to pay to his wife, during her life, £80 a year out of the rents. A trust, to pay a sum out of rents, is materially different from a charge upon lands; and in that case there was, moreover, the specially noticed in the judgment, that the testator, upon leases of part of his Irish estates, had reserved rent to be paid in London tax-free, which was just sufficient to pay the annuities given by his will. In *Saunders v. Drake* (2 Atk. 165), the testator residing in Jamaica at the date of his will, but having friends in England as well as Jamaica, gave some legacies to be paid in sterling money; others he gave generally; and Lord Hardwicke decided that the general legacy was payable in the currency of Jamaica. No place of payment being specified in the deed giving the power, the default, if made, and the consequent remedy, could only be in Ireland. They might (and if that had been the intention, would) have provided that the money should be payable in England: not having done so, the case is left to the general operation of the law.

* This appears only by allegation, *arguendo*, of the counsel for the Defendants, in the case cited, who represent it to be "a rent to be paid at London without any deduction for exchange."—See 5 Vin. Abr. 209.

† The portions for the daughters were to be raised by a term vested in trustees for that purpose.

‡ But Parker, C. who decided the case, commences his judgment, by saying, "the portion ought to be paid here where the contract was made and the parties resided, and not in Ireland where the lands lie charged with the payment;" and he relies upon the intention of the parties.

[81] By the general rule of law (Co. Lit. 210 (b.) 211 (a)), an annual sum chargeable on lands is payable on the land, and in this respect differs from a sum in gross secured on land which is payable to the person, where no place of payment is expressly appointed. In this case the legal effect of the contract is, that the money which the parties to the deed had power to charge upon lands situate in Ireland only, is payable in Ireland, and in Ireland only. There is no personal obligation to pay, nor personal remedy to enforce payment; the power is to charge certain lands, situate in Ireland, with a rentcharge. The whole subject-matter is local by the very nature of the contract. The grantee of a rent charge (and the appointee of a rentcharge is as such grantee) is to demand it where he can find his remedy; that is to say, upon the land (Gillb. on Rents, 8vo. Irish edition). It was argued for the Appellant, that the rule of law is, that contracts are to be judged according to the law of the country where such contracts were made, and that this deed, having been executed in England, was to be construed accordingly; but that rule extends only to personal contracts, and is confined to contracts to be performed within the country where they were made. It is a rule as general and recognised (or an exception to the general rule before stated), that contracts entered into with an express view to the law of another country, and to be performed in another country, are to be judged of according to the law of that [82] country wherein they are to be performed. *Consuetudo, et statuta loci in quem est destinata solutio respicienda sunt.** In this sort of contract the parties contracting to settle or limit lands in England and Ireland, and giving the power in question to charge lands in Ireland only, must be implied to have contracted with a view to the law of that country where the lands lie, and upon which the contract was to be performed, and their contract ought to be construed accordingly. Such was the rule according to the civil law. "Verum tamen non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. Nam contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit." † —Lord Mansfield adopts the same distinction in *Robinson v. Bland*.‡ In delivering his judgment, he says, "The parties had a view to the laws of England. The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed;" and in reasoning on the [83] circumstances in that case, he observes, "Now here the payment is to be in England: it is an English security, and so intended by the parties," and adopts the reasoning of counsel—That Sir John Bland could never be called upon abroad for payment of this bill, till there had been a wilful default of payment in England. The bill was drawn by Sir John Bland, being in Paris, *upon himself in England*, payable ten days after sight." So in *Sir John Champant v. Lord Ranelagh* (Prec. Chan. 128). "A bond made in England was sent over to my Lord's correspondent in Ireland, *and the money to be paid there*, and it was not mentioned what interest should be paid, and the Lord Keeper was of opinion that it should carry *Irish* interest." Upon a careful review of all the cases, it will be found that whenever the law of the place of contract has been allowed to influence the construction of the instrument, there was nothing local in the terms of the contract as to its performance.

As to the argument raised upon the words "lawful money of Great Britain." British money is current in England; so is it current in Ireland; but not at the same rate. The same constitutional prerogative, which stamps its currency in England at one rate, ascertains its currency in Ireland also at another rate. Money, by the law of Ireland, ought not to be current at one rate, and payable at a different rate, respecting a contract to be there performed. That mixed money, does not import

* Sir John Davies' Reports, Case of mixed money, in the last resolution near the end. The passage quoted is from Budelius de re Nummaria, l. 2, c. 21, and it is there applied to contracts between merchants.

† Hub lib. i. tit. 3, n. 10. The passage quoted occurs in the title "De conflictu Legum," and is specially applied in that place to the subject of marriage contracts. Its general application seems to be borne out by the authority of the last resolution in the "Case of mixed moneys."

‡ 2 Burr. 1078.

English [84] currency, appears from "The case of mixed money;" * which has established the construction uniformly since given to these words in Ireland, as not denoting money according to *English currency*, but merely money of *English coinage*. In Ireland these words have a definite meaning.

In granting a power to create a rentcharge to a given amount, the parties cannot well be implied to have intended that a greater rentcharge might be created under the words used, than could be levied by distress on the lands, according to the law of the country where the lands lie: and it is clear law in Ireland, that under a distress and avowry for a rentcharge of £3000 lawful money of Great Britain, no more could be levied than £3000 of Irish currency, although the party might insist upon payment in money of the coinage of England. The common printed forms of bonds and other instruments used in Ireland are in these terms: and yet it never has been attempted to recover upon these instruments according to *English currency*; so well ascertained is the meaning of the words "lawful money of England." In truth, a different decision on these words would operate to improve considerably the situation of all obligees in Ireland, and to injure that of obligors, who have in all cases signed bonds for payment of lawful [85] money of Great Britain, upon the general understanding and hitherto received legal construction, that these words did not import the currency, but the coinage of the money.

This annuity being charged on Irish land, it must be intended to be Irish money: it could only be recovered by process in Ireland.

These parties certainly understood, and took the distinction between English and Irish money, as appears by the recital of the valuation of part of the lands; but in the clause in question the language is varied. The jointure is limited to £3000 lawful money of Great Britain; but there is no direct power to charge the estate with lawful money of Great Britain. The power is merely to charge; and the words tax-free, and without deduction, relate to the taxes of Ireland.

The Attorney General in reply. The attention of the parties having been called to the distinction, as appears by the valuation, what could they mean, by using the words lawful money of Great Britain, but to distinguish it from Irish currency?

The Lord Chancellor. How would they deal with a recital, that a man having advanced £12,000 sterling, it is provided that he shall receive £12,000? Would they contend he must receive so much less?

The Attorney General. That is precisely the case upon the mortgage to Munday, which is for £30,000. This is no question between landlord and tenant upon a distress for rent. If the power had been to charge dollars, no objection could be raised on the part of the tenant. Is the power given? That is the sole question.

[86] The Lord Chancellor. The power is clearly to charge an annuity of £3000 lawful money of Great Britain. If the donee had exceeded the power, the appointment would have been void at law—in equity it might have been good except for the excess. But what has a court of law to do with that question?

The Attorney General. It was not argued in Ireland that the appointment exceeded the power, which must have been the case if their construction is right.

The Lord Chancellor † It is difficult to imagine how this case found its way into a court of equity, except on the ground of calling upon the trustees to act. If the Appellant is entitled, as grantee of a rentcharge, she might have proceeded to enforce her legal remedy by distress. It is stated that the Lord Chancellor of Ireland, after the return of the certificate from the Common Pleas, retained an opinion contrary to that certificate, but made the decree according to it, from deference to the judges of the Common Pleas. In that surely there must be some mistake. For, although it is highly useful in legal questions to resort to the assistance of the courts of law, yet it must be well known to those experienced in the practice of courts of equity, that they are not bound to adopt the opinion of the courts of law to which

* Davies' Rep. *qua supra*. The case of "mixed moneys" is more favourable to the Respondent's argument than it is here represented. For, upon a contract to pay £100 sterling, lawful money of England, it was held in the Privy Council, upon the opinion of the judges, that a tender of mixed moneys was sufficient. See a short abstract of that case in a note at the end of this case.

† At the conclusion of the reply.

they send for advice. It has occurred to me to send the same case successively to the Courts of King's Bench and Common Pleas, and not to adopt the opinion (though highly to be respected) of either of those courts.

[87] If this were the case of a simple charge of £3000 on lands in Ireland, the place of contract, the domicile of the parties, the place appointed for payment, and other circumstances, might require consideration, and would furnish the ground for the decision of the case: but the instrument itself must, in this case, give the rule of decision,—a settlement making various arrangements, some like to the provision in question, others different from it. It was impossible that the Court of Common Pleas should have given a satisfactory opinion upon the question, if the case was sent nakedly to them without a statement of the deed. It will be proper that we should carefully inspect every part of the deed before we decide whether the judgment ought to be affirmed or reversed.

The Lord Chancellor. This is a question, whether, under an instrument purporting to be an appointment, according to a power, of an annuity of lawful money of Great Britain, the sum is to be paid in lawful money of England, at the rate of English or of Irish currency.

Before I state the instrument containing the power, I ought to observe, that, upon looking at the settlement, I perceive it was expedient and proper to raise this question in equity: because, by the deed of settlement, various terms of years were created for various purposes, and the remedy in a court of law might have been defeated, if those terms had been set up to obstruct such proceeding.

The Lord Chancellor of Ireland, it is said, was of opinion that the annuity was payable in English currency; but thought fit, nevertheless, to direct a case for the opinion of the Court of Common [88] Pleas, in which the question raised, was, whether the annuity or jointure was payable to the Appellant in English or Irish currency, and where payable. The Court, whose opinion was desired, certified, that the jointure being a rentcharge upon lands in Ireland was payable in Ireland, and in Irish currency. The reason for this opinion is to be collected only from the certificate, namely, that it is a charge upon lands in Ireland. We are not informed of any other reason. If that were the simple case, the matter is clear according to settled principles of law. But in this case the question is to be decided by the intention expressed in the deed of settlement. The meaning is to be collected from the words immediately applicable to the point, from the context, and from *all parts of the settlement*.

This is a power to charge the lands with a jointure of "lawful money of Great Britain." The appointment is made according to the authority, and in the words of the power. The question is whether these words can be said to mean Irish currency. In the naked case of a charge upon lands the law is clear and settled; but upon wills and instruments of marriage contract all the cases cited authorise a distinction. In such cases the intention of the person making the will, and of the parties to the contract, is to be collected from the different parts of the instrument. The case of *Phipps v. Earl of Anglesea* is to be found in three books (5 Vin. Abr. 209, part 8. 2 Eq. Ca. Abr. 220, part 1, 754, part 3. 1 P. W. 696), but is most fully reported in Viner's Abridgment. [89] According to that report, by a settlement made upon the marriage of the Earl of Anglesea with the daughter of the Countess of Dorchester, a term of five hundred years was created in trust to raise £12,000 for the portions of daughters. The parties to the settlement resided in England, and upon a bill filed in Chancery by a daughter, the sole issue of the marriage, and her husband, to have the portion, with the rest of her fortune settled, the first point raised in Court, was whether the £12,000 portion charged by means of the term of years upon lands in Ireland should be paid in England without any abatement or deduction for the exchange from Ireland to England. After hearing arguments, which, in many respects, were similar to those urged in the present case, the Chancellor of that day was of opinion that the portion ought to be paid where the contract was made and the parties resided, and not in Ireland where the lands lay charged with the payment, for that it was a sum in gross, and not a rent issuing out of land; that it was certainly the intention of the parties that the portion should be paid in England, and not to send the young lady into Ireland to get her portion. In that case, as the facts are stated in the report, it was a question simply upon a charge

of a sum of money for a portion upon estates in Ireland, there were no such words as *sterling*, or, as in this case, *lawful money of Great Britain*.*

[90] It is true, that, in *Phipps v. Lord Anglesea*, the distinction is taken in the judgment which was urged in this case at the bar, that there it was a sum in gross, and not a rent issuing out of land; but that seems to be in answer to that part of the argument in that case, which is founded on the different expressions of the settlement as to the jointure of the wife, and the portions of the daughters. As to the former, which is by name a rentcharge, it is provided that it shall be paid in London *without deduction for the exchange*; whereas, in the declaration of the trust of the term created for raising the portion these words are omitted, and it is only said in trust to raise £12,000. Upon this point of the argument the Court seems to have been of opinion, that, in the case of a rent-charge, the addition of such words might be necessary; but that the question as to a sum in gross, (which the portion in that case was considered to be) was to be decided on circumstances, and accordingly the decision rests, in substance, upon the domicile and the presumed intention of parties resident in England, that a portion secured for a daughter should be paid to her in England. That case decides nothing which can rule the present case; and although it may be inferred from that case that the Court thought, that, in the simple case of a rent charged upon lands in Ireland, it would be payable in Ireland, and in Irish currency, yet nothing [91] is to be concluded from the case as to what the judgment would have been in the case of a rent-charge of lawful money of Great Britain.

The case of *Saunders v. Drake* (2 Atk. 465), shows, that whatever the rule may be in the simple case of a rent-charge,—in a devise the construction must be according to the intention. In that case the testator being domiciled, and, making his will in Jamaica, gave, in the first place, certain legacies to be paid in *sterling money*, and immediately after two legacies are given by the will, without any direction that they should be paid in sterling money. The person who claimed one of the latter legacies filed a bill claiming payment of his legacy in English currency. Lord Hardwicke, in that case, was of opinion, that the residence of the person devising must decide the question as to the legacies given generally; but where directed to be paid in sterling money, they ought to be paid in the currency of England, although the testator resided in Jamaica. So, if the question now before us had occurred upon an Irish will, the rule established in *Saunders v. Drake* would authorise our deciding that a legacy, given in the words contained in this power, must be paid in the lawful money of Great Britain, that is, in the currency of England.

In *Hallis v. Brightwell* (1 P. W. 88), again, it appears, that intention is to furnish the rule of decision. There the testator living with his wife in England, by his will, made in England, devised his lands in Ireland to a trustee for five hundred years in trust, out of the rents and profits to pay £80 per annum to his wife for life. It was argued, in that case, [92] that no place being appointed for payment, and the fund being in Ireland, the annuity ought to be paid in Irish currency, or subject to the charge of remittance; but the Lord Chancellor decided, that the will being made in England, where all the parties to the contract resided, and this being a provision for a wife, it should be intended that the provision was estimated in the money of the country where the will was made. He added, that if one, by will made in England, gives a legacy of £80, it must be intended of English money, and it will be the same thing though charged on lands in Ireland. In that case, although the words are simply to pay out of rents, &c. £80, the intent presumed from domicile and other circumstances prevailed. Must we not, a

* It is singular, that, although (in Viner's report) nothing appears in the statement of the facts of the case, nor in the report of the judgment, of any specification as to the kind of money to be paid, but simply that £12,000 is to be raised; yet, in the argument for the defendant, where the language of the settlement is discussed, and the provisions as to the jointure and the portions are contrasted, this passage occurs: "*It is only said* (as to the term for raising the portions) *in trust to raise and pay out of the premises the sum of £12,000 of good and lawful money of England*, &c."

fortiori, where the words are to grant a rentcharge of £3000 lawful "money of Great Britain," presume a similar intent under similar circumstances?

So again, in *Pearson v. Garnett* (2 Bro. C. C. C. 38, 46, 226, Prec. in Chanc. 201, n.) Lord Kenyon said, he was tied down by the authorities; and held that unascertained or general legacies must be paid in the currency of the country where the will is made.

If this be the rule of law in the case of a legacy, where the party must claim under the voluntary benefaction of the testator, will it not, *a fortiori*, apply to a case where the party is a purchaser? In this case, it must be remembered, the appointment, under a power given by contract, is of a sum of £3000 a year, lawful money of Great Britain; and such sum must be paid in such lawful money, unless the instrument of contract, in [93] all its other parts, manifests a clear intention to the contrary. Now, without going through the provisions of the settlement, it is enough to say, there is not a page of it in which it does not appear that the annuity to be charged is payable in lawful money of Great Britain.

True, it is a rentcharge, but upon that the only question will be what is the quantum of the rentcharge? How it is reserved is immaterial, whether in guineas, sovereigns, or dollars. It need not be in money at all. If it had been in loaves or oakes, the principle of decision would have been the same. There are throughout the settlement charges on English as well as Irish estates. Can it be said, as to any of these charges, that a different sum is to be paid to the person entitled, according to the site of the estates out of which the money is drawn? In those instances, where Irish estates only are charged, the situation and conduct of the parties, and the language of the instrument of contract, show that they meant English currency. In the schedule annexed to the settlement, the Irish estates are valued according to Irish currency, and then it is reduced to English. If the parties have, in the schedule, recognised the distinction, and shown an intention to compute in English currency, how can I understand that they make no distinction, or have a different meaning in the body of the deed? Even in the body of the deed the distinction is taken and acted upon with respect to the compensation given to the Marquis of Lansdowne.

The question, looking at the whole deed, is whether the power is duly exercised by granting a [94] rentcharge of £3000 of lawful money of Great Britain. If the power gave him authority to do so it is sufficient.

It is said to be the practice in Ireland, (but I never heard of a decision to the effect,) that a bond given for £3000 lawful money of Great Britain could be discharged by paying £3000 of Irish currency.

In this case the decision must be grounded upon the construction of the instrument before us.

There is a point remaining to be noticed, which did not form part of the argument at the bar of the House, although it is included in the certificate, and adopted by the Court of Chancery: namely, the question, whether the annuity is to be paid in England or in Ireland. Upon this, it is to be observed, that the power is to charge Irish lands with so much lawful money of Great Britain. It is not, however, such a power, that it is necessarily to be inferred that the money must be paid in England. The appointment directs it to be paid in Lincoln's Inn Hall; but we can only decide that the power is well executed, so far as it charges on the lands a sum of £3000 lawful money of Great Britain. As to the cost of exchange, the appointee may be liable to that deduction. I found my opinion upon the short reason, that, by the appointment, £3000 of lawful money of Great Britain is given according to the power, and that such a provision, from the expressions and the whole frame of the contract, seems to have been contemplated by the parties.

Lord Redesdale. There is no doubt, that, according to the intention of the parties, and the legal operation of the appointment made under [95] the power, this rentcharge is to be paid in lawful money of Great Britain, and at the rate of English currency.

No part of the deed of settlement furnishes a ground to infer that the money to be charged should be paid in Irish currency. As to exchange the case is different. The currency is always the same: the rate of exchange depends on circumstances, which may cause a gain or loss upon payment in either country. If the proceeding

had been by distress, a tender of 3000 sovereigns would have put an end to the distress, and the tender must have been where the proceedings took place. The right of demand and payment was certainly in Ireland. In that part of the appointment, which directs payment in Lincoln's Inn Hall, the donee has exceeded his power. The proceeding in equity, and not by distress, was necessary in this case, because the term of five hundred years might have been interposed and defeated the distress; but a court of equity could only decree payment of the sum charged into court, or to the individual, suing by his agent, in lawful money of Great Britain. The court could not decree that 3000 sovereigns should be sent to the claimant in England. There is, therefore, no doubt that the money is payable in Ireland. The question then is, whether the money is payable in Irish currency which is not expressed, or in lawful money of Great Britain which is expressed in the deed? In all cases of a similar description upon legacies, where the word "sterling," or some word equivalent has been used, the money has been held payable in English cur-[96]-rency, even although the testator was resident out of England. In some particular cases* it has been inferred, from circumstances, that the money was payable not only in English currency but also in England: but there is no ground for such inference here. The decree itself drops the words "lawful money of Great Britain," which was a necessary omission to make it consistent. To have said that £3000 of lawful money of Great Britain should be paid in the same sum of lawful currency of Ireland, would have been contradictory, for the one would exceed the other by eight and a half per cent.

The decree orders that all parties shall abide their own costs, which is contrary to the provision of the deed; but no alteration can be made here in that respect, as it is not made the subject of appeal.

Lord Lauderdale. If lawful money of England is paid in Dublin, the only deduction to be incurred would be the price of the purchase of a bill, or the cost of conveyance. There is a great difference between paying a sum in English money in Dublin, and paying the same sum in Dublin, according to the difference of exchange, in which the value of the Irish currency is computed.

The Lord Chancellor. Upon looking at the cases, it appears that the appeal extends to the question of costs; and as the term given, according to the power to secure the annuity, provides for the payment of all "costs and charges relating thereto," we think the reversal ought to be with costs. As to the other points it will be sufficient to reverse the decree on further directions. The reference to [97] the Court of Common Pleas was according to the course of a court of equity, and ought not to be impeached.

Lord Redesdale. Care should be taken, in framing the cases, to show what are the points of appeal. No one could have imagined, from reading these printed cases, that the reference to the Common Pleas was a ground of appeal.

July 3, 1820.—Ordered and adjudged, that the decree of the 8th of December, 1814, so far as it orders, adjudges, and declares, that according to the true intent and meaning, and the legal operation of the deed of the 17th of May, 1791, in the pleadings mentioned, the Appellant, is, and she was thereby decreed, intitled to be paid the rent charge of £3000 per annum therein mentioned, according to the currency of money in Ireland, and not according to the currency of money in Great Britain, and so far as it orders, adjudges and decrees, that, the Respondent having offered to pay the said rent charge accordingly, it should be referred to one of the masters of the said court of chancery, to take an account of what is due on the foot of the said rent charge after all just allowances, and that all parties should abide their own costs; be and the same decree is hereby so far reversed. And it is declared, that according to the true intent and meaning, and the legal operation of the said deed of the 17th of May, 1791, the rent charge therein mentioned, of £3000 of lawful money of Great Britain, is to be deemed a rent charge of £3000 of lawful money of Great Britain, and not a rent charge of £3000, according to the currency of money in Ireland, and that according to the express words of the said deed of the 17th of May, 1791, the term of years thereby

* *Phipps v. Lord Anglesca, Wallis v. Brightwell, qua supra.*

authorised to be created for better securing the payment of such rent charge, was to be made defeasible only on full payment of such rent charge, and all arrears thereof, and all costs and charges relating thereto: and it is further ordered and adjudged, that the Appellant is entitled under the deed of the 20th of February, 1809, to an annuity, or yearly rent charge of £3000 of lawful money of Great Britain, to be issuing out of and chargeable on the lands in the said deed mentioned, and to all costs and charges sustained by non-payment thereof, and the Respondent having offered to pay the said rent charge as a rent charge of £3000 according to the currency of money in Ireland, and not as a rent charge of £3000 of lawful money of Great [98] Britain, it is further ordered, that it be referred to the master to whom the said cause stands referred, to take an account of what is due to the Appellant, on the foot of the said rent charge, as a rent charge of £3000 of lawful money of Great Britain, after all just allowances, and of all costs and charges sustained by non-payment thereof, and particularly so much of the costs of this suit as have been occasioned by non-payment of the said rent charge: And it is further ordered and adjudged, that so much of the said decree as declares that the Appellant is entitled to be paid the rent charge to which she is entitled, in Ireland, and not elsewhere, be affirmed, and that as to so much of the costs of this suit as have been occasioned by her claim to be paid the said rent charge in England, the parties do bear their own costs.

In the case of mixed monies, as reported by Sir John Davies, the contract was by bond, upon condition to pay at a future day £100 *sterling*, current and lawful money of *England*, at the tomb of Earl Strongbow, in Christ Church, Dublin. The bond was executed in April, 13o Eliz. upon a purchase of wares, by a merchant of Drogheda, from one Gilbert, of London, and at a time when *the pure coin of England* was current in Ireland. Before the day of payment specified in the bond, Queen Elizabeth, in order to pay the troops of the royal army which had been many years employed in Ireland, in the suppression of Tyrone's rebellion, caused a great quantity of mixed monies, with the stamp of the Arms of the Crown, and the inscription of her Royal style, to be coined in the Tower of London, and transmitted to Ireland, and a proclamation was issued, bearing date the 24th of May, 43o Eliz. declaring those mixed monies to be lawful and current money in *the realm of Ireland*, and commanding all her subjects and others using traffic and commerce in *that kingdom* to receive those monies in payment of debts, etc. Brett, the obligor, tendered the mixed monies in payment, and whether the tender was sufficient to save the forfeiture of the bond, was the question, which was brought before the *privy council*, where Gilbert, being a merchant of London, exhibited a petition against Brett, for the speedy recovery of his debt. Upon advice of the judges, the council resolved that the tender was sufficient.

See 1 Eq. Ca. C. 36 (E). Under that title, pl. 2, the correctness of the Report in 2 Vernon 395, of the case of *Lord Rinchagh v. Sir J. Champant*, is doubted, and in Prec. in Ch. 108, where the same case is reported: it is said that Irish interest was allowed. See the Authorities on this head, collected in Mr. Raithby's Edition of Vernon, ii. 395.

[99]

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

THOMAS LIDWILL, Esq.—*Appellant*; WILLIAM HOLLAND P.—*Trustee and Executor of THOMAS LIDWILL, Esq. deceased, and others,—Respondents* [17 May, 1820].

[Mews' Dig. x. 1572. See Sug. *Law of Prop.* pp. 463, 464. On the point as to evidence in printed cases (2 Bli. p. 124, note *) see *Annual Practice*, vol. ii. Part vii. *Directions for Agents*, rr. 23 *et seq*; *Lansdowne v. Lansdowne*, sup. 2 Bli. at p. 97; *Stacpoole v. Stacpoole* 1816, 4 Dow, at p. 222; *Dillon v. Parker* 1833, 1 Cl. and F. at p. 304.]

By a marriage settlement, containing the usual limitations, the husband, having

a life estate in reversion, expectant upon the death of his father, was empowered when in possession under the limitations of the settlement, to revoke, etc. as to so much and such part of the premises conveyed, "as shall be then in possession of any one or more tenants, by virtue of any one or more lease or leases, whereon a rent or rents, not exceeding £300 by the year in the whole, shall be reserved, etc. so as there shall not, at the time of such revocation, be less than twenty years, or three lives, unexpired of such lease or leases." The clause of the settlement conferring the power concluded, with a declaration, that it was the true intent and meaning of the parties that the husband should, at any time during his life, after he should come into, and be in the actual possession of the premises (settled), have absolute power and dominion over so much thereof as should be of the clear yearly value of £300 sterling, and be at full liberty to dispose of the same in such manner, and to such uses and purposes, as he should think proper.

The husband (donee of the power), after the death of his father, when he was in possession under the trusts of the settlement, by a deed of revocation, purporting to be an execution of the power, and reciting that certain lands therein specified then produced a clear yearly rent of £3000 or thereabouts, revoked the uses of the settlement as to those lands, and appointed the same in trust for him (the donee), his heirs, and assigns. Afterwards the donee died, indebted to an amount exceeding the value of the lands so appointed, and having no other estate or effects. By his will duly attested, and reciting his title and power to dispose of the lands specified in the deed of revocation and appointment, he devised to trustees his right and interest therein, upon trust, to sell the same, and out of the purchase money to pay his debts, etc. The lands [100] revoked, appointed, and devised, except a very small part, to the value of £8 a year, were not (as recited in the deed of revocation) under lease at the time of the appointment by that deed, nor at the date of the will; but, in a suit instituted on behalf of creditors and legatees, to carry the trusts of the will into execution, it was found and reported by the officer of the Court that the lands so appointed and devised were of the value of £300 a year. By the decree in that suit the will was established, and the revocation and appointment held valid; and, upon appeal to the House of Lords against the decree, it was held that the power was rightly applied to the subject, and that the appointment was well executed.

By indentures of lease and release, dated 13th and 14th January, 1771, (being the settlement executed previous to the marriage of Thomas Lidwill the younger, and E. J. O'Grady) certain lands held upon leases for lives, with covenant for perpetual renewal, the property of Thomas Lidwill, the elder, for life; remainder to T. L. the younger, for life; remainder to his sons, in tail male; remainder to M. L. (the Appellant's father) for life; remainder to the sons successively of M. L. in tail male, etc.

By the indenture of release, power was given to T. L. the younger, and the other tenants for life in remainder after him, when in possession, to demise or let all or any part of the premises, for any term not exceeding three lives, or thirty-one years in possession, and not in reversion, at the best improved rent, without fine.*

[101] The release also contained a power of revocation, by which it was provided that T. L. the younger, after he should be in possession of the premises, might, by any writing under his hand and seal, attested by two witnesses, or by his will attested by three witnesses, revoke, alter, or determine, all or any, the use and uses, estate and estates before limited, "as to so much and such part of the premises as shall be then in possession of any one or more tenant or tenants, by virtue of any one or more lease or leases, whereon a rent or rents not exceeding £300 by the year, in the whole, shall be reserved and payable during the continuance of such lease or leases, so as there shall not at the time of such revocation be less than twenty years

* A power of leasing as to part of the lands in settlement, was also given to Thomas Lidwill the elder. But the original deed of settlement was not produced upon the hearing of the appeal, nor was the power set forth in the printed papers upon this subject. See the Censure of the Lord Chancellor, p. 121.

or three lives unexpired of such lease or leases; and that from and immediately after the execution of such revocation, Standish Grady and Richard Lalor, (trustees in the settlement) and the survivor, etc. shall stand seized of such part of the premises, concerning which such revocation shall be executed for the use of T. L. the younger, his heirs, and assigns, and that he and they shall and may hold and enjoy the same, and receive to his and their own use the rents, etc. clear of the rent reserved out of the premises, or any of the uses, etc. before expressed. It being the true intent and meaning of these presents, and of the parties hereunto, that the said Thomas Lidwill the younger, shall at any time during his life, after he shall come into, and be in the actual possession of the said hereby granted and released [102] premises, have an absolute power and dominion over so much thereof as shall be of the clear yearly value of £300 sterling, and be at full liberty to dispose of the same in such manner, and to such uses and purposes as he shall think proper."

Thomas Lidwill the elder died in November, 1782, whereupon Thomas Lidwill the younger became seized of the lands of Clonmore, etc. under the settlement of the 14th January, 1774.

By indenture dated the 20th December, 1782, signed, sealed, and delivered, by Thomas Lidwill the younger, attested as by the deed of settlement required, and made between Thomas Lidwill the younger of the one part, and Standish Grady and Richard Lalor of the other part, reciting the marriage settlement and the power of revocation therein contained, and that the lands of Coologenafrian or Graffin, containing 300 acres or thereabouts, with the bog and common thereto belonging, and part of the lands of Clekile, containing about 41 acres, with 14 acres of bog, *then produced a clear yearly rent of £300 or thereabouts*; and were part and parcel of the lands mentioned in the marriage settlement: Thomas Lidwill, in execution of the power of revocation, and of all and every other power and authority in him being or him thereunto enabling, for the purpose of revoking, altering, making void, and changing all and every the use and uses, trusts and limitations, in the deed contained, so far as the same related to the £300 a year, did declare, order, direct, limit, [103] and appoint, that Standish Grady and Richard Lalor, and the survivor of them, and the heirs and assigns of such survivor, should stand, and from thenceforth be seized of that part of the lands in the settlement mentioned, called Coologenafrian or Graffin, containing 300 acres or thereabouts, with the bog and common thereto belonging; and that part of the lands of Clekile, containing about 41 acres, with 14 acres of bog, together with all and every their rights, members, appendances, and appurtenances thereto, or to said lands of Mucklonemore, otherwise Clonmore, Coologenafrian, and Coologenvodeale, belonging or in any wise appertaining.

To hold to the only proper use, behoof, and benefit of the said Thomas Lidwill, his heirs, and assigns, for ever; and to, for, and upon no other use or uses, trust, intent, or purpose whatsoever, any thing therein, or in the marriage settlement contained, to the contrary in any wise notwithstanding. It being thereby declared to be the true intent and meaning of the said deed of revocation, and of the parties thereto, to carry into execution the said power of revocation as fully and effectually as in them lay, according to the true intent and meaning of the said deed, and of the parties thereto, so as that Thomas Lidwill, his heirs, or assigns, or Standish Grady and Richard Lalor, and the survivor of them, and the heirs of such survivor, in trust for Thomas Lidwill should, from the day of the date of the deed of revocation become, and then were actually seized and possessed of the revoked lands, to the only [104] proper use, behoof, and benefit of said Thomas Lidwill, his heirs and assigns for ever; and it was thereby agreed that it should and might be lawful for Thomas Lidwill, his heirs and assigns for ever, thereafter, to have, hold, and enjoy the revoked lands and premises with the appurtenances; and to have, receive, and take to, and for his and their own use and benefit, the yearly rents, issues, and profits thereof, separately and apart, and free and cleared, and absolutely discharged from the rent payable out of the lands of Clonmore to the head landlord, by virtue of the original lease, or renewal or renewals thereof, to be thereafter had by virtue of the covenant of renewal in the original lease; and of and from the payment of all and every, or any part whatsoever of such renewal fine or fines which then were, or thereafter might become payable by virtue of the original lease or

renewals to be thereafter had thereof, and freed, acquitted, exonerated, and discharged of and from all or any and every of the use and uses, estate, trusts, charges, and limitations contained in the marriage settlement; and from all manner of judgments, mortgages, or incumbrances whatsoever, which could or might affect the lands.

On the 16th June, 1809, Thomas Lidwill the younger died, without issue male, having no other property but in the lands, subject to the revocation, and indebted to several persons, leaving his widow, Elizabeth Julia, and the Respondent, Mary Grady, his only child, and heiress at law. By his will, dated on the 13th of June, 1809, [105] and duly executed and attested in the manner required by law for devising freehold estates, reciting, that he was entitled to 300 acres of the lands of Clonmore or Graffin, under and by virtue of his marriage settlement, and to dispose thereof as he should think proper; he devised and bequeathed all his right, title, and interest in and to the said 300 acres of the said lands of Clonmore or Graffin, and all other his estates of what nature or kind soever which he should die seized possessed of, or entitled to at the time of his decease, unto the Respondents, John Maherg and William Holland P. and the survivor of them, and his heirs, executors, administrators, and assigns in trust, to sell and dispose thereof, and out of the monies arising from such sale, to pay all his just debts, funeral expenses, and the several legacies therein mentioned, and, among others, a sum of £2500 which he bequeathed to the Respondent, Mary Grady's children, and thereof appointed the Respondent, Mary, residuary legatee, and William Holland P. and John Maherg his executors.

William Holland P. alone proved the will in the proper ecclesiastical court in Ireland; and on 5th January, 1810, being trustee and executor, and also a judgment creditor of T. L. filed his bill in the Court of Exchequer in Ireland against the Appellant, (who had become intitled as next in succession, under the limitations of the deed of settlement,) and others, stating the indentures of 14th January, 1771, the power of revocation therein contained, the deed of revocation of the 20th December, 1782, and also the will of Thomas [106] Lidwill the younger; and charging that Thomas Lidwill, at the time of his death, owed several sums of money by judgments and otherwise; and that he bequeathed the several legacies therein mentioned, to the persons therein named, and insisted that the deed of the 20th of December, 1782, (which was not then in the possession of William Holland P.—) was a due execution of the power of revocation, and that even if the same had not existed, the will was in itself a sufficient execution of the power, and that, if defective, the Court would set it right; and praying that the Defendants might set forth what estate or interest they claimed in the lands revoked, and that the trusts of the will might be carried into execution; and that it might be declared that the power of revocation had been well executed by Thomas Lidwill; and that accordingly the revoked lands might be sold by the decree of the Court for the purposes mentioned in the will; and that in the mean time, until such decree should be obtained, a receiver should be appointed to receive the rents, and that an account might be taken of Thomas Lidwill's personal estate, and of his debts, legacies, and funeral expenses; and that, the marriage settlement and deed of revocation might be lodged in Court.

The Defendants having filed their answers to the bill, and issue being joined, witnesses were examined, and publication of their depositions having passed, the cause came on to be heard on the 13th of May, 1813, on pleadings and proofs, when the Court decreed, that the trusts of the will of Thomas Lidwill, deceased, in the [107] pleadings mentioned, should be carried into execution, and that the proper officer should take an account of his real estates, and the rents, issues, and profits thereof, into whose hands the same came, and how applied; and also an account of his personal estate, and the nature and value thereof, into whose hand the same came, and how applied, and of his debts, legacies, and funeral expenses, and of all charges and incumbrances affecting his said real and freehold estates, and the nature, priority, and amount thereof, and what was due thereon respectively, and whether any and which of them had been paid, and out of what fund: the officer was also directed to inquire and report, whether, on 20th December, 1782, the lands of Coologenafrian or Graffin, containing 300 acres, with the bog and common thereunto belonging; and also the said part of the lands of Clekile, containing about 11 acres, together with about 14 acres of bog thereunto belonging, comprised in the deed of 20th

December, 1782, in the pleadings mentioned, or any and of which of them, or any and what part thereof were in the possession of a tenant or tenants having, at the time of the date of said deed of 20th December, 1782, a term or terms of three lives, or twenty years, then to run of their lease or leases; * and if he should find that the entire of the lands *were not in the possession of such tenant or tenants* at the time (when the deed of revocation was executed), [108] that then he should *state the clear yearly value of the lands at that time, and how much and what parts thereof were of the clear yearly value of £300 on the 20th December, 1782*: and if the officer should find that any part thereof was, at that time, in the possession of such tenant or tenants as aforesaid, then he was directed for so much to take the reserved rents as the value: and that the officer should also inquire and report, whether any and what other part of the lands comprised in the settlement of the 14th January, 1774, were in lease to a tenant or tenants having, on the 20th December, 1782, three lives, or twenty years unexpired of such lease or leases.

The Respondent, William Holland P.—the Plaintiff, on 27th December, 1813, filed his charge under said decree, and the Appellant, on the 28th of January, 1814, filed his charge and discharge to Plaintiffs said charge; and among other things charged and contended before the officer, that he was entitled to be repaid as a creditor of Thomas Lidwill, the younger, certain sums in his said charge mentioned, out of the real freehold and personal estate of Thomas Lidwill: and further charged that the whole of the lands in the deed of revocation of the 20th of December, 1782, were then unset and out of lease, and that no part thereof was in possession of a tenant or tenants, having, on the 20th of December, 1782, a term or terms of three lives or twenty years then to run: and that parts of the lands comprised in the marriage settlement of 14th January, 1774, and distinct from the lands comprised in the deed of [109] revocation of the 20th of December, 1782, were in lease to tenants having, on the 20th of December, 1782, three lives or twenty years unexpired of such lease or leases.

The Appellant also insisted, that the lands comprised in the deed of revocation exceeded the clear yearly value of £300 on the 20th December, 1782, and contended before the officer, that those lands were of considerably greater value at that time.

On the 3rd of November, 1815, the officer reported (among other things) that Thomas Lidwill, deceased, in the pleadings mentioned, died seized of a real estate in the lands of Coologenafrian or Graffin, and also in part of the lands of Clekile, with the bogs and common thereto belonging, comprised in the deed of the 20th of December, 1782, and that Thomas Lidwill was not at the time of his decease seized of any other real or freehold estate.

The officer also found that Thomas Lidwill, by his will, dated 13th June, 1809, charged all and singular his real estates with the payment of his debts and legacies (in the report mentioned), and directed his trustees, therein named, to sell the same for payment thereof; and that Thomas Lidwill was indebted, at the time of his decease, to several persons therein particularly named in the several sums therein mentioned, amounting, in the whole, to the sum of £7512 17s. 4d., and that the debts and legacies were charges and incumbrances affecting the real estate of which Thomas Lidwill died seized.

He further found, that there was one tenant [110] who occupied a part of the lands of Coologenafrian or Graffin, on the 20th of December, 1782, of whose lease a term of 23½ years was then unexpired, at the yearly rent of £8, but did not find that there was any other tenant or tenants on the 20th of December, 1782, in possession of any part of the lands of Coologenafrian or Graffin, or of the part of Clekile, mentioned in the deed of the 20th of December, 1782, under any lease thereof, of which a term of three lives or twenty years was then to run.

He also found, that, on the 20th December, 1782, the part of the lands under lease were of the yearly value of £8, taking the same at the reserved rent, and that the remainder of the lands of Coologenafrian or Graffin, and the lands of Clekile, and the bogs and common thereto belonging, in the said deed of revocation mentioned, were, on the 20th day of December, 1782, of the yearly value of £292 (both said sums making

* Against this part of the decree no objection, in any shape, appears to have been made.

together the yearly value of £300) and no more, and that no further or other part of the lands of Mucklinimore, otherwise Clounmore, comprised in the marriage settlement of the 14th of January, 1771, were, on the 20th day of December, 1782, leased or demised to a tenant or tenants having, on the last-mentioned day, a term for three lives, or twenty years, unexpired of their said lease or leases.

Thomas Lidwill, the Appellant, on the 9th of November, 1815, filed four exceptions* to the officer's report, because he had not reported cer-[111]-tain claims of the Appellant, as incumbrances affecting the revoked lands.

On 17th February, 1816, the cause came on to be heard on the report, exceptions, and merits, when the Court ordered, that the first and fourth exceptions should be over-ruled, without prejudice to any suit then depending, or which might thereafter be instituted as to the matter thereof, and that the second and third exceptions should be also over-ruled, and the report confirmed; and that the defendant (Appellant) should in one kalendar month, to be computed from the date thereof, bring in and lodge in the Bank of Ireland, to the credit of the cause, with the privy of the accountant general of the Court, the sum of £1303 2s. 5d., being the balance of the rents, issues, and profits of the revoked lands and premises remaining in the (Appellant's) hands; and that the register should tot up the interest of the several sums in the decree particularly mentioned, due to the several creditors and legatees therein named; and that the Defendants, or such of them as ought so to do, should, in three kalendar months, to be computed from the date of the decree, pay to said William Holland P., and to the several other creditors and legatees therein named, the several sums therein mentioned, with interest from that day until paid, with costs to the persons therein named; or, in default thereof, that the chief remembrancer of the Court, or his deputy, should set up and sell by public sale, to the highest and fairest bidder, the said revoked [112] lands and premises in the decree particularly mentioned, or a competent part thereof; and that out of the monies arising by such sale, the Plaintiff, William Holland, P. and the several other creditors and legatees therein named, should be paid the respective sums therein mentioned due to them, and that the remainder (if any) of the money arising by such sale, should be disposed of as the Court should thereafter think fit; and that all proper and necessary parties should join with said chief remembrancer, or his deputy, in executing proper deeds of conveyance to such person or persons as should be declared the purchaser or purchasers of the lands and premises, or such parts thereof as should be sold; and that either party should be at liberty to apply to the Court in the mean time for such further and other directions as might be necessary; and that the other Respondents should recover their costs expended by them, in the cause, out of the money arising by such sale; and that the Plaintiff, W. Holland, might accordingly make up and enrol the decree, with costs as aforesaid, for the performance whereof, the process of the Court was, from time to time, to issue as in such cases usual.

The several sums so decreed due to the creditors of Thomas Lidwill, the younger, amounted to £7512 17s. 4d., and to his legatees £4824, and Plaintiffs taxed costs, to £470 0s. 11d., making, in all, £12,806 18s. 3d., exclusive of Respondent Grady's and the other parties' costs, which amounted to a considerable sum.

[113] On the 5th of June, 1816, the lands were put up to sale by public auction, pursuant to the decree: the Respondent, Henry Grove Grady, was declared the highest bidder at a sum of £6000: the sale was confirmed, and out of purchase money advanced by the Respondent, Henry Grove Grady, the creditors and legatees of Thomas Lidwill the younger were satisfied.

This appeal was presented against the decrees of the Court of Exchequer, by the remainder-man next in succession, under the limitations of the settlement upon the demise of T. L. the donee of the power.

For the Appellants—Mr. Hart and Mr. Phillimore.

Whether the power to revoke the uses of the settlement by the said Thomas Lidwill the younger be considered (as intended to be executed by him) either by the deed of revocation of the 20th day of December 1782, or by his will; such executions of the power were both defective (except as to a very small part of the lands in question), since a power can only be regarded as duly executed, when all the conditions and circumstances required by the deed or instrument creating it are complied with.

* The matter of these exceptions forms no part of the present appeal.

An express condition is explicitly stated in the deed of settlement, creating the power by which Thomas Lidwill the younger is restricted, in his exercise of the power, "to so much and such part only of the lands in question, as should be then in the possession of any one or more tenant or tenants, by virtue of any one or [114] more lease or leases, wherein a rent or rents, not exceeding three hundred pounds by the year in the whole, should be reserved, and made payable during the continuance of such lease or leases, and so as there should not, at the time of such revocation, be less than twenty years, or three lives, unexpired of such lease or leases:" which restriction must be considered as in the nature of a condition precedent, and any execution of the power, in which this restriction or condition is not attended to or complied with, must consequently be regarded as void and inoperative.

The condition annexed to the execution of the power, requiring that the lands over which it should be exercised should be held for a term not less than three lives, or twenty years, at the time of the execution of the power, was not introduced into the settlement without due consideration or a sufficient reason. One object of it was to relieve the remainder-men from the difficulty, at a future and possibly a remote period, of showing the value of the lands at the time of the execution of the power,—a difficulty which would occur if the lands were either actually out of lease, or held for a term nearly expired, a difficulty which the Appellant has actually experienced in this cause. It was also intended to guard against a fraudulent execution of the power, by first letting the lands at low rates for a short term, and then executing the power of revocation. It was considered by the parties to the settlement containing the power, that leases for three lives, or of which twenty years were unexpired, must be supposed to have been granted under the leasing power, and con-[115]sequently at the best rent, and, therefore, that the rent reserved in such leases would be a fair criterion of value.

Neither by the deed of revocation of the 20th day of December, 1782, nor by the last will of Thomas Lidwill the younger, is the restriction or condition annexed to the power strictly complied with, save only as to a very small portion of the lands in question.

If the intended execution of the power by the deed of revocation of the 20th day of December, 1782, be duly considered, it will be found defective or fraudulent, since there is in that deed an express but false recital, stating that the lands in question were then actually leased to solvent tenants, who had more than twenty years or three lives then to run and unexpired of their leases, and that the lands produced a profit rent of the clear yearly value of £300 or thereabouts, (thus explicitly admitting and recognising, on the part of Thomas Lidwill the younger, the necessity of a full compliance with the restriction or condition annexed to the power in that respect;) whereas it has been clearly proved and reported by the officer, to whom that matter was referred, that the recital was wholly false or erroneous, (except as to a very small part of the lands in question;) since it was found by the officer, that at the time when the said deed of revocation was executed by Thomas Lidwill the younger, a very small part only of the lands in question was actually let agreeably to the power, and that no further or other part of the lands was then in lease.

[116] If it be contended that the will of Thomas Lidwill the younger was an execution of the power of revocation, it will be found liable to the same objection on account of the non-compliance with the condition or restriction annexed to the power, the lands in question not being let agreeably to that condition, for three lives, or twenty years, at the time of the execution of Thomas Lidwill's will, or of his death; and such execution by will must also, for that reason, be regarded as wholly void and inoperative; the term of twenty-three and a half years of the part of the lands, which was, at the time of executing the deed of 1782, in lease, according to the terms of the power, having expired, and that part of the lands not being, at the execution of the will, actually let in the manner required by the deed creating the power. The will recites a title to the 300 acres: the power is to appoint land of the value of £300. The will, therefore, is merely an appointment of 300 acres, which he was not empowered to appoint; and Thomas Lidwill the younger must be considered as having been fully aware of the necessity of all the lands being so let, in order to render any execution of the power valid and effectual, because he had previously recognised and fully admitted the necessity of such a compliance with the requisitions of the power.

by the specific introduction of the recital or statement to the effect before mentioned, in the deed of revocation of the 20th day of December, 1782.

The execution of the power of revocation, by the deed of revocation of the 20th day of Decem-[117]ber, 1782, being thus defective, can be considered as an effectual execution of the power, so far only as relates to that part of the lands in question, which was found by the officer, to whom the cause was referred, to be actually let agreeably to the power, at the time of the execution of the deed of revocation.

The will of Thomas Lidwill the younger cannot be considered an effectual execution of the power, with respect to any part of the lands, because the term in that part of the lands leased in the year 1782, had then expired. Both these executions of the power must be considered as defective, and consequently void and inoperative as to the lands in question, so far as they were not under lease, according to the requisition of the power. The Appellant is clearly entitled as immediate tenant in tail in possession, under the uses of the settlement, to the lands and premises of Coologenafrin or Graffin, and the part of Clekile in the pleadings mentioned, together with the rents and profits which have accrued due thereon, from the time of the decease of Thomas Lidwill the younger.

If this were a case of mere informality in the execution of a power, the defect might be supplied in a court of equity in favour of particular objects; but the record makes no such case. The only question presented is, whether the power was legally executed. Error or mistake in the instrument creating the power or the appointment might have been rectified in equity; but no such case is alleged. The decree does not even comprise a declaration to such effect, or any thing [118] which can clear up the doubts which hang over the case. The exceptions taken to the report do not indeed touch the matter of the present appeal; but that is not a material objection, for the subsequent directions are consequential, and must stand or fall with the decree. The contract between the parties to the settlement provides what lands shall be appointed, and under what circumstances. A court of equity cannot make a new contract for the parties, or strike out of the settlement a material provision. It may be thought a capricious mode of ascertaining the value of the lands; but it has the character of caution, and, at all events, it is the caprice of parties contracting, and it is not the province of a court of justice to control such caprice, if it be legal. That the lands were, in fact, of the value contemplated is immaterial, if the mode prescribed to ascertain that value has been neglected. Appointments, in a multitude of other cases, which, apparently, have been innocent variations from the power, have been held void. In this case the defect is not in form but in substance. The Court is required in this case to substitute a new power.*

For the Respondents—Mr. Wetherell and Mr. Shadwell.

The decree, if right in substance, is not bad for form. The question is, whether the direction of the power as to lands in lease is material, or a point of form.

The father had power to make a beneficial lease [119] provided the rent was not below a certain depreciation.† Thomas Lidwill the father never having executed his power, it was indifferent whether Thomas Lidwill the younger exercised his power of leasing or not. He might have leased before he revoked; but the essential part of the power is that lands, not exceeding £300 in value, should be revoked and appointed. The report finds the value. There is no excess of the power in point of value. How can it be represented that the leasing was essential? If any prejudice to the remainder-man could have arisen from the non-leasing, the omission to do so might have avoided the power; but those interested in remainder could not be injured by the omission. The value, at the date of the revocation, was always capable of being ascertained. If leases had been actually subsisting, the revocation, no doubt, must have applied to them. If a lease had been made by Thomas Lidwill the father, there would have been a tenant at an undervalue. The

* As to the restrictions, the doctrine in the case of the *Earl of Montague v. the Earl of Bath*, 2 Ch. Rep. 191, was cited by Mr. Phillimore.

† This power, it seems, extended only to lands in Graffin, and a mode was prescribed of ascertaining the yearly value of the lands to be leased under the power. It was not set forth in the printed cases; nor was the deed containing it before the House of Lords upon the hearing.—See the observation of the Lord Chancellor upon this subject, *post*, 124.

revocation in such case could not have extended to lands in Graffin. The power not having been executed by the father as to those lands, the revocation might extend to them. The last clause shows that the power of Thomas Lidwill the younger is absolute. If the words of the power are ambiguous, the construction ought to be favourable to the object of the power.

[120] We stand on the right of creditors. Thomas Lidwill had a power to appoint by will as well as by deed, and he expressly refers to the deed by the will. It is the same thing as if he had sold to a purchaser in his lifetime.

The Lord Chancellor. Do the debts cover the estate? Is there any other fund to pay debts?

For the Respondents. The debts exceed the value of the estate appointed, which is the only fund for payment. In what form an agreement or appointment is made a court of equity does not regard—a bond or any writing may operate as an appointment. By the will, the fund is given to trustees to sell and dispose in payment of debts. In the case of the *Earl of Montague v. the Earl of Bath* (2 Ch. Rep. 191), the judges intimated, that if it had been the case of creditors, purchasers, or children, they would have decided for the validity of the revocation; but it was the case of a volunteer, and that circumstance was the ground of the judgment.

The Lord Chancellor. I apprehend they will not dispute, that, if he intended to execute, it would, in that respect, operate as an appointment; but they say he has failed in the subject of the power.

For the Respondents. The remainder-man cannot be affected by this mode of appointment.

Such construction should be made upon the instrument creating and the instrument executing a power as will effectuate the intention of those creating the power, and further the objects of such power.

Upon this principle the deed of 20th December, 1782, is a due execution of the power of [121] revocation contained in the settlement of 14th January, 1774, so far as the estate, the subject of the power, would extend, it has been literally pursued: throughout it has been substantially executed. It appears by the officer's report, unexcepted to (in this respect), that the revoked lands at the time of the execution of the deed of 20th December, 1782, did not exceed £300 a year in value. The intention of the power was to allow lands of that annual value to be revoked; and it pointed out the means of ascertaining that value by the existence of leases of a certain description; but where no such leases existed on the estate, the subject of the power, the donee of the power was not to be deprived of the benefit of the execution of the power: he was not to be driven to a formal execution of leases, so as to bring himself and the lands within the very letter of the power.

Although the deed of the 20th of December, 1782, and the will of Thomas Lidwill should be deemed a defective execution of the power, a court of equity will supply a defective execution in favour of creditors:—and it appears that the debts reported due by Thomas Lidwill, the donee of the power, amounted to the sum of £7512 17s. 4d. and that his creditors have no other fund for payment of their debts but the revoked lands, the subject of the power.

The Appellant has submitted to this view of the case, for he took no exception to the officer's report, which finds that Thomas Lidwill died seized of the revoked lands; but, on the contrary, he took several exceptions, because the [122] officer did not report him to be a creditor of Thomas Lidwill on the revoked lands, a case altogether inconsistent with that which he now brings by way of appeal: and, moreover, the Appellant went into evidence before the officer, to show that the revoked lands exceeded in value, at the time of the revocation in 1782, £300 a year.—He failed in making such proof; and it was satisfactorily proved by the Respondents, that the lands did not exceed £300 a year in value: the officer so reported, and his report stands unimpeached in that point.

The whole power must be read together: the last clause is the key to its meaning. There it is expressed to be the true meaning and intent that Thomas Lidwill the younger should have absolute power over and property in the lands to the amount in value of £300 a year. A special mode of leasing is provided (see notes, pp. 119, 124), by the deed of settlement, as to part of the estate called Graffin; but not as to other parts of the estates. They might never be under lease. No direction to lease is

given, nor any mode prescribed by the instrument of contract. It is analogous to the cases of leasing powers, where it is provided that leases shall be made at the usual rent. In such cases, with respect to lands which have never been leased, and for which, consequently, there can be no usual rent, it has been held (*Goodtitle v. Funnecan*, Doug. 544) that the power extends to such lands, if it appears to be the intention of the parties to the instrument raising the power. It can only extend to such lands by estimate or valuation; it [123] is reduced therefore to a question of intention. In *Bagot v. Oughton* (1 P. W. 347; Fortescue, 332; Mod. Cas. 249, 381), as Lord Mansfield said, in *Goodtitle v. Funnecan*, it was evident, from the nature of the thing, that the power of a temporary owner could not extend to the letting the ancient manor house, and excluding the representatives of the family who might succeed him.

The objection to the frame of the suit is too late; it should have been taken when a reference was decreed as to the value of the lands not leased. There has been no exception to the report on that point; nor is there any appeal against the decree which assumes that the value was the material question.

Mr. Hart in reply. The owner of property may exercise the most arbitrary and capricious will, and annex unreasonable conditions to his gifts. The Court cannot interpose a Praetorian equity.

The Lord Chancellor. The real question is, had he or not a right, by a due execution of the power, to affect the land made the subject of appointment. The true meaning and intent of the power is to be considered, and whether the condition is mere matter of form.

Lord Redesdale. The decree supposes that the power is well executed at law.

Reply. It has been argued that the generality of the latter part of the power supercedes the restrictions of the former part. The power directs that the appointment shall be of so much and such parts of the premises as shall be in possession of tenants having interests, by way of lease, for twenty years to come, or for the duration of three lives, from the date of the revocation, and that [124] the rent payable on the leases shall not exceed £300. What is there in the clause which follows expressly rescinding this provision and condition? What is there to furnish an implication that it could be within the intent of the parties to annul this express condition? It has lately and often been regretted that courts of equity, in the cases even of meritorious objects, should have adopted the practice to supply the want of form in appointments.

The latter clause must be taken with and explained by the first. The restrictions were material to ascertain the value before it had become difficult by lapse of time. It was a security taken by making the son the first victim of any indiscreet exercise of the power.*

* In the course of the argument the Lord Chancellor censured the omission to furnish instruments referred to in the printed papers, observing, that the power to Lidwill the elder to grant leases contained provisions as to the mode of ascertaining the full improved yearly value at the time of making leases under the power. Those provisions were not set forth, but only alluded to in the printed cases as "therein (*i.e.* in the deed of settlement) particularly mentioned," and the instrument containing that power was not before the House.

The rule of construction as to powers has varied materially in different ages of the law, in different courts, and with different judges. What is essential to be observed in the conditions or circumstances *prescribed* by the power is now, and, perhaps, from the nature of the subject, ever will be a matter of uncertainty, unless all discretion of the judge is taken away, and a literal observation of the power in every particular is required. The same uncertainty prevails in many similar questions of this [125] branch of law, as, for example, what is a valid, what an illusory appointment? What a reasonable time to be allowed for payment of rent, in a lease made under a power requiring a right of re-entry to be reserved for non-payment of rent? The cases decided on these points seem to furnish rules only for cases exactly similar. In a new case, where the appointment varies in any circumstance from the authority, whether it be a valid execution of the power, can only be matter of probable conjecture, until the opinion of some court has been pronounced upon the particular case.

The Lord Chancellor, on the day after the argument, said, upon the whole, we think that the power was well applied to the subject, and that the appointment has been well executed; and, without further observation, the judgment of the Court below was affirmed.

Every new decision upon these questions does, indeed, make an approximation to certainty; but it never will be fully attained until every variety in powers is exhausted, and it can be declared to be impossible to contrive a new condition or circumstance to accompany any power.

A distinction has been taken between the cases where a man has power to make leases, etc. which shall charge and encumber a third person's estate; and where the power is to dispose of a man's own estate, as upon a settlement in tail or otherwise, with power of revocation in the settlor. In the first case, it is said, such powers are to have a rigid construction; but where the power is to dispose of a man's own estate, it is to have all the favour imaginable.—See *Sayle v. Freeland*, 2 Vent. 350.

In *Comberbach*, 11, 12, (a book, indeed, of little authority,) it is said, powers of revocation are to be largely taken. This is probably to be understood of such powers, where they are reserved by the owners of the estate to themselves. In *Scrope's Case*, 10 Rep. 144, where the power was to determine existing uses and limit new ones, and the donee, (who was before owner of the estate,) covenanted upon a second marriage, to stand seized to new uses, without determining or declaring any purpose to determine the former uses, it was held a valid revocation, on the ground, that when he limited new uses, he thereby signified his purpose to determine the former uses: and a case is cited, as an authority for the decision, with the maxim, "*Non refert an quis intentionem suam declarat verbis an rebus ipsis vel factis.*"

In the case now reported, the decision seems to have been made on the ground that the intention of the donor was not transgressed in the execution of the power. The noble Lords who moved the judgment apparently considered the power to be well executed at law. The doctrine of equity, by which the defects in the execution are supplied in favour of special objects of appointment, cannot be considered as a ground of decision in this case, although the Lord Chancellor, in the course of the argument, put a question, which seemed to point to such a ground.—See and compare the observations, pp. 120 and 123.

In these questions, upon the execution of powers, the difficulty lies, and insuperable it seems, between discretion with uncertainty on the one hand, and a literal construction with intolerable hardship on the other.

[126]

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

THOMAS GRAHAM, of Kinross, etc.—*Appellant*: PAGE KEBLE, a Lunatic, Residuary Legatee of P. K., dec.; R. SAUNDERS, Esq. Comm. of the said P. K.'s Estate; and R. RATTRAY, Esq. Mandatory of the said R. SAUNDERS, —*Respondents* [19th July 1820].

[See 2 Dow, 17; 6 Paton, 616; 3 Scots R.R., 563; *Keble v. Graham's Trustees*, 1827, 6 Shaw, 119; 1830, 4 Wils. and S. 166; *Palmer and Co.'s Assignees v. Glas's Trustee*, 1835, 13 Shaw, 311.]

K. having left East-India bonds in the hands of a mercantile firm at Calcutta, with directions to apply the interest and principal when received to a specific purpose, by his will appointed G., a partner in the firm, one of his executors. After the death of K., the will was proved by G.; and the firm, acting under his authority as executor, assigned the bonds, and used in their trade the money received upon the assignments.

G. ceased to be a partner in the firm before all the bonds had been assigned.

Upon suit, by the residuary legatee of K. against G., and on appeal, it was held that he was accountable to the residuary legatee of K. for the monies received

upon the bonds, with 8 per cent. from the time of the deposit to the dates of the respective assignments by the firm: and with interest at 12 per cent. (being the current rate in Calcutta) from the time of the assignments and receipt of the monies to the date of the judgment upon appeal in the original suit; and with interest at 5 per cent. upon the accumulated sum, composed of principal and interest, from the last-mentioned judgment till payment: but the cost of remittance from India, and the property-tax, were held to be charges on the fund payable.

Upon a general account subsisting between K. and the Calcutta firm, held that G., as partner and executor, was liable for the balances of account, and interest at 12 per cent. upon all such balances as should appear to be stated and signed by the parties: such interest to be calculated from the date of the statement and signature of the account to the time of the final judgment on appeal.

Held also that G. was not, as executor, entitled to withhold payment against the residuary legatee until an account of debts, etc. had been taken: and that, as debtor, he was not entitled to require that executors in [127] England (who had also proved the will of K.) should be parties to the suit in order to give him an acquittance.

In appellate proceedings interest upon the accumulated sum of principal and interest is chargeable on the debtor from the date of a judgment in the Court of Session to the date of the judgment in the Court of Appeal, although the Respondent has obtained an inhibition against the lands of the Appellant before the date of the original judgment.

Where a matter is, by the pleadings, specifically made the subject of demand, and the judgment is general for the demandant, yet, if a particular part of the demand, as the rate of interest, was not discussed, or specifically decided in the suit, it is not *res judicata*.

Page Keble, of Calcutta, in the year 1785, deposited certain bonds, due from the East-India Company, in the hands of Messrs. Graham, Crommeline, and Mowbray, a mercantile house at Calcutta, of which the Appellant was a partner. These bonds amounting, in the whole, to 46,428 current rupees, were delivered with instructions as to their application. They were to be appropriated eventually in payment of a debt owing by Mr. Keble to the East-India Company, and which became payable in the year 1796.

Soon after making this deposit, Mr. Keble quitted India, and died on his passage to England.

By his will, which he had left in the hands of Messrs. Graham and Co. as his agents, the Appellant was named one of Mr. Keble's executors, with certain other persons in Europe. The European executors having proved the will, transmitted powers of attorney to the Appellant and his partners, authorising them to act in the affairs of Mr. Keble's estate. But in the mean time the Appellant had proved the will at Calcutta: and the house of [128] Graham, Crommeline, and Mowbray, by a letter dated the 10th of September, 1787, informed the executors in England that they had no occasion to use the power of attorney, as they could act under the authority of the Appellant as executor.

No account of the affairs of Mr. Keble was transmitted to the European executors until the 10th of March, 1791, at which time the Appellant had retired from the firm, and in the November following the house failed. Some of the bonds deposited had been indorsed away by the house, for their own accommodation, between the months of November, 1789, and October, 1790, before the Appellant had retired from the concern: the remaining bonds were disposed of in the same way soon after his retirement.*

There was also a sum due to the estate of Page Keble on a balance of account subsisting between him and the Calcutta firm.

* The particular dates of the assignments of the bonds were not very exactly ascertained in the proofs before the House. The point is not very material, according to the view taken by the Lord Chancellor in moving the judgment.

The Respondent, Mr. Keble, as residuary legatee under the will of his father, as soon as these facts came to his knowledge, required the Appellant to account for the funds due from the house of Graham and Co. to the estate of the deceased, and, upon his refusal,* brought an action against [129] him before the Court of Session in Scotland. When the action was commenced the Appellant was still resident in Bengal, but having land in Scotland was subject to the jurisdiction of the courts of that country. The summons, in the action, concluded for payment of the amount of the bonds deposited by the late Mr. Keble in the hands of the Appellant and his then partners, with interest, praying that the Court would "decern and ordain the said Thomas Graham, Defender, to make payment to the Pursuer of the specific sum of £4786 8s. 6d. sterling, *with interest, at the rate of 8 per cent. till the bonds were severally cancelled or endorsed away; and with interest after that period at the rate of 12 per cent. being the legal rate of interest in Bengal* to the time of payment; and interest on the sum of £2126 13s. 8d., the balance of account from the 14th of February, 1788, at 12 per cent. and until payment, etc."

This action was commenced in December, 1803, and at the same time a diligence of inhibition was executed by the Respondent against the lands of the Appellant in Scotland. After various proceedings in the Court of Session, an interlocutor was pronounced on the 11th of March, 1808.†

[130] From this decree, an appeal, partly on the charge of Indian interest, was brought in the House of Lords; on hearing which, in the year 1813, the judgment was affirmed, upon the ground that the Appellant being a partner in a house of agency, where a deposit was placed in special trust, became and acted as the executor of the person by whom the deposit was made; and that having acted in that fiduciary character he could not renounce it, and elect to act under his other character of agent, that he could do no act, in respect of the estate, for which he was not answerable as executor, and could not be discharged of the trust.‡

The decree thus affirmed did not ascertain the periods of the different rates of interest. It became necessary therefore to present a petition to the Court below to have the sum due ascertained. With this petition a "state of the debt" due by the Appellant was lodged, in which (*inter alia*) interest was charged at the rate of 12 per cent. from the different periods at which the money secured by the bonds had been received by the firm, in which the Appellant was partner, to the date of the judgment in the House of Lords, according to which calculation the debt amounted to the sum of £19,413 16s. 2d.

This petition being remitted by the Court to the Lord Ordinary, the Appellant was allowed to put in objections to the state of the debt.

The Appellant thereupon contended that the [131] House of Lords, by their judgment, had determined that he, "having taken out a probate as executor, could not divest himself of the character of executor;" and, therefore, that he must pay off and see discharged the debts and legacies due from the estate of the late Page Keble before the amount of the residue could be ascertained: that he had a right to resist payment, or accounting to the Respondents, until he was satisfied what might be the just amount of the residuary estate of the deceased. The Respondents insisted that the House of Lords, having "affirmed the interlocutors of the Court of Session," and given judgment in terms of the conclusions of the libel, which was to make

* The same demand had, in the year 1796, been made upon the Appellant in India, and proceedings against him, in the courts of Calcutta, had been in contemplation: but, after various negotiations and transactions, a case was submitted to the Advocate General by the East-India Company, and that officer, in 1802, gave his opinion that the Appellant was not responsible. Whereupon the East-India Company enforced the payment of their debt against the estate of Page Keble, and no proceedings were taken against the Appellant until he became amenable to the jurisdiction of the Scottish courts. The facts, upon this part of the case, are omitted in the text, because, (although pressed in argument,) they do not appear to have been noticed in the reasons given for the judgment.

† The Appellant became resident in Great Britain in the year 1808.

‡ MSS. cases, in D. P. 1813, No. 10; and see a short report of the case up to this point in Dow's Reports, Vol. II. p. 17.

payment to the Pursuers of a certain specific sum total of principal, with interest due thereon, at certain specific rates, it was incompetent for the Court of Session now to hear the Appellant upon any point or points, save those relating to the mere accuracy, in point of computation, of the "state," exhibited with the Respondents' petition.

The Lord Ordinary, by interlocutor, of the 28th June, 1814, (having repelled the objections by a former interlocutor, and having found the Appellant liable to the costs incurred since the cause was remitted,) decerned against the Defender (Appellant) for the sum of £19,413 16s. 2½d. sterling (according to the computation of the Respondent), with the interest thereof, at the rate of 5 per cent. from and after the term of Martinmas, 1813, and until paid.

To this judgment he adhered after several representations.

[132] The Appellant thereupon petitioned the Court of Session (Second Division) against the judgment of the Lord Ordinary, and by the original and various re-claiming petitions, the Appellant raised the following objections:—1. That the claim to interest ought to be restricted to 8 per cent. to the year 1796. 2. That British interest only ought to be allowed from 1796, or, otherwise, from 1803; or, from 1806, or, at the utmost, from 1808. 3. That there ought to be no accumulation of interest. 4. That he was entitled to deduct the expense of remittance from Bengal. 5. That he was entitled to make deductions, on account of the property-tax, from 1803. The Court, by five interlocutors, affirmed the judgment of the Lord Ordinary, and over-ruled all the objections except what related to the property-tax, which the Court held the Appellant was entitled to deduct from 1808 to 1813, when the debt is accumulated, and also to deduct the property-tax from the interest of the accumulated sum from Martinmas 1813, until payment.*

From these several interlocutors of the Lord Ordinary of the 15th and 28th June, 8th July, and 22d December, 1814, and of the Second Division of the Court of 4th July and 15th November, 1815, 13th February, 1st and 8th March, 1816, the appeal was presented.

For the Appellant—Mr. Wetherell and Mr. Brougham.

1. This is not a case where a trustee has made use of the money committed to his charge; it is a [133] simple breach of trust at the utmost. By the judgment of this House, in 1813, the Appellant is charged as executor: in the summons he is charged both as debtor and executor. The pleas in defence took issue upon both those points, and the Court has decided generally in the terms of the libel, embracing both the *media concludendi*. If the Appellant is charged as executor, the Respondent, suing under the qualified title of residuary legatee, is only entitled to the surplus above debts and general legacies; and before any sum can be finally awarded and paid to him under the authority of the Court, it must be ascertained that all prior claims upon the estate have been satisfied. If the Appellant is charged as a debtor only, the English executors ought to be parties in the suit in order to give a discharge. An executor only has authority to receive the debt and acquit the debtor; and even the authority of the Court could not protect the Appellant from future responsibility, if this money should be required to satisfy creditors of the estate. Considered in the double character of debtor and executor, the Appellant is equally entitled to have it ascertained that debts and legacies are discharged before he pays over any sum as a residue. This claim is not inconsistent with the decree, by which the Appellant is bound to pay, through the medium of the legal representative, what is due to the estate of Page Keble, and those having right to that estate in their order of preference.

2. As to the objection, that it is not now competent for the Appellant to object to the rates of interest, because the summons concluded speci[134]fically for those rates of interest, and the Court below has decided in terms of the libel; and that judgment having been affirmed on appeal, it is now *res judicata*, and no longer questionable; it is an objection founded in fallacy.

If that matter had been *proposed and repelled* in the cause, or *competent and omitted, in foro contradictorio*, both the policy and statutory enactments (Scots Stat.

* This part of the judgment below, as the Respondent alleged, was by consent.
— See p. 113.

1672, c. 19) of the law would have excluded the Appellant from further litigation. But on this point no question was raised or debated in the former proceedings, no defence was urged, and the judgment, so far as it affects the question of the rates of interest, was virtually a decree in absence, which never was held to constitute *res judicata*. The conclusion of the summons was for two distinct matters, a principal sum and interest at, etc. *to the date hereof, and in time coming till payment*. The defence was, simply, that the Appellant was not responsible, and no other question was considered, or intended to be adjudged in the cause, but that of his general liability. Where defences have been made upon one branch of a cause, and omitted as to another, no presumption can be raised against the Defender as having confessed the matter, and submitted to judgment on the point undefended and undiscussed. Such is the principle and practice upon a decree in absence, where the party has been cited, and even where he has appeared by his procurator. It is said that there has been no denial of the allegations of the summons as to interest; yet, in the petition of the 31st August, 1815, which was presented after the [135] date of the summons, this passage is to be found:—"It is allowed, on all hands, that from the beginning to the end of the pleadings not a word has been said on the subject of interest."

Moreover, if this be *res judicata*, the Court itself has invaded and disturbed its own judgment. For the original decree, in terms of the libel, was for interest at 12 per cent. *till payment*. But since the cause was remitted from this House, a new judgment has given interest, at 5 per cent. from November, 1813; and whereas the summons makes no conclusion for accumulation of interest, the subsequent judgment authorises accumulation to the 12th of November, 1813. The Respondents, after the judgment in 1813, did not sue execution, but proceeded before the Court to settle all the details as to interest. They have, in this and other respects, treated the matter as *res non judicata*. So has the Court below, and no cross appeal on that ground is entered. The plea of *res judicata* has been rejected, in many cases, much stronger than the present. *Millie v. Millie* (Dict. of Dec. Tit. process, No. 318, Nov. 27, 1801), *Young v. Mitchell* (No. 320, Feb. 10, 1803), *Chirurgeons of Glasgow v. Reid* (No. 340, Dec. 17, 1701), *Smith v. Semple* (No. 341, Dec. 14, 1711).

A foreign rate of interest is a fact, upon which no decree can be made, without proof or express admission. Decrees must be founded upon allegation and proof. Admission of the fact cannot be implied where the question has never been [136] raised; at all events, not before the decree is extracted. Such implication is never made against a party unless the matter has been referred to his oath as the medium of proof, and he does not appear, and answer upon oath. Upon a verdict in an action for a promissory note interest follows incidentally by way of damages; but every claim for debt or damage does not, as a matter of course, include interest. In equity proof is required of the employment of the money. The defence, therefore, against the liability for the principal does not comprise a defence against liability for interest. Upon this point, therefore, the judgment is not conclusive against the Appellant. In moving the judgment in this House in 1813 not a word was said upon the subject of interest.

3. Indian interest is not due to the extent awarded. The Appellant has not used the funds, and the Respondents ought not to benefit, by their own delay, from 1791 to 1803. During all that time they might have sued in the courts of Bengal. The House of Graham and Co. were instructed by Page Keble to invest his money in the purchase of bonds, which were to remain in their hands until the joint bond to the Company became due, which happened in 1796. The interest upon bonds so purchased would have been 8 per cent. or less, and the purpose of the deposit terminated in 1796. The Appellant, therefore, is not chargeable with more than 8 per cent., nor beyond 1796 at the utmost. From the year 1796, when the bonds ought to have been applied in payment to the Company, the amount became a debt, owing from one British subject to another, upon which, [137] by the statute against usury (12 Anne, c. 16), more than 5 per cent. cannot be demanded.

According to authorities in the law of Scotland, interest, above the domestic rate, is not allowed even upon foreign contracts, *Savage v. Craig* (Fountain-hall, vol. ii. p. 559), *Wood v. Grainger* (Fac. Coll. June 24, 1779). In *Campbell v. Hannay* (Ibid. Feb. 15, 1800), interest was, indeed, finally given at 8 per cent. according

to contract by bond; but that is a single case not applicable in its circumstances, and the authority is questionable. This is not a foreign but a British debt, nor constituted by contract but by law. This distinction is recognised by the text writers: by Dirlton (P. 227, *voce* process against strangers), and by Lord Kaimes.* According to these principles, if the Appellant is considered as responsible for the bonds, the interest which they bore is the proper rate. When it became a debt constituted by law, he is only liable to interest established by the law of the country where the remedy is applied. Upon the same principle it is that the law of Scottish prescription is applied to debts arising upon foreign transactions, when the party sues in the courts of Scotland.† At all events foreign interest ought to cease, and British interest to commence either from the 13th of December, 1803, when the first step was taken in the action, or from the 14th of November, 1806, which is the date of the first decree. The Appellant, upon the first process, [138] might have obtained security for the amount.‡ If the commencement of the action did not, at least the judgment of the Court, in 1806, did make it a Scotch debt, carrying Scotch interest. If that judgment should be considered as interlocutory, then the final decree by the Court of Session in 1808 ought to be the period for the computation of British interest. By the judicial proceedings in Scotland, the debt was, or might have been, secured by the Scotch law; and by the execution of the inhibitions, in 1803, against the heritable estates of the Appellant, it became a Scotch debt vested upon heritable security.

4. Foreign interest cannot be due after the year 1808, when both debtor and creditor were resident in Great Britain. Interest, at more than 5 per cent. is forbidden by law between parties so resident. The place of the original contract, or of the transactions from which the liability arose, cannot alter the law between resident subjects. While one of the parties to the contract is absent in the foreign country, the courts here may apply the foreign law, but not after the parties become resident in this country. Could parties intending to negotiate a loan, by going to Ireland for the purpose, fabricate a bond, which, upon their return, should bear interest at 6 per cent! Could such a transaction be sustained upon a short residence? If so, the statutes against usury are futile.

Interest does not depend unalterably upon the original constitution of the debt, but arises from [139] detention of the money due. It is an equivalent for the use of the money; and a change in the rate of interest ought to follow a change in the residence of the parties, by which the use and the remedy are regulated. While the Appellant remained in Calcutta, the place of implied contract, he might be liable to Indian interest: when he came to Great Britain the implication as to interest ceased. The Appellant then became amenable to British laws both in person and estate. He ought not to be injured by delay in the administration of justice.

Whether foreign interest can be given by the courts of Great Britain must depend on the nature of the contract and the residence of the parties, or one of them in the place of contract. Such was the case of *Bodily v. Bellamy* (2 Burr. Rep. 1091). There was express contract by bond, and the Plaintiff, from the date of the obligation to the time of judgment in the action, had been resident at Calcutta. Under those circumstances the Court gave interest at 9 per cent. In *Elkins v. the East-India Company* § foreign interest was given upon the value of a ship and cargo, because it was wrongfully taken from the agent of the owner, and the Court held that the Company (who may be considered as residents of India) had made the usual advantage of money in that country. In *Boddam v. Riley*,|| interest was refused upon the balances of unsettled accounts of a partnership in Bombay, notwithstanding [140] standing the custom of the country, stated upon affidavit, to charge and

* B. 3, c. 8, s. 1, p. 324, citing Eq. ca. abr. c. 36, (E.) s. 1.

† Kaimes Sel. Dec. No. 85. March 2, 1761. McNeil. July 13, 1768. Randal. Feb. 20, 1771. Ker. Feb. 4, 1772. Barret.

‡ He did, in fact, obtain an inhibition against the lands of the appellant, which operates as an injunction against alienation.

§ 1 P. W. 395.—See the Treat. of Eq. b. 5, c. 1, s. 6, and the notes of the editor.

|| 1 B. C. C. 239; 2 B. C. C. 2, 3; and see 1 B. P. C. 560, with the abstract preceding the report, and the note at the end.

allow interest in all mercantile transactions, and upon debts in general. In that case, Lord Thurlow observed, "I am to say, that although the general rule of law is otherwise, yet, by reason of this custom, interest is to run on a debt not carrying interest in this country, because the original transaction was in India; I cannot admit such a custom to control the clear law of this country." In a former stage of the same case, Lord Thurlow had said, that interest was not in the discretion of the Court, and could only be given upon contract.*

In *Connor v. the Earl of Bellamont* (2 Atk. 382), Irish interest was given, because the debt, though contracted in England, was charged upon land in Ireland, and the debtor being an Irish Peer executed a bond in Ireland to secure the debt.

The neglect of the Respondent is a further reason for refusing all interest. This claim was raised against the Appellant when he was in India in 1796, and was apparently abandoned, after an opinion had been given against the claim by the Advocate General of Calcutta in 1802. The Appellant might have made arrangements to dis-[141]-charge or diminish the debt, if he could have anticipated that the claim would be renewed in Scotland after so great a lapse of time.

5. Compound interest ought not to have been allowed. If, as the Respondent contends, the affirmance of the judgment in this House is conclusive upon the question of interest, then there being no conclusion in the summons for accumulation of interest, the judgment, which is in terms of the libel, does not warrant accumulation.

If the judgment is not conclusive, as the Appellant contends, then it will be necessary for the Respondents to amend their libel (if that can now be permitted) before any judgment can be given for a right, which, as the summons is now framed, makes no part of the Respondents' demand. Independent of all questions of form, interest upon interest is never allowed, but upon adjudication, or a denounced horning upon an extracted decree.

6. The Appellant is entitled to deduct the cost of remittance. If this was a debt contracted, and payable in Bengal, the creditor is bound to receive it there. In *Campbell v. Hannay* (*ante*, p. 136) the Court refused the debtor's cost of remittance, because he had compelled the creditor to sue in Scotland; but in this case the creditor has avoided the *forum contractus*, and selected the courts of Scotland.

7. The Appellant is also entitled to deduct the property-tax from the year 1803. The Respondent was liable to the tax, not being within the exceptions of the statutes; and the circumstance [142] that the Appellant was resident in Calcutta till 1808 is immaterial.

For the Respondents—The Solicitor General (Sir Robert Gifford) and Mr. Kindsley.

The Appellant was sued both as partner in the firm of Graham and Co. and as executor: so it appears expressly by the summons. The Respondent, suing as residuary legatee, claims a specific sum as residue against a person filling the character both of debtor and executor: and so he was charged by the judgment below, according to the allegations of the summons, and the defence made by the Appellant.

The argument † of *novatio debiti* is repelled by the fact, that the firm of Graham and Co. rejected the authority and orders of the English executors, upon the express allegation that they had the authority of the Appellant as Indian executor, and he was then also a partner of the firm.

* The report, 1 B. C. C. p. 239, supposes the Lord Chancellor to say, "that nothing but what arises from contract or demand of debt can give rise to a demand of interest." This appears both incorrect and deficient. For a demand of debt gives no right to interest, and in equity it is always given upon *breach of trust*. If a trustee sells stock out of the public funds, the Court gives to the *cestui que trust* an option to demand against the trustee the dividends which the stock would have produced, or interest upon the proceeds of the sale.

† This point was argued in the former stage of the suit. It was then contended by the Appellant, that, by the effect of the transactions between the parties, and the events which had happened, he was released; and that the new firm, after he ceased to be a partner, had been accepted and recognised as the debtors.—See the Lord Chancellor's observations in moving judgment, post, 147-8.

The question, as to the rate of interest was concluded, by the judgment of this House, in 1813. For the decrees of the inferior Court were thereby affirmed, and those decrees were in the terms of the libel, by which interest, at the rates and for the periods in question, was specifically demanded. The very question was argued in the Courts below, and upon the hearing of the appeal.

[143] In order to constitute a valid judgment, it is not necessary that the question should be debated. If it be alleged on the one part, and not contradicted on the other, that is sufficient ground for the judgment (Stair's Inst. l.) The Appellant might have pleaded, 1. that he was not liable at all; 2. if so, that the rate of interest claimed was extravagant.

The subsequent proceedings in the Court of Session, upon the subject of interest, were merely to ascertain the amount of the sum due by calculation, not to open and re-discuss the general question of liability for the specific rates of interest, and for the times before awarded. The allowance of interest follows as a consequence upon a judgment for the principal.

The allowances for property-tax, since the judgment in 1813, do not operate as an admission by the Respondent that the judgment was open: that was done by consent, and was a gratuitous boon to the Appellant.

If it be admitted that the question is open, this being a claim against a trustee, *ex delicto*, he is liable for the largest rate of interest which might have been made by the use of the money in the country where the breach of trust took place.* If a trustee sells out stock from the public funds, he is chargeable either with the dividends or the profits actually made, or the proceeds, with the usual [144] rate of interest at the option of the *cestui que* trust: so even if he represents, contrary to the fact, that he has purchased stock. *Bate v. Seales*.† In these cases the Court does not consider, as the measure of damages, what would have been gained for the benefit of the *cestui que* trust, if the directions of the trust had been followed, but what has been wrongfully acquired, or might have been acquired by the trustee upon the misapplication of the trust fund. The partners of a firm, to which the Appellant belonged, have abused their trust, and the Appellant being executor has permitted that abuse. Six of the bonds were endorsed away while the Appellant was a partner in the firm, and four a year after his retirement. If he had written or endorsed upon them a statement of the purpose for which they were deposited the loss would have been prevented; but, in gross violation of his trust, he left them in the hands of a firm, which he, as a partner, could not fail to suspect of actual or approaching insolvency.

As to the objection made against the judgment for accumulated interest, it is consonant to the settled principles of law as well as equity, that interest, ascertained and decreed upon a final judgment, should be incorporated with the principal (*Bodily v. Bellamy*. *Ante*, p. 138.) From that time the principal and interest [145] become an entire sum bearing interest. The right to interest upon this aggregate sum arises from the delay of payment caused by the appeal. The accumulation, they say, is not asked by the summons; nor is it necessary. In actions upon bills of exchange interest is not demanded by the declaration; yet it is given by the judgment, or upon motion: and upon writ of error, if the judgment below is affirmed, interest is calculated, not on the principal sum for which the action was brought, but upon the whole amount recovered by the judgment below up to the time of the judgment in the Court of Error†. The result is, [146] that, as long as the bonds were held by

* That 12 per cent. is the usual rate of interest in Bengal is recognised, and it is made the legal rate there by stat. 13 Geo. III. c. 33, s. 30. It was not proved in the cause that 12 per cent. was actually made: that such advantage might have been had is sufficient to charge a trustee.

† 12 Ves. 102; and see *Harrison v. Harrison*, 2 Atk. 121; *Pacock v. Redington*, 2 B. C. C. 653, 5 Ves. 791, and *Long v. Stewart* in the note; *Treves v. Townshend*, 1 B. C. C. 381; *Newton v. Bennett*, *Pickins v. Bayntun*, 1 B. C. C. 359, 375; *Forbes v. Ross*, 2 B. C. C. 130; *Young v. Combe*, *Petty v. Stace*, 1 Ves. 101, 620; and *Tebbs v. Carpenter*, 1 Mad. Rep. 290, where the cases upon the general questions are collected.

‡ Upon writs of error interest is given by way of damages, for which provision

the firm, they and the Appellant as partner, trustee, or executor, are responsible for the amount of interest paid upon them, which appears to be 8 per cent. From the time when the bonds were assigned and converted into money, which they used, or might have used in Calcutta, and up to the date of the final judgment, the common interest of the country, which is 12 per cent per annum, has been rightly charged against the Appellant; and, after the date of the final judgment, the Respondent is entitled to English interest upon the whole sum ascertained and awarded by the judgment.

The Lord Chancellor, in the course of the argument, made the following observations:—

Laying the rule of law out of the case altogether, is not this, upon the special circumstances of the case, a continuing trust?

If I intrusted a person to lay out money for me in government bonds, and if, instead of doing so, he had laid it out for himself, or for his own partnership, would he not be liable to pay [147] me the common rate of interest? For this reason, it becomes material to be considered whether the interest, as payable on the bonds, ought to be continued after 1791, or whether it ought to cease. It is contended, by the Appellant, that the interest, as on the bonds, ought not to cease after 1791, if a larger rate of interest is to be charged, when the interest, as on the bonds, ceases. On this point the questions to be settled are whether the former interest is to go up to 1791 only, or to 1796; and whether the larger rate of interest is to go on to 1813, or to cease in 1803; or when to commence, and when to cease. On this point there is a difference in the statements of the parties as to the facts. The Appellant states in his case that all the bonds were uplifted after he had left the partnership. The Respondent, on the other hand, in his case states, that, in respect to six of them, they were indorsed away between the months of November, 1789, and October, 1790, and that the remaining bonds were disposed of soon after the Appellant had taken leave of the concern. As a question of fact considered material in arguing this case, it may easily be ascertained, with respect to these bonds, whether they were disposed of by the partners of the house after Mr. Graham had left the concern, or whether he is to be considered as having been a partner in the house when the bonds were

is made by the statutes for preventing delays in suits of law, 13 Car. 2, s. 2, c. 2, s. 8, 9, 10. The Plaintiff, upon suing his writ of error, is, by that statute, compelled to give security for *damages* as well as costs, otherwise execution may issue, without stay or supersedeas, notwithstanding the writ of error. See also, 3 Jac. 1, c. 8, made perpetual by 3 Car. 1, c. 4, s. 4, 16 and 17 Car. 2, c. 8, s. 3. Upon affirming a judgment in the Exchequer, the Chancellor personally (who, with the treasurer and judges, are, by the 31 Edw. III. constituted a court for examining erroneous judgments in the Exchequer), gives interest, computed according to the *current* (not the legal) rate, from the day of signing judgment below to the day of affirmance in that Court of Error. In the Exchequer Chamber, which is a Court established by 27 Eliz. c. 8, to rectify errors in the judgments of the King's Bench, if no direction is given by the court, the officer (under the authority of 13 Car. 2, s. 2, c. 2, s. 10,) in taxing costs, allows double the money out of pocket, but gives no interest. In the King's Bench, upon writs of error from the Common Pleas, interest is usually given, by way of damages, upon the sum recovered in, and from the time of signing the judgment below until the affirmance. *Bishop of London, etc. v. Leven*, 2 Strange, 931; *Bodily v. Bellamy*, 2 Burr. 1094. By stat. 3 Hen. 7, c. 10, upon all writs of error sued, in delay of execution, to reverse judgments "if they be affirmed, or the writs discontinued in default of the party, or the Plaintiffs be non-sued in the same, the Defendants in Error shall recover costs and damage, for delay and vexation, by discretion of the justice before whom the writ is sued." This is re-enacted by 19 Hen. 7, c. 20. The Plaintiff, in the Court below, has also the option to bring an action of debt upon the judgment, in which action he may recover interest, by way of damages, for detention of the debt constituted by the judgment.

The House of Lords, in deciding appeals and writs of error, exercise a discretion as to costs and damages: to answer which, security is taken, by requiring the Appellant to enter into a recognisance, in the sum of £400 before he is permitted to prosecute his appeal.

actually disposed of. But whether he was a partner in the house or not, he was at least bound, both on account of the residuary legatee, and on his own account, to have taken some little care that no improper use was [148] made of the bonds, and to have taken that care, more especially, on account of his own character of executor.

There may be a great distinction to be made, in point of fact, with regard to the insolvency of the partnership, and with regard to the periods at which they took the bonds to themselves; but if I had put my money into the hands of the house of Graham and Co., while Mr. Graham was a partner in it, whether the other partners had continued solvent or not—whether they had continued in the country, or had left it, I should have looked to Mr. Graham, and should have expected to call upon him, according to the terms of the contract, to have that contract fulfilled to me.

The elder Page Keble died in 1786, when his son, the residuary legatee, was about five years old, since he did not attain the age of twenty-one till the year 1802. Now Mr. Thomas Graham was in a situation in which he ought to have acted both for himself and the infant.

Mr. Graham might have relieved and protected himself; and if he had considered the matter for a moment, he must have been convinced of his liability for interest, if there were no special circumstances in the case; and can he press special circumstances against an infant for whom he was trustee?

The Lord Chancellor. There was a cause heard some time ago, in which Thomas Graham was the Appellant, and Page Keble, a lunatic, and others, were Respondents.

[149] In the year 1803 an action had been brought in Scotland against the Appellant, upon his succeeding to the estate of Kinross, in Scotland. When he became entitled to that estate, and the possession of it, he became amenable to the jurisdiction of the courts in Scotland. The action was commenced by Mr. Page Keble in the Court of Session against the Appellant, while he was resident at Calcutta, and the summons stated a variety of transactions, in which Mr. Graham, the Appellant, had been engaged with Mr. Keble, the father of the Respondent. It represented that the Appellant was a member of the house of Messrs. Gramahs and Mowbray of Calcutta; that Mr. Keble, the father, before leaving India, in 1786, had executed a power of attorney in favour of that house for managing all his affairs, and uplifting the debts and effects due to him; that besides this power of attorney, he left a letter of instructions with this firm, and a duplicate of his will in the hands of the Appellant, who was his confidential friend, and who was one of the executors named in the will; that, upon receiving accounts of the death of Page Keble, the Appellant proved his will and codicil, obtained letters of administration from the Prerogative Court of Calcutta, and had extensive intromissions with the estate and effects of the said Page Keble as executor, or as a partner of the company of Graham and Mowbray, in virtue of which, it was stated, that he was justly indebted to the pursuer (Respondent, P. K.), as residuary legatee of his father, in a great variety of sums, which are stated and set forth in the summons, and which amount to [150] £4768 8s. 6d. sterling, and interest thereon: "Therefore" (the summons concluded that) "the said Thomas Graham ought and should be decreed and ordained, by decree of the Lords of Council and Session, to make payment of the principal sum of £1768 8s. 6d., and interest thereon as follows, viz. interest of the said several bonds, from their respective dates, till the same were paid or discharged, or indorsed away, and value received therefrom, at the rate of 8 per cent., being the rate of interest which these securities bore; and, afterwards, at the rate of 12 per cent. of the principal sums contained in the said bonds, being the ordinary rate of interest exigible in Bengal to the date thereof, and in time coming during the non-payment; and interest of the sum of £2426 13s. 8d. rupees, the balance of the said account, from the said 14th of February, 1788, at 12 per cent. to the date hereof, and in time coming during the non-payment, deducting always from the said principal sums and interest all partial payments, which the said Defender can instruct to be (have been) made, if any such there were."

The defence against this original action was this: that, although he had taken

out probate of the will, in which he was named executor; yet he did not act, he did not possess the character of executor, and did not incur any legal responsibility: and, in the next place, that, after he had ceased to be a member of the company of Grahams and Mowbray, and was by public notice separated from it, the executors in England recognised the new company as their debtors, and had [151] intrusted the funds to the new and not to the old company, which created, what they call in Scotland, *novatio debiti*.

By interlocutors of 1806 and 1808 the Court of Session declare their opinion against the Appellant.

An appeal was then brought to this House, which was heard in November, 1813. Upon that appeal it was ordered and adjudged that the petition and appeal should be dismissed, and that the interlocutors therein complained of be, and the same were thereby affirmed.

After the dismissal of the appeal from this House, a petition was presented to the Lord Ordinary to apply the judgment. A great variety of proceedings appear to have taken place: and it is upon the judgments pronounced in the course of these proceedings by the Lord Ordinary and the Court of Session that this new appeal is brought, praying that these interlocutors may be reversed, and assigning several reasons which are stated.

The Appellant says he has been made liable as executor, and that he ought not to have been so made liable: and, as this action was brought against him by the residuary legatee, that it was necessary to ascertain whether all the debts and legacies had been paid before the amount due to the residuary legatee could be determined. In the next place, he objects to the rate of interest awarded, complaining that it is higher than the law authorises.

The Appellant contends also that the judgment of this House, in November, 1813, did not form a *res judicata*. As to the charge of Indian interest, he says the action was brought against him in 1803, in the Court of Session, without any intimation to [152] him, when he was resident in the East Indies. Now, the Scottish courts had jurisdiction by reason of his having property in Scotland, but the debt was not contracted in Scotland but in India.

He further insists, that, supposing the Court to be right as to the mode of calculating interest, he is entitled to have the charge of remitting the money from Calcutta to England deducted, and that an allowance ought to have been made for the property-tax: that it ought to have been deducted from the interest.

In my opinion the Appellant has not a right to call on the residuary legatee for an account of all the estate and effects of the testator: I do not think there is any pretence for it.

In the next place I state, as my opinion, that the decision upon the cause in this House in 1813, did not amount to a *res judicata*, so as to fix the Appellant with a demand to the full extent of the conclusions of the summons in the Scottish court.

The next question is, how the interest ought to be calculated: and recollecting the circumstances of this case, the place where the debt was contracted, and the judgment obtained, the party will be chargeable with interest on the different bonds, according to the interest they carried, until they were paid off, or indorsed away, at the rate of 8 per cent. By the receipt of the money due upon these bonds, a debt was constituted as an Indian debt; and being so constituted, it must, upon principles of law, bear interest at 12 per cent. from the time when the bonds were paid off until it became a British debt. When this House dismissed the appeal in this cause in November, [153] 1813, it became a British debt, and therefore from that time it can only carry British interest, that is to say, interest at 5 per cent.; and that interest at 5 per cent. is to be calculated on the sum constituted, by consolidating the principal sum, with interest at 8 per cent. on the different bonds from their dates till they were paid off, and 12 per cent. from the time when the bonds were paid till it became a British debt, and from that moment 5 per cent. on the aggregate, composed of this consolidated sum of principal and interest. That consolidated sum should bear interest at 5 per cent.

The next question is, whether the Appellant is entitled to any thing *for remittance*. I think he will not be entitled to remittance for the whole sum due, as it will stand after it bears British interest at 5 per cent., and up to the day of pay-

ment; but he will, in strictness, be entitled to the cost of remittance, on the amount of the debt, as it was estimated on the 10th of November, 1813.

The last thing which I am to consider in this case relates to the deduction of the property-tax. I think he ought to be allowed a deduction of the property-tax, between the year 1803, and the time when the property-tax ceased to exist, on all sums which he can show that he paid during that period.

What I have stated, and mean to propose as the minutes of the judgment on Wednesday, is to this effect:

With respect to the bonds, the interest on them shall be calculated at the rate per cent. which they respectively bore from their dates till the time when they were discharged; and the party shall be charged with 12 per cent. after that time till [154] November, 1813, when it became a British debt. Then 5 per cent. only became chargeable on the consolidated sum of the former principal and interest. An allowance is to be made for remittance on the sum, principal, and interest, as it stood in November, 1813; and an allowance is also to be made for the property-tax between the year 1803 till the time when it ceased. With these findings, I shall propose to remit the parties to the Court of Session to do therein as may be just.

As to the sum which is due on the balance of an account, not being sure whether I rightly apprehend that part of the case, I shall consider whether it may be necessary to say any thing further upon it.

It is declared that the Appellant is to be charged with interest at the rates following, viz. with interest, at the rate of 12 per cent. upon the balance of any account which shall appear to have been *stated and signed*, and which is mentioned in the summons in this action, such interest to be calculated from the date of the account so stated and signed to the 10th of November, 1813; and with interest of the several bonds in the proceedings mentioned, at the rate per cent. which they respectively bore, until the times when they were respectively paid and discharged, or indorsed away; and value was given for the same, and with interest, at 12 per cent. from and after such times respectively to the 10th day of November, 1813, when the former appeal was dismissed this House. But that the Appellant is to have proper and just allowances, and deductions made, in respect of [155] partial payments, if any, which he can instruct to have been made, and in respect of interest thereof, and also a deduction of the charge of remittance to Great Britain of the consolidated amount of the debt which shall be constituted against him up to the said 10th of November, 1813; and it is further declared that the Appellant is chargeable with interest, at 5 per cent., upon such consolidated amount of debt from the said 10th day of November, 1813, until payment thereof; but with a due deduction of the property-tax upon the amount of the interest of such consolidated amount of debt so long and at such rates as the same were chargeable upon the Appellant's property in Great Britain; and it is ordered, that, with these declarations, the cause be remitted back to the Court of Session in Scotland to do therein as is just and consistent with these declarations.*

* Upon the questions of foreign interest and remittance, see the case of *Lansdowne v. Lansdowne*, *ante*, p. 60 *et seq.* and the notes to that case.

In 1 Eq. Cas. Abr. c. 36, (E.) an authority is cited, in which it is laid down generally, that, "in all cases, interest must be paid according to the law of the country where the debt was contracted, and not according to that where the debt is sued for." Instances are quoted, in which Turkish interest, although both parties had been long in England, (pl. 1.) East Indian and Irish interest, (pl. 1.) and West Indian interest, at 10 per cent. (pl. 3.) were awarded by courts of equity upon contract and breach of trust. In the same place a doubt is expressed as to the accuracy of the report of *Lord Ranelagh v. Sir John Champant*, 2 Vern. 395, where it is said, upon a debt contracted in Ireland, and a bond given in England to secure it, English interest was awarded; and, in contradiction to Vernon's Report, it is stated that Irish interest was allowed by the Court. So the same case is stated in Prec. in Chancery, 108.

But as to the general doctrine that interest, *in all cases*, is regulated by the law of the place of contract, without regard to the place where the security is given, the residence of the parties, or other circumstances, *quære*, and see the cases collected in the note to the foregoing case in Mr. Raithby's edition of Vernon.

[156]

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

JAMES Duke of ROXBURGHE, etc.—*Appellant*: JOHN ROBERTON, late Tenant in Newton of Roxburghe,—*Respondent* [17th July, 1820].

[Mews' Dig. vi. 750, viii. 1186; 3 Scots R. R. 575. Commented on in *Gordon v. Robertson*, 1826, 2 Wils. and Shaw 115; at pp. 127, 135, 141; *Ogilvie v. Dundas*, 1826, 2 Wils. and Shaw, 214, at p. 225; *Gordon v. Anderson*, 1828, 3 Wils. and S. at pp. 12, 13; *Greig v. Mackay*, 1869, 7 Macph. 1109; at pp. 1110, 1111, and 1112. Distinguished in *Elibrink (Lord) v. Scott*, 1884, 11 Rettie 494, at pp. 495, 498, 499. As to English law see *Massey v. Goodall*, 1851, 17 Q. B. 310; *Gall v. Bates*, 1864, 3 H. and C. 84; 56 Geo. iii. c. 50, s. 6.

A TENANT, by a clause in his lease was bound, "at his removal, to leave upon the land all the dung and manure of the preceding year, the value to be paid by the succeeding tenant, etc.; and at no time to sell or give away any of the hay or straw of the said farm, which shall always be spent on the ground."

Held, on appeal, (reversing the judgment below) that the tenant, under this contract, is not entitled to take away or sell (or semb. to have value for) the straw of the last or way-going crop, and that the lessor is entitled to have and maintain letters of suspension and interdict if the tenant threatens to sell the straw.

The custom of the country can have no operation where there is a contract with provisions applicable to the point in dispute.

In 1790, a farm, called Newton, being parcel of the entailed estate of Roxburghe, was let by John Duke of Roxburghe for twenty-one years from that date to John Robertson, the Respondent.

In the lease there was a clause in these words:—"Farther, the said John Robertson, or his foresaids, at *their removal from the said lands*, shall be obliged to leave upon the ground all the dung and manure of the preceding year; but the value *thereof* shall be paid to them by the succeeding tenant, as the same shall be ascer-[157]-tained by two neutral men, one to be chosen by each party; and AT NO TIME shall the said John Robertson, or his foresaids, sell or give away any of the hay or straw of the said farm, which shall always be spent on the ground."

This lease expired in 1811; but by agreement with Mr. Swinton, the judicial factor,* to whom the entailed estate of Roxburghe had been committed by authority of the Court of Session, the Respondent obtained leave to possess, until Whitsunday, 1815, on the same terms as in the lease, which was to be held as continued to that period.

In the year 18—, the Appellant established his right as heir of entail, and obtained possession of the entailed estates of Roxburghe.

The Appellant, by a written intimation from the Respondent, in August, 1815, was informed that he meant to *sell the whole straw of that crop*, unless the Appellant would take *the crop*, both corn and straw, at a valuation. The Appellant having no occasion for the corn declined this proposal, stating, that he conceived the straw could not be sold, but must be consumed or left on the farm, without valuation to be paid by the landlord; but, as the Respondent disputed that point, the Appellant proposed that the straw should be left, a valuation being put upon it, and the Appellant bound himself to pay that valuation, *in case* it should appear that the tenant was not bound to [158] consume or leave the straw upon the farm. This proposal was rejected by the Respondent, who threatened to sell the straw. The Appellant, thereupon, obtained letters of suspension and interdict. These letters

* The right to the entailed estates of Roxburghe was under litigation, pending which a manager was appointed.

were afterwards brought to be discussed before Lord Pitmilley, who pronounced the following interlocutor:—"The Lord Ordinary having considered the foregoing minute for the charger, with the answers thereto for the suspender, and whole process, repels the reasons of suspension, and *revocals the interdict*, and decrees."

A representation against this interlocutor having been lodged, and followed by answers, his Lordship, on the 29th of February, 1816, pronounced the following interlocutor:—"The Lord Ordinary having considered this representation, with the answers thereto, and whole process, refuses the desire of the representation, and adheres to the interlocutor represented against; finds the Respondent entitled to expenses, and allows an account thereof to be given in, and to be taxed by the auditor."

The Appellant then presented a petition to the second division of the Court of Session, on advising which the Court pronounced the following interlocutor:—"The Lords having heard this petition, they adhere to the interlocutor complained of, and refuse the desire of the petition."

On the 28th of June, 1816, the Appellant presented another petition to the Lords of the second division of the Court, which, on advising, their Lordships refused.

An account of the expenses incurred by the [159] Respondent having been put in, and taxed by the auditor of the Court, the Lord Ordinary, of this date, pronounced the following interlocutor:—"The Lord Ordinary approves of the auditor's report; and, in terms thereof, modifies this account to £35 16s. 3d.; decrees for the same, and the expense of extract, and allows the decret for expenses to go out and be extracted in the name of Alexander Douglas, writer to the signet, the charger's agent."

Against these several interlocutors the Duke of Roxburghe appealed to the House of Lords.

For the Appellant—The Attorney General and Mr. Bligh.

For the Respondent—Mr. C. Warren and Mr. Wetherell.

For the Respondent, it was argued, that the words did not apply to the last year of the lease; that the custom of the country, in the absence of stipulation to the contrary, gave right to the Respondent; that the straw of the last year could not be consumed on the land by the Respondent, because he was to quit at the separation of the last crop; that, as a price was, by the agreement, to be given for the dung, it was not probable the straw was to be left without recompence; that the clause, obliging the tenant to leave the hay and straw, must be limited in construction to the currency of the lease, which ceased to be binding on both parties at the same time: that the obligation, to spend hay and straw on the ground, could only apply to the period of the tenant's possession, when he had the power of spending them; and that [160] the landlord ought not to receive rent for a crop which the tenant has not reaped.

For the Appellant the argument (upon the opening and in reply) was to the following effect:

The words of the lease directly prohibit any sale of hay or straw, and provide that they shall be spent on the ground. The tenant is at *no time* to sell, and the straw is *always* to be spent on the ground. If the last year of the lease may be considered *a time*, or comprised in the word "always," the clause applies to the last as much as to any other year of the lease. The custom of taking away the straw of the last crop was never general, and has been long abolished as inconsistent with good husbandry. If the custom were universal and certain, it could have no effect against express agreements. It may be true, that, according to the provisions of the lease, the straw could not be spent by the tenant—that is not contemplated by the agreement. The provision and expression is that "it shall be spent on the ground." Whether the Respondent did or did not receive straw at his entry is immaterial, and the fact doubtful. He had allowance in the rent, and stipulated, in other beneficial terms of the lease, for the value of the straw which he might leave at the last crop. The stipulation as to price for the dung, and the omission as to straw, creates a presumption the very opposite to that for which the Respondent contends.

The words of the lease are clear, and *in claris non est locus interpretationi*. If they were doubtful, there is strong corroboration of the Appellant's construction in the context. [161] For, in the very sentence next to that immediately preceding

the clause founded on by the Appellant, there is special mention of the last or way-going crop: and in the sentence immediately preceding that founded on by the Appellant, there is special mention of *a time*, viz. *the time of removal of the Respondent*. After that follows the agreement, that *at no time* shall any straw be sold, or given away, but always be spent on the ground.

From the connexion of these sentences, it is demonstrable that the parties in the lease must, in the last sentence, have contemplated the way-going crop, and time of removal.

The interpretation of the Respondent would entitle him to accumulate straw for any number of the years of the lease, and take it away at the expiration of the term.

If a construction were to be forced upon the clause, from views of hardship, and the notion of an imperfect expression of intention, this conjectural and equitable construction could never go farther than the insertion of a clause allowing to the tenant value for the straw which he left. But that would not support the interlocutors under appeal. It would only have entitled the Respondent to a claim for value, but not to sell the straw: and therefore the suspension, at the instance of the Appellant, must have been well founded, and the reasons of suspension ought to have been sustained.*

[162] The Lord Chancellor. This case arises upon a lease made between John Duke of Roxburghe and John Robertson, bearing date the 11th and 19th of February, 1790, by which it is contracted, on the part of the Duke of Roxburghe, to set for the rent, and upon the conditions therein mentioned the farm, called Newtown, with its appurtenances, for the term of twenty-one years, from and after the said John Robertson's entry, which it was thereby declared should take place at the term of Whitsunday then next, old style, with regard to the houses, grass, and pasture ground: and with regard to the arable land and corn, at the separation of the crop, 1790, from the ground. With respect to the management of the farm, the following provisions are made:—

"John Robertson obliges himself and his heirs, first, to keep in grass during the tack, and, at the expiry thereof, one-third part at least of the arable lands; secondly, that, of all the land kept in tillage, one-fifth part at least should be in fallow or turnip yearly, and both sufficiently manured: thirdly, that whatever land should be laid [163] down in grass should be sufficiently sown with sound grass seeds for the fallow crop: fourthly that during the last year of the tack, one-fifth part at least of the lands in tillage should be left in one or two brakes for the incoming tenant to fallow: fifthly, that John Robertson and his aforesaid should give the due changes of seed, that is to say, they shall not sow wheat after wheat, nor wheat after rye or oats: nor oats after wheat or rye, nor oats after oats: neither shall they sow more wheat on the land, in any one year of the three last years of the tack, than what they have been in the practice of sowing annually during the preceding years of the tack."

And it was further covenanted between the parties that no "meadow ground, on any part of the lands thereby set, should ever be fallowed or riven out, but always kept in grass: and that no turfs or divots should be cast on any part of the land, which, on no pretence, should be pared or burnt."

Then follows this provision:—

"Whereas the rent hereinbefore covenanted was specially ascertained and agreed

* Upon the question whether the custom of the country was not excluded where an agreement expressed the terms of the tenancy, and whether an omission to provide by the lease for payment of a given article did not furnish a presumption that no payment for that article was intended, where payment for other articles was provided for by the lease, the case of *Webb v. Plummer* was cited. In that case, by the custom of the country, the outgoing tenant was entitled to an allowance for foldage from the incoming tenant. The lease specified certain payments to be made by the incoming to the outgoing tenant at the time of quitting the premises, among which there was not included any payment for foldage. It was held that the terms of the lease excluded the custom, and that the outgoing tenant was not entitled to any allowance in respect of foldage. 2 B. and A. 746.

upon between the parties, and in the view and upon the condition that the lands should be managed, cropped, and cultivated after the method, and according to the rotation specially above set forth; therefore, in case the said John Robertson shall, during the currency of the tack, depart from the method of labour or rotation before described, without leave in writing given by the said noble Duke or [164] his chamberlain; in that case John Robertson obliges himself, etc. to pay, etc. £3 sterling additional rent yearly for each English acre so differently cultivated contrary to the covenant, and that the lessor, notwithstanding this provision for additional rent, should have power to prevent such cultivation."

And it was thereby specially provided and declared

"That the proprietor or incoming tenant should have power and liberty to sow grass seeds, in due time, upon any part of the corn lands of the said farm, with the *last or way-going crop*, and that without any allowance to be made to the outgoing tenant for the same; and that John Robertson, etc. at *the removal* from the said lands, should leave upon the ground all the dung and manure of the preceding year, but that the value thereof should be paid, etc. by the succeeding tenant, as the same should be ascertained by two neutral men, one to be chosen by each party; and at no time shall the said John Robertson or his foresaids sell or give away any of the hay or straw of the said farm, which shall always be spent on the ground. And in case the said John Robertson or his foresaids shall not remove from the said lands, at the said term of expiry here of, but shall continue to possess by tacit relocation, or by any other title, or under any pretence, other than a new agreement in writing, then it is hereby stipulated and agreed, that, as long as the said John Robertson, or his foresaids shall continue to possess, they [165] shall be holden and obliged to pay to the said noble Duke or his foresaids a yearly rent of £150 sterling in place of the said rent of £225, and that besides performing and fulfilling the whole other conditions and prestations hereby incumbent on them."

Out of this instrument arises the question upon which the House is now to give judgment.

The tenant relies upon the provision expressed that the dung and manure is to be left upon the ground, and paid for according to a valuation; but that, as to the hay and straw, it is not to be left or paid for. The absence of any such provision (according to his argument) shows that the tenant was to be at liberty to carry and take away at the expiration of the lease, the hay and straw of the last year: that the prohibition extends only to selling or giving away; and, as to the expression, which provides that the hay and straw shall be always spent on the ground, it is to be construed as applicable only to the currency of the lease, and not to an act which takes place at or after its termination.

It is moreover contended, on his behalf, that, as he or those in whose right he stands, upon their accession to the farm, received no hay or straw, which was taken away by the preceding tenant, he will receive no consideration for those articles unless he is permitted to take them away. But this is an argument which cannot be admitted to have weight against the expressions, or to affect the fair construction of the instrument which ascertains the rights of the parties. Sup[166] posing all the facts to have been proved, which ought to form the ground of such an argument, the law requires us to presume a consideration for this sacrifice, on the part of the tenant, in the nature and conditions of the contract, and the amount of the rent to be paid by him. He binds himself by express obligation; and it must be inferred and implied, that, in his contract, he stipulated for some equivalent benefit. In the case of a reciprocal contract such as this, a party cannot be admitted to say that he has no consideration for a sacrifice which he binds himself to make. When a tenant is making such a bargain, is it probable that he should forget his interest so far as not to provide, in the other conditions of the lease, a consideration for what he gives up to the landlord?

The dung and manure is to be left on the ground and paid for. An inference from that provision is drawn, that what, according to the expressions of the contract the tenant is not bound to leave, he may carry away. But that is not a conclusive argument, because it is necessary to attend to the further provisions of the lease. Nothing is said as to any payment for hay and straw; and the clause which provides what shall be done at the *removal*, that is, the expiration of the lease, stipulates that

the hay and straw of the farm "shall always be spent on the ground," not that *the tenant* shall spend it, an expression which might possibly lead to a different construction. The provision that the tenant shall at "no time" sell or give away the hay or straw is absolutely [167] incompatible with the supposition of a right in the tenant, in any manner, to eloin those articles during the last year, if, indeed, the express words of the instrument leave us at liberty to enter into conjectures as to any intention to except the last year of the lease.

The case put for the Appellant, of an accumulation of hay and corn during three years or more, which might be found upon the farm during the last year, shows the consequence to which the argument for the Respondent would lead. The manure is collected and prepared by the labour of the tenant, but hay and straw are almost the spontaneous growth of the land. It might be reasonable, therefore, that such a difference, as we find in this contract, should be made as to those respective articles.

The tenant, in this lease, was to enter upon the arable lands at the separation of the crop, and to quit at the corresponding period. In such a case, where no special provision is made by contract, the law of custom may qualify the right of the incoming tenant, and give to the outgoing tenant certain privileges, as the right to enter, for the purpose of thrashing, after the expiration of his lease. That is a question, upon the customary law of Scotland, which it is not necessary that we should deal with in this case (see note at end of case). Assuming or admitting the existence of such law founded on custom, we have here to construe a written contract; and, if the Scotch law is to be administered on the same principles as English law, or any law [168] founded on principle, we must hold that the engagements of parties to each other, by the express stipulations of a written instrument, exclude all consideration of the custom of the country.

Resting upon such principles for the direction of our judgment, can we hold that the words "at no time shall sell or give away the hay and straw, but that the same shall always be spent on the ground," are consistent with a right in the tenant to collect hay and straw during the last year, or any preceding years, and to carry away what he has collected at the expiration of the tenancy?

Judgment reversed.

It is declared that the Respondent, according to the true intent and construction of the tack, is not entitled to sell or give away any of the hay or straw upon the farm at any time during the continuance of the tack, or upon the same at the time of the expiry of the tack. And it is ordered, that, with this declaration, the cause be remitted back to the Court of Session to review the interlocutors complained of, and further to do in the cause as is just and consistent with this declaration.

[For the principles of interpretation to be applied to contracts and statutes, see Ersk. B. 3, tit. 3, s. 87. B. 1, tit. 1, s. 54 and 56; and, for the law as to the right of the tenant to the straw of the way-going crop, by custom and the common law of Scotland, with the exceptions to the rule, see Bell on Leases, pp. 265 *et seq.*]

[169]

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

SIR JOHN CHARLES HAMILTON, BART.—*Appellant*; JOSEPH HOUGHTON,—*Respondent* [21st July 1820].

[*Mews'* Dig. ii. 1382: ix. 312; x. 888: as to computation of interest, see now R.S.C. 1883, Ord. 55 rr. 62, 63.]

Where a trust is created by deed for the payment of debts; if a bill is filed by one of the creditors to enforce the payment of his debt; that purpose can only be effected by the general execution of the trust. The decree ought to direct such execution and an inquiry as to all the debts owing and payable under the trust, and that they should be paid according to their priorities.

A decree for payment of the debt of one creditor, under a deed of trust, which provides for the payment of other creditors is erroneous.—So if the bill, stating A. to have been the survivor of the trustees named in the deed, makes the heir of A. a party to the suit, as such supposed survivor, and that allegation

proves to be false, the decree made upon such state of the pleadings is erroneous.

A bill to carry such a decree into execution, notwithstanding long acquiescence, cannot be sustained. The original decree may be examined, impeached and varied in a suit to carry that decree into execution. It is not conclusive until reversed by original bill, or bill of review, for error apparent on the face of the decree, and the court may refuse to carry it into execution.

A decree, to carry into execution an erroneous decree, being reversed; the cause was remitted, with leave to amend the bill, by adding parties and making a better case as to the original claim, notwithstanding the lapse of sixty years from the date of the deed by which the debt was secured, and of forty years from the date of the erroneous decree; as between the plaintiff creditor, and the debtor there is no presumption-[170]-tion from lapse of time in such a case, and upon such state of the pleadings that the debt has been paid. But other creditors, whose debts ought to have been provided for by the decree, might have a right to raise that question.

A debt by simple contract does not carry interest, because provision for its discharge is made by a deed of trust; such a deed *per se* does not import contract or trust for the payment of interest, especially where the creditors have not signed the deed, and no agreement is made to charge the land and discharge the person.

Interest ought not to be computed from the date of the decree for payment, but from the day when payment is by the decree directed to be made.

An erroneous decree, directing payment of interest cannot give the right to interest; but interest may be due under circumstances.

A party who files a bill in a court of equity to have the benefit of a former decree, must shew (if the case requires it) that such former decree was right. If a decree appears to be erroneous, it cannot be carried into execution.

A decree taken *pro confesso* is the decree of the plaintiff who takes it, and it is his duty to see that it is right.

A decree taken *pro confesso* against one of the defendants in a suit, may be impeached for error by a party claiming under that defendant; and the party claiming under the plaintiff in the suit can have no benefit of that decree, if erroneous.

A bill taken *pro confesso* is conclusive against the defendant only as to the facts within his knowledge; not as to facts which the plaintiff has the same opportunity of knowing as the defendant, *e.g.* as to the survivorship of a trustee, which was alleged in the bill but proved to be contrary to the fact.

This was an appeal, on various grounds, from a decree of the Court of Exchequer (Equity side) in Ireland. The following are the facts of the case, shortly abstracted from the pleadings in the Court below.

[171] By indenture of release, bearing date the 13th of May 1758, and made between William Hamilton* and John Hamilton, his eldest son (afterwards Sir John Stewart Hamilton, baronet,) of the first part; the Bishop of Limerick, William Scott, Henry Hamilton, and Galbraith Lowry, of the second part; and Redmond Keane, of the third part: certain hereditaments and premises therein mentioned were conveyed to the parties of the second part; and their heirs, upon trust, that they or the survivor of them, his or their heirs, should, by sale, &c. discharge the debts and incumbrances mentioned in the schedule to the release annexed, together with all interest then due thereon respectively.

Robert Carson was one of the creditors named in the schedule, and opposite to his name is written the sum of £350. Upon the several debts contained in the schedule, which carried interest, being debts by mortgage, judgment, &c. the interest was computed, and the word "*interest*" was written under them; but the word "*interest*" was not written under the debt of Robert Carson, and no interest was computed on his debt.

William Hamilton died intestate before the 5th day of January 1778, when Sir

* It appears that William Hamilton was tenant for life of the estates conveyed in trust, and John Hamilton was owner of the inheritance in remainder. See p. 184.

John Stewart Hamilton * became entitled to the premises comprised in the release; and also obtained letters of administration of the personal estate of his father.

[172] On the 5th of January 1778, Robert Carson filed a bill in the Court of Exchequer in Ireland, against Sir John Stewart Hamilton, James Scott, as the heir at law of William Scott, (in the bill stated to be the survivor of the trustees named in the release), and others.† The bill stated, that Robert Carson had been employed for several years before the month of May 1758, by William Hamilton, as attorney and solicitor in several causes: that for the prosecution and defence thereof, after making all fair allowances, there remained due to Robert Carson £100 for money laid out and expended, and for his fees as an attorney or solicitor, and that William Hamilton being so indebted to him, and at the same time owing several other debts, did, with Sir John Stewart Hamilton, execute such indenture of release as before mentioned; and the bill prayed, that an account might be taken of what was due to Robert Carson, for principal, interest and costs, in respect to the said sum of £400, and also what was due to the other creditors of the said William Hamilton, who should come in and contribute to the expenses of the suit, and that the lands and premises mentioned in the deed of release, or a competent part thereof, might be sold for payment of such demands.

Robert Carson died, and his executors filed a bill of revivor; but Sir John Stewart Hamilton having been served with process, and not appearing to the original bill and bill of revivor, process of contempt to sequestration was entered up against him, for want of appearance and answer.

[173] On the 26th day of February 1779, the cause came on to be heard on sequestration as against Sir John Stewart Hamilton, and *on bill and answer*, as against the other defendants,‡ when it was decreed that the bill should be taken as confessed against Sir John Stewart Hamilton, and that the Remembrancer should state an account of what was due to the executors of Robert Carson, on the foot of the deed of the 13th of May 1758, for principal, interest and cost, and also on the sum of £50 in the pleadings mentioned.

In pursuance of the decree, the Remembrancer made his report, bearing date the 15th day of September 1779, whereby he certified that there was due to the executors of Robert Carson, for principal and interest on the foot of the deed of the 13th May 1758, and of the said sum of £50, £835 5s.

This report was afterwards confirmed.

On the 23d day of February 1780, the cause came on to be heard for further directions, when it was ordered and decreed, that the Remembrancer should take an account of interest on the principal sum of £350, from the 3d day of December then last, to which time interest had been computed, to the 31st day of January then last, being the time when the report was confirmed, which (being computed) amounted in the whole to the sum of £555 19s. 6d.; and it was further ordered and decreed, that Sir John Stewart Hamilton should, in three calendar [174] months, pay such sum to the executors of Robert Carson, with interest from the 31st day of January then last, until paid with the costs of the suit, or in default thereof, that the Remembrancer should sell the premises comprised in the deed of the 13th day of May 1758, and that out of the money arising by such sale, the plaintiffs should be paid the principal money, interest and costs.

In the year 1785, the executors of Robert Carson, assigned the claim under the decree to George Gordon Carson, who, by a deed executed in 1796, assigned to John Potter.

On the 31st of May 1800, John Potter filed a bill in the Court of Exchequer against Sir John Stewart Hamilton and others, stating the facts before mentioned, and also that Sir John Stewart Hamilton having been served with an attested copy of the

* In the printed cases his title is stated as *heir at law* to William Hamilton; but probably it accrued under the limitations of a will or settlement.

† See the statement, p. 173; and the observations of the Lord Chancellor, p. 185. The statement in the text is from the printed cases.

‡ This is so stated in the respondent's case, and in this respect, the observations of the Lord Chancellor, p. 185, seem to point to this passage; but in other respects, they are more applicable to the subsequent suit to carry the decree into execution.

decree in the former suit, and the principal money and interest not having been paid, the hereditaments and premises comprised in the deed of the 13th of May 1758, were, in the month of June 1780, put up to sale, and purchased by one Arthur Hawthorne, in trust for the plaintiffs in that suit, for the sum of £1000, and that such sale was absolutely confirmed, but that the same was never completed by Arthur Hawthorne, because immediately after the sale, Sir John Stewart Hamilton requested the executors of Robert Carson not to suffer the purchase to be completed, promising that he would shortly pay to them the full amount of the sum so decreed, with interest, and all costs attending the same: whereupon the executors, and George Gordon Carson, assented to postpone the completion of [175] the sale, in order to give time for payment. The bill further stated, that Sir John Stewart Hamilton having, after the pronouncing of the decree, become greatly embarrassed in his circumstances, took upon himself to *execute several deeds of mortgage* of the lands comprised in the decree, whereby John Potter had been obstructed in establishing his rights under the decree: and the bill prayed, that Sir John Stewart Hamilton might be compelled to come to account with the plaintiff, on the foot of the decree, and to pay him what should appear to be due on the foot of such account, for principal, interest and costs, and that the decree might be carried into execution and confirmed.

Before any further proceedings were had in the cause, John Potter and Sir John Stewart Hamilton died, *and the appellant, upon the death of Sir John Stewart Hamilton, (according to the allegations of the appellant's case,) as his only son and heir at law*, became entitled to the hereditaments and premises comprised in the deed of the 13th May 1758.*

On the 12th of June 1802, the respondent, who is the executor of John Potter, filed a bill of revivor against the appellant as the heir at law † of Sir John Stewart Hamilton, and the cause was duly revived.

[176] On the 29th of May 1806, the appellant put in his answer to the original bill, and bill of revivor, insisting that Robert Carson was not entitled to interest on the sum of £350, or to the sum of £50, which he claimed upon an allegation (not admitted) of a parol promise made by William Hamilton, who died seventeen years before the decree was pronounced: that Henry Hamilton, one of the trustees named in the deed of the 13th May 1758, was alive at the time when the decree was pronounced, and lived several years afterwards, and that although he was the surviving trustee named in the deed, he was not made a party to the original suit; that the decree had not been prosecuted for more than twenty years after the same had been pronounced, and the appellant, by the answer, farther insisted upon the statute made in Ireland for the limitations of suits: and prayed the same benefit as if he had pleaded the statute.

On the 3d day of February 1804, the respondent filed an amended bill against the appellant, stating admissions and acknowledgments by letters and conduct on the part of Sir John Stewart Hamilton, of the fairness of the decree, and the validity of the demand against him, especially as to the interest, and containing allegations of various other facts not material to be stated.

On the 5th day of December 1808, the appellant filed his answer to the amended bill, representing that the admissions and acknowledgments set forth in the bill might be as therein alleged, but were owing to the negligence and indolence of his father, Sir John Stewart Hamilton, and his consequent ignorance of the facts of the case.

[177] The answer of the appellant having been replied to, witnesses were examined on the part of the respondent, who proved the exhibits, consisting of the deeds in the pleadings mentioned, some letters of Sir John Stewart Hamilton, and a draft, or

* Upon this statement the Lord Chancellor observed, that there was some inaccuracy in the statement of the printed cases, as to the manner in which the appellant became entitled; and that these inaccuracies occurred so often in the Irish appeal cases, that the House of Lords was always in a state of uncertainty as to matters which might form the grounds of their judgment.

† Probably as issue in tail, or remainder man, under a will or settlement. As the case does not turn upon the fact, it is not material to pursue this inquiry; and this observation may be applied to other points of this case.

order, dated the 2d day of June 1781, drawn by Sir John Stewart Hamilton on Francis Vesey, esq. in favour of one of the executors of Robert Carson for £300, etc. The witnesses on the part of the appellant proved that Sir John Stewart Hamilton was a man of indolent disposition, inattentive to his own concerns, and totally unacquainted with business; that Henry Hamilton, afterwards Sir Henry Hamilton, bart. was the survivor of the trustees named in the deed of the 13th day of May 1758, and that he was living at the time when Robert Carson filed the bill against Sir John Stewart Hamilton.

The cause came on to be heard in the Court of Exchequer, upon the 14th of February 1812, when it was decreed that the respondent was entitled to the sum of £350 in the pleadings mentioned, without interest, and that the appellant should, within three calendar months, to be computed from the day of the date of the decree, pay to the respondent, as executor of John Potter, the sum of £350, with legal interest from that day until paid, together with his costs to be taxed by the proper officer, or that in default of payment, the Remembrancer should sell the lands and premises therein mentioned, or a competent part thereof, and that out of the money arising from such sale, the respondent should be paid his principal, interest and costs, and that if any overplus should remain, the same should be paid to the appellant, or such person as should appear entitled [178] thereto, upon the making out a good title to the purchaser.

By an order dated on the 21st of February 1812, and made upon the petition of the respondent, it was ordered that the cause should be re-heard, and the cause came on to be re-heard on the 26th day of June 1812, when it was declared that the respondent was entitled to the benefit of the decree pronounced in the cause of *Carson v. Hamilton*, on the 23d day of February 1780, and that the same should be carried into specific execution, save only so far as related to the sum of £50 therein mentioned; and that the Remembrancer should take an account of what was due to the respondent, as the executor of John Potter, on the foot of the decree of the 23d of February 1780, for principal, interest and costs, deducting therefrom the principal sum of £50.

In pursuance of the decree, upon re-hearing, the Remembrancer made his report, bearing date the 6th day of June 1813, whereby he certified, that there was due to the respondent, as executor of John Potter, on the foot of the decree of the 23d Feb. 1780, for principal, deducting the sum of £50 - - - £805 19 6
For interest on £805 19s. 6d. from the 23d February 1780, to 23d

June 1813, being thirty-three years and four months - - - 1611 19 4
For costs of obtaining decree - - - - - 91 15 6
Ditto of defendants, Scott and Emery, parties thereto - - - 15 13 4

Total - - - - - £2525 7 8

[179] This report was confirmed, and on the 20th of November 1813, the cause came on to be heard upon further directions, when it was ordered and decreed, that the register should compute interest upon the sum of £805 19s. 6d. due to the respondent, as executor of John Potter, from the 23d day of June 1813, being the time to which interest was computed thereon by the report to the 20th day of November: which he having done in court, and the same amounting to the sum of £20 3s. and which being added to the sum of £2525 7s. 8d. reported due, amounted in the whole to the sum of £2545 10s. 8d. it was further ordered and decreed, that the appellant or such other of the defendants as ought so to do, should, within three calendar months, pay to the respondent, the sum of £2545 10s. 8d. with interest from the 20th day of November until paid, together with the costs of the respondent and the said other defendants, or in default thereof, that the appellant should be barred and for ever foreclosed of and from all right and equity of redemption in and to the lands and premises in the pleadings mentioned; and that the Chief Remembrancer of the court, or his deputy, should set up and sell to the public, and to the highest bidder, the said lands and premises, or a competent part thereof; and that out of the money arising by such sale, the respondent should be paid the sum of £2545 10s. 8d. so due to him, as executor of John Potter, with interest and costs, and that the remainder (if any) of the money to arise by such sale should be disposed of as the court [180]

should thereafter think fit to direct; and that the other defendants in the cause should recover their costs from the respondent, and the respondent should recover the same, together with his own costs out of the monies to arise by such sale.

The appeal was brought to reverse or vary the decrees and decretal order of the 14th day of February 1812, 26th day of June 1812, and of the 20th day of November 1813.

For the Appellant, Mr. Wetherell and Mr. Treslove.

The decree of the 23d day of February 1780, was made in the absence of Henry Hamilton, afterwards Sir Henry Hamilton, baronet, who was the surviving trustee named in the deed of the 13th day of May 1758, and was then living, and was therefore a necessary party to that suit.

Even assuming the said decree of the 23d day of February 1780, to be valid, yet, twenty-three years having elapsed before steps taken in prosecution thereof, the respondent was barred from recovering the money certified to be due by the report made in the cause of *Carson v. Hamilton*; or the same ought, at the time when the said John Potter filed his bill of complaint against Sir John Stewart Hamilton, to have been presumed to have been satisfied.

The debt of £350 due from William Hamilton to Robert Carson, was a simple contract debt, and no interest is provided in respect of that debt by the deed. There was no evidence of any contract to pay [181] interest. A debt by simple contract is not made special, because the creditor signs a deed of trust, which provides for the payment of that, with other debts bearing interest by contract. That was supposed to have been the opinion of Lord Hardwicke, from the report of the case of *Carr v. Lord Burlington*, 1 P. W. 229. But it appears from the decree, as given in the notes of Mr. Cox, that Lord Hardwicke in that case, made an order, referring it to the Master to compute interest on such of the debts as in their nature bore interest; and the case of *Barwell v. Parker*, 2 Ves. 363, shows that such doctrine was never intended to be understood as a general proposition of law.

The Lord Chancellor:—That will depend upon the language of the deed. If there be debts with and debts without interest, and the words are general, it must be construed *reddendo singula singulis*. In decrees, the language is guarded with that special view. The Master is directed to compute interest on such of the debts as bear interest.

For the appellant:—

There is nothing in the provisions of the deed which shows an intention to give interest, on the contrary, the word "interest," which is subjoined to the specialty debts, is not set opposite to this and other debts by simple contract. In the case of a will, providing for the payment of interest upon debts, it was held not to extend to debts by simple contract, *Tait v. Lord Northwick*, 4 Ves. 618. The same construction has prevailed as to arrears of annuities, *Crenze v. Hunter*, 2 Ves. jun. 157, 4 B. C. c. 316 (see also *Anderson v. Dwyer*, 1 S. and L. 301). [182] Upon a judgment at law, interest is only given upon the new suit. Here the original decree was erroneous and defective for want of parties, and the assignee cannot have the benefit of such a decree. When a suit is instituted to carry a decree into execution, the court "sometimes consider the directions, and varies them in case of a mistake, and it has, on circumstances, refused to enforce the decree," Mitf. 75 *. Upon this principle the decree was varied on re-hearing in the Court below.

The sum of £805 19s. 6d. upon which the decree of the 26th of June 1812, directs interest to be calculated from the 23d day of February 1780, the date of the decree in the cause of "*Carson against Hamilton*," was in part composed and made up of accumulations of interest upon the original debt of £350. If the respondent is entitled to interest upon the original debt, he is not entitled to interest upon the aggregate of interest and principal.

For the Respondents, Mr. Hart and Mr. Raithby.

The decree of 13th February 1780, is binding and conclusive on all parties, until reversed by original bill or bill of review for fraud, or error apparent on the face of the decree, and the appellant, claiming as heir at law, is equally bound by the

* See the note, and the *Attorney General v. Day*, 1 Ves. 218; *West v. Skip*, Id. 241; *Johnson v. Northey*, Prec. in Chan. 131.

decree as Sir John Stewart Hamilton, his father, and estopped from averring any matter *dehors* the decree, because the decrees of the 14th February 1812, the 26th June 1812, and the 20th November 1813, are decrees [183] founded on a suit filed merely to revive and carry into execution the decree of the 13th February 1780, which has never been disputed. In bills to carry decrees into execution, the law of the decree ought not to be examined into, or the decree varied, and especially in this case, where the appellant's father, during his whole life, and the appellant himself, have acquiesced in, and submitted to the decree.

Supposing, but not admitting, that the appellant had a right to unravel the decree, as to the question of interest on the principal sum of £350, the decree is well warranted by the contract of the parties themselves, evidenced by the deed of the 13th of May 1758, whereby the lands and premises therein mentioned are conveyed to trustees, to pay thereout, by sale or mortgage, the sum of £350 with the other debts mentioned in the schedule annexed to that deed, with the interest due on the debts, and, in the mean time, to apply so much of the rents and profits of the premises as would satisfy the accruing interest. Even without any express direction as to the interest, whenever a trust deed is executed for payment of debts, and a schedule made of such debts, the simple contract debts are then in the nature of specialties, and a specific interest given in the fund out of which payment is to be made.

The case of a trust by deed is distinguished in the case of *Barwell v. Parker*, from a trust by will for the payment of debts by simple contract, which are not thereby converted into debts by specialty. In the latter case, it is the voluntary [184] act of the testator; in the former, the debts are charged on the land by contract, and the remedy of the creditor by legal process, is stayed for the benefit of the debtor. The doctrine of Lord Hardwicke, in *Barwell v. Parker*, is recognized and adopted in *Shirley v. Lord Ferrers*, 1 B. C. C. 41. With respect to the construction of the deed it is said, that interest is computed and charged on the specialty debts, and is omitted as to this and other debts by simple contract. It is not probable that any of the creditors would give up their legal remedy without securing their right to interest.

Lord Redesdale: The nature of the deed must be observed. It is not one by which the debtor alone charged the estate. He was only tenant for life. The charge was made by the concurrence of the son, who was the owner of the inheritance. There is a clause in the deed to indemnify the son, and that extends only to the principal of the debt.* The decree is at all events erroneous, being made in the absence of the person having the legal estate.

For the Respondents: There is an admission, by inference, from the answer of the appellant, that Scott was the surviving trustee. And where a bill is taken *pro confesso*, the facts stated are conclusive against the defendant.

Lord Redesdale: Only as to those facts which are in his knowledge. If you take a decree against [185] a person having no interest, what operation can it have? The decree is moreover erroneous, because it directs no enquiry as to the debts owing and payable under the trust, such enquiry should have been directed, and that the debts should be paid according to their priority.

The Lord Chancellor: The decree does not direct that the scheduled creditors should be called in. If the charges in the bill, that the trustees entered and received the rents, but did not pay, are to be taken as true; the suit is defective for want of parties. The representatives of the tenant for life should have been before the Court (see p. 171). He was bound to keep down the interest of the debts until the execution of the trusts.

In the subsequent decree nothing is said of the mortgagees or other parties mentioned in the bill. The respondent states in his case, that the cause, as against all the other parties, was set down on bill and answer (see p. 173). Should not the Court have made some deliverance as to those other defendants? The subsequent incumbrancers raise questions, which they had a right to have decided. How far can the decree be considered as valid against them? In the decree of 1813, as stated in the case, it is only directed, that the appellant, or such other of the defend-

* This does not appear by the cases. The deed is not printed either in the body of the cases or in the appendix.

ants as ought so to do, should pay, etc. or otherwise, the premises should be sold. This is a defect in the decree. But the parties interested do not appeal.

Lord Redesdale: It seems that the decree on rehearing does not order a sale of all the estates, or [186] do more than direct that the plaintiff shall have the benefit of the former decree.

In reply: Lord Hardwicke, in *Crenze v. Hunter*, does not decide what precise species of deed shall be sufficient to convert a debt by simple contract into specialty. As to *Shirley v. Lord Ferrers*, it is an authority in favour of the appellant.

The Lord Chancellor: The decree in that case, at least, is not adverse. The mere direction by deed to pay a debt, does not infer either contract or trust to pay interest upon debts by simple contract. As to contract, the creditors did not execute the deed. There was nothing to prevent their suing the debtor after the execution. They did not contract for specialty, and no consideration was given to the debtor by charging the land and discharging the person. The debt, after the deed was executed, remained as before, a debt by simple contract.

Lord Redesdale: It is the practice in Ireland, where the Court orders money to be paid, and it is not paid, to give interest from the date of the order. But the great difficulty is, that the decree is erroneous for want of proper parties to the suit, and proper directions in the decree.

Mr. Hart: There is no appeal against the original decree.

The Lord Chancellor: That brings it to the question, whether the assignee can have the benefit of a decree which is erroneous.

Lord Redesdale: It is the decree of the creditor, and taken upon sequestration *pro confesso*. [187] In such a case it is the business of the party taking the decree to see that it is right.

The Lord Chancellor, on moving the judgment, in the course of stating the facts and pleadings of the case, censured the general inaccuracy of the Irish cases, and remarked, that whether the bill filed by Robert Carson was on his own behalf, or for others also, was not very material, considering that he was thereby demanding the execution of the trusts of a deed: that if Hamilton was the surviving trustee, to sell and mortgage for the payment of debts, the surviving trustee or his heir was not before the court to sustain the interests of the person for whom he was trustee: that the trust was not for the payment of the individual person of the name of Carson, but for the payment of "all and singular the debts and incumbrances in the schedule to the release annexed, together with all interest then due thereon respectively;" that the decree carrying into execution the trusts of such a deed, should not have made provision for the debt of Carson only, but should have called on the Master to enquire what debts and incumbrances remained to be paid under the effect of that trust: bringing before the Court all persons interested in that enquiry, and then paying and satisfying them proportionally, if the funds would not pay all the creditors: paying them entirely, if the fund would pay them all; paying interest to such of them as were entitled to interest, and not paying interest to such of them as were not entitled to interest: that by the original decree, which was [188] taken *pro confesso* against Sir John Stewart Hamilton, the officer of the Court of Exchequer was to do no more than to audit and state an account of what was due to the executors of Robert Carson alone, on the foot of the deed of the 13th of May 1758, for principal, interest and costs: and whether this decree as to the title of Carson to interest, meant to leave that question to the officer of the court, when he was to take the account on the footing of that deed, to take an account of principal, interest and costs, if, according to the true construction of that deed, interest was due, or whether it was meant to determine that interest was due, and to call upon the officer of the court to take an account on the footing of the deed of the 13th of May 1758, of principal, interest and costs as due, did not distinctly appear.

After these observations, which were intermixed with statements of the facts and pleadings, the Lord Chancellor proceeded thus: The appeal complains, that the decree was taken in the absence of Henry Hamilton, afterwards Sir Henry Hamilton, bart. who was the surviving trustee named in the deed of the 13th day of May, 1758, and was then living, and was therefore a necessary party to that suit. This is the objection made to the decree of the 23d of February 1780, which is sought by the subsequent proceedings to be carried into execution, and the benefit of which is

sought thereby. If that decree was an erroneous decree, they were not entitled to have it carried into execution. It appears upon the evidence, that Henry Hamilton was the surviving trustee, living at the time when this decree was [189] made, he was therefore the proper person to represent the *cestui que* trusts.

This ought not to have been the decree made in the cause, even supposing Henry Hamilton, or the other trustees to have been dead, because, as this was a deed to pay all creditors, it should have been made in the ordinary course in which decrees in such cases are made, viz. providing for the payment of all creditors, and not merely a decree for the payment of this particular creditor: in that respect also it is wrong. In the next place, the appellant, by his case, insists upon length of time, as a bar to the right claimed under the decree: but as that point is now abandoned, it is unnecessary to discuss the question. He then further insists that the debt of £350 was a debt which ought not to have carried interest. That would be a reason for setting up the decree on the original hearing of the 14th of February 1812, which declared that the £350 was a debt of that kind, which ought not to have carried interest, except from the date of that decree. Then is stated the objection to the accumulation of interest upon interest.

The questions here, are really these: In the first place, it has been suggested at the bar, that there is a presumption, from lapse of time, that this £350 must have been paid, and that neither principal nor interest can be claimed after so long an interval. It does not appear to me, from these pleadings, that we can take that for granted; but if there were other creditors, whose demands ought to have been provided for by this decree, they might have had a right to insist upon that proposition. The [190] original decree appears to me to be a decree, the benefit of which cannot be had in this suit. That original decree is at least wrong in these respects, viz. First, that the surviving trustee was not before the Court; Secondly, that it was not a species of decree which ought to have been made to carry into execution the trusts of such a deed as this. If I were asked which of these decrees, that giving interest or that not giving interest, was right, I should certainly say, it is my opinion, that the decree which did not give interest, was correct. The meaning of that deed was not to give interest on debts not carrying interest, and the state of the accounts tends to that opinion; but under the circumstances of this case, it appears to me, that we can do no more than displace all these decrees, with liberty to the party to go before the Court again, and to amend these pleadings, if he shall be so advised.

Lord Redesdale: I perfectly concur in the opinion already expressed upon the merits of the case, and upon the construction of the deed under which the sum of £350 was claimed by this suit. It appears to me perfectly clear that the deed has not given interest; the deed does not alter the nature of the debt, but merely provides for the payment of the debt. It expressly provides for the payment of interest on debts, which did carry interest, and it is silent as to any interest upon this debt. I am therefore of opinion that the deed itself does not give interest upon that debt. Whether under any circumstances interest ought to be calculated upon that debt is another question, which may come to [191] be decided when there are proper parties before the Court for that purpose. The decree of the 14th of February 1812, considers the person filing that bill as entitled to the £350 principal sum, with interest from the date of that decree. Whether that is correct or not, and especially as there were not the proper parties before the Court, I will not venture to say. It appears to me that nothing should be said upon the subject of the interest in the order of the House, but that the question should be left perfectly open. That decree proceeded, I suppose, on the ground that when the Court decreed the sum of £350 to be due, it was considered as the judgment of the Court, upon which interest ought to be calculated; that is not quite according to the course of a court of equity. The usual course is to direct the payment of the sum at a certain day, and then, in case of non-payment at that day, interest to accrue from the time appointed for payment. Such, however, is the form of this decree. Upon that subject I should rather wish to leave the question open.

The decree of 1780 could only be sustained under the authority of a deed, by which the estates were vested in trustees in trust for the payment of certain debts. Subject to that charge they were limited to William Hamilton (who was the debtor) for life, with remainders over. The charge was introduced upon the estate, by an

agreement between the father and the son, that the son should suffer a recovery and charge these debts of his father upon the estate. The interests therefore which were taken under that deed were the interests of all the creditors who were specified in that deed. The [192] trustees hold the estate in trust for these creditors, and, subject to the claims and rights of these creditors, were trustees for Mr. Hamilton, the father, for his life, and after his death for the several persons who were entitled in remainder under the deed.

It is perfectly clear that no proper decree could be made for the purpose of raising any sum of money under that deed, without having before the Court all the persons who were interested in the property. The parties before the Court upon the original suit in which the decree of 1780 was made, were the claimant of this sum of money of £350 and a further debt, a person who was represented to be the heir of the surviving trustee, and the person who was then entitled as tenant in tail to the property, subject to the payment of those debts. If Henry Hamilton, who appears by the evidence in this suit to have been at that time living, and the surviving trustee, had been a party to the suit, the decree should have directed the trusts of the deed to be carried into execution; that an account should be taken of all the debts remaining unpaid; that the amount of those debts should be raised by sale or mortgage of the estates; and that the surplus, whatever it might be, should be settled to the uses contained in that deed. The decree, instead of being to that effect, is a decree providing for this particular debt, and directing a sale to take place in consequence of non-payment of the debt, and as I observed, having before the Court not the surviving trustee, but the heir of a person who was represented to be the heir of another trustee then dead, and which heir of that trustee had no estate vested in him, for the estate [193] had vested at that time in Henry Hamilton, the surviving trustee.

It is clear that the decree was erroneous in every respect; it was erroneous, unquestionably, in decreeing the party to that deed entitled to that which it then gave him; it was erroneous in decreeing that he was entitled to any thing, without giving the same benefit to the other creditors entitled under the trust; it was erroneous in proceeding to a sale without having the surviving trustee before the Court; and therefore it is a decree which the Court can never carry into execution. The party who comes into a court of equity to have the benefit of a former decree, must show that it was a right decree, if the decree appears to be erroneous, the Court cannot carry it into execution.

In the present suit, Mr. Houghton claims as assignee under different assignments, and so far may be considered as the assignee of the debt of £350 charged by the trust deed. The decree obtained by him in the Court of Exchequer on the 26th of June 1812, by which he was declared entitled to the benefit of the decree of 1780, proceeding upon that ground, and giving him the aggregate sum which that decree provided, (except as to a sum of £50 which was so manifestly erroneous that the Court of Exchequer altered so much of the former decree); but declaring that the aggregate sum, with subsequent interest calculated upon it, should be paid to Houghton, is throughout erroneous. The Court of Exchequer had, on the 14th of February 1812, made a decree, by which only £350, with interest from the date of that decree, [194] was given to the appellant. That decree is also erroneous, because that decree had not the proper parties before the Court.

The order which ought to be pronounced is, that the decree of the Court of Exchequer of the 26th June 1812, and that which followed upon it of the 20th November 1813, on further directions, should be reversed, they being manifestly throughout erroneous, and that the decree of the Court of Exchequer on the 14th of February 1812, should be also reversed; but observing that decree to be confined to the £350, to order that that decree should be also reversed, inasmuch as although the respondent may be entitled to the sum of £350, we cannot assert that he is entitled, because there are persons who ought to have been before the Court, who might have disputed whether he was so entitled or not. Although the respondent may be entitled to the sum of £350 under the provisions of the deeds of the 12th and 13th of May 1758; yet the former decree, the benefit of which was sought by the respondent, and the decree of the 14th of February 1812, do not provide for the due execution of the trusts of the deeds of the 12th and 13th of May 1758, and as there

were not in any of the suits in which such decrees were made, the proper parties before the Court, the cause should be remitted to the Court of Exchequer in Ireland, with leave to the respondent to amend his pleadings, by introducing parties thereto, or otherwise, as he shall be advised. The amendment to this bill may be not only by making proper parties to it, but by framing his bill according to the rights of the parties, namely, to [195] have the proper trusts carried into execution. The minute which I have drawn out will comprise all these particulars.

Die Veneris, 21 Julii 1820.

It is ordered and adjudged, by the Lords, etc. That the decrees of the 26th of June 1812, and the 20th of November 1813, complained of in the said appeal, be and the same are hereby reversed. And it is hereby declared, that although the respondent may be entitled to the sum of £350 under the trusts of the deeds of the 12th and 13th of May 1758, yet inasmuch as the former decree, the benefit of which was sought by the respondent, and the said decree of the 14th of February 1812, did not provide for the due execution of the trusts of the said deeds of the 12th and 13th of May 1758, and there were not, in any of the suits in which such decrees respectively were made, proper parties before the Court for such purpose, It is therefore ordered and adjudged, that the said decree of the 14th of February 1812, also complained of in the said appeal, be and the same is hereby also reversed; and it is further ordered, that the cause be remitted back to the Court of Exchequer in Ireland, and that the respondent be at liberty to apply to the said Court for leave to amend his bill by making proper parties thereto, or otherwise as he shall be advised.

[196]

SCOTLAND.

ON APPEAL FROM THE COURT OF SESSION.

ARCHIBALD, Duke of HAMILTON, etc. (since deceased), and ALEXANDER, Marquis of DOUGLAS, etc.: And by Revivor, ALEXANDER, Duke of HAMILTON, etc.—*Appellants*: Mrs. H. P. ESTEN, (now Scott Waring,) and JOHN SCOTT WARING, her Husband, for his interest.—*Respondents* [24th July 1820].

[Mews' Dig. xiv. 412 (on the point noted at p. 209 as to illegality of trust for future illegitimate children); 3 Scots R.R. 581. See *Boyes v. Waring*, 1822, 1 Shaw, App. 121.]

Under a strict tailzie prohibiting alienation, but containing a power to grant leases, provided they do not exceed twenty-one years, and be not let with evident diminution of the rental; the heir of tailzie in possession, acting upon the opinion of counsel, made leases to his steward at rents a little above the former rents of the lands leased, but far below their market value; with intent that the steward should underlet the lands at their full value, and pay the surplus, beyond the rents reserved in the principal leases, to persons named by the grantor of the leases, the heir of tailzie in possession. The steward accordingly underlet the lands at rents exceeding the principal rents by £1371, and, some time after the grants of the principal leases, executed a trust obligation in favour of the objects of the trust. Held, that the leases, from the time of the grants until the declaration made by the trust obligations, were held in trust for the grantor, and that they were invalid as a violation of the prohibitions, and not within the permission of the deed of tailzie.

[197] Whether receipt of the rent reserved upon the principal leases, or knowledge of and acquiescence for a considerable time in the payment to the objects of the trusts of the surplus, arising from the rents reserved upon the underleases, constitute homologation, *Quære*.

The family estates of the Dukes of Hamilton, in Scotland, are held under the letters of a strict entail, with all the requisite clauses to make such an entail effectual, containing an express prohibition against alienation, and a permission to let leases, provided they do not exceed twenty-one years, and be not let "*with evident diminution of the rental.*"

Douglas, Duke of Hamilton, having cohabited with the respondent, Mrs Scott Waring, (then Mrs. Esten,) who during the cohabitation had borne a daughter, the reputed issue of that connexion, and being anxious to make a provision for the mother and child, entered into a correspondence* with his agents, and took the opinion of counsel as to the most secure and effectual mode of making such provision, by granting beneficial leases of the entailed estates, to be held in trust for their benefit. In consequence of advice upon the opinion thus taken, the Duke, by a lease executed the 30th of November 1798, let to his steward and agent, John Boyes, his heirs, assignees, and subtenants, certain farms, part of the entailed estates, for twenty-one years from Martinmas 1798 and 1799, at a rent nominally higher than had been paid on former leases.

[198] By another lease, executed on the 8th of February 1799, the Duke let to Mr. Boyes, his heirs, assignees and subtenants, for twenty-one years from Martinmas 1798, other farms, being also part of the entailed estates, at rents just exceeding the rents payable on leases lately expired.

By a third lease, of the 20th and 25th of June, a farm called Bonbard was let to the same person, and for a similar rent.

On the 2d of January 1799, about a month after the date of the first lease, Mr. Boyes executed an obligation, which reciting that lease, *and certain causes and considerations*, proceeds to declare the trust, which is in the form of an agreement between Mr. Boyes and Mrs. Esten, and an obligation on his part to underlet the lands or assign the leases for the highest rents and prices which could be obtained, and after paying the rents reserved in the principal leases, to hold the surplus rents or prices which might be so obtained for the use of Mrs. Esten, during her life, and for Anne Douglas Hamilton, her daughter, *and any other after-born child or children* of Mrs. Esten and the Duke of Hamilton, in such manner as in the trust obligation specified.

On the 26th of April and 3d of October 1799, Mr. Boyes executed similar obligations by way of declaration of trust, with respect to the second and third leases respectively.

These trust obligations were not produced or known to the appellant until long after the death of Douglas, Duke of Hamilton. Whether they [199] were ever by the grantor delivered to or in behalf of the respondent, Mrs. Scott Waring, and if so at what time they were so delivered, did not appear.

Douglas, Duke of Hamilton, died on the 1st of August 1799, and immediately after his death Mr. Boyes granted subleases of the lands comprised in the principal leases at rents which created a surplus of £1370 beyond the rents reserved upon the principal leases.

Upon the death of Douglas, Duke of Hamilton, he was succeeded in the estates and honours of the family by Archibald, Duke of Hamilton, the original appellant.

After the death of Duke Douglas, Mr. Boyes became the steward and agent of Duke Archibald, and accounted with and paid to him the rents reserved upon the three principal leases granted by Duke Douglas to Boyes, as trustee for Mrs. Esten and her issue by Duke Douglas; and with the knowledge and acquiescence of Duke Archibald, accounted with or paid to the respondent, Mrs. Waring, the surplus rents arising out of the subleases made by him to his subtenants.

Mr. Boyes died in 1812, and upon his death the principal leases vested in John Boyes, his son, as his heir and representative.

The respondents (who had lately intermarried) finding that some question was about to be raised on the part of the appellants, as to the validity of the leases and trust, required Mr. Boyes, as the representative of his father, to execute a conveyance of the principal leases and under leases in favour of new trustees; with which

* The material parts of the correspondence and the opinion, are stated by the Lord Chancellor, in moving the judgment. Post, p. 208, *et seq.*

requisition, he having [200] delayed to comply, an action of adjudication in implement, and of count and reckoning, was brought against him by the respondents in the Court of Session.

The summons in this action concluded that it should be declared that the principal and sub-leases were held by John Boyes, deceased, in trust for the respondent, Mrs. Scott Waring, under the trust-obligations, and that they were binding on "John Boyes, as representing his father, and that he should be decerned to render to the pursuer, Mrs. Scott Waring, or to Captain Donald Macleod and Alexander Forsyth, as trustees nominated by her, a just and true account of his intromissions with the rents of the farms therein specified, (parts of the entailed estate of Hamilton,) and should be decerned and ordained to denude and convey two leases, which the said deceased John Boyes held of these farms, and several subleases therein specified, in favour of the said Donald Macleod and Alexander Forsyth, or otherwise, on his failing so to do, that the said leases and sub-leases should be adjudged from the said John Boyes, and decerned and declared to pertain and belong to the said trustees, in trust for the use of the pursuer during her lifetime."

Upon this action being raised, the appellant, the Marquis of Douglas, raised an action of exhibition, count, reckoning, and payment, against Mr. Boyes and the sub-tenants, demanding that they should produce the principal lease and the subleases: and that it should be found that they had no right to possess the lands demised, and that they should be [201] bound to account to him for the whole rents actually payable by the sub-tenants.

The appellant, at the same time, gave in defences in the action at Mrs. Scott Waring's instance, mentioning the action which he had brought, and praying that proceedings should be sisted, until they were conjoined. In the meantime an action of multiple-poin ding was brought in the name of Mr. Boyes, with the view of trying the validity of the claims of the parties.

By an interlocutor of the Lord Ordinary on the 10th of March 1812, the three actions were conjoined: and on the 11th March 1812, the Lord Ordinary pronounced the following interlocutor:—"Having considered the three processes now conjoined, the representation for the Marquis of Douglas, separate representation for John Boyes, esquire, and having heard parties procurators upon the whole of the action of multiple-poin ding: prefers Mrs. Scott Waring and her husband, so far as he may have an interest, to the sums that may be in the hands of the raiser of the multiple-poin ding, and decerns in the preference accordingly under deduction always of the necessary expences incurred by the raiser of the multiple-poin ding, etc.; prefers Mrs. Scott Waring and her husband, so far as he may have an interest, for such of the rents as may be received for the year 1813, as well as for the preceding years, and decerns in the preference accordingly."

Against this interlocutor the appellants gave in a representation which the Court appointed to be answered.

On the 12th of May 1814, the appellants brought [202] an action of reduction and declarator against John Boyes, and the respondents, Mrs. Scott Waring and her husband, for his interest, (but taking no notice of Miss Hamilton, the respondent's daughter,) wherein they called for the production of the two leases granted by Douglas, Duke of Hamilton and Brandon, in favour of John Boyes deceased, and also the obligations of trust granted by the said John Boyes, in favour of Mrs. Scott Waring, and concluding that these writings should be reduced, set aside, and decerned, and declared to have been from the beginning, and in all time coming, to be null and void, and that the appellants should be reponed and restored against the same for the following reasons:—1st. Because they were vitiated and erased *in substantialibus*, and defective in the solemnities required by law.—2dly. Because the said leases were granted fraudulently and confidentially by the said Duke to the said John Boyes, his factor at the time, without any value, and with a view to defraud the heirs of entail in the dukedom and estate of Hamilton.—3dly. Because the foresaid tacks and relative obligations of trust were granted, *ob turpem causam et propter causam adulterii*, that they were not actionable and could bear no faith in judgment or out with the same, and that the said leases and trust obligations being so reduced and set aside, it should be found and declared that the appellant, the Duke of Hamilton and his successors in the entailed estate of Hamilton, had the only right and title to possess the lands contained in the said

leases, and that the said John Boyes and his sub-tenants, should be decerned and ordained to flit and remove themselves from the said lands, in order that the pursuers might enter thereto.

[203] By an interlocutor dated the 9th of July 1811, the Lord Ordinary found, "that the leases being granted in trust for Mrs. Scott Waring and Miss Hamilton, so far as they were for the benefit of Miss Hamilton, they must be held to be altogether legal and unexceptionable; and so far as any benefit was by the leases conferred on Mrs. Scott Waring, it did not appear to have been with the view of her entering into or continuing in an improper course of life, but to secure a permanent income to a person, who had been induced by the granter to withdraw from a lawful and lucrative employment, and who was the mother of his only daughter; and *having been so long acquiesced in and unchallenged**, it ought not to have been made the subject of judicial discussion; therefore, in the action of exhibition, count and reckoning, and adjudication by Mrs. Scott Waring and her husband, so far as he has any interest, decerns, declares, and adjudges in terms of the conclusions of the libel; the pursuers, before extract, finding security to relieve the defender of the engagements his father came under, as a trustee for the pursuer, in the process of multiple-poincing brought by Mr. Boyes, prefers Mrs. Scott Waring and her husband, so far as he may have any interest, to the rents and funds *in medio*; and decerns in the preference, and against the raiser of the multiple-[204]-poincing, accordingly; Mrs. Scott Waring and her husband for his interest, before extract, finding security as before mentioned; refuses the representations for the Marquis of Douglas and for Mr. Boyes; and, in fine, in the process of reduction at the instance of the Duke of Hamilton and the Marquis of Douglas, his commissioner, sustains the defences, assoilzies the defenders from the whole conclusions of the libel, and decerns."

To this interlocutor the Lord Ordinary subjoined the following note:—"The former decisions upon the point of *turpe pactum* do not appear to be uniform. In the case of Sir William Hamilton, the Lords had set aside a bond in favour of a woman who was living in adultery with the granter, while they sustained an obligation to the child, which had been born of the same connection. And from the case referred to, (20th July 1622. Weir,) it appears, that a bond granted to a mother in similar circumstances for behoof of her child, was set aside. But in the case of *Ross v. Robertson*, in 1642, a bond which had been granted to a woman in the very same situation, and after her death, to her children begot in adultery, was sustained; and although, from the statement of the case, it would appear, that some argument had been raised upon the rule of the civil law, that *turpiter facit quod set meretrix, non turpiter accipit cum sit meretrix*, the more probable ground of decision seems to have been that stated by Lord Kames (Principles of Equity, B. 2, cap. 1, near the end), viz. that it was a duty and not a wrong to provide for a natural child, and for a woman, that the man had robbed of her [205] chastity. It appears, too, (which, in a question depending on general principles of jurisprudence, must be of great weight) that in England, in a similar case (*The Marchioness of Annandale v. Harris*, 2 P. W. 432, and 3 B. P. C. 145), a decree in the courts of law (Chancery) had been affirmed in the House of Lords (in 1728), though the precedent appears to have been overlooked in the case of Sir William Hamilton; and there is this difference between the formerly decided cases and the present, that there, the obligation granted to the woman and to the children of an illicit connection could not be enforced without the aid of a court of law, whereas in this case, the right of Mrs. Scott Waring and her daughter has been carried into effect, and must continue in full force, unless challenged and set aside in a court of law."

The case having been brought before the second division of the Court, at the instance of the appellants, the Court, by two successive interlocutors, affirmed the judgment of the Lord Ordinary.

The appeal was brought against the several interlocutors before stated.

* This is to be taken (*semble*) as an opinion and decision against the appellants, upon the ground of acquiescence, (by receipt of rents, etc. p. 199.) and laches, as distinguished from homologation. See pp. 206 and 225. To what antecedent the relative pronoun *it* in this passage refers does not very clearly appear. Whether to "*leases*" (by inadvertence,) or to "*benefit*," or generally to the whole subject matter of the litigation.

For the appellants, The Attorney General, and Mr. Abercrombie.

For the respondents, Mr. Warren, and Mr. Wetherell.

The question as to the illegality of the consideration, though strenuously argued in the Court below, [206] and discussed with much ability and learning, and supported by many authorities in the printed papers, was waived in the argument before the House of Lords.

The question of homologation was argued at great length before the House of Lords. But the House being of opinion that there was nothing in the judgments of the Court below upon that point amounting to a decision, gave no opinion upon that question. The arguments therefore, and the authorities upon these two points are omitted.

The validity or invalidity of the leases, under the power, or as affected by the prohibitions of the tailzie, was the only remaining question, and that was argued by the appellants upon the authority of the judgments in the *Westshiell's Case*, and the *Queensberry Leases*, (*ante*, vol. 1.) and for the respondents the same arguments as in that case were repeated.

The Lord Chancellor, in moving judgment, observed, that Miss Hamilton had not been a party in any of the suits, and upon a statement made by the agents in the cause, that she had no interest, because the leases had expired; the Lord Chancellor asked, whether they had expired at the time when this suit was instituted? to which question an answer was returned in the negative.

The Lord Chancellor then further observed, that upon the question of homologation, the House could give no opinion whatever, there being no passage in any of the interlocutors, which expressed any opinion (See the interlocutor of the L. O. p. 203, and the observations, post, 225) of the Court of Session as to [207] that question, and having put a question to the agents, whether he was right in that apprehension, in which they concurred, the Lord Chancellor then proceeded thus:—It is desirable that we should know, whether we are right in that, because the question on the validity of the leases, is certainly a very important question; but if there had been any opinion given by the Court of Session, in the terms of their interlocutors, that there was homologation sufficient to sustain the leases, then if we had concurred in opinion with them, that there was homologation sufficient to sustain the leases, it would have been unnecessary to consider how the question ought to be determined about the validity of the leases, supposing there had been no such homologation; but as far as I can find, looking anxiously at the terms of the interlocutors, the court has given no opinion whatever as to the homologation.

I can collect from the notes of the Judges opinions, what each of them probably thought about this matter of homologation; but we cannot take that to be a matter decided in the cause, unless it is decided in the terms of the interlocutors, and that therefore will reduce the question to this way of being considered, namely, whether if it should turn out (and I am not stating any thing now with reference to that question), that we should think the leases not good leases, we must not necessarily send it back again on the point of homologation. If we thought the leases bad, it would become absolutely necessary to consider, whether they have been homologated or not; if we thought them good, it [208] would be unnecessary to consider the effect of homologation.

I know what the parties contend, and I have an opinion as to the merits of the case on the point of homologation; but we, upon that question, cannot, according to our forms, give any opinion, if it should become necessary to give an opinion, because that point appears not to have been decided in the Court below.

If the agents are agreed as to that question, we shall know how to decide the case.

Upon the question of the validity of the leases, I have made up my opinion; but as it may be necessary to go to some length in the statement of the reasons upon which our opinions must be founded, we propose to move the judgment upon the validity of the leases to-morrow. If that opinion should be that the leases are good, then it is not necessary to consider homologation at all; if on the other hand, it should be the opinion of the House that the leases were originally bad, we cannot determine whether homologation has or has not made them good. In that case the cause must be remitted. I will go so far now in the case, as to state the circumstances.

All that relates to the turpitude of the transaction, has been given up at the bar.

I do not mean to say given up because it could or could not be sustained, but because it has been thought right to give it up; that is therefore a point not to be the subject of decision: but I would observe, that whatever might have been in England the law with respect to a provision for Mrs. Scott Waring [209] (Mrs. Esten as she then was), and the child which was her child, and supposed to be a child by the Duke of Hamilton: if the provisions for these two persons could have been supported, I apprehend, that according to the decisions of English courts, a trust for illegitimate children to be begotten between A. and B. could not be supported. I will say no more, however, upon that point; and with respect to homologation, if the leases are held to be invalid, there being no opinion of the Court of Session given upon that point, the cause must be remitted.

By the case as it is stated by the respondents, in whose printed case the whole history of this transaction is minutely traced, it appears, that Douglas Duke of Hamilton having communicated his intention to Mr. Cochrane, one of the commissioners of the excise in Scotland, who was also a commissioner for the management of the Duke's affairs, and much in his Grace's confidence, and also to Mr. Hugh Warrender, writer to the signet, his confidential agent, a correspondence ensued between the former of these gentlemen and the respondent Mrs. Waring, respecting the most eligible method of accomplishing his Grace's intentions. In a letter from Mr. Commissioner Cochrane, in answer to one from the respondent, Mrs. Waring, relative to the expediency of taking the proposed leases in her own and her daughter's name, or in the name of Mr. Boyes, the Duke's chamberlain, he says, "When I first thought of this subject, it occurred to me, that provided it could be done, the simplest and most natural method was what I see has also occurred to you, that the leases should be in [210] your own name; I accordingly some time ago mentioned this to Mr. Warrender, (the Duke's agent in Edinburgh) who was of opinion, that in case of the Duke's death, such leases might be liable to be reduced by his successor in the entail, and that therefore using (the name of) some other person might perhaps be safer: I made it my business to meet with Mr. Warrender this morning, and again fully stated the matter to him, showing him at the same time your letter: the result of our conversation was, that the safest and most satisfactory thing which could be done, was to follow your suggestion, and to lay the matter at once before counsel: I mentioned Mr. Blair, Solicitor General, (afterwards Lord President of the Court of Session) as undoubtedly the best in every respect which this country can afford; such matters are understood to be entirely confidential, and the most perfect reliance may be put, as well upon his honour as upon the soundness of his opinion; Mr. Warrender agreed with me, and the opinion of Mr. Blair is accordingly to be got as soon as possible." In an after part of the same letter, Mr. Cochrane says, "with regard to your questions, how you and your child would be situated in case of Mr. Boyes's death, and how your claim would be ascertained while he is living, I have only to repeat what I mentioned in my letter to Mr. Boyes, that it was understood that he was to execute a proper deed, obliging himself and his heirs to account for the surplus rents for behoof of you and your daughter." In this sentence the plan is developed, which was finally adopted in regard to these leases. There is [211] a series of letters from Commissioner Cochrane, which give a clear view of the progress and the various steps which preceded its completion.

In another letter to the respondent, Commissioner Cochrane says, "Immediately upon receiving your letter this morning, I went to Mr. Warrender, who put into my hands the list of farms which he had just received from Mr. Henderson, (the Duke's sub-factor). I have accordingly requested Mr. Warrender to draw up the form of a lease to Mr. Boyes, containing these farms which expire at Martinmas 1798 and 1799, to be submitted to Mr. Solicitor Blair for his consideration and opinion, and this you may depend upon being done as soon as possible. The surplus arising from these farms, according to Mr. Henderson's estimate, is I see £4313," that is, the surplus arising upon sub-leases, beyond the rents payable on the principal leases. In a postscript to a letter of this date, Mr. Cochrane says, "Since writing the above, I have this moment received from the Solicitor his opinion, of which I now send a copy, and wait your further instructions."

The case as laid before Mr. Solicitor Blair, (a very great authority undoubtedly,) is stated thus:

A. B. holds an estate under entail, with prohibitory, irritant and resolute clauses against selling, contracting debt, wadsetting or granting infeftments in security. Having no lawful issue, the estate, failing him, devolves on a relation who is heir of entail. By a female friend living with him he has a daughter, and in the event of his predeceasing them, he wishes to have some provision secured to [212] them. In consequence of the entail, and their particular situation, it is not in his power to grant them any provision on the estate; and though he has some real and personal estate, yet, as there are debts which may go far to exhaust the value of them, he would not wish to rest their dependence solely upon what surplus might remain. Several of the farms on the estate are out of lease at Martinmas next, or Martinmas thereafter; and owing to the progressive state of improvement, as well as the general rise of rent through the country, a considerable increase of rent will certainly arise from them. In his particular situation, it has occurred, that by granting leases to his female friend, or some trustee for her and her child, of the farms so now falling out of lease, at the present or some small additional rent, with the power of subsetting, a considerable surplus could be had by them upon subsets, and in that mode he may attain his wish of securing some provision for them. It never has been his practice to take any grassums, but always to let farms, as they became open, at the best rent that could be had, on leases for nineteen years, so that every justice in that respect has been always done to the future heirs of entail; and he does not feel that he could be accused of impropriety to them, if, in his situation, for the purpose of subsistence for his child, he should endeavour to appropriate to her the *additional* rent only, that might hereafter be got on a small part of his estate, during the currency of one lease. By the entail, "notwithstanding the prohibitive and irritant clauses," it is declared, that it shall be lawful to the first institute "and the other heirs of tailzie above spe[213]-cified, to set tacks of the said estate, or any part thereof, for the space of twenty-one years, or the setter's lifetime, the same not being set with evident diminution of the rental." Was there but one farm or two, on which a surplus rent might arise to the extent of what was wished, the matter might, it seems, be easily carried into execution; but the farms in general, in that part of the country, are small, and therefore, though the increase on each might be considerable, in proportion to the rent presently payable, yet, in order to raise on the whole a surplus equal to the provision he would wish, it would require a very considerable number of farms to be so let. His female friend is also in a particular situation. She had been formerly married in England, where her husband yet is. Articles of separation were long ago entered into betwixt them, and they have ever since lived separate. A divorce has taken place in the Doctor's Commons, but has not been carried through the House of Peers.

On the whole, under all the circumstances, the opinion of counsel is requested:—and more particularly,

1. If it is not in the power of the memorialist, to let leases at present, of such of his farms as expire at Martinmas next, or Martinmas 1799, for any period of years not exceeding twenty-one, and at the present rent?

2. If the granting such a lease to his female friend, or a trustee for her, would be effectual, although not actual resident tenants?

3. If so, could he, instead of one farm only, include perhaps twenty or thirty in one lease?—Or [214] would a separate lease for each be necessary, and would all of these be effectual?

4. If one lease, to comprehend the whole, should be deemed sufficient, would it be necessary in it to specify the rent presently payable for each, and make a specific rent payable for each? Or would a general set and *cumulo* rent for the whole be sufficient, resting on the knowledge that the rent was not less than the present?

5. Under the particular circumstances of her situation, would it be advisable to have any lease in the name of the lady herself?

6. If in the name of a trustee, would it not be sufficient that he granted a declaration of the lease being only in trust, with an obligation on him and his heirs to pay the surplus rent arising from the subsets?

The Solicitor General gave the following opinion.

"As to the first query, I have no doubt that A. B. may at present grant leases for twenty-one years, for such of the farms as will be out of lease at Martinmas next or Martinmas 1799, such leases being granted without diminution of the rental. I even think, that A. B. is under no limitation with respect to the endurance of the leases, which he may choose to grant upon the entailed estate, for although there is a clause in the entail giving power to the heir in possession to set leases for the space of twenty-one years, or the setter's lifetime, which would seem to imply, that the heir was understood to be restrained from granting leases for a longer endurance, yet I observe no such limitation in the clauses of the entail [215] itself, and it is a received rule in the construction of entails, that restraints of this sort are not to be fixed upon an heir by implication alone, or from the presumed will of the entailor, however clear. An heir of entail in the eye of law, is proprietor of the entailed estate, and is entitled to exercise every power inherent in the right of property, except so far as he is limited and restrained by the express words of the entail. Query second. I do not think it will affect the validity of the lease, whether granted to the lady herself or to a trustee for behoof of her and her child, that the lessee does not reside upon the farms, and cultivate the same personally, as the lease may contain an express power to assign or sublet."

Much argument has been made at the bar, upon the question, whether supposing this had been *bonâ fide* a transaction between the lessor and lessee, the lessee at the time when the lease was constituted, and for some time after, was not a trustee for the lessor. If the appellant herself had been made the lessee, it might have been otherwise; but it is insisted, that during an interval of time (how short they say does not signify) the lessee is trustee for the lessor, and that he did not become at the time when the lease was executed immediately a trustee for the lessee, whereas, if the lady herself had been made the lessee, I think, (under the circumstances, which I shall have occasion to speak to presently,) that argument could not have been urged.

With respect to queries three and four, the learned counsel says, "I see no objection to including any number of farms in the same lease; it may, however, be proper to specify a separate rent to be [216] paid for each farm, so as to make it appear with certainty, that there is a rise of rent, however inconsiderable, upon each farm, or at least, that they are all set without diminution of the former rental. Queries five and six. Under the whole circumstances of this case, I consider it to be the most eligible plan, that the proposed lease should be granted to a trustee, who must execute a back bond, declaring that he holds the same in trust, and binding himself to account for the surplus rents to the lady for behoof of herself and child, in such proportions and in such manner as shall be agreeable to the parties, and in the event of either dying during the currency of the lease, to be accountable to the survivor for her sole benefit."

It will be recollected, that other great lawyers have in former cases given opinions more qualified, by stating, that this would be all right, unless it could be said to be in fraud of the entail, and it was that expression which led to a discussion in former cases (*Queensberry Leases*, Bl., vol. i.) in this House, as to what was fraud upon the entail, and that qualification of the opinion to which I have alluded, was certainly of some importance; I mean, if there can be such a thing as fraud upon an entail.

Acting upon the advice of that eminent lawyer, the parties finally resolved that the leases should be granted to Mr. Boyes, and that he should declare, by a separate deed, that they were held in trust by him for the respondent and her daughter, and oblige himself to account on their behalf for the excrement rents.

Accordingly, in a letter to the respondent Mrs. [217] Waring, Mr. Cochrane says, "Agreeable to your desire, the scroll of the lease was sent to Mr. Eiston, who, after revising it, returned it to Mr. Warrender. Two copies being necessary, one to be kept by the Duke, the other by Mr. Boyes, I accordingly send them both by this night's post, under covers addressed to the Duke. Mr. Boyes will explain the form, as to signing and witnesses. Upon the Duke's executing this lease, it will become necessary that Mr. Boyes should on his part execute the trust obligation in regard to the surplus."

The respondents then state, in their case, that "instructions were accordingly given to Mr. Eiston to frame the trust obligations." Mr. Eiston is represented,

however, as labouring under indisposition, and for that reason, as it is alleged, the execution of the deeds was delayed, and this, they say, is "a circumstance which will explain the interval of time between the dates of the principal leases and the dates of the trust obligations."

In another letter to the respondent, Mrs. Waring, dated the 27th of December 1798, Mr. Cochrane says, "Mr. Eiston will, I suppose, have mentioned to you the cause of the delay in drawing up the back bond, (that is, the declaration of trust,) occasioned by his health not permitting him to attend to it. I have, however, been this moment informed by Mr. Warrender, that Mr. Eiston will send it to you in a day or two." On the 9th of January 1799, Mr. Cochrane writes to the respondent, Mrs. Waring—"Immediately upon receiving your letter this morning, I went to Mr. Warrender who informed [218] me, that the obligation which he had sent off to Mr. Boyes, had not been as yet returned to him. As soon, however, as it is returned to him, I shall not fail to acquaint you."

On the 30th of November 1798, the Duke let to Mr. Boyes, his heirs, assignees and subtenants, certain farms, parts of the entailed estates of the family (the names of which it is unnecessary to detail), some for twenty-one years after Martinmas 1798, and the rest for the same period after Martinmas 1799. These farms (as the case of the respondent states) were all out of lease at the time, and a separate rent is stipulated for each, somewhat higher than had been paid by the former tacks. At the same time, the regulations, which were in use to be observed on the estate for the cultivation of the farms, were carefully preserved, and other clauses were super-added, which they say "are greatly for the benefit of the heirs of entail." The case of the appellant states that the farms so let were thirty-nine different farms.

By a second lease, dated on the 8th of February 1799, the former having been executed on the 30th of November preceding, (and therefore about two months and eight days afterwards), his grace also let to Mr. Boyes, his heirs, assignees and subtenants, for twenty-one years after Martinmas 1798, certain other farms, being also part of the entailed estates of the family, specifying a separate rent for each, exceeding the rents payable by the tack which had just expired, and the lease contains the same conditions and provisions as the former, for securing the interest of the grantor and the heirs of entail.

[219] A third lease was made on the 20th and 25th of June 1799, by which there was let to Mr. Boyes, also for twenty-one years, the farm of Bonhard, in Lindlithgowshire, for a rent exceeding the former tack duty, and upon the same conditions and provisions as were contained in the former leases. The declarations of trust bear date on the 2d of January, the 26th of April, and the 3d of October 1799, the leases being dated on the 30th of November 1798, the 8th of February 1799, and the 20th and 25th of June 1799, so that there is an interval of time between each lease, and each declaration of trust, executed at those respective periods.

Mr. Boyes declares in the following manner: "that he held them in trust for the benefit of the respondent and her daughter," namely, "that for certain causes and considerations," (not stating what,) "it had been agreed upon between Mrs. Harriet Pye Esten and him, that whatever advantages or rise of money-rents could be obtained," (so that you observe here, Mr. Boyes is agreeing with Mrs. Esten, and Mrs. Esten is agreeing with Mr. Boyes, as to the advantages or rise of money-rents which could be obtained, that is, according to the ordinary sense of the language, could be obtained by Mr. Boyes from these leases), "by subsetting the lands and farms before mentioned, or by assigning the said leases, or any part thereof, should be held by him in trust for the use and behoof of the said Mrs. Esten during her lifetime, and of Anne Douglas Hamilton, her daughter, and any other child or children that may be procreated between the said duke and her, in manner underwritten, and that [220] she had further reposed in him the trust and charge of collecting the surplus money-rents to be obtained by subsetting, or the prices or considerations to be got by assignments."

On this narrative, Mr. Boyes bound and obliged himself and his heirs to use all manner of diligence in getting the said farms subset, and to report his progress thereon, by delivering to the respondent "a faithful and true account from time to time, of the rises of rent that might be obtained by subsetting, and to pay over to her during her natural life all and whatever sum or sums of money, as (which) may so be got, raised and recovered by him from subtenants or assignees, upon subsetting

the said lands and farms, or any part or parts thereof, and after her death to pay over the same, along with what remains unaccounted for to herself, to the said Miss Anne Douglas Hamilton, or any other child or children she may have as aforesaid, equally amongst them or in such proportions as the said Mrs. Harriet Pye Esten may direct and appoint by any writing under her hand; and that yearly and ternly during the currency of the lease, and as soon as the same can be got in and uplifted and recovered by the ordinary and usual modes of process and diligence, deducting always all charges of management, and a reasonable allowance for his own trouble."

Within a very few weeks after granting the third lease, the Duke of Hamilton died, (I believe within the sixty days).

Mr. Boyes proceeded to grant subleases of the farms, whereby a surplus beyond the rents payable [221] to the proprietor was obtained upon the whole of about £1370.

The questions which arise in this case between the parties, (putting out of the case now all that has been stated about the vicious consideration of this transaction,) are, whether leases made under these circumstances are to be considered as leases made within the power which the possessor, as heir of entail, had, or whether they are to be considered as leases at all; whether they are to be considered as leases in trust for Mrs. Esten, or whether they were originally to be considered as leases granted according to the power, and from the moment when they were granted, leases in trust for her, and good against the succeeding heirs of entail.

These questions came to be discussed in different actions, which have produced different interlocutors. The last interlocutor, which is a material one, is to this effect, "having considered, etc. finds, that the leases in question are proved to have been granted in trust for the pursuer, Mrs. Scott Waring, and her daughter Miss Hamilton, and not as in the case of Westshiel, to create in or reserve to the grantor a right to part of the rents of the lands, after his interest in them as proprietor under a strict entail had ceased."

The case of Westshiel was a case where a person in possession of a tailzied estate, let leases without a diminution of the rental, that is, not below the last rent that was paid; but at the same time, instead of taking a grassum, that is, instead of taking what the Scotch call a slump sum, at the time when the leases [222] were made, he took bonds from the tenants to pay him yearly certain sums of money.

If I recollect that case rightly, the yearly sums were not reserved payable at the same period as the rents, but they were reserved payable by bonds yearly from the respective tenants.

It was contended on the one hand, that this was to be considered as a grassum. It was held that it was not a grassum, because it was not a slump sum, according to the then notions of grassum.

On the other hand, it was said, inasmuch as the heir of tailzie in possession might have taken grassum, there was no reason why he who could have taken £1500 at once, might not reserve £1000 to be paid to him at certain times during the currency of the lease; and if he might reserve £1500 to be paid to him prior to his making the demise, it was nothing to the subsequent heirs of tailzie what he got from the tenants for the forbearance. Instead of taking it in one sum he took it in portions of yearly payment, having just as much for his forbearance in that respect, as the value of the money during that period.

The Court of Session was at last of opinion, that although he might have taken £1000 *in presenti*, (for such was the position in that case) although he might have enjoyed that £1000 together with the interest of it, by laying it out in loans to a third person, yet that he could not lend the money to the tenants themselves, but that what was secured by these bonds was to be considered as rent, and that although the bonds had been assigned, or might have been as [223] signed, for a valuable consideration, they were in truth to be taken as so much yearly rent, and being to be taken as so much yearly rent, the succeeding heirs of entail were entitled to these yearly payments, although they would not have been entitled, as the law then stood, to any part of the £1000 if it had been paid before, or at the time of executing the lease.

We then, as it appears to me, get into a considerable difficulty in this case, because if the Duke of Hamilton could not have reserved these surplus rents for his own bene-

fit, in the form of bonds for money, and if the surplus rents, reserved for his own benefit in the form of bonds for money would have been bad in the hands of persons holding for a valuable consideration, you will have to consider whether it is argued unanswerably at the bar, that nothing was reserved for himself. Surely, as between the tenant in tail in possession, and the person to take after him, it is a very nice distinction, that for the actual use and enjoyment of the tenant in possession, he cannot reserve, by a separate security, such a payment; but if he has to provide for a person with whom he cohabits, and her natural daughter, he may then relieve himself of the necessity of making that provision out of another part of his fortune, and make it at the expense of the entailed estate.

That is one way in which the House will have to consider this case.

The interlocutor proceeds in these words: "finds, that in so far as the leases were granted for the benefit of Miss Hamilton, they must be held to be [224] altogether legal and unexceptionable; finds that so far as any benefit was by the leases conferred on Mrs. Scott Waring, it does not appear to have been with a view of her entering into or continuing in an improper course of life, but to secure a permanent income to a person who had been induced by the grantor to withdraw from a lawful and lucrative employment, and who was the mother of his only daughter, and having been so long *acquiesced in and unchallenged*, it ought not to have been made the subject of judicial discussion."

This was afterwards adhered to by subsequent interlocutors.

In this interlocutor of the 9th of July 1814, there are many findings, which it has become unnecessary by what has been stated at the bar to attend to, and the question in which alone the House can deliver any judgment now, is, whether under all the circumstances appearing in this case, under which these instruments were made, (call them leases, or by whatever denomination you think proper to give to them), this is to be considered as a transaction which lies within the true intent and meaning of the power which the Duke of Hamilton had, or whether on the other hand, this transaction is of such a nature, that it cannot be sustained against the subsequent heirs of entail.

I will at this time only add again, that with respect to the other question, which has been very largely argued at the bar, (the question of homologation,) I am afraid we cannot deal with it. If we could, provided there has been sufficient homologation, it would not be necessary to consider whether these leases [225] are in themselves good or bad; but as we are not in a situation to authorize us to consider whether there has been homologation, we must enquire whether the leases themselves are valid according to the law of Scotland. I move that the discussion which belongs to that important question, be reserved till the House shall meet to-morrow.

The Lord Chancellor:—I have stated from the papers, the case of the Duke of Hamilton and Brandon against Mrs. Scott Waring.

The two questions which have been submitted to your consideration are, first, whether the leases which were made by the late Duke of Hamilton are to be considered as valid and effective leases? and secondly, if they are not, whether you are to consider the circumstances which have been stated to you in argument, as circumstances proving that these invalid leases have received validity from what is called homologation; or whether on the other hand there is only acquiescence, not in its effect equivalent to homologation? With respect to the latter question, I stated the other day, that it appeared to me that we should not rightly proceed according to our usage, if we now gave an opinion upon it.

If you hold the leases to be valid, it is not necessary to consider the other question: if you hold the leases to be invalid, it appears to me it will be absolutely necessary to remit the cause to the Court of Session, in order that the court may consider whether the circumstances stated to amount to homologation, do or do not give validity to these leases.

[226] The first question, whether the leases are valid or not, is certainly an important question in a great many views. It appears to me, that your decision may bear on a great many cases which have not yet come into controversy. I have endeavoured to look at the case in all the points of view in which it may possibly affect such cases, but into the discussion of those points it does not appear to me prudent, or at all events necessary at present to enter. The opinion which I have formed

with respect to these leases, (an opinion which I entertain with great confidence) is, that these leases are not valid. The ground upon which I satisfy my mind as to that question, is, that when these leases were executed, they appear to me to have been leases for the benefit of the Duke of Hamilton himself. Without entering into the question whether the making a provision for another person is a benefit for himself, it appears to me, that at the time when these leases were actually made and in existence, the Duke of Hamilton might have disposed of the leases as he pleased. He was under no more obligation to give them to Mrs. Esten than to any other person, and if a lease under such circumstances, executed by the person in possession of an estate tail, would not be a good lease, it appears to me that it will make no difference in principle, whether he makes a present of that lease soon after it is executed, or at a distant period from the date of its execution, and upon that ground alone, my opinion is, that these leases were not good. There are other grounds also on which, as it appears to me, the validity of the leases [227] might be affected; but it is not necessary for me, at least in my view of the case, to proceed to examine those other grounds.

The judgment, therefore, which I think the House ought to pronounce is, a judgment asserting the invalidity of these leases, and sending the case back again, with that finding, to the Court of Session, in order to have the question determined how far the plea of homologation can or cannot be supported. I therefore move the House to find, that the leases in question were leases not warranted by the power contained in the deed of entail, and were therefore subject to reduction, unless the same were homologated by the late Appellant Archibald Duke of Hamilton, deceased, and by the present Duke of Hamilton and Brandon; and so far as the same were not so homologated, to reverse the interlocutor complained of, and to remit the cause to the Court of Session to review, subject to this finding, and to do therein as is consistent with right.

24th July 1820.

The Lords find, that the leases in question were not warranted by the power contained in the deed of entail, and therefore subject to reduction, unless the same were homologated by the late Appellant Archibald Duke of Hamilton, deceased, and by the Appellant Alexander now Duke of Hamilton, and so far as the same were not so homologated respectively; and therefore, it is ordered and adjudged, that the interlocutors complained of be reversed; and it is further ordered, that the cause be remitted back to the Court of Session, to review the same, subject to the above finding.

[228]

IRELAND.

ON APPEAL FROM THE COURT OF CHANCERY.

ROGER MONTGOMERY HAMILTON M'NEILL, and DANIEL M'NEILL, Esquires,

—*Appellants*; MICHAEL CAHILL, and ROBERT GROVE LESLIE, Esquires,

—*Respondents* [24th July 1820].

[Mews' Dig. i. 35, 65, 328; iv. 221; v. 345; vii. 182, 220; vi. 877; xii. 945. As to omission in pleading, commented on in *Hosking v. Terry* 1862, 15 Moo. P.C.C. 193 at p. 501. As to agreement with creditors, see Bankruptcy Act 1890, s. 3.]

Where a deed of marriage settlement is drawn up, as between the intended husband and wife, and their respective fathers; and the father of the wife secures to the father of the husband, a sum of money, as the portion of the wife, according to a provision of the deed, but neither he nor his daughter execute the deed, and it is executed only by the intended husband and his father; it is binding upon and as between the parties who execute, and creates efficient rights for the objects of the settlement.

If two deeds be executed, bearing different dates, that which is first registered,

even with notice of the other deed, has priority both in law and equity, although it be posterior in date and execution.

On points, in which the two deeds are inconsistent, the deed last registered is personally binding on the parties who execute: and the lands and property comprised in the deed first registered, are also bound, after satisfying the trusts of the first, by the contracts and trusts of the deed last registered.

A transaction of sale made upon a false or mistaken consideration between parties in the relation of brothers-in-law: the vendor being an heir succeeding to the estate sold, and the purchaser executor of the will of the vendor's father, and where the party selling is under circumstances of great pecuniary embarrassment and distress, will not be impeached if fairly made: but if the consideration for the purchase was the balance of an account, which appears to be erroneous, the whole transaction must be so far investigated as to correct the accounts.

[229] Upon a bill by the vendor, seeking to rescind the sale, on the ground of fraud and oppression in the transaction, and error in the accounts, although the prayer to rescind the sale was refused, the account was opened after a considerable lapse of time.

If the plaintiff in a suit omits to put facts in issue by his original bill, or by amendment, leave to file a supplemental or amended bill, after the suit is at issue, ought not to be granted by the court, on the ground of inadvertence. A petition to obtain such leave ought to make out a case of new evidence lately discovered, material to the plaintiff's equity, and which, with reasonable diligence, could not have been discovered before: but in such case the suit ought to be disposed of without prejudice to the matter omitted to be put in issue, which the plaintiff may prosecute in any future suit.

If the plaintiff in a suit has, by the course of the court, a right to a decree for an account, he does not forfeit such a right by refusing an account which is offered by the defendant or the court at the hearing. It is the duty of the court to decree an account *ex officio*: and if such decree is not made, it is a valid ground of appeal, notwithstanding the refusal of the plaintiff.

An agreement between an insolvent debtor and his assignee, by which an estate of the insolvent is to be held in trust by the assignee, to pay out of the rents and profits, annuities to the insolvent and his wife, and the surplus towards the extinction of a debt owing to the assignee, is a transaction which, being brought before a court of equity, at the instance of the insolvent himself, must be rescinded, on the ground of public policy.

This was an appeal from a decree of the Court of Chancery, in Ireland, made in a cause in which the appellants were plaintiffs, and the respondents were defendants, by which decree the plaintiff's bill was dismissed with costs: and from a subsequent order of the court, by which an application, on behalf of the plaintiffs, for liberty to file a supplemental bill, was refused with costs.

[230] The case, as it appeared in the pleadings and proceedings, comprised the following facts:

By a marriage contract, dated the 15th of June 1743, and made between Roger (Hamilton) McNeill (the father of the appellant Roger) on the one part: and Elizabeth Price, his intended wife, and Cromwell Price, her father, on the other part, and executed according to the forms of the law of Scotland, Roger, the father, bound and obliged himself to settle a certain estate, called the Taynish estate, in Scotland, upon the heirs male of the intended marriage, subject to a life rent or estate for life to himself, and to a jointure and portions for the younger children of the marriage, and subject also to the charges and conditions therein mentioned.*

By the Appellant, on the application for leave to file a supplemental bill, it was alleged that the limitation of the estate was perfected according to the law of Scot-

* This contract was not put in issue in the cause, and it became the subject of discussion only, so far as the right to give it in evidence, or to amend the bill, or file a supplemental bill, to put it in issue, was in question.

land; and that one part of the settlement having been deposited and recorded in the proper office in Edinburgh, in the year 1768, Cromwell Price in 1769, instituted certain proceedings, and obtained, in the courts of Scotland, an inhibition restraining Roger, the father, from selling, aliening or encumbering that estate.

The marriage took place, and there was issue two children, viz. a son, (the Appellant Roger,) and a daughter, Margaret.

In the year 1773 the Respondent Cahill intermarried with the daughter Margaret.

In the year 1777 the appellant Roger inter-[231]-married with Catherine Chambers, the daughter of Daniel Chambers.

At the date of the Appellant's marriage, the Irish estates of the McNeill family stood limited as follows, viz. the Shanvally, or Dunseverick estate, in the county of Antrim, (the rents of which amounted only to the sum of £231 a year, above chiefry and other charges of receipt, etc.) was limited to Roger the father, for life, with remainder to the Appellant Roger in tail, with the reversion in fee to him and his heirs; the Ballylesson, or Newgrove estate, in the county of Down, was limited, (subject to certain charges,) to Archibald McNeill Montgomery, a brother of Roger the father, for life, with a general power to charge the estate with £2000 (which power was exercised by will,) with remainder to Roger, the father, for life; with remainder to the Appellant Roger, for life, with a power to charge the estate in favour of any wife, with a jointure of £200 a year, with remainder to the first and other sons of the Appellant Roger, successively, in tail male, with remainders over; and the lands called Sheeplands, in the county of Down, held by lease for lives renewable for ever, and the lands called Loughmoney and Carrowearland, in the same county, held under fee farm grants, were limited to Archibald McNeill Montgomery, in tail, or *quasi* tail, with remainder to Roger the father, for life, with remainder to the Appellant Roger, in tail, or *quasi* tail, with remainders over.

Archibald had demise the Ballylesson estate to his brother Roger, for the term of Archibald's life, at the rent of £400 a year, under which demise Roger, the father, was then in possession of that estate.

[232] By an indenture, dated the 15th of October 1777, being a settlement made previously to the marriage of the Appellant Roger, and Catherine Chambers, the Dunseverick estate was vested in William Gillespie, (the attorney of the McNeill family,) in trust, in the first place, for the payment of certain debts mentioned in a schedule annexed to the indenture; and then, out of the rents, to pay £200 a year to the Appellant Roger, during the life of his father, for a present maintenance, (which was to be increased to £400 a year, chargeable on other lands therein mentioned, and which devolved to Roger, the father, on the death of Archibald McNeill Montgomery,) and subject thereto, to the use of Roger, the father, for life, with remainder to the Appellant Roger, in tail male, with reversion to him in fee. By this deed, the appellant Roger, in exercise of his power, charged the Ballylesson estate with a jointure of £200 a year, in favour of Catherine Chambers; and Daniel Chambers agreed to pay Roger, the father, the sum of £500 as a portion with his daughter. The deed contained an agreement to suffer a common recovery of the estate, which was duly suffered accordingly in Trinity term 1778.

The debts set forth in the schedule to the settlement were, a debt of £1500, due to William Gillespie; a debt of £150, due to Sir Patrick Hamilton; and a debt of £250, due to Skeffington Thompson, and others; all these debts, except that to Sir Patrick Hamilton, had been previously secured by the Appellant Roger, and his father, jointly.

The debt of £1500 was owing to Gillespie for his bills of costs, and for money advanced by him in a suit between Roger, the father, and his brother Archibald [233] relative to the Ballylesson estate, and which was compromised on the settlement of the estate, according to the limitations before stated. The debt of £150 was originally the debt of the father; the debt of £250 was the debt of the appellant Roger.

Roger the father, the appellant Roger, and William Gillespie, executed this settlement, but Chambers and his daughter refused to execute, and prevailed on the appellant Roger, before the marriage had been solemnized, to execute another settlement in the form of marriage articles, bearing date the 25th of October 1777. By those articles, the appellant Roger covenanted, that as soon as he should become seised

of the several lands of Dunseverick, etc. of which his father was then seised in the counties of Down and Antrim, he would vest the same in trustees therein named, to the use of himself for life, with remainder to the first and other sons of the marriage, successively in tail male, subject to a jointure to Catherine Chambers of £400 a year, £200 a year of which was to issue out of the Shanvally or Dunseverick estate, and with a provision for raising £6000 as portions for the younger children of the marriage.

In these articles no notice was taken of the first settlement, or of the debts mentioned in the schedule annexed to it, or of any of the provisions contained in that settlement.

By the activity and contrivance of Daniel Chambers, the articles were registered before the indenture of settlement; the articles having been registered on the 7th, whereas the settlement was not registered until the 13th of November 1777.

[234] Notwithstanding the execution of the articles, and refusal to execute the settlement, Daniel Chambers sent to Roger, the father, his bond to secure the £500 portion provided by the settlement; and William Gillespie, the trustee, was permitted to enter without dispute into the possession of the Dunseverick estate, under the trusts of the settlement; the yearly sum of £200 was paid to the appellant Roger, and the surplus rents were applied by Gillespie in the reduction of his debt.

Roger, the father, was not informed of the execution of the articles until after it had been accidentally discovered in 1781, on searching the registry; but Gillespie having obtained information of the fact, took preliminary steps for obtaining a *custodiam* against the Ballylesson estate, in order to enforce the payment of his debt. To prevent that proceeding from being executed, Roger, the father, paid Gillespie £1150, part of his debt.

The father also paid some debts of the appellant Roger; and by the request of the father, the respondent Cahill paid other debts.

In the year 1779, Roger, the father, sold the Taynish estate to Sir Archibald Campbell, for £21,000; which sum was paid to Roger, the father, or allowed in account with the respondent Cahill, as his executor.

A sum of £10,000 or thereabouts, part of the £21,000 for which the Taynish estate was sold, was applied in paying off different incumbrances on the estate, including £2000 the portion of the respondent Cahill's wife, as the only younger child of Roger, the father, and Elizabeth, his wife; and the [235] remainder of the £21,000, except about £700, was received by Roger, the father.

In the year 1779, Roger, the father, granted to the respondent Cahill a lease of Mountain farm, part of the Dunseverick estate, for three lives, or sixty-one years, at the rent of one shilling a-year during the life of the lessor, and of £14 a-year afterwards. It having subsequently appeared that this lease exceeded the power of Roger the father, the appellant Roger, in the year 1785, confirmed the lease, by a memorandum indorsed on the instrument of demise, noticing the defect, and also executed in favour of the respondent a lease of the farm for sixty-one years, to commence from the death of Roger the father, at the rent of £14 a-year, at the same time promising, that when he came into the possession of the estate, he would grant a lease for the like term at a nominal rent. This he did, of his own accord, in the year 1794, after his father's death, and instructed his bailiff not to demand the rent of £14 accrued during the interval.

In December, in the year 1784, Archibald McNeill Montgomery died without issue, when the estate of Sheeplands, Loughmoney and Carrowearland devolved to Roger, the father, under the limitations before stated, and the appellant Roger, from that time received the additional £200 a-year, provided by the settlement.

On the 10th March 1788, Roger, the father died, having made his will, whereby he made the respondent Cahill's wife residuary legatee of his personal estate, and the respondent Cahill his executor. By a clause in the will, the following direction was given: "as to all sum or sums of money, which I have paid for [236] or on account of my son, Roger McNeill, and for which he was joined as security with me, it is my will, that all such sum and sums shall remain and be a charge against my son and his estate, and that the same shall be paid to my daughter, or be by her raised off the said estate, by sale or otherwise, as the law shall enable her to do: in regard, I did, by a settlement executed on my son's marriage, grant to him an annuity off my said estate during my life of £200 a-year, and also gave him up the estate of Sheeplands, in

consideration, that he should pay off certain debts, and also exonerate me from said joint securities, which he has failed to do," etc.

The Appellant, Roger McNeill, for several years before the death of his father, had been very much involved in debt. At the time of his father's death he was in Scotland. The respondent Cahill, in the year 1789, called upon him there, and showed him a list of debts, which he alleged had been paid by Roger the father, for the Appellant Roger McNeill; and the respondent claimed to be entitled to the amount thereof, under the will of the father, against the appellant Roger McNeill, and his estates. The respondent Cahill also represented to the appellant, Roger McNeill, that his estates were liable to those debts; and knowing the embarrassments of the appellant, (as he alleged,) the respondent proposed to lend him a sum of two hundred pounds upon his bond, which the appellant agreed to borrow, and thereupon was induced, for the consideration of £3500, part of the alleged debts, to convey to the respondent Cahill, the lands of Loughmoney, Carrowearland and [237] Sheeplands, being of the annual value of £180 or thereabouts, by deed dated the 28th day of May 1789.

The claims set up by the respondent Cahill, as executor of Roger H. McNeill, against the appellant, Roger McNeill, and his estates, consisted of the following items of account:—

1777. Sep. 10:

To Gillespie's bond	£1500	0	0	
Interest to 10th Sept. 1788, at £90 per ann.	990	0	0	
	£2490	0	0	
Paid by disbursements, as per Gillespie's acct.	276	19	5½	
				£2213 0 6½
To Sir Patrick Hamilton for	£150	0	0	
Interest to September 1788, at £9 per annum	99	0	0	
				249 0 0

1778. March:

Bond to J. Malcolm, assignee to Fulton	£60	0	0	
Interest to Sept. 1788, at £3 12s. per ann.	34	4	0	
				94 4 0

From the records of judgments, the date of the bonds and sum of interest, therefore uncertain.

1778. Trinity Term:

William Moore's judgment, £103 8s. 5d.	£51	14	2½	
Interest, 10 years, at £3 2s. per annum	31	0	0	
				82 14 2½

1781:

Per Mr. Fulton's account, on preceding page	£1100	6	3	
Interest 7½ years, at £66 per annum	495	0	0	
				1595 6 3

1788. March 10th:

Legacy on New Grove estate, from Mrs. Anne McNeill to her grand-daughter Margaret, assigned by her and her husband to William Gillespie, and further assigned by him to Fulton,	£200	0	0	
Interest to 10th September 1788	6	0	0	
				206 0 0
				£4529 18 3

[238] This account was furnished by the respondent Cahill, to the appellant Roger McNeill, in Scotland, a few days previous to the execution of the deed of conveyance, and at a time when the appellant Roger McNeill, (as he alleged) was unacquainted with the nature or particulars of the account, or with his late father's

affairs, and when he was, to the knowledge of the respondent, in great distress, and had no opportunity of having the advice of his friends or legal assistance.

The principal sum of £1500 due to Gillespie, as mentioned in the account, with interest to the amount of £990, which (as appears by the date in the schedule) accrued in the lifetime of the testator, was the proper debt of the father, Roger Hamilton McNeill, the appellant Roger being a mere surety. Part only of the debt to Gillespie had been paid by Roger Hamilton McNeill, namely, to the amount of £1130 principal money, which was paid out of the purchase monies of the Tainish estate. The balance of Gillespie's account, to the amount of £392 9s. 7½d. had been paid by the appellant Roger McNeill, since his father's decease.

The debt to Sir Patrick Hamilton, (being a judgment) for £150, with ten years interest, amounting to £99, which accrued in the lifetime of Roger Hamilton McNeill, was the sole exclusive debt of Roger Hamilton McNeill, the appellant not being joined therein as a surety.

The debt to Fulton, amounting to the principal sum of £1100 6s. 3d. with seven years and a half's interest thereon, amounting to £495, consisting partly of debts owing by Roger Hamilton McNeill, [239] and partly of debts owing by the appellant Roger McNeill, discharged by his father, and principally paid out of the purchase money of the Tainish estate.

No consideration was given or paid by the respondent Cahill for the conveyance of 1789, except the credit on the foregoing account to the amount of £3500, and the sum of £200 lent by the respondent to the appellant Roger McNeill, which was secured by his bond and warrant of attorney, to confess judgment.

The appellant Roger McNeill, in the month of May 1790, was arrested for debt, and detained a prisoner at the suit of several of his creditors until the month of June 1791, when the respondent Cahill, claiming to be a creditor of the appellant, to the amount of £200, applied by petition to the Court of King's Bench in Ireland, under the compulsory clause in the Irish act 31 Geo. III. for relief of insolvent debtors, to compel the appellant to make discovery of his real and personal estate, to the end that the same should be applied in payment of his debts; and the appellant, having given such accounts and schedules as required by the act, was discharged from confinement under the provisions of that act.

Henry Coulson, one of the Masters of the Court of Chancery, was first appointed assignee of the estate and effects of the appellant, Roger McNeill; and upon his decease, by an order of the court, in the matter of the insolvent, bearing date the 3d day of August 1801, the respondent Cahill was appointed in the place of Henry Coulson, and acted as assignee.

[240] The respondent Cahill, after he became assignee of the estate of the appellant, entered into a treaty with him, upon the foundation partly of the old account, including some of the debts alleged to have been paid by the father, and claimed by the respondent Cahill as executor, according to the preceding statement; and by a memorandum of agreement, bearing date the 17th day of September 1801, after reciting that the respondent Cahill claimed to be a creditor of the appellant, Roger McNeill, as assignee of a judgment debt obtained by Skeffington Thompson, against the appellant, as assignee of a judgment debt obtained by Sir Patrick Hamilton against the appellant's father, on the foot of two judgments obtained by the respondent against the appellant; and also on account of a legacy devised by Ann McNeill to Margaret, the wife of the respondent; and also on account of the rents of the lands of Sheeplands, Loughmoney and Carrowearland, which were thereby stated to have been applied in payment of the *custodiam* and *eligis* debts of the appellant, (the several claims according to the respondent's statement, amounting to £3000,) and reciting that the claims were disputed by the appellant; and further reciting that the respondent had agreed to accept £1500 in full of all demands against the appellant; it was thereby agreed, that the respondent, as assignee of the appellant, under the order of the 3d day of August then last, should enter into possession and receipt of the rents of the Ballylesson estate, upon trust, in the first place, to pay thereout £227 10s. yearly in manner therein mentioned, to the appellant Roger McNeill; and also a sum of [241] £120 as a maintenance for Catherine McNeill, wife of the appellant Roger McNeill, and her family; and after payment thereof, to apply the surplus rents and profits in discharge of the sum of £1500 with interest

The respondent Cahill was afterwards, on the motion of the appellants, removed, and the respondent Robert Grove Leslie was appointed assignee in his place.

The original bill in this cause was filed on the 6th of June 1808, by the appellants, and Charles Crauford, a trustee for the appellant Daniel, under a conveyance by the appellant Roger M'Neill, against the respondent Cahill. The bill (comprising allegations of most of the preceding facts) stated, that Roger the father was seised of an estate for life in several lands in Ireland and Scotland, which were by *certain deeds* respectively limited in remainder to the appellant Roger, etc.; that at the time of the appellant Roger's marriage, he and his father were tenants for life of the estates in the county of Down, and also of the Scotch estates, *except the lands of Taynish in Scotland*, which the appellant Roger joined his father in selling for payment of debts; that the estate was sold at an undervalue; but by a deed on record in Scotland, it was stipulated that after payment of the debts affecting the estate, the remainder of the purchase money should be vested in securities for the benefit of the appellant Roger and his family; that the lease of the Mountain farm was obtained by undue influence; that the will also was obtained from the father by undue influence; that the debts mentioned in the will had been paid by the father out of the purchase money of the Taynish estate; that the sale and conveyance of Sheeplands was fraudulently, and with-[242]-out fair consideration, obtained by the respondent Cahill from the appellant Roger M'Neill, while he was in a state of embarrassment as to his affairs, and ignorance as to his rights; that the debts, which formed part of the consideration, were the debts of the father; and that the agreement of 1801 was obtained in like manner, and in fact for the same consideration, the appellant Roger M'Neill, being at the time insolvent, and the respondent Cahill, his assignee. The bill, among other things, prayed a general account, including the purchase money of the Taynish estate; and that the conveyance of 1789, the agreement of 1801, and the lease of the Mountain farm might be set aside.

The respondent Cahill, by his answer, denied that the appellant Roger M'Neill joined in the sale of the Taynish estate, and alleged, that the father was seised in fee of that estate. He denied the existence of any deed settling the residue of the purchase money, on the appellant R. M. H. M'Neill and his family. He denied also the imputed influence and fraud in obtaining the lease, agreement, conveyance and will. He contended, that the consideration for the conveyance was full and fair; that the judgment owing to Gillespie, was on a bond given to him for costs and services in a suit relating to the Ballylesson estate, from which the appellant derived benefit; and that the consideration was immaterial, because it became by contract a charge on the appellant's estate; that the father paid Gillespie £1150, and other sums to other creditors. He denied that the debts so paid were the debts of the father; and represented that the appellant's solicitor took objections to the accounts when [243] furnished, which were answered, and the appellant acquiesced.

After this answer was filed, the appellants made an application for an injunction and receiver, which was refused.

On the 8th of August 1811, before the examination of witnesses, the appellants filed a supplemental bill, which stated the appointment of the respondent Cahill, as assignee, and his removal; that the life interest of the appellant Roger M'Neill, in the lands in question, had been sold and conveyed to the appellant Daniel M'Neill, by the new assignee; that Crauford was no longer a necessary party, and prayed the same relief as the original bill, with a few variations, not material to be stated.

In his answer to the supplemental bill, the respondent Cahill stated, that the motion for removing him from his situation as assignee, was unopposed, owing to the absence of his counsel on the circuit, and the circumstance of the appellant's solicitor having detained an affidavit on which he intended to oppose the motion, and that the Lord Chancellor, in that instance, acted solely on the principle of the propriety of dissolving that kind of relation between persons so deeply involved in hostile litigation. He admitted the receipt of £1209 3s. 3d. as assignee, and that he applied the same in payment of the debt due to himself, and did not pay any other creditor of the appellant Roger, because no other creditor had proved any debt against the insolvent's estate; and if any other creditor had proved, that his own were the preferable debts; that by an order of the Irish Court of Chancery, a sum of [244] £6000 was lodged in the Bank of Ireland, to answer the demands of the fair

creditors of the appellant Roger McNeill, and by another order made in December 1814, the appellant Daniel undertook by his attorney, in open court, to pay to the respondent any sum not exceeding £6000 which should finally appear to be due to him.

A replication was filed to the answer to the supplemental bill, and issue being thereupon joined, the appellants and the respondents proceeded to the examination of witnesses, and publication having passed, the cause came on to be heard before the Lord Chancellor of Ireland, on the 20th of May 1816, the same having previously stood over to give the appellants time to amend their bill, for the purpose of bringing the respondent Robert Grove Leslie before the Court.

The only points particularly urged at the hearing, were those relative to the purchase money of the Tavnish estate, and the sale of Sheeplands. In regard to the former, the appellants were not allowed to read the marriage contract of 1743, nor the inhibition of 1769, as they had not been put in issue by the pleadings, and no deed having been produced, showing the appellant's title to any part of the purchase money for the Tavnish estate, according to the allegations contained in the bill. The following decree was made:—

“ Upon reading the proofs, etc. and the defendant having offered to account, as on foot of the deed of the 17th of September 1801, in the pleadings mentioned, and the plaintiffs declining the same, it is this day ordered, adjudged and decreed, [245] that the plaintiff's bill in this cause, and all and every the matters and things therein contained be and the same is hereby dismissed, with costs, to be taxed against the plaintiffs.”

On the 26th of June 1816, the appellants presented to the Lord Chancellor a petition for leave to file a further supplemental bill, on the ground of the new matter therein alleged to have been discovered, after issue was joined, and also for a re-hearing. It was supported by an affidavit of the appellant Daniel.

In this affidavit the appellant Daniel, after referring to the settlement of the 15th of June 1743, states:—

“ That one part of the settlement was deposited in the proper office for registering deeds in Scotland, and the other part always remained in the possession of Roger the father.”

“ That he did not, nor did the appellant Roger, as he believes, know of the registry of the said deed, or the proceedings had therein, or any of them; nor did deponent, or the appellant Roger, get possession of the other part of the original deed, until after the death of Roger the father.

“ That his solicitor procured the part of the said settlement now in his possession, at the time of the commission, which was sped for the examination of witnesses in Scotland in this cause, in the latter end of August, and beginning of September last, and not before; and until that time, deponent, and the appellant Roger, as he believes, were ignorant of the precise nature of their rights under the said deed of settlement, of the 15th June 1743, and the inhibition of the 15th August 1769, and therefore the same were not put in issue, etc.

[246] “ That at the time of the said examination of witnesses in Scotland, it was for the first time, as he believes, discovered by the appellants, that proceedings were had in the Scotch Courts in 1768 and 1769, at the instance of Cromwell Price, and Elizabeth Price, otherwise McNeill, his daughter, for the purpose of obliging Roger, the father, to carry the trusts of the said settlement of 1743 into effect; and on the 15th August 1769, an inhibition containing a statement of the said deed or settlement, was obtained from the said court, inhibiting or restraining Roger, the father, from selling, alienating, or incumbering the estate of Tavnish: an attested copy of which hath been regularly proved in the cause.”

The appellant Roger McNeill, made no affidavit in support of the petition.

Upon the coming on of the petition, on the 26th June,

“ It was ordered, that this cause be set down to be re-heard: And further, that plaintiffs be at liberty to file a supplemental bill in aid of such re-hearing, for the purpose of putting in issue the settlement of 1743, and the inhibition of 15th August 1769, and the effect and operation of the same according to the laws of Scotland, relating to the said Tavnish estate, upon paying costs, etc.”

The above petition having been presented without any notice being given

of it to the respondents, and the order having consequently been obtained by surprise, the respondent gave the appellants notice of a motion to set aside the said order, so far as the same related to the filing of a supplemental bill; and a motion was made accordingly, on the 10th of [247] July 1816, when it was ordered, that the plaintiffs should be at liberty to file a supplemental bill, unless in ten days cause be shown to the contrary.

The respondent afterwards filed an affidavit, in answer to the appellant Daniel's affidavit. In this affidavit the respondent, among other things, states:

"That the cause or suit instituted by Cromwell Price, as the trustee of Mrs. McNeill, and her children, mentioned in the affidavit of the appellant Daniel, in which suit the inhibition was obtained, was as deponent believes, after the time when the said inhibition was granted, heard, and the said Cromwell Price failed therein, as deponent believes, and thereupon the said inhibition was determined.

"That the appellant Roger must have been fully aware, before the commencement of this suit, of the marriage settlement of 1713, and of his rights thereunder; for in a document proved in this cause, given to deponent by the said Roger, in the year 1807, a few months only before the filing of the bill, and drawn up shortly before on the part of the said Roger; it being a statement of claims made by him against one Doctor James McNeill, express mention was made of the said settlement, and the rights of the said Roger, under the same, are alluded to therein: that it is further evident from this, that the said Roger was acquainted with the said settlement; because at the time of the execution of the deed of conveyance of the said Tavnish estate to the purchaser, he, in the presence of the deponent, refused to execute the [248] same, and said that he would not part with his claim to the said lands: and the said Roger, at the time when deponent was in habits of intimacy with him, which continued at intervals until the year 1807, used repeatedly to talk of recovering the said estate from the purchaser."

On the 20th July 1816, cause was shown against the last-mentioned order, on behalf of the respondent Cahill, grounded on his affidavit. The respondent at the same time read from the appellant's original bill a passage, in which he speaks of the receipt of £2000 by the respondent Cahill, as the portion of his wife, and to which his wife was entitled under the settlement of the Tavnish estate. A passage was also read from a letter of attorney, executed by the appellant Roger, and recited in a state of claims, which was delivered by the appellant to the respondent and proved in the cause, in which it is provided, that the attorney "shall pay the rents of Raplock during the life of R. H. McNeill, agreeable to and in terms of the contract entered into between the said R. H. McNeill and Mrs. Elizabeth Hamilton Price, my mother." References were also made to the interrogatories filed by the appellant, and the depositions of a witness in the cause, Walter Moir, who in answer to those interrogatories, stated, that his father was the agent of the appellant Roger, and that on his father's death, the deed of settlement, of the Tavnish estate came into his hands as executor, among other papers relating to that estate. The court on this evidence set aside the former order with costs.

Against the decree of the 20th May 1816, and [249] the order of the 20th July 1816, this appeal was presented on the 10th of February 1817*.

* On the 4th of March 1817 a petition was presented to the Lords in the name of the appellant Roger, praying that his name might be struck out of the appeal, and that the appellant Daniel might pay costs incurred thereby. On the 21st of March the respondent Cahill presented a petition, praying to withdraw his answer to the appeal, so far as, etc. On the 25th of March the appellant Daniel presented a petition, praying that the two former petitions might be dismissed.

The petitions of the appellant Roger, and the respondent Cahill, set forth instruments executed by the appellant Roger, purporting to be a disclaimer and release, on his part, of the matters pending in the cause, and empowering his attorneys, therein named, to appear and disavow the proceedings. The petition of the appellant Daniel, setting forth various circumstances, represented that the instruments were procured by misrepresentation, fraud and circumvention, and by advantage taken of the distress and embarrassments of the appellant Roger, who was at the time a prisoner for debt.

The Lords Committee, to whom the petitions were referred, reported their

[250] For the Appellants, Mr. Wetherell, Mr. Heald.

If the deed of settlement of 1743, the inhibition and other proceedings in Scotland, were not sufficiently put in issue in the pleadings, to intitle the appellants to read evidence of them on the hearing of the cause, yet, under the circumstances, and especially considering that the respondent had full notice of the settlement, and those proceedings, and had actually received £2000 under the provisions of the settlement; and as also witnesses had been examined on both sides in the cause, relating to the title of Roger Hamilton M'Neill to the estate in Scotland, and his right to dispose of that estate, the Court ought to have allowed the appellants, by supplemental bill, to put in issue the deed, inhibition, and other proceedings in Scotland.

Independent of the several matters relating to the sale of the estate of Taynish, and the right of the appellant, Roger Montgomery Hamilton M'Neill, to an account of the produce, there is sufficient evidence in the cause to intitle the appellants to a decree for setting aside the conveyance of the 28th of May 1789, made by the appellant Roger to the respondent Cahill, as fraudulent and void.

The agreement of the 17th of September 1801, cannot be considered of any avail in a court of equity, the same having been made between an insolvent debtor and his own assignee, to the prejudice of the general creditors of the insolvent.

For the Respondents, Mr. Hart, Mr. Lynch.

It appears, from the circumstances stated in the affidavit of the respondent Cahill, from the reference [251] in the original bill, and the affidavit of the appellant Daniel, to the instrument releasing the £200, the portion of the respondent's wife, which instrument recited the marriage contract of 1743, and inhibition of 1769; from the interrogatories exhibited in the cause by the appellants, as to the marriage contract; from the circumstance of the settlement being in the hands of the appellant Roger's Scotch agent, Walter Moir, (a witness in the cause,) and his father, as well as other circumstances mentioned in his deposition; and from the deed of ratification of 1782, executed by the appellant Roger, to Colonel Campbell, the purchaser of the Taynish estate; that the appellant Roger must have known of the settlement of 1743, and the inhibition of 1769, or at least the former, long before the filing of the original bill. The settlement and inhibition were proved in the cause by the appellants. They must, or might therefore, have known of them before publication was passed. At the hearing of the cause, the appellants did not ask for leave to file a supplemental bill, for the purpose of putting those matters in issue in the cause, and suffered a final decree to be pronounced against them.

opinion that the cause ought to stand over, that the parties might proceed, in such manner as they should be advised, to have it determined by a competent jurisdiction, whether the power of attorney and release was binding on the appellants, or either of them, and whether the appellants, or either of them, were entitled to be relieved against the said power and release.

An order of the House having been made according to this report, a bill was filed in the Court of Chancery in Ireland, by the appellant Daniel, against the respondent Cahill and the appellant Roger, stating the circumstances of misrepresentation, fraud, and duress; and further, that the appellant Roger, having discovered the fact, had revoked the power, and by a subsequent deed authorized the appellant Daniel to prosecute the appeal.

The respondent Cahill having put in his answer to the bill, and the cause being at issue by replication and rejoinder, witnesses were examined, and publication passed; and the appellant Roger having also answered the bill, the cause was set down on pleadings and proofs, as against the respondent Cahill, and on bill and answer, as against the appellant Roger; and upon hearing, the instruments of disclaimer, and power of attorney, and an indenture of release of the 29th of October 1816, were declared fraudulent and void, so far as they affected the right of the appellant Daniel to prosecute the appeal in the names of the appellants; and it was ordered that the respondent Cahill should be restrained from using the said instruments on the hearing of the appeal, and that the appellant Daniel should be at liberty to use the name of the appellant Roger in prosecuting the appeal. The appellant Daniel was accordingly, on petition, admitted to prosecute the appeal.

Upon inspection of the affidavit of the appellant Daniel, on the ground of which leave was in the first instance given to file a supplemental bill, it will appear that the prior knowledge of the marriage contract of 1743, and of the inhibition, is not unequivocally, or in fact at all denied.

As the appellant Daniel has not shown, or even stated himself to be interested in the question as to the Taynish estate, the affidavit, so far as it related [252] to that estate, ought to have been made by the appellant Roger, and more particularly as from the age of the latter, and his having been conversant with the different transactions relating to the Taynish estate, which chiefly took place before the former was born, the appellant Roger was more competent to speak upon the subject of the affidavit. It does not appear that the appellants could gain any advantage by filing a supplemental bill, putting the marriage contract and inhibition in issue; since, if Roger, the father, had not a full power of disposition over the Taynish estate, the proper remedy of the appellant Roger is against the purchaser. If the appellant Roger were held to be entitled to recover against his father's estate, in respect of any part of the purchase-money, such recovery would be no bar to his remedy against the purchaser, and the estate of the father might ultimately become twice charged on the same account.

If the marriage contract were in issue in the cause, the appellant could derive no benefit from it, on account of the internal defects in the contract itself, and in consequence of his interference with the rents of the Raplock estate, during his father's lifetime, and now demanding a certain portion of them by his bill.

The respondent is released from all claims of the appellant Roger, in respect of the purchase-money of the Taynish estate, by a release and disclamation made by him in the Scotch suit in 1789, which suit had reference to that purchase-money.

The appellant Roger, has not by any proof of *mistake*, or *surprise* in the *settlement of accounts* of [253] 17th September 1801; or by excepting to any item, or showing any error in the same, or for any other reason, shown sufficient grounds for avoiding that settlement of accounts, which was made after full opportunity had been given to the appellant Roger, to investigate those accounts, a statement of the respondent's claims having been in the appellant's, and his attorney's possession, and under consideration for eighteen months, and after he had, in fact, investigated them, as appears by the objections delivered to some of the items in the statement, which was made with the advice and assistance of the appellant's own solicitor, and by a deed prepared by that solicitor.

When an account was offered to the appellant by the Lord Chancellor at the hearing, on the foot of the second agreement of 1801, it was refused.

At all events, as the respondent has shewn that he gave a full and valuable *consideration* for the estate, the sale of the laids of Sheeplands, Loughmoney, and Carrowearland, ought to be considered a valid sale, and ought not to be disturbed; and the more especially, after the repeated confirmations thereof by the appellant Roger, during an interval of nearly twenty years, between the sale and the filing the bill.

The appellant Roger, has shown no ground whatever for his impeachment of the lease of Dunseverick Mountain farm, and the same ought not to be disturbed.*

[254] The Lord Chancellor and Lord Redesdale, in the course and at the conclusion of the argument, made the following observations.

* Upon the several points discussed on the hearing of the appeal, see the following authorities: as to reading evidence of matters not put in issue by the pleadings, *Clark v. Turton*, 11 Ves. 240.—That evidence of a distinct fact, as a declaration by an auctioneer, cannot be read without an allegation in the record, *Smith v. Clark*, 12 Ves. 477.—As to the right to amend, or file a supplemental bill, or bill of review, *Jones v. Jones*, 3 Atk. 217; Red. Treat. on Pleading, 49, 66, 263; *Boore v. Skipwith*, 2 Ch. Rep. 112; Eq. Ca. Abr. 79; *Goodwin v. Goodwin*, 3 Atk. 370; *Ludlow v. Macartney*, 2 B. P. C. 101; *Norris v. Le Vere*, 3 Atk. 25, 31; *Young v. Kneighley* 16 Ves. 348.—As to the account, *Drew v. Power*, 1 Sch. and Lef. 182. As to acquiescence by *cestui que trust*, in an agreement with his trustee, *Campbell v. Walker*, 5 Ves. 678, (citing *Prier v. Byrne*.) *Webb v. Rork*, 2 Sch. and Lef. 672; *Medlicott v. O'Donnell*, 1 Ball and Beatty, 156.—As to length of time as a bar to inquiry, *Chambers v. Bradley*, Jac. and W. 51.

The first settlement followed by the recovery, the uses of which are declared by the deed, is different in its limitations and provisions from the second settlement, and by the operation of the registry act, becomes void as against the second, which, although subsequent in date was first registered. It is material to consider whether the first settlement was not a fraud. It is admitted, that the whole income of the lands settled, did not exceed £234 per annum. By the settlement, the father is to take £500, the fortune of the intended wife. Then debts, to the amount of £1800 are to be charged on the (Dunseverick) estate, of which only £250 was the proper debt of the son; all the rest was the debt of the father only, or of the father as principal and the son as surety. After this provision, an annuity of £200 is to be paid to the son for present maintenance, and the residue is limited to the father for life, with remainder to the son in tail. It is clear from the statement of the rental of the [255] estate made in the respondent's case, not only that there could be no residue, but that there could not be enough to pay half the annuity provided for the son. The father of the intended wife is said to have been dissatisfied. No person in his senses could be satisfied with such a settlement. It was in fact no settlement at all; the whole nearly of the rental or value would have been swallowed by the provision for debts.

A second settlement is then made, to which the father is not a party, and this, it is contended, is a fraud against him. In fact, the whole transaction appears to have been fraudulent on all sides, the father deceiving the son, and the son deceiving the father. The first deed is a delusion upon the face of it: the son permitting the debts of the father to be charged on his interest in the estate, without adequate consideration: the annuity of £200 being postponed to incumbrances, which would almost exhaust the estate, can hardly be deemed a consideration. The debts of the son, which form part of the charge, might have been paid out of the portion of his intended wife. That portion was taken by Roger the father. It was paid to him by the bond of the wife's father, by collusion between the parties to the second settlement, to induce him to believe that the first settlement was in existence and operation, a device which was so far successful, that for many years afterwards he did not discover the registry of the second settlement.

Lord Redesdale, in moving judgment, after stating the facts of the case, proceeded to make observations to the following effect:

[256] The schedule to the indenture of settlement of the 15th of October, contained one debt owing by the appellant Roger M. H. McNeill, amounting to £250; the rest were properly the debts of Roger the father. According to the terms of this instrument, the debts charged on the lands amounted to £1800 principal money. The annuity of £200 payable to Roger the son, for maintenance during the life of the father, was an additional and subsequent charge. It must have been the understanding of the parties, that the estate was of sufficient value to satisfy the debts, to pay the annuity for maintenance, and leave a surplus. It is a very informal, ill-worded deed, but that is the effect of it, as the agreement of the parties.

The articles of the 25th of October were registered before the deed of the 15th of October, and the priority of registry, both in law and equity, gives a priority to the instrument so registered, though subsequent in date and execution. But the deed nevertheless binds the appellant Roger, as his agreement. So far as the two instruments are inconsistent, he is bound personally by the deed. The parties are responsible, therefore, by that their agreement for the debts mentioned in the schedule: they must be paid according to the trusts created for the purpose; and as the appellant Roger thus made his estate liable for the payment of those debts, so he became entitled to the benefit of that instrument as against his father, who thereby, as it must be intended, undertook that the estate was sufficient to answer the charge. Upon any other supposition the transaction would be unfair and fraudulent: for Roger the father, taking the por-[257]-tion of the son's wife, gives an estate inadequate to the purpose intended and professed. In consequence of such inadequacy, the limitation to the issue, for which in fact the consideration was given, might have been wholly or partially defeated. The parties, therefore, who executed, had, under this instrument, mutual demands, which were personal so far as it was inconsistent with the posterior settlement: the son to make good to the father the payment of the debts; the father to establish for the son the income thereby provided for maintenance, and the limitations to the issue.

Under these circumstances, Gillespie, the trustee named in the first indenture, took possession of the estate, and paid to the son the annuity of £200 provided by that instrument, but did not keep down the interest upon the scheduled debts, either of the debt of the son, or of those owing by the father and son jointly, in which the son was a surety for the father. In settling the accounts, the father was to be charged with so much of the debt as he did not pay out of the rents of the estate. The father had also paid money in discharge of the debts of the son; and the debtor and creditor account between them remained unadjusted at the period of the father's death.

Upon the death of the father, the respondent Cahill became entitled under the will, and in right of the father, as his executor, to demand the debt owing to his estate from the son. A claim for these debts was made in the year following the father's death. In the account stated by the respondent Cahill, he charges the son with the debt to Gil-[258]-lespie, and the interest upon it, amounting to £990; the whole of which, except £45, had accrued during the life of the father. Another charge, to the amount of £276 19s. 5½d. is made in respect of disbursements appearing by Gillespie's account. There is also charged a debt owing to Sir Patrick Hamilton, which was the debt of the father alone, with interest upon that debt to September 1788. The account contained other charges of sums with interest, which were the debts of the son discharged by the father. The last item in the account was the amount of a legacy, with interest, which was charged on the Newgrove or Ballylesson estate, of which the son became tenant for life on the death of the father, and as such bound to keep down the interest of the legacy. The whole charge in this account amounted to £4529 18s. 3d. which the respondent Cahill, as the executor of the father, demanded against the son. It is clear that much of this was no debt of the son. The interest upon the debts, for example, which accrued in the lifetime of the father, ought to have been satisfied out of the rents; but after paying the annuity provided for maintenance of the son, they did not produce sufficient to pay the interest accruing upon Gillespie's debt.

The demand, therefore, made upon Roger the son by the respondent Cahill, as executor of the father, was excessive. It rested upon insupportable charges, and he took no notice of the claims of the son upon the father, in respect of monies received by him from the purchaser of the Tainish estate. Admitting that the father was entitled to sell that [259] estate, he was answerable for the value. The son had affirmed the sale by executing the deeds: but this was a matter not in the contemplation, or not taken into the consideration of the parties at the settlement of the accounts.

Upon such a state of transaction between the parties, the respondent Cahill contracts with the appellant Roger the son for the purchase of Sheeplands. It is admitted that the consideration was not actually paid; but upon the conveyance, a receipt was signed by the appellant Roger, for the consideration, as part of the debt alleged, and in the transaction supposed to be due, from the son to the father. Whether it was really a consideration must depend upon the state of the account. The bill impeaches the transaction of the sale itself, but not on sufficient ground, supposing the purchase-money to have been, as alleged, a debt from the son to the father. Assuming the account to be correct, or the consideration actually paid, the transaction of sale was proper and fair.

The claim made by the son against the father as to the Tainish estate, is very imperfectly stated in the pleadings. The son, it seems, had at least a right to demand the value of the estate against the father.

It appears, that in 1791 the son became embarrassed, and was discharged under the Irish act 31 Geo. III. as an insolvent debtor. Various creditors had by process of law obtained possession of different parts of his estate; and several persons having been from time to time appointed assignees, the respondent Cahill finally became assignee of his estate and effects. After this appointment, a transaction of agreement took place between the respon-[260]-dent Cahill, and the appellant Roger, in which upon the old statement of account as to the debt supposed to be owing from the son to the father, to the amount of £3000, and an arrangement by which £1300 was to be accepted in full of the demand, it was agreed that the respondent Cahill should have the Ballylesson estate, to pay out of the rents and profits an annuity of

£227 10s. to the insolvent, £120 to his wife, and then to apply the residue in discharge of the £1300 owing to the assignee himself.

This is a transaction which a court of equity cannot countenance or suffer on the part of the assignee of an insolvent debtor. It is a contrivance to provide for the family of the insolvent, and the assignee as one of his creditors, at the expense of the other creditors. On grounds of public policy, it is necessary to declare that such an instrument is void. It is a deed contriving a fraud against creditors, to which a trustee for them is a party.

The bill in this case was filed by the appellant Roger, to investigate the transactions between him and the respondent, to which fraud is attributed; but I do not enter into the question in that point of view. The bill prayed that various accounts might be taken; that the agreement and conveyance mentioned in the pleadings might be set aside; and a reconveyance. It is a very confused and inaccurate bill.

At the original hearing, which took place in 1816, it was objected that Leslie, who had in the meantime been appointed assignee, was not a party, and leave was given to amend the bill.

When the cause came before the Court upon further hearing, the deeds of 1743, being the settlement of the Taynish estate, and the proceedings in [261] Scotland, were offered in evidence. It was objected that there was no allegation in the bill to warrant the production of such evidence, and the objection was held valid by the Court. A petition was then presented, praying leave to amend the bill, or to file a supplemental bill, for the purpose of supplying the defect. The prayer of that petition was properly refused, and afterwards the bill was dismissed with costs.

The subsequent proceedings in the cause it is not material to state or discuss.

The appeal raises the question, what ought to have been done in the cause under these circumstances. When the hearing took place in the Court below, the respondent Cahill offered to account on the foot of the deed of 1801; that was an offer in affirmation of the deed. The Court held, that because the plaintiff, (the appellant Roger,) had refused that offer, the Court would not direct the account; but whether he accepted or refused, if the Court were of opinion that the deed of 1801 was binding upon the appellant Roger, it was the duty of the Court, without regard to the sentiments of the parties, to direct the account. On the footing of that deed, the respondent Cahill was clearly responsible in account; it is therefore difficult to understand why the bill was dismissed.

This is an error which makes it necessary for the Court of Appeal to interfere.

The effect of the transaction in 1777, was to constitute the father and son mutually and personally creditors and debtors to a certain extent. The father was bound to make good to the son the annuity provided by the deed, and the interest of the [262] debts charged on the estates; otherwise the deed was a fraud on him and the persons to take, subject to the charges. The issue of the marriage might have had nothing. According to the true intent of the deed of the 15th October 1777, the parties executing became mutually and personally debtors, so far as the deed could not have the effect contemplated or professed, by means of the estates conveyed.

At the date of the father's death, it is clear that the account was pending and unsettled. When that account came to be settled between the son and the representative of the father, the actual state of debts and credits on each side ought to have been investigated; whereas, all the debts were charged upon the son, and the son was not made creditor upon the estate of the father, for interest accrued in the lifetime of the father, and upon his own debts, which were charged upon the estate.

Omitting all consideration of the question as to the Taynish estate, it is impossible to hold, that the account so taken was fairly taken between them. In the account there are sums charged as paid by the father for the son. Great part of this demand was constituted by agreement between the father and the son, and looking at the will of the father, it is difficult to hold, that he intended these sums should be charged against the son as debts: the terms of the will raise considerable doubt as to that point. If there was any demand arising out of the sale of the Taynish estate, that was not taken into account in the settlement. The whole amount of the bond to Gillespie is charged in the account against the son, although £392 9s. 7½d. of the amount was not paid by the father, but by the son after his

death. [263] So, as to the interest accrued in the life of the father, it was improperly, and not according to the contract between the parties, charged in account against the son. The case is the same as to the debt to Sir Patrick Hamilton. It appears, therefore, that an erroneous account is the foundation of all the subsequent transactions between the parties.

Justice requires that the account should be investigated, to ascertain how far the son was indebted to the father; and, considering the question as to the produce of the Tavnish estate, whether the estate of the father was not indebted to the son.

The account, which is the foundation, being erroneous, the subsequent transactions, so far as they depend on the account, must be subject to investigation. It will require much consideration in framing the order. The House must declare what was the true right between the parties when the account was settled and acted upon. The transaction of 1801, cannot stand. The case must be reviewed by the court below. There must be an investigation as between debtor and creditor. The question, as to the lease being, I suppose, of no value, was abandoned at the bar. As to the Tavnish estate, if the appellant Roger, has a right against the estate of the father to call for an account of the value, I doubt whether it can be admitted in this suit. If not put in issue by the bill, it cannot be the subject of decision here.

As to that part of the case, the bill may be dismissed, without prejudice to any other suit which the appellant may be advised to institute.

[264]

24o Julii 1820.

ORDERED and adjudged, that the decree complained of be reversed: And it is declared, that the deed bearing date, the 11th October 1777, making the tenant to the *præcipe*, and declaring the uses of the recovery suffered in Trinity term 1778, and the deed dated the 15th August 1777, purporting to be a settlement previously to the marriage of the appellant Roger Montgomery Hamilton M'Neill and Catherine Chambers, the father and mother of the appellant Daniel M'Neill, ought to be deemed personally binding, both upon the appellant Roger Montgomery Hamilton M'Neill, and Roger Hamilton M'Neill, deceased, father of the said appellant, notwithstanding the said deed of the 15th October 1777, was not executed by the said Catherine Chambers and Daniel Chambers her father, and was not registered until after the deed of settlement of the 25th October 1777, in the pleadings mentioned, was registered; but so far only as the said deed of the 15th October 1777, may be deemed just and reasonable, as between the said Roger Hamilton M'Neill, deceased, and the appellant Roger Montgomery Hamilton M'Neill, his son, attending to all circumstances: And it is further declared, that according to the true intent and meaning of the said deed of the 15th October 1777, the said Roger Hamilton M'Neill, deceased, was entitled to have the debts mentioned in the schedule thereto, to which he was liable, charged on the estates comprised in the said deed, so far as the appellant Roger Montgomery Hamilton M'Neill, his son, had any interest in such estates, after the execution of the said deed of the 25th October 1777; and the appellant Roger Montgomery Hamilton M'Neill was entitled to have the debts due from him, as stated in the said schedule, also charged on the said estates; and he was also entitled to the several annuities provided for him, and particularly to the annuity of £200 a year, provided for his immediate maintenance; and inasmuch as it appears that the rents and profits of the lands comprised in the said deed of the 15th October 1777, were inadequate to the payment of the said annuity of £200 provided for his immediate maintenance, and the interest of the debts stated in the schedule to the said deed, and thereby intended to be charged on the said estates, the said deed ought to be taken to have been so far entered [265] into by the said appellant, Roger Montgomery Hamilton M'Neill, under a mistake or misrepresentation of the annual value of such estates; and therefore, and inasmuch as the said Roger Hamilton M'Neill, deceased, received the portion of the said Catherine Chambers, according to the terms of the said deed of the 15th October 1777, the said Roger Hamilton M'Neill, deceased, ought to be deemed to have been a debtor to the said appellant Roger Montgomery Hamilton M'Neill, his son, for the amount of such portion, so far as to give said appellant the full benefit of such deed on his part, both with respect to the said annuities and the payment of his own debts mentioned

in the schedule to such deed: and the said appellant ought to be deemed a debtor to the estate of his father, the said Roger Hamilton M'Neill, deceased, in respect of so much of the principal of the debts of his said father, mentioned in the schedule of the said deed, as were paid by his father, but not for the interest thereof, nor for the interest of his own debts mentioned in the schedule to the said deed, during the life of his said father, if any interest was paid by his father, but on the contrary, the said appellant ought to be deemed a creditor on the estate of his said father, for so much of all such interest as was paid by the said appellant: and the said appellant ought to be deemed to be a creditor on the estate of his said father, for so much of the interest of his own debts mentioned in the said schedule, which accrued during the life of his said father, as was not paid by his father: and that therefore the demand made upon him by the respondent Michael Cahill, as representative of the said Roger Hamilton M'Neill, deceased, the father of the said appellant, ought to have been made accordingly, subject nevertheless to the question, whether on any other account the said appellant Roger Montgomery Hamilton M'Neill had any demand against the estate of the said Roger Hamilton M'Neill, deceased, his said father: And it is further declared, that the demand made by the respondent against the appellant Roger Montgomery Hamilton M'Neill, by which he claimed the sum of £4529 18s. 9d. as due from the said appellant to the estate of the said Roger Hamilton M'Neill deceased, for principal and interest, calculated to the 10th September 1788, was therefore founded on mistake, and that it appears to have [266] been erroneous in other particulars, independent of any question whether the appellant Roger Montgomery Hamilton M'Neill was entitled to make any demand against the estate of his said father, in respect of the money for which the estate in Scotland, called the Taynish estate, was sold: And it is further declared, that such question was sufficiently put in issue by the said appellant's bill, and by the answer of the respondent Michael Cahill to such bill, to warrant an inquiry, whether any part of the principal or interest of any of the debts, mentioned in the schedule to the said deed of the 15th October 1777, which were paid in the lifetime of the said Roger Hamilton M'Neill, or after his death, was so paid out of the money arising by sale of the said Taynish estate: and whether what was so paid ought to have been demanded by the said respondent, as executor of the said Roger Hamilton M'Neill, deceased, against his son the appellant: and also, whether the said appellant had, in respect of such money arising by sale of the said Taynish estate, such demands against his said father's estate, as were equal to, or might in any manner reduce the claim which the said respondent, as executor of the said Roger Hamilton M'Neill, deceased, might otherwise have had against the said appellant: to the end that it might be ascertained, whether upon a just and fair settlement of accounts between the said appellant and the estate of his said father, the said Michael Cahill as executor as aforesaid, had on the 10th September 1788, a just demand against the said appellant to the amount of £4529 18s. 9d. or any other, and what sums of money: And it is further declared, that it does not appear that there are sufficient grounds for impeaching the sale made by the said appellant to the respondent, of the lands of Loughmoney, Carrowearland and Sheeplands, conveyed to the said respondent by the deed of the 20th May 1789, in the pleadings mentioned: but it being admitted, that the purchase money for the said estate was not paid, except by setting against the same the demands made by the respondent, as executor of the said Roger Hamilton M'Neill, against the said appellant, but for which no discharge was then given by the said respondent to the said appellant: the said appellant ought to be deemed to have a lien on the said estate for the purchase money: and the said respondent ought to be deemed a debtor to the said appellant, for [267] so much of the purchase money, if any, as would not at the time of the purchase have been satisfied by the just demands of the said respondent, as executor as aforesaid, against the said appellant, and all other demands of the said respondent, at that time against the said appellant: And it is further declared, that the deed of the 17th September 1801, having been entered into by the appellant Roger Montgomery Hamilton M'Neill, under the influence of the prior transactions between him and the respondent, and the said respondent being then assignee of the estates and effects of the said appellant, under the authority of an act for the relief of insolvent debtors, and such deed containing a contract on the part of the said

respondent, for the benefit of the said appellant, which was a fraud on the other creditors of the said appellant, who might have sought relief against him under the said act: It is declared, that the said deed of the 17th September 1801, ought to be set aside as fraudulent, with respect to the said appellant, and void on principles of public policy: And it is further ordered, that it be referred to one of the Masters of the said Court of Chancery in Ireland, to take an account between the said appellant and the said respondent, as executors of the said Roger Hamilton McNeill, deceased, the said appellant's father, according to the declarations hereinbefore contained, and to state the same as it ought to have been stated, according to the declarations aforesaid, on the 10th September 1788, the time to which the interest was calculated, according to the account set forth by the said respondent, in his answer to the said appellant's bill; and that the said Master do ascertain what sum, if any, was actually due from the said appellant to the estate of his father, on the said 10th September 1788: in taking which account, the Master is to have regard to the several declarations hereinbefore contained, and also to enquire whether any, and which of the debts of the appellant, paid by his father, were paid by his father with intent to create, by such payment, a demand against his said son, or with any other, and what intent: and the said Master is also to have regard to the claims of the appellant against his said father, in respect of the money raised by sale of the Taynish estate: And for that purpose it is further ordered, that the said Master do enquire what were the rights and interests of the said Roger Hamilton McNeill, [268] deceased, the said appellant's father, in the said Taynish estate; and whether the said appellant had, according to the law of Scotland, any demand against the estate of his said father, in respect of the money raised by sale of the said estate, and what was the nature of such demand: And it is further ordered, that the said Master do state the amount of the just demands of the said respondent, as executor of the said Roger Hamilton McNeill, deceased, against the said appellant, for principal and interest on the said 10th September 1788, and also on the 20th May 1789, the date of the conveyance of the said lands of Loughmoney, Carrowearland and Sheepland, without including any demand of the said appellant, in respect of the money arising by the sale of the said Taynish estate: And that the said Master do also state distinctly the nature and extent of the demands of the said appellant, if any, against the estate of his said father, in respect of the money raised by sale of the said Taynish estate, and all dealings and transactions respecting the same; and that the said Master do also state the just amount of the demands of the said respondent, as executor of the said Roger Hamilton McNeill, deceased, against the said appellant, on the said 10th September 1788, and also on the said 20th May 1789, taking into such account all demands of the appellant against the estate of his father, in respect of the money raised by sale of the said Taynish estate, so far as the same may extend to balance the amount of the just demands of the said Michael Cahill, as executor as aforesaid, against the said appellant: And it is further ordered, that the said Master do take an account of all dealings and transactions between the respondent, in his own right, and the said appellant, and of all demands of the said Michael Cahill against the said appellant in respect thereof, considering the said deed of the 17th September 1801, as null and void, and not binding on either of the parties thereto; and state the amount of the balance, if any, due from the said appellant to the said respondent, independent of his demands as executor: in taking which account, the said Master is to give the said appellant credit for so much, if any, of the sum of £3500, the purchase money for the Loughmoney, Carrowearland and Sheepland estate, as was not exhausted by any debt due from the said appellant to the estate of his said father on the 20th May 1789, the date of the con-[269]veyance of such estate: And it is further ordered, that the said Master do state such account between the appellant and the said Michael Cahill, in his own right, according to the direction aforesaid, taking into consideration the demands of the said appellant in respect of the Taynish estate; and also without taking into consideration such demands: And, in case the said Master shall find, on taking such account in either way, that the whole or any part of the sum of £3500, the amount of the purchase money aforesaid, was not on the 20th May 1789, due from the said appellant to the estates of his said father, it is ordered, that the Master do compute interest on the whole, or on the balance, as

the case may be, at the rate of interest demanded against the said appellant on the accounts before directed: And it is further ordered, that the said master in stating the accounts between the said respondent in his own right, and the appellant, do give the appellant credit for such principal money and interest: And it is further ordered, that all further directions be reserved until after the said Master shall have made his report: And it is further declared, that the said appellant hath not by his said bill, sufficiently put in issue his rights against the estate of his said father, if any he has, with respect to the money arising by sale of the said Taynish estate, beyond the right to have such demands as may arise therefrom set against demands made against him as debtor to his father's estate, as hereinbefore directed: And it is therefore ordered, that the said appellant's bill do stand dismissed, so far as it claims any surplus of the money raised by sale of the Taynish estate, beyond the demands of the said Michael Cahill, as executor of the said appellant's father against the said appellant, but without prejudice to any suit which the said appellant may be advised to institute concerning the same.

[270]

SCOTLAND.

ON APPEAL FROM THE COURT OF SESSION (FIRST DIVISION).

JOHN GEDDES.—*Appellant*; ARCHIBALD WALLACE, for Himself and Partners.—*Respondents* [24th July 1820].

[3 Scots R.R. 593. See now Partnership Act 1890, sect. 2 (*b*). Cited in *England v. Curling*, 1844, 8 Beav. 129, at p. 133. Cp. *Wallace v. Geddes*, 1821, 1 Shaw, App. 42.]

The manager of a partnership concern, having a salary, with a share of the profits, according to a proportion of capital and stock not advanced by him, but assigned by way of nominal interest, (for the purpose of creating an addition to his salary, depending upon the contingency of the success which might be consequent upon his skill and industry,) is not a partner subject to loss in account with the other partners.

In such a case the manager is not liable for loss, although it is expressed in the articles of partnership that the partners (not excepting the manager,) are to be "subject to profit and loss," and although the manager signed the partnership books, joined in securities given by the partnership, and in most other partnership acts, including the advertisement for a dissolution; because it appeared, from the general structure, and all the provisions of the contract taken and construed together, as well as from the transactions between the parties and the conduct of the other partners, that the provision as to profit and loss was not intended to apply to the manager.

If it were so intended originally, it could not be enforced at the date the suit commenced, because the other partners, upon the dissolution of the partnership, and for many years afterwards, made no mention of the subject, and particularly as in a former suit between them and their manager respecting the amount of his salary, they omitted to make any claim against him as partner for a share of loss; and more especially as the Court below, and the House of Lords on appeal in that suit, estimated the salary on the supposition that [271] the manager was entitled to a share of profit as an addition to his salary, without being subject to loss, no mention or claim having been made on that subject, either in the original suit in the Court below, or upon appeal.

A partner may be liable for loss as to the creditors of the partnership, and not so as to his copartners.

The most positive expressions as to liability to loss, in articles of copartnership, may be controlled and superseded by transactions between the parties, the conduct of the copartners, and the special circumstances of the case, including non-claim, and inconsistent representations during a protracted litigation, which furnished occasion to make the claim if the right existed.

The transactions between partners may amount to a waiver of a written agreement, or evidence of a new agreement, different from written articles, provided those transactions show a probability, amounting almost to demonstration, that the articles were otherwise intended.

In September 1785, the firm of "The Glasgow Bottleneck Company," having lately purchased the concern in which the appellant was manager, retained the appellant in his situation, and agreed to allow him a fixed salary of £100 per annum, with a thirteenth share of the free profits of the trade, not requiring him to advance any capital.

Soon after the establishment of the bottleneck company, a proposal was made to them by "Hamilton, Brown, Wallace, and Company," manufacturers of flint glass at Verreville, Glasgow, to unite into one company; and in June 1786 a partnership was formed, which assumed the denomination of "The Glasgow Glasswork Company." The nature of the connection between the appellant and this company forms the subject of the present appeal.

The superintendence of the manufacturing department, both of the bottleneck and of the flint [272] glasswork, and the general management of the concern, were intrusted to the appellant. The mercantile and pecuniary transactions of the new company were directed chiefly by a committee, consisting of four of the partners.

The new company did not immediately upon their formation execute a written contract of co-partnership. In the mean time the committee held meetings for the purpose of conducting the business, and inserted their resolutions and orders in a sederunt book. The appellant attended them to receive instructions as manager and subscribed some of the minutes in the book.

The contract of co-partnership,* which was subscribed by the appellant, declares that the stock of the Glasgow glasswork company was to be £12,000; of which £8000 was to be advanced, and £4000 was to be borrowed. Eight shares were to belong to the partners of the bottleneck company; eight shares were to belong to Hamilton, Brown, Wallace, and company; and the appellant was to have one seventeenth share, without advancing any capital.

The article, by which this arrangement is made, is expressed thus: "Third, In the said capital stock of £12,000 sterling, the *partners* shall be interested in the *profit or loss* in the following proportions: viz. the partners under the firm of Glasgow bottleneck company eight seventeenths; and the partners under the firm of Hamilton, Brown, Wallace, and company, eight seventeenth [273] shares; and the said John Geddes one seventeenth share."

The ninth article provided, that "the company's books shall be balanced upon the 31st day of December yearly, and docketed in three months thereafter, beginning the first balance upon the 31st day of December 1787, when the company's free stock shall be ascertained, which shall then, and yearly thereafter, be subscribed by a majority of the partners in point of interest; and which docketed balance shall be held good and probative for and against all parties concerned."

The fifteenth article declared, that "although, by this contract, the said John Geddes is admitted a partner, and holds one seventeenth share in this company, yet it is expressly declared and understood to be under the conditions and restrictions more particularly specified in an agreement of this date, made and entered into between him and the company, and to which all the parties hereto bind and oblige themselves to conform."

The contract, towards the close, contains the following declaration: "That although, by the eighteenth and eleventh articles of the foregoing contract, certain rules and regulations are laid down for the payment of the shares of deceasing or bankrupt partners, yet, notwithstanding thereof, it is specially covenanted and agreed to by the whole parties hereto, that the stock or interest in this co-partnership of deceasing or bankrupt partners shall not be paid to their executors or creditors by this company, but that the same shall fall and devolve upon the remanent partners, of whichever [274] of the said Glasgow bottleneck company, or Hamilton,

* To avoid repetition, some of the provisions of the articles of copartnership, which are stated by the Lord Chancellor in moving judgment, are omitted here.

Brown, Wallace and company, they may respectively be partners: which respective companies shall be entitled to hold and enjoy the said shares, and settle with the executors or creditors of such deceasing or bankrupt partners, according to the rules of their own co-partnery."

The agreement, stated in the fifteenth article of the contract, was drawn up, but not signed by the appellant or the other partners.

This agreement, among other things, provided, 1st, "That the said John Geddes shall take the management and direction of the business of the company, for which he shall be allowed the sum of £100 sterling yearly out of the company's stock during his management, *besides* his one seventeenth share of *the profits or loss* arising from the business, if any be, as likewise the house usually occupied by the company's manager, and coals and candles for his family: 2d, In consideration of which the said John Geddes shall devote his whole time and attention to the affairs and business of the company, and keep such regular books and accounts as necessarily belong to the business of his department, and which shall be open to the inspection of the partners at all times: that he shall likewise engage or cause to be made all the pots necessary for the business: and in short, he hereby engages to do whatever else may be required of him for the interest and advantage of the company: that he shall at all times subject himself to such orders and regulations as a majority of the partners in [275] point of interest may think fit to give him; and he hereby further promises and engages, that he will not be concerned in any other trade during the time of his acting as manager for this company. 3d, It is hereby specially provided and declared, that it shall and may be competent at all times, to and in favour of a majority of the partners of the said company in point of interest, in case of difference, at pleasure to supersede the said John Geddes as manager, and to appoint another in his stead, upon giving him six months previous notice; or in the company's option, instantly to supersede him upon paying him £200 sterling; and likewise that the said John Geddes shall at all times have it in his power to leave the said company's service, on giving them six months previous notice; and in either of these events, of his being so superseded or leaving the company's service, he shall from that time cease to be a partner in the said company, and shall be obliged to assign over his share to the other partners, upon being paid the value thereof in manner after mentioned. 4th, In case the said John Geddes shall, during the subsistence of the before mentioned co-partnery, be superseded in the management aforesaid, his share shall be withdrawn by him or his assigns, agreeable to the balance struck immediately preceding his dismissal, which shall be payable to him or them in two equal portions, at the distance of three and six months from the time of his leaving the work, and settling with the company the accounts of his intromissions, with the legal interest thereof from the date of such [276] balance till the same is paid; and in the event of his death or bankruptcy during the currency of this agreement, his share shall be paid to his executors or creditors, at the times and by the proportions, and bearing interest in the same manner, as is mentioned in the contract of co-partnery itself of this date, in the article with regard to the death of any partner."

Part of the appellant's duty originally as manager, was to keep the books personally; but in September 1787, the minutes of the committee of management state, that as the appellant had too much to do, it would be expedient to get a man "who would take charge of the mercantile part of the business, such as the writing of letters, making out invoices, taking care that orders were properly and expeditiously executed," etc. so as to leave the appellant full leisure to attend to the manufacturing part of the business. In pursuance of this resolution, a clerk was employed to keep the books and attend to the mercantile part of the business, as an assistant to the appellant.

In the balance book of the company, where the balance sheets of each year were entered and docketed, were docketts dated 15th April 1789, 12th March 1790, 17th March 1791, and 3d April 1792; the three last were signed by the appellant, and express that the partners then "examined the books of the Glasgow glasswork company, kept by John Geddes," etc.

The capital consisted of buildings, tools, and stocks of manufactured glass, belonging to the two former companies, which were purchased or taken by the united

company, according to inventories and [277] upon a valuation. To carry on the trade, money was borrowed on their joint bonds.

When the stock of the company was fixed, and the inventories and valuations made, accounts were opened in the ledger for the shares of stock belonging to the different parties interested. The plan being that the bottlework company and the flint glass company should rank as creditors on the funds and profits or losses; eight seventeenths of the stock were entered in a stock account to the Glasgow bottlework company; eight seventeenths to the flint glass company, Hamilton, Brown, Wallace, and Co.; and the remaining one seventeenth to the appellant.

A stock account was opened for him at the first valuation, crediting him with one seventeenth share of the stock, which then was £625. This sum was not advanced by Mr. Geddes, though credited to him in the stock account; there was therefore a second account opened, viz. a common stock account current, in which the preceding share of stock was stated to his *debit*.

In December 1788, upon a balance of the books, there was an apparent profit of £1475 10s.; but the balance book states, that as no allowance had been made for bad debts, and as the buildings were stated rather high, the company ordered a deduction to be made from the valuations of the whole, to the amount of £2626. This made a loss on the balance of 1788, of £1151 5s. 10d.; and Mr. Geddes' one seventeenth of that loss, £67 14s. 5d. is charged to his *debit*, but he did not sign the docquet, although he acquiesced in the arrangement.

[278] On the 28th of September 1790, a minute was entered in the sederunt book, dividing the shares into eighty-five parts, and mentioning the number of shares opposite to the names of each of the partners. Mr. Geddes' share is entered thus: "To John Geddes 5-85ths." His name is entered on the list like those of the other partners, after which the minute proceeds as follows: "In which proportions we declare ourselves to be interested, and to *draw profit or suffer loss* accordingly; and in case of the death or bankruptcy of any of the partners, the share of such deceased or insolvent partner shall fall in and belong to the company in general, agreeable to the manner as specified in the contract of co-partnery, in every respect, except in belonging to the particular company to which said partner originally belonged, which is hereby in so far altered. In witness whereof, etc."

This minute was signed by the appellant.

In 1790 the books were balanced. They showed a supposed profit of £1055 4s. 4 $\frac{3}{4}$ d.; and the docquet at this balance, which was also signed by the appellant, is in the following terms: "At Glasgow, the 12th day of March 1790: We subscribers, all partners in trade, buildings, and other effects contained in this and the other books belonging to the concern carried on under the firm of The Glasgow Glasswork Company, as kept by our partner, Mr. John Geddes, and the clerks under him; having examined the said account books and inventories, as made up to the 1st day of January last, find the same to be fairly stated, and brought to a balance, and that the profit for last year amounts to £1055 [279] 4s. 1 $\frac{3}{4}$ d. sterling, and the stock of said company to £9173 11s. 2d. sterling. We hereby order, that the £1055 4s. 1 $\frac{3}{4}$ d. sterling, profit for last year, be added to the amount of the stock, which makes it now amount to £10,528 18s. 6 $\frac{3}{4}$ d. sterling; and declare for ourselves, our heirs, executors, and successors, that in case of the death or bankruptcy of any of us before next balance, we are to draw our proportion of the foresaid funds according to the above balance, at the terms and in the manner specified in the contract of co-partnery."

The docquet entered immediately before the dissolution of the company, which is also signed by Mr. Geddes, was to the following effect: "At Glasgow the 3d day of April 1792: We, James Dunlop, etc. and John Geddes, all merchants in Glasgow, and partners in the business carried on here under the firm of the Glasgow Glasswork Company having examined the books of the said company (kept by John Geddes) from the 1st day of January 1791, to the 1st of January last, find the same to be fairly entered and stated, and brought to a balance as above, and on the thirteen preceding pages: that the capital of the company amounts to £11,166 10s. 5d. sterling, which belongs to the partners according to their respective shares, narrated in sederunt dated the 28th day of September 1790. That the property and debts belonging to the company amount to £23,387 1s. 8d. sterling, the debts due by the company amount to £11,778 1s. 6d. and the neat profit for said year to £412 9s. 9d. sterling. We

hereby order that £53 9s. 7d. of the sum gained be applied to the credit of [280] the different partners, according to their respective interests, and the remaining sum of £389 0s. 2d. towards the credit of a sinking fund, to answer for bad debts and discounts: And we also agree, that in case of the death of any of us before the end of the contract, or winding up of this concern, that our heirs, executors, or assignees shall be liable to sustain any loss and entitled to any profit that may be applicable to the share of such deceased partner during that time. In witness whereof, etc."

In the year 1792, the Dumbarton Glasswork Company having made an offer to purchase the whole buildings and property of the company, it was resolved to accept of the offer, and to dissolve the company as at December 1792.

The minute agreeing to dissolve the company, is signed by Mr. Geddes as well as the rest of the partners. The advertisement published in the Gazette and other newspapers, with the subscription of the partners, intimating the dissolution of the company, had the appellant's name subscribed to it as a partner, and the minute of sale by the Glasgow to the Dumbarton Company was signed by Messrs. Wallace, Warrock and Geddes.

Immediately after the dissolution of the company the books were balanced on their prior transactions, when it appeared that there were nearly £19,000 of debts owing to, and upwards of £11,000 owing by, the company. Supposing the debts good, the loss upon the balance for that year would have been £2766 7s. 3d. which the partners by their docquet ordered "to be applied to the debit of the different partners stock accounts, according to their respective inte-[281]-rests at the first of January last: But (they observe) as debts to a considerable amount are still outstanding, and as the sum set aside as a sinking fund to answer for bad debts and discounts may not be sufficient, we cannot at present ascertain the exact loss upon this concern, and therefore we hereby agree, as mentioned in last docquet, that in case of the death of any of the partners before the end of the contract or winding up of this concern, that our heirs, executors, or assignees shall be liable to sustain what ever loss may be applicable to the share of such deceased partner at that time."

This minute was not signed by the appellant. Some time elapsed after the dissolution of the partnership, while the partners were employed in winding up their affairs. After the debts due to and from the company had been settled, it ultimately turned out that there was such a defalcation of funds, from the failures of persons indebted to the company, and other causes, that the partners, when interest was calculated on their respective balances, were subject to a loss.

In 1798, Mr. Archibald Wallace, one of the respondents, transmitted to the appellant a statement of accounts between him and the company, in which the appellant's share of loss is placed to his debit.

The appellant on the 10th July 1798, returned an answer, in which he said, that the company were considerably in debt to him; and in a subsequent part of his letter he adds, "I have nothing to do with the losses of the late Glasgow glasswork company. If they think otherwise, they must take what measures they can for making their claim effectual."

[282] During the period of his connexion with the Glasgow glasswork company, the appellant had occasionally drawn from the company's funds small sums for his subsistence. After he had quitted the service of the company, some further payments were made to him in liquidation of his allowances; but no conclusive settlement was made. The company insisted, that he had overdrawn the sum to which he was entitled; and that upon making up the books, it appeared that he was debtor to the company to the amount of £650 11s. 2d. being for payments made to him, after he quitted their service.

The claim which the company thus made against the appellant, to refund the money so paid to him, rested upon an assertion, that the appellant was entitled to no higher salary than £100 per annum. The appellant offered to consent to an adjustment of the amount of his salary by reference to arbitrators, which was accepted by the respondents, and two persons with an umpire were named.

The bond of arbitration submits all pleas, claims, and debates, "and debateable matter whatever, presently subsisting between the said Glasgow glasswork company and the said John Geddes, for whatever cause or occasion, previous to the date hereof; and particularly, without prejudice to the said generality, a claim made by the said

John Geddes upon the said parties or partners of the said Glasgow glasswork company, for a certain sum of money to be allowed him for his management of the company's affairs, and extra trouble while he superintended their works, to the decree arbitral of," etc.

[283] In the pleadings under the submission, the claims of the parties were confined to two points; first, a claim for adequate salary on the part of the appellant; and secondly, a counter claim for advances made in cash and goods by the company to the appellant, after he quitted their service. These advances, after extinguishing a salary of £100 per annum, left a surplus of £602 9s. 8d. In a letter to their law-agent at Edinburgh, the company say, "the difference between the company and Mr. Geddes is chiefly, if not solely, a claim of salary for additional trouble."

The submission having expired without a decree, the parties had recourse to a court of law. The company raised against the appellant an action in the Court of Session in Scotland, in the name of Mr. Hamilton, one of the partners, as attorney for the rest, concluding for payment of £650 11s. 2d. with interest from 31st December 1792, the date at which the books were balanced. The above sum was the alleged surplus received by the appellant over and above the salary for six years and a half. The appellant raised a counter action against the company, concluding for payment of £911 3s. This action was founded on the claim of the appellant to be entitled to salary at the rate of £275 per annum.

After the cause had been brought into court, the appellant, in a letter to one of the partners, proposed a new reference, which was at last agreed to, and the arbitrators named and appointed.

In this second submission, the claims of parties stood as before. Archibald Wallace, acting for the [284] company, addressed to the arbiters two letters: in one of which he says, "The sum of £650 18s. 2½d. is the amount which the Glasgow glasswork company claim as due to them by Mr. Geddes, agreeable to account rendered;" in the other letter dated the 15th October 1796, he thus expresses the sentiments of the respondents, as to their rights: "We would wish to remind the arbiters, that the Glasgow glasswork company's claim against Mr. Geddes, began with the sum of £175 10s. 7½d. balance due by him on 1st Jan. 1792, agreeable to a state of the company's affairs at that time, signed by him and the partners." No claim for loss of capital was brought before the arbitrators, but in this, as in the former reference, the sole question was the rate of salary payable to the appellant. This submission also having expired without a decree, the cause was resumed in court. In the course of the pleadings, the company produced the copy before stated, of a contract between the company and the appellant, written on stamped paper, but not signed by any party. They alleged, that this was the contract which was meant to have been executed, to regulate the rights of the appellant, and that it was alluded to in the 15th article of the principal contract, already recited. According to this unsigned contract, the appellant was to have a salary of £100 per annum. The appellant denied all knowledge of the contract, and contended that he was not privy to it, and that it was not binding upon him.

The company in their pleadings further insisted, that in their books they had given credit to the appellant at the rate of £100 per annum, and that the [285] books must be considered as under his care, because he was the manager of the company. The appellant alleged that he kept none of the books; that they were kept by Stewart Telfer; that the hand writing of the appellant, except as a subscriber to some documents would not be found in the books; and offered to prove, that the books were kept by a clerk not under the superintendence of the appellant, but under the committee of management; that the appellant had never consented to the entries in question, which had been inserted by the direction of the managing committee, with a view to the final balancing of the books. Finally, the company contended, that the sum of £100 per annum was, in itself, a reasonable allowance as a salary to the manager of such glassworks, considering that the appellant was to obtain a *share of the profits* of the business in addition to his fixed salary. On that question of fact concerning the reasonableness of the rate of salary, the appellant joined issue with the company, and called for a remit to persons of skill and experience in the business.

By an interlocutor, dated November 13th 1798, Lord Craig, (Ordinary) found the appellant entitled to salary, at the rate of £120.

Both parties lodged representations to the Lord Ordinary against that judgment.

The Lord Ordinary having adhered to his judgment, both parties presented petitions to the whole court, and the case was remitted to persons acquainted with this branch of business, to report their opinion upon the merits of the appellant's claim for salary. The following judgment was afterwards pronounced: [286] "The lords having resumed consideration of the said petition for Gilbert Hamilton and others, with the counter petition of John Geddes of the 1st March last, with the remit therein of the 4th of that month, and reports made in consequence thereof by Messrs. William Tennant, John Niven, and James Smith, now lodged in process—Finds the said John Geddes entitled to an allowance, including all his claims for salary, extraordinary trouble, or for the expenses of entertainments in his house, at the rate of £226 18s. 5½d. sterling per annum, during six years and a half that he acted as manager for the petitioners Gilbert Hamilton and others; and remit to the Lord Ordinary to proceed accordingly, to hear parties *on any claims of compensation*, and all other points of the cause, and to do therein as he shall see just."

The appellant acquiesced in this judgment; but the company presented a reclaiming petition, which was refused; whereupon the company appealed to Parliament.

In the printed cases of the company presented to the House of Lords, as appellants, in that case, the second reason of appeal is in these words: "The manager, as a partner, has a share of the profits; and, when the two glasswork companies were united in 1786, there was conferred on him a greater proportion of those profits than upon the other partners." It was added, they, "made Mr. Geddes's emoluments to a certain extent to depend upon their trade being profitable or not; for they made him a partner entitled to a share of [287] the profits, and they increased his share in 1786, *instead of conferring on him a large salary.*"

The fifth reason of appeal declares, that Mr. Geddes (then manager) had a share of profits as a partner without capital, "which he accordingly received as the salary due to him."

The judgment of the Court of Session was affirmed in the House of Lords, and the cause returned to Lord Craig, Ordinary, to adjust the accounting between the parties. The appellant put into process a state, showing, that in terms of the final interlocutors of the Court of Session, affirmed in the House of Lords, he was creditor of the company to the amount of £401 3s. of principal, and he claimed interest on the arrears of his salary.

A new litigation now commenced in the form of objections, answers, replies, and duplies. Disputes were raised about the mode of charging interest, etc. and the company now brought forward a claim which had formed no part of their former pleadings, that Mr. Geddes must be liable for a share of losses sustained by the company many years before, to an extent sufficient to extinguish his claim of salary, and to turn the balance against him.

On the 13th of May 1806, Lord Craig, Ordinary, pronounced the following interlocutor: "Having considered the foregoing objections for Gilbert Hamilton, and the other partners of the late Glasgow glasswork company, defenders, with the answers thereto for John Geddes, pursuer, replies, and duplies.—Finds, that an interest account must be stated between the parties, giving each of them interest on the sums they shall appear to [288] be in advance; and, with regard to the plea of compensation for alleged loss, finds it too late to insist on this claim in the present process; and, before answer as to the other points of the cause, remits to Mr. Claud Russell, accountant, to examine the books of the company, and vouchers, and to report his opinion thereanent *quam primum.*"

The action about the salary, after much further litigation, terminated in favour of the appellant, by a judgment, in June 1815 for his salary, with expenses.

In the meantime, in consequence of Lord Craig's interlocutor, refusing to allow the new claim for loss to be intermingled with the original action about salary, the company, in November 1808, brought a new action, concluding against the appellant for payment of a share of alleged losses said to have been sustained by the company. The sum of £512 9s. was claimed as the appellant's share of loss to January 1798, with interest from that date, and a further claim was made for posterior losses.

The appellant, on his part, raised a counter action, concluding for an accounting and payment of the share of profits due to him by the company, upon the supposition that he was entitled to receive a share of profits during those years in which no loss occurred.

The action, at the instance of the company, was brought in the name of Mr. Hamilton, one of the partners of the company; upon whose death, Mr. Wallace, another partner, became the pursuer. This second action also depended before Lord Craig, by whom a remit was made to an accountant, to inquire [289] into the state of accounts as they stood in the books of the Glasgow glasswork company, from 31st December 1797, five years after the appellant quitted the company, to 15th May 1813. The books had been kept by the respondent, Mr. Wallace, since August 1792. It was reported by the accountant, that the charge made in these books against the appellant, amounts to £1021 16s. 6d.

The actions about profits and losses, which had been conjoined, being remitted, upon the death of Lord Craig, to Lord Gillies, as Ordinary, he pronounced the following interlocutor: "Having heard parties procurators—Finds, that Mr. Geddes is liable in his share of the loss as a partner of the Glasshouse company; but that no part of the expenses incurred in the process, at his instance, for salary, falls to be stated as a part of the loss, but that the same must fall entirely upon the other partners."

Against this interlocutor, the appellant presented a short representation, upon which the following interlocutor was pronounced: "The Lord Ordinary having considered this representation, which does not state the merits of the case—Refuses the desire thereof, and adheres to the interlocutor complained of."

Afterwards, this interlocutor was pronounced: "The Lord Ordinary having again considered the representation, with the answers thereto—Refuses the desire of the representation, and adheres to the interlocutor complained of."

The appellant submitted these interlocutors to review of the court (first division), by petition; on [290] advising which, with answers, the following interlocutor was pronounced by a majority of one judge: "The lords having resumed consideration of this petition, and advised the same, with the answers thereto—They refuse the prayer of the said petition, and adhere," etc.

A new petition, and additional petition, were presented by the appellant; on advising which, the following judgment was pronounced: "The lords having resumed consideration of this petition and additional petition, and advised the same, with the answers thereto, and excerpts from the books of the Glasgow glasswork company, for both parties—Refuse the desire of the said petition, and adhere to their former interlocutors."

Against these several interlocutors, the appeal was presented.

For the appellant.

For the respondents.

In the course of the argument the Lord Chancellor observed, that, when the stock account was first opened, the appellant was debited and credited for the same amount, or supposed value of stock, viz. £625; and asked, whether he was charged in subsequent accounts on the same principle? and whether it was a substantial credit, or only for the purposes of calculation? At first (he remarked) it clearly was so merely; and he put the further question, When afterwards the partnership credited the appellant with five eighty-fifths of the stock, whether they debited him, per contra, in the same fraction?

The Lord Chancellor also asked, Whether it was contended that the appellant was to have no salary, [291] if the loss in any one year amounted to a sum which would exceed his salary? or what he would receive if there was no profit? It was answered, that in both cases he would receive his salary; upon which answer the Lord Chancellor remarked, that in such view the other partners would be losers. He then added the following observations:

The Court of Session, in the former case, computed the salary on the supposition that the appellant was to have a share of profit as a partner, which appears from the *dicta* of Lords Balmuto and Balgraith. The declaratory clause provided, that on the decease or bankruptcy of any of the partners, their shares should devolve to the partnership to which they originally belonged, and of which the deceased or bank-

rupt parties were partners, paying an equivalent to their representatives. Now Geddes was no partner in either of those partnerships. Suppose he had died within six months, what could his representatives have claimed? In the former case my opinion was, that he was entitled to £—— a-year only as salary, and to no further remuneration, upon the ground that he claimed and was entitled to a share in the profits: nothing having been suggested or contemplated as to losses.

The Lord Chancellor, after stating shortly the judgments against which the appeal was brought, proceeded as follows:—

The question in this cause is, whether the Lord Ordinary and the court were right or not in finding that Geddes was liable, under the circumstances of the case, for his share of the loss as a partner. I observe, that when the judgment of the court was given, it was pro-[292]-nounced by what we are accustomed to hear termed by the bar, the narrowest possible majority, that is, two of the judges were of opinion that he was not liable for loss as a partner, three of them were of opinion that he was liable: and the question is, under all the circumstances of the case, whether that judgment is or is not right. It appears, that by an instrument, executed in 1786, this partnership was formed. Geddes had formerly been a species of manager in another glasswork concern; but when these two concerns formed one partnership, they executed this bond of co-partnership. It is entered into by Peter Murdock and several other persons, stating themselves to be all partners in the company carried on under the firm of Murdock, Warroch, and Co.: likewise, James Dunlop and several other persons, all partners in the company, carried on under the firm of Dumbarton Glasswork Company: the whole of the above, being now partners in the company carried on under the firm of the Glasgow Bottlework Company, on the first part: and Patrick Colquhoun and several other persons, all partners in the company at present carried on under the firm of Hamilton, Brown, Wallace, and Co. at Verreville, on the second part: and John Geddes, at present manager of the Glasgow bottlework company, of the third part.

In a case, in which the question is, whether Geddes was a partner, and not only a partner with respect to the world, but in what relation he stood as a partner with reference to this co-partnership, it is not immaterial to observe, that though he is unquestionably a partner to some purposes, yet he is treated, in the very descrip-[293]-tion of the parties to this instrument, as an individual of the third part, separate from those of the first and second parts. Then this instrument proceeds to state, that "whereas the said two companies have judged it to be for their mutual advantage to form a junction, and enter into a co-partnership together, for the purpose of manufacturing glass, in such branches as they shall afterwards think best for their interest; they have agreed, and they hereby do agree, to the following articles, as the fundamental rules and regulations of the said co-partnership, and which are hereby declared to be the conditions under which the said junction is made and this co-partnership formed, and which the whole partners bind and oblige themselves, their heirs, executors and successors to conform to and implement to each other: First, the firm of the company shall be, the Glasgow Glasswork Company, which shall not be used but for their behoof, and such manager only as they shall appoint shall have power to sign the name. Second, the said co-partnership shall continue and endure for the period of nine years complete, from the 1st day of June next, when the junction shall take place: and it is likewise hereby declared, that the capital stock to be employed therein by the partners shall extend to £12,000 sterling, two-thirds of which shall be advanced by the partners, according to their respective shares after-mentioned, and one-third may be borrowed, on the joint securities of the company." Now these words appear to me to be material to be attended to: "two-thirds of which shall be advanced by the parties, according to their respective shares after-[294]-mentioned, and one-third may be borrowed, on the joint security of the company." With respect to what thus appears to be advanced by this agreement among the partners, according to their respective shares after-mentioned, I have mistaken the facts of this case altogether, if I am not at liberty to state, that Geddes unquestionably (though in a sense a partner) could not be considered as one of *those* partners who was to advance any part of the two-thirds, according to their respective shares after-mentioned. I take it to be a fact, that Geddes was to contribute nothing of the capital: and it becomes material therefore to observe, that the words "the partners in this bond of co-partnership," must be construed, in reference to the subject matter of the clause in which it is used. The

partners who are to contribute according to their respective shares, must be those partners who were to contribute some share of the capital, and Geddes was not to contribute any share of the capital.

These articles further provide, that "in the said capital stock of £12,000 sterling, the partners shall be interested in the profit or loss in the following proportions: namely, the partners, under the firm of the Glasgow bottlework company, eight seventeenths; and the partners, under the firm of Hamilton, Brown, Wallace, and Co. eight seventeenth shares; and the said John Geddes one seventeenth share." Under this clause, which is the third article in the bond of co-partnery, it is insisted, that Geddes was to be liable to loss as well as profit; and this is the clause upon which, in addition to docquets and entries in the books of the company, etc. the Court [295] of Session held, that he was not merely entitled to profit but liable to loss. Now, that these words do, in the most express terms, render him liable to loss, there can be no doubt, but you are to take the whole of this instrument together, and you are not only to look at the whole of this instrument together, but you are to look at the transactions of the parties; for, whatever may be the language of a partnership deed, the dealings and transactions among the partners may be such as to amount to distinct evidence that some of the articles in that partnership deed were waived by all parties, and that some of the articles in that deed were not to be considered as rules which should regulate the rights and duties of the partners. It becomes necessary therefore in this case, to examine accurately, not only the whole instrument, but what have been the dealings among these parties. With this view, it is material to consider the eighth article, by which it is provided, "that on the 1st of June next, each of the parties shall advance and pay in to the company's manager, their respective proportions of stock as before mentioned: in payment of which stock shall be reckoned the foresaid ground, houses, utensils, goods, materials, etc. as before specified, (the stock of goods at Verreville being always excepted); and in case the amount of the property, belonging to either of the said two companies shall exceed their respective proportions of stock, the overplus shall be repaid to them by the united company, by granting them bills for the same, payable in six or nine months, with interest thereon from the 1st day of June next, the date of the junction." [296] Here is another clause purporting to relate to all the partners, which can have no relation, as it seems to me, to Geddes, because he was not to contribute any part of this capital.

The fifteenth clause is expressed in these words, "although, by this contract, John Geddes is admitted a partner, and holds one seventeenth share in this company, yet, it is expressly declared and understood, to be under the conditions and restrictions more particularly specified in an agreement of this date, made and entered into between him and the company, and to which all the parties hereto bind and oblige themselves to conform." It is quite clear, from this fifteenth article, that Geddes was to be, in some sense, a qualified partner; in what sense and with what qualifications is to be collected from an agreement of even date; and, it will be in your recollection, that there was an instrument which Geddes firmly denied to be an agreement of even date, which the other parties asserted to be an agreement of even date, and the substance of which I shall have occasion to state.

This bond of co-partnership being executed, and this unexecuted agreement, either being or not being the agreement, meant to be referred to by the fifteenth article, the parties go on dealing in partnership from 1786 to 1792. It is undoubtedly to be looked at as a circumstance of evidence, that in several instances Geddes's name is put into securities given by the company as a body. He, acting as one of the partners in the partnership, is unquestionably a partner with respect to all the rest of the world; and from the circumstance of his joining in the securities, [297] (a circumstance that happens every day where a man is not a partner for loss), it must be admitted, that he was clearly and undoubtedly a partner as to the world for loss; but the question here is, whether he was a partner as between himself and his partners, for loss as well as for profit. He contends, that he was entitled to so much a year for salary, that he was likewise to have the inducement of sharing a seventeenth of the profits, if there were any profits; but if there were no profits, and the thing was on the whole a losing concern, that he was not to be liable, as between himself and his partners, to pay part of that loss. It struck me very early in the argument, as a very singular thing, if he was to be so liable; because if, as manager he was to have a salary, (put it so, that he

was to have £100 a year as a salary;) and there was a loss in the course of the year of £1700, and he was to bear his proportion of that loss as between the partners, that proportion being £100, he could not get one shilling of his salary.

Similar difficulties run through the whole deed.

Without entering into particulars, I observe, that there was an end of this partnership about the year 1792, and it is reasonable to suppose, that, in the year 1792, when the partners were about to dissolve all connection with each other, they should have contemplated the obligations they were under to each other, and the demands they would have on each other.

The law, as I apprehend, is, that the transactions of partners are always to be looked at, in order that you may determine between them, even [298] against the written articles, what clauses in those articles will not bind them, provided those transactions afford a higher probability, amounting almost to demonstration. Taking that to be the law, it appears to me, notwithstanding all the difficulties which belong to certain transactions, which are stated as having taken place while the partnership existed between 1786 and 1792, that the transactions after 1792 are such in their nature, that, consistently with the safety and the interests of mankind, it is impossible to permit these copartners after those transactions, in my judgment, to say that Geddes was a partner with them for loss. Observe what those transactions are: Geddes brings them into court in 1792, demanding from them his salary; what do they do upon this? they refer the matter to arbitration—that arbitration goes off; they refer it to arbitration again—that arbitration goes off. He then brings an action in the Court of Session, in order to have his salary calculated, estimated and paid; the parties proceed in the Court of Session, until a judgment is obtained in that Court, that the appellant is entitled to such a sum of money. There is then an appeal to this House. In the petitions of appeal he is represented as a partner without capital,—those are the very words which are used in some of the petitions; and your Lordships affirmed that judgment of the Court of Session.

The first demand in any tenable form, that he should be liable to loss, was made in a suit instituted in the Court of Session, in Scotland, in the year 1807, that is fifteen years after this partnership was dissolved, and in the mean time, he was suing them [299] for the amount of his salary, a claim upon which they would have been entitled to have said: If you establish your right to this salary, you are, on the other hand, liable to us for so much loss; therefore, calculate it as you will, you cannot be entitled to demand any thing, or, at all events, not so much.

The first intimation of a claim upon him was in the year 1798, six years after the partnership was dissolved, when one of the partners wrote a letter to him, insisting that he was liable to losses in partnership. He wrote in answer: I was not a partner in capital, I am not liable. With that exception, they did not make a demand upon him, in a form in which he could resist it, until the year 1807, fifteen years after the partnership was dissolved; it appearing that, in the mean time, there were statements made out of the different proportions of the various shares, (amounting, I think, in the whole to eighty,) in which persons were supposed to have an interest in the stock, and his name never occurred in any one of them.

Now it is true, that during the existence of the partnership there are to be found doequets, there are to be found statements, and there are to be found writings, from which you would infer that he was a partner, both for profit and for loss. But looking at the whole of these entries, as he had no interest whatever in the capital, it is as impossible that many of those entries can refer to him, though he was a partner, as it is that some of those clauses in this instrument of co-partnery could refer to him. He was a partner capable of being dismissed at any time; he was a partner having no right to draw out any part of the stock, for he had [300] no stock in it; and therefore the terms which are used lead forcibly, according to my notion, to the conclusion, that though he was a partner, he was, in some qualified sense, a partner different from the sense in which the other partners were interested; and if he had thought proper to quit the partnership, if he had died, or become a bankrupt, the *provisions*, with respect to death or bankruptcy, could not have applied to him as they would have applied to all the other partners in this co-partnery concern; but, on the contrary, he stands distinguished from first to last in the nature of his interest.

In the course of dealings among men, there are a great many things done, some with more, some with less, regularity; some with more, some with less, irregularity; and men, before they quarrel, are much too apt to suppose they shall be set right easily when they happen to quarrel; but I wish to ask this question: How happened it, that if this partnership was dissolved in 1792, no special demand should be made upon the appellant, I say special demand, till 1807? fifteen years afterwards. The reasons they attempt to give in this case appear to me the most futile and ridiculous possible: They say, so long as the amount of his salary could not be ascertained, they had no reason to talk about losses; then, I ask, why did they, in the letter of 1798, talk about losses; and what signifies it, whether it was ascertained, if they had a single demand, which would extinguish, or *pro tanto* extinguish, that salary. It appears to me utterly impossible that that could be the reason on which they acted; but besides, they impute to him the receiving, as he actually did receive, some sums of money after he left the part-[301]-nership—they paid him sums of money after he left the partnership: and you will recollect in the former cause we had notices of that fact. If he was liable to losses for the partnership, and they contemplated them as due from him, is it possible they could have paid this, and not have demanded the losses?

The case has difficulties and peculiarities upon the bond of co-partnery itself. It has many difficulties and peculiarities with respect to an agreement, which is referred to by the fifteenth article of the bond of co-partnery; one of the parties having contended that a certain paper, unexecuted and unsigned, is that agreement; which is denied by the other party, the appellant. It is undeniable on the face of this bond of co-partnery itself, that he was to be, in some qualified sense, a co-partner; but then it is said, as this deed was never executed, he must be taken to be a partner in the sense in which other persons were; I say, that is impossible from some other parts of that deed of co-partnery; and with respect to the docquets and entries to which I have been referring, they admit of this explanation: that they must be taken to apply to those partners, and those partners only, who had part of the stock belonging to them, and who were to be dealt with, in case of bankruptcy or death, according to principles which do not apply to this person.

I say further, that if you had found unequivocal proof in the transactions, during the partnership, that he was to be considered a partner, liable to his share of profit and loss; supposing the articles, [302] clearly and unequivocally to express that he was to be liable to loss, he would, upon the construction of the articles, and by inference from his conduct, have been liable to loss; but even if the case did amount to that unequivocal proof, (which it does not,) the subsequent transactions might have so weakened and destroyed that proof, that you could not act fifteen years afterwards upon the effect of any such transactions as those. For the conduct of these persons, from 1792 down to 1807, is a conduct from which you would be authorized to infer that they never did, prior to 1792, or in 1792, draw those inferences from those transactions which they wish you in 1820 to draw from those transactions.

It is, therefore, on the ground of the subsequent transactions that I entertain the opinion very confidently, (I must say, at the same time, very humbly differing from the majority of the Court,) that no jury in this country could have been brought to find this man a partner on this suit, instituted in 1807; and therefore I move the House,—To find that Mr. Geddes ought not to be considered, as between him and his partners, as a partner liable to any share of loss; and, with that finding, to remit the cause to the Court of Session, to do in it what is right and consistent with that finding.

21 July 1820.

The Lords find the Appellant ought not to be considered, as between him and his partners, as a partner liable to any share of loss; and with this finding, it is ordered that the cause be remitted to the Court of Session, to do as is just and consistent with this finding.

[303]

SCOTLAND.

ON APPEAL FROM THE COURT OF SESSION.

RICHARD HOTCHKIS and JAMES TYTLER, Clerks to the Signet, designing themselves Trustees, nominated and appointed by the deceased Colonel WILLIAM DICKSON of Kilbucko,—*Appellants*; JOHN DICKSON, Esq. Advocate, now of Kilbucko,—*Respondent* [19th July, 1820].

[Mews' Dig. iii. 2036; iv. 158: Cited (*arg.*) in *Stewart v. Stewart* 1839, 6 Cl. and F., 911, at p. 953; and see *Harvey v. Cooke* 1827, 4 Russ. 34 at p. 54; and *Stapilton v. Stapilton* 1739, 1 Atk. 2 and 1 Wh. and T.L. C., 7th Ed. 233.]

A pursuer, asserting in an action of declarator a right as unlimited fiar of lands, has power to execute, and is bound by a deed of entail restricting his estate to a life-rent.

A transaction between parties dealing upon a doubtful question as to their rights, if it be not tainted with fraud, will be upheld, although one of the parties, being an advocate and brother of the other party, acted generally in the transaction as the legal adviser of the other party.

I. being seised of lands in Scotland, executes a deed, vesting the lands in trustees for sale to pay debts, and afterwards to manage the residue of the lands until, by accumulation of rents, they could purchase an equivalent in lands in the place of those which should be sold; and he directed that an annuity of £100 for life should be paid to D. his brother and heir at law, and a like annuity to W. the son of D.; and when the purposes of the trust should be accomplished, the trustees were to divest themselves of the estate in favour of such person as at that time might be the eldest son of D. and his heir; I. had never completed his title to the lands, and D. not being satisfied with the provisions of the trust, served himself heir to his father, passing by his brother I. and brought an action to reduce the deed of trust.

[304] A judicial sequestration of the estate was the consequence of this action, and other matters in litigation respecting the estate.

In order to settle all disputes, the parties interested, including D. and W. executed a deed, submitting all differences to the award of chosen arbitrators. The deed, among other things, empowered the arbitrators to determine "in what manner, to what series of heirs, and under what conditions, etc. the lands should be settled.

The arbitrators, by their award, directed that D. and W. should execute, as to the lands not sold, a tailzie and strict settlement in favour of D. in life-rent, and W. and the heirs male of his body in fee, whom failing, etc. with the clauses prohibitory, etc. contained in a scroll, etc. and particularly that the life-rent of D. should be charged with the payment of an annuity of £250 to W. which should be a real burden on the lands.

D. and W. executed a deed of entail accordingly; but D. refusing to deliver it, another deed of similar import was drawn up and executed by W. only, to whom the trustees executed a deed of renunciation and disposed the lands; D. having previously, by order of the arbiters, conveyed to the trustees upon his claim of right as heir, and to perfect their title.

The entail contained the usual prohibition against selling the estate.

Upon failure of issue of W. the lands by this new entail were limited to J. D. next brother of W. The entail was executed in 1776.

In 1785, D. being dead, and W. being in possession of the lands, and claiming a right, notwithstanding the entail, to sell for payment of debts, conveyed the lands to a trustee for that purpose; and the trustee having accordingly contracted with a purchaser, an action of declarator was raised by W. and the purchaser against J. D. and the other heirs of entail, concluding to have it declared that the lands were liable to the trust for the payment of debts, and the decree of the Court was according to the conclusion of the summons.

In the year 1808, W. being embarrassed and in debt, advertised all the lands, except one farm and a few *parks*, with the mansion, for sale. Whereupon J. D. remonstrated, and having threatened to prosecute, on behalf of himself and the other heirs of entail, a [305] declaratur of irritancy, a compromise was effected on the terms that a sufficient part of the lands should be sold to discharge the debts of W., and that of the lands remaining unsold, a new entail should be made, restricting the estate of W. to a life-rent, and giving to J. D. and the heirs of the former entail, estates in tail general.

In this transaction W. had no legal adviser but his brother J. D., who was an advocate, and had usually acted in that capacity towards W.

The deed of entail was drawn up under the direction of, and settled by J. D. It contained a recital of the former entail; a statement of former sales of parts of the lands by W. that he had thereby become liable to a declaratur of contravention of irritancy at the suit of J. D., but that he had agreed, for the accommodation of W., not to object to the sales already made, nor prosecute his right of action, on condition that W. would execute the deed; and upon this recital, W. thereby limited the lands unsold to himself in life-rent, and to J. D. *in fee*, and the heirs male of his body, whom failing, to the heirs female of his body, etc.

This deed was accordingly executed by W., but he becoming again embarrassed and involved in debt, at the instance of his creditors, brought an action to reduce this deed of entail, on the ground of fraud, want of power, etc. The Court below held that W. had power to execute the deed, that it was delivered and irrevocable, that there was no legal ground to set it aside; and that it did not appear, from the tenor of the deed or collateral evidence, that W. was improperly or fraudulently induced to execute it.—This judgment was affirmed on appeal.

The object of this suit was to reduce a deed of entail, and annul a transaction which took place under the following circumstances:

In the year 1767, John Dickson, being seised of the lands of Kilbucko, executed a trust-deed in favour of the Earl of Hyndford and others, wherein [306] after mentioning the destination of the estate, he added a clause referring to a future deed which he meant to execute, "containing such other destination, and under such burdens, conditions, provisions, restrictions and limitations, as it may hereafter appoint to be therein inserted, by any writing under my hand." This purpose was not executed; for Mr. Dickson died suddenly, in the beginning of December, in the same year.

By the deed of trust, the trustees were *directed to sell such* part of the estate as might be necessary *to pay the debts affecting it*, and thereafter they were to continue their management, *till, by accumulating* the rents of the remaining part of the estate, *they could purchase lands yielding a rent equal to the rent of the lands which might be sold*. In the mean time David Dickson, the brother and heir-at-law of John Dickson, was to be allowed an annuity of £100; and a similar allowance of £100 was to be given to William, who was the original pursuer of this action, and then the eldest son and heir of David; and when all the purposes of the trust were accomplished, the trustees were to denude (divest) themselves of the estate, in favour of whatever person might be the eldest son and heir of David Dickson at the time. John Dickson, the maker of this trust-deed, bequeathed various legacies and annuities, and died considerably in debt, which rendered it probable that the trust would be of some continuance.

These circumstances induced David Dickson to serve himself heir to his father William, and thereupon raised an action of reduction for setting aside the trust-deed of his brother John, who had never [307] completed his titles to the estate. In consequence of this action, and other subjects of litigation respecting the estate, which occasioned a judicial sequestration, a plan was devised for submitting to arbitration all the matters in dispute between the parties interested in the estate.

The deed of submission empowered the arbiters "to direct what steps should be taken by the parties for denuding (divesting) the trustees, named by the said deceased John Dickson, of the lands, estate, and other subjects which belonged to him.

and for removing the sequestration thereof." It also empowered them "to appoint such parts of said estate or other subjects to be sold, as they shall think necessary, for payment of the debts affecting the same," etc.: also "to determine what provisions shall be settled on the younger children of the said Mr. David Dickson, and in what manner the same shall be secured;" and further, "to determine in what manner, to what series of heirs, and under what burdens, limitations, conditions, prohibitory, irritant and resolute clauses, the said lands and estate, or what part thereof may remain unsold, shall be settled: and in general to determine and appoint every thing to be done, of or concerning the lands, estate, and other subjects, heritable or moveable, that belonged to the said deceased John Dickson, which the said arbiters, or either of them, in case of the death or non-acceptance of the other, or which the said oversman may judge fit and necessary to be done for the interest of the said parties, and a final and amicable settlement of their whole family affairs."

[308] Mr. David Dickson, as the heir-at-law, and his eldest son William Dickson, as the first expectant heir under the trust-deed, were, in point of form, the only persons named as parties to this submission, and who executed it; but the trustees required the approbation and discharge of every creditor and legatee upon the estate, which was to be obtained in consideration of David Dickson and his eldest son, jointly, giving new heritable securities; and at the same time conveying to a trustee the separate estate of Culter, etc. for the purpose of paying off the debts. In the second place, the direct sanction of at least the immediate substitute heirs under the trust-deed was required; and, in the third place, that the residue of the estate should be freed from debt, and completely secured by a strict entail.

Dr. Michael Dickson, who was a younger brother of David Dickson, and a creditor to a considerable amount, having refused to accede to the arrangement, in order to remove this obstacle, the respondent, with his younger brother David, and another person at the respondent's request, concurred in granting a bond to the trustees for a sum of £3000.

The preliminaries having been arranged, a decree-arbitral was pronounced, and the trustees executed a conveyance in terms of the trust. These deeds are both dated 11th August 1775, and refer to each other. The decree-arbitral, instead of the annuity of £100 allowed by the trust-deed, awarded to Mr. David Dickson the life-rent of the whole estate, subject to the charge of an annuity in favour of his son; and instead of the annuity of £100 to his eldest son, the sum of £250 charged upon the father's life-estate, was given to him during his father's life, and [309] upon his father's decease, an estate to him and the heirs male of his body. It contained the following finding as to the execution of a deed of entail:

"We having now considered the particular situation and circumstances of the estate of Kilbucko, and of the said Mr. David and William Dickson, and the several particulars relative thereto, which have been laid before us, and being desirous, so far as possible, to preserve for the family such parts of the estate as the situation of affairs will permit, etc. decern and ordain the said Mr. David and William Dickson, for their respective rights and interests, on or before the 1st day of October next, to execute a tailzie and strict settlement of the lands and barony of Kilbucko, in favour of the said Mr. David Dickson in life-rent, and the said William Dickson and the heirs male of his body in fee, whom failing, to the other heirs mentioned in a scroll of the said tailzie signed by us of the date hereof, as relative to this decree-arbitral, and with and under the whole conditions, provisions, clauses, prohibitory, irritant and resolute, contained in the said scroll: and particularly with and under this condition, that the life-rent right of the said Mr. David Dickson shall be burdened with the payment of a free annuity to the said William Dickson of £250 sterling money yearly, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the term of Martinmas next, for the half-year preceding, and so to continue during the life of the said Mr. David Dickson; and which annuity shall be a real burden upon the lands and estate contained in [310] the said entail: and the said William Dickson, in case the same is not regularly paid to him, shall have access to the rents of the said estate to the extent of what is unpaid, notwithstanding the life-rent disposed to the said Mr. David Dickson: but it shall be declared by the said entail, that although the said William Dickson shall have access to the rents of the estate for payment of the above annuity,

yet that the by-gones of such annuity shall not be the ground of any adjudication of the property of the said entailed estate; and we decern and ordain the said parties to put the said entail upon record in the register of tailzies, and to complete the same by charter and infeftment, as soon as the same can be properly done."

The trustees executed their deed of renunciation and conveyance on the same date as the decree-arbitral, but it was not delivered till the entail was executed.

This deed of entail was executed by David Dickson and his son William; but David having previously executed an entail, which is still extant, refused to deliver up the new one.

In consequence of this refusal, some delay took place; and as the trustees would not give up their deed of renunciation till the entail was also delivered up, another copy of the deed of entail was prepared and executed by William alone, who, being formally the disponent of the trustees, was sufficiently *in titulo* to execute the entail alone. The deed was accordingly so executed. It proceeded expressly upon the decree-arbitral, and contained all the usual prohibitory, irritant and resolute clauses, and was executed according to the statute 1685, ch. 22.

[311] John Dickson, who executed the trust-deed, not having completed his titles to the estate, the right of his trustees was incomplete, especially as David had served himself heir to his father, passing by his brother John. In order to remove this objection, David, by order of the arbiters, conveyed the lands to the trustees. The trustees then conveyed to William, and he, by order of the arbiters, executed the entail.

The entail contained the following provision: "It shall not be in the power of me, the said William Dickson, or any of the heirs of entail succeeding in the said lands and estate, to sell, alienate, or impignorate the same, or any part thereof, either irredeemably or under reversion, or to burden the same in whole or in part, with any debts, or any other burden, incumbrance, or servitude whatsoever."

The irritant clause, which is coupled with a provision, binding William Dickson and the heirs of entail to redeem adjudications or other legal diligence, is thus expressed: "In case of our failing to redeem accordingly, we shall forfeit and lose our right to the lands and estate above disposed, etc.; and with and under this irritancy, as it is hereby conditioned and provided, that in case I, the said William Dickson, or any of the heirs succeeding to the lands and estate before disposed, shall contravene the before written conditions, provisions, restrictions and limitations therein contained, or any of them, that is, shall fail or neglect to obey or perform the said other conditions and provisions, and each of them, or shall act contrary to the said other limitations or restrictions, or any [312] of them, then and in either of these cases, I the said William Dickson, or any other person or persons so contravening, shall, for ourselves only, amit, lose and forfeit all right, title and interest which we have to the lands and estate before disposed, and as such right shall become void and extinct, so the said lands shall devolve, accresce and belong to the next heir appointed to succeed, although descended of the contravener's own body, if capable to possess and enjoy the said lands and estate, in the same manner as if the contravener were naturally dead, and had died before contravention."

The concluding clause of the entail was in these words: "And lastly, I hereby authorize the said Mr. John Dickson, or any of the substitutes above named, to apply to the Court of Session to have this present tailzie judicially recorded, in terms of the act of parliament." The deed was accordingly, on the 13th of February 1776, recorded upon a petition by the respondent, Mr. John Dickson, the first substitute, and thereby completed, agreeably to all the forms which are required by the law of Scotland.

For several years after the trustees denuded, the respondent managed the estate as factor, both for his father, Mr. David Dickson, and for his brother William, who was the pursuer of the present action in the Court of Session. In March 1779, the pursuer went in the army to America, and the respondent then accepted from him a commission and factory, under which he managed all his affairs in Great Britain, both before the father's death, which [313] took place in 1780, and afterwards until the respondent's return at the peace.

In consequence of the embarrassment of his brother's affairs, and soon after his return, the respondent resigned the factory and commission. But previous thereto

he raised an action before the Court of Session, under a power reserved in the deed of entail, for selling as much of the estate of Kilbucko as was necessary to relieve his brother from some debts which were a burden upon the entail. By the decree of the Court, in this action, it was found, "that the pursuer must lay out any surplus price of the said lands, when sold, at the sight of and to the satisfaction of the heirs of entail, in the precise terms of the said disposition and entail."

Upon the sale there was a surplus of £600 which was not applied in terms of the decree, but appropriated to his own use by William Dickson, who being involved in debt, soon afterwards conveyed the estate to John Loch, in trust, with power to sell the whole or part for payment of his creditors.

Under this power, a part of the estate was sold by Mr. Loch to a Mr. Cunningham. Whereupon an action of declarator was brought in the Court of Session by William Dickson, and Mr. Loch, as his trustee, to have it declared that they had power to make such sale; and at the same time, a bill of suspension was presented by Mr. Cunningham, the purchaser, to delay payment of the price until the judgment of the Court, as to the right of selling, was obtained.

[314] In that action the respondent was called with the other heirs of entail; but the suit, (as represented by the respondent), was entirely amicable, and the expense on both sides was paid by William Dickson. The information, in name of the heirs of entail, though it did not oppose the sale then contemplated, sought some security against further sales. The concluding paragraph was in these words: "Upon the whole, the defenders hope your lordships will be inclined to sustain the entail in question, even against the pursuer's creditors. But if, on the contrary, this fair, onerous, and necessary deed shall be found ineffectual against creditors, they trust that it will at least be effectual against the pursuer."

The information for William Dickson stated, that the question was not between him and the heirs of entail, but a question with his onerous creditors, viz.: "Whether this deed of entail may be considered a gratuitous or onerous deed in any question betwixt the pursuer and the heirs of tailzie alone, will not affect the present question, which is a case with the onerous creditors of the pursuer, who insist, by their trustee, that the onerous debts and deeds of William Dickson, the maker of the entail, must be effectual against his estate."

The summons concluded, "that it should be declared, that the trust-deed granted by William Dickson to John Loch affects the lands for payment of the debts therein mentioned, and other debts," etc.

[315] When the cause came into Court, in the year 1786, Lord Braxfield observed, "that the arbiters designed to bind William Dickson, but they did not take the right way. They should have restricted his right to a life-rent; for so long as he holds the fee of the property his debts must affect it." This opinion was adopted by the Court; and upon the acquiescence of the heirs of entail a decree was made, corresponding with the conclusion of the summons.

This decision was not satisfactory to the purchaser, who refused to pay the price unless a judgment of the House of Lords was obtained. Upon this objection, to avoid expense and delay, it was proposed, and upon conference agreed, that the respondent should concur with William Dickson in granting the disposition; and a conveyance also was granted to the purchaser of the whole of the remainder of the estate, in real warrandice.

In the year 1809, William Dickson, having incurred new debts, in order to relieve himself proposed to sell a further part of the estate: whereupon the respondent intimated to his brother his intention (on behalf of the heirs of entail) to prosecute a declarator of irritancy, which, though it might not prevent the sale then intended, so far as the interest of the creditors were concerned, yet would prevent any future sales, and in so far secure the interests of the heirs of entail.

At the same time the respondent made a proposal and offer to his brother, that if he would do what the [316] Court suggested in the year 1786, and which, agreeably to the opinion then given, ought to have been done at the original settlement of the family affairs in 1776, viz. restrict himself to a life-rent, the matter should be amicably settled without further trouble or expense. To this proposal William Dickson assented; and thereupon a transaction of agreement took place between the parties; the respondent, as next heir of entail, assenting to the sale of part of the

estate for the sum of £6300 which was to be applied, so far as required, in payment of the debts of William Dickson, and the surplus was, by the agreement, to be invested upon the trusts of the entail. On the other hand, William Dickson agreed to execute a new entail, reducing his estate in the lands of Kilbucko to a life-rent.

The deed creating this new entail was drawn by John Dickson, writer to the signet, the nephew of the parties to the transaction, and under the direction of the respondent, who made in the scroll, as originally drawn, the marginal additions which appear printed in italics in the following clauses.

1. I bind and oblige me and my heirs and successors whomsoever, without the benefit of discussing them in order, to infeft myself in life-rent; *for my life-rent use alienably*; and the said John Dickson, and the other heirs of tailzie above-named, in fee, with and under the conditions, etc.

2. In the clause which provides against the lands being affected by debt, the words in italics were marginal additions in the hand-writing of the respondent. "Debts or deeds, legal or voluntary, contracted [317] or granted *by me as life-renter*, or by the said John Dickson as heir, or to be contracted," etc.

3. The last addition was in the irritant and resolute clause, which originally provided only for the case of heirs failing or neglecting to perform the conditions of the deed; the marginal addition was, "or shall act contrary to the said other limitations or restrictions, or any of them."

The draft was settled by the respondent, and transmitted to William Dickson; but the respondent had been his ordinary legal adviser, and he had no other adviser in this transaction.

This deed, which was shortly afterwards (1809), executed, proceeded upon the following narrative and statement of considerations, and contained limitations to the following effect:

"Know all men, by these presents, that I, Brigadier-general William Dickson of Kilbucko, considering, that by disposition and deed of entail, executed by me, dated the 27th day of January 1776, I gave and disposed, heritably and irredeemably, to David Dickson, my father, in life-rent, and to myself in fee, and the heirs male of my body; whom failzieing, to John Dickson, advocate, my first brother, and the heirs male of his body; whom failzieing, to the other heirs of tailzie and provision therein particularly mentioned, All and whole the lands and barony of Kilbucko, comprehending the lands and others therein and after mentioned, lying in the parish and regality of Kilbucko, and sheriffdom of Peebles, with and under the conditions, provisions, restrictions, limitations, exceptions, clauses prohibitory, irritant [318] and resolute, therein specified; that notwithstanding thereof, I had sold a considerable part of the said lands and estate, and have thereby become liable to a declarator of contravention of irritancy, at the instance of the said John Dickson, which he might now raise against me; but whereas he the said John Dickson has, for my accommodation, agreed not to object to the sales already made of part of the foresaid lands, for payment of certain debts contracted by me, nor to pursue any action of declarator or irritancy against me, upon condition of my granting the deed underwritten, for the purpose of preventing any further sales of what still remains of the estate: Therefore I have given, granted and disposed, as I do hereby, with and under the conditions, provisions, restrictions, limitations, clauses prohibitory, irritant and resolute, declarations and reservations after specified, give, grant and dispose, to and in favour of myself in life-rent, for my life-rent use alienably, and to the said John Dickson, my first brother, in fee, and the heirs male of his body; whom failing, to the heirs female of his body, the eldest always succeeding without division; whom failing, to the Reverend David Dickson, my next brother, and the heirs male of his body; whom failing, to the heirs female of his body; whom failing, to James Dickson, now James Randalson Dickson, my third brother, and the heirs male or female of his body; whom failing, to Elizabeth Dickson, my sister, and the heirs of her body; whom all failing, to the other heirs-substitute in the foresaid deed of entail, the eldest heir female always suc [319] ceeding without division; and excluding heirs portioners throughout the whole course of succession hereby established, heritably and irredeemably, all and whole," etc.

The deed contained an obligation to infeft procuratory of resignation, precept of sasine, and the usual prohibitory, irritant and resolute clauses, against altering the order of succession, or burdening or alienating the estate. Upon this deed

infeftment was taken by the agent of William Dickson, and recorded in the record of sasines.

In the year 1813, William Dickson again became embarrassed in his affairs; and being pressed by his creditors, and advised that the entail of 1809 was invalid, he raised an action to reduce that entail. At the same time, the appellant William Tytler obtained from William Dickson a minute of sale of the estate, raised an action of suspension against a threatened charge for payment of the purchase-money, on the alleged ground that the vendor could not give the purchaser a proper right to the estate, but in truth to try the validity of the entail; both which actions came before Lord Balgray, as Ordinary, and were conjoined.

On the 6th of July 1813, the following interlocutor was pronounced, "The Lord Ordinary, having considered the memorial for Colonel William Dickson of Kilbucko, charger and pursuer; memorial for James Tytler, writer to the signet, and suspender; defences for John Dickson, against the action of reduction at the instance of the said William Dickson: In respect that the pursuer and charger asserts and maintains, that he was unlimited fiar [320] of the estate of Kilbucko, and had the right of disposing thereof as he thought proper, Imo, finds that so far as he is concerned he had power to execute the deed of entail, dated 28th April 1809: 2do, finds, that the said entail is a delivered deed, and irrevocable; and that the pursuer has conveyed away the right of fee, and has restricted his right to that of life-rent alienarly: 3tio, finds, that no legal, just, or reasonable ground is assigned by the pursuer or by the suspender for setting aside the said deed: therefore, in the process of reduction, assoilzies the defender: and in the suspension, suspends the letters *simpliciter*, and decerns."

Upon a representation by the appellants, the Lord Ordinary again minutely considering the whole argument on both sides, pronounced a second interlocutor.

"The Lord Ordinary having resumed consideration of this representation (the pursuers), with the answers thereto, and having also resumed consideration of the former papers in the cause, with the deed of entail 1809, and scroll thereof: In respect, Imo, that it does appear that the execution of the deed of entail 1809, was, under all circumstances, a measure highly proper, prudent, and expedient on the part of the pursuer: 2do, that it is admitted by the pursuer, that he voluntarily executed the said entail, and had power to do so; and that there does not appear, from the tenor of the deed itself, or any other collateral circumstance, any foundation for the allegation that the pursuer was improperly or fraudulently induced to execute said deed; and that the pre-[321]-sent proceedings seem to arise rather from a change of mind on the part of the pursuer, than the discovery of any facts attending the execution of the entail 1809: therefore, refuses the desire of the representation, and adheres to the interlocutor reclaimed against."

Upon a second representation by the appellants, the Lord Ordinary, on January 21, 1814, appointed informations to be ready in a fortnight; but in the mean time the minute of sale was renounced by a discharge, dated February 7, 1814. Whereupon William Dickson became nominally the sole party. By a deed, dated the 31st of January 1814, William Dickson conveyed to the appellants, as trustees, all his estate and interest in the matter in dispute, with power to carry on the action, or raise a new action in their own name, or in the name of William Dickson, or of his creditors.

By an interlocutor of the Inner House, dated June 2, 1814, "The Lords having advised the mutual informations for the parties and whole process: the suspension at the instance of Mr. Tytler being withdrawn, assoilzie the defenders from the whole conclusions of the actions of reduction, and find and decern in the terms of Lord Balgray's interlocutors of the 6th July and 16th November last, etc." By a second interlocutor (June 28, 1814,) a reclaiming petition was refused, without answers, and by a third interlocutor costs were given against William Dickson.

Soon after these judgments had been pronounced William Dickson, the pursuer, died in extreme pecuniary distress, having before his death given to [322] his creditors the power of prosecuting the suit then in process, by the trust-deed before mentioned, which was recorded in the books of council and session in Scotland, 9th February 1816, conveying his lands to the appellants, for behoof of his creditors.

The deed commences as follows: "Be it known to all men by these presents, that I, Colonel William Dickson, of Kilbucko, taking into my consideration, that

upon the 24th April 1809, I was induced to execute a disposition and deed of entail of my lands and estate after mentioned, in favour of myself, in life-rent, and John Dickson, esquire, of Culter, advocate, my brother, in fee; whom failing, certain other heirs of tailzie therein mentioned, to my enormous lesion, as well as to the great injury of my just and lawful creditors; and that I have brought an action before the Lords of Council and Session against the said John Dickson, and the heirs substituted to him in the said deed, for setting aside the same on various grounds; and which action is now in dependence before Lord Alloway, as Ordinary thereto: And I being desirous to do every thing in my power for the benefit of my said creditors, and to enable them the better to set aside the said deed executed by me to their prejudice, and to obtain justice for themselves in the said matter, I therefore hereby give, grant and dispoise, to and in favour of Richard Hotchkis and James Tytler, writers to the signet, and the survivor of them; whom failing by death, non-acceptance, or otherwise, to any other person or persons who shall be nominated and appointed by the majority of my creditors in value, assembled at [323] a general meeting, as trustees, for and to the use and behoof of all my present just and lawful creditors, all and whole," etc. (the lands of Kilbucko).

After the powers usually conferred by such deed, it proceeds thus: "And for rendering the above-written disposition more effectual, with special power to my said trustees and trustee acting for the time, to insist in and follow forth, at the expense of me and my heirs and successors, the aforesaid action of reduction, or to raise such new actions as they shall be advised to prosecute against the said John Dickson, my brother, and all others concerned, and that either in my name, or in the names of themselves, as trustees aforesaid, or in the names or name of all or any number, or any one of my said just and lawful creditors, as they shall think most conducive for obtaining a avoidance and reduction of the said deed, and to employ agents and counsel, and to take all other necessary and lawful steps, at the expense of me or my aforesaid, for conducting to a termination the said questions at law."

The appeal was brought by the appellants as assignees in trust for the creditors of William Dickson.

On the part of the appellants the case was supported by the following arguments:

I. The deed is void, and of no legal effect, being vitiated *in substantialibus*. It purports to have been executed on the twenty-fourth of April 1809; but the word *fourth* is clearly written upon an erasure. Such a vitiation is laid down by authorities, and recognised in practice, as fatal to the authenticity of any deed in which it occurs. According to Balfour (page 371), "an instrument, charter, contract, obligation, or other writing, being rasit in any substantial part, as in name or surname, subscription of notar or party, is not authentic, neither could make any faith, albeit the parties offer him to prove by the witnesses instrumentar, or *per comparationem litterarum et instrumentorum, ejusdem notarii*, the said rasure to be restorit, and the said places to be filled by the notar himself."

To the same effect is the authority of Stair, in his Institutes, b. 4, tit. 12, sect. 19; who in the same passage states, that the date as to time, as well as place, is *de substantialibus*.

Erskine, in his Institutes, b. 3, tit. 2, sect. 26, speaking of the case of erasure and interlineation of deeds, says, "the presumption is, that they have been made after the grantor and witnesses had signed the deed, since no person is presumed to sign a blotted or vitiated writing."

In support of the same doctrine were quoted the following cases; *Edmiston v. Sym and Skeen*, July 1, 1796, Fac. Coll. No. 228, Mor. Diet. 1458; *Bryce v. Dickson*, Nov. 16, 1810, Fac. Coll. No. 6; *Merry v. Howie*, Feb. 6, 1800, Fac. Coll. App. No. 13, Mor. Diet. App. voce Writ, No. 3.

II. The deed in question is reducible on the ground of fraud, which appears from the mode in which the execution of the deed was procured, from the relative duty of the person by whom it was procured, and from its effect upon the interest of the parties.

[325] The deed in question was drawn out by Mr. John Dickson, junior, nephew of both parties, exclusively by the direction of the respondent. Its effect and import never were explained to the appellant by the writer; it was neither explained, nor any part of it read over at the time of signing it; and William Dickson was

utterly ignorant of its effect, as even after its execution he considered himself proprietor of the estate.

The communication of the draft of the deed to Colonel Dickson was useless. The execution was required and advised by his brother, a lawyer, who had always acted as his confidential and legal adviser. This fact is admitted in various parts of the pleadings of the respondent, who seems to take credit for his exertions in that capacity. In fact, the respondent was the very person to whom he would have applied for advice, whether he should sign any such deed or not. Such was the character in which the respondent had, even by his own account, uniformly acted; and he cannot point out a single circumstance tending to show that he had renounced that character in this transaction. He cannot pretend that he ever suggested to William Dickson the propriety of resorting to any other professional person for advice as to the expediency of the deed. He took upon himself to advise his brother and client to execute a deed, by which, divesting himself of the fee of his own estate, he was made to convey the fee of that estate to his adviser, and to sacrifice to that adviser every right which the character of fiar could confer upon him. This is one of the cases where fraud is necessarily [326] implied. It is not enough for the respondent to say, as in the case of parties bargaining with each other, that the deed was executed without compulsion, and that the grantor must be held to have satisfied himself of its prudence and necessity. His responsibility extends farther. In his character of adviser, he is bound to substantiate the soundness of the advice by which it was procured, on pain of incurring the penalties of fraud or breach of trust. It is upon this admitted principle, that various acts, which, between unconnected parties, would be considered perfectly indifferent, are held necessarily to imply fraud on the part of agents, and other confidential persons, who may have derived benefit from those acts at the expense of the person by whom they are trusted. In this case, the brother and professional adviser of the disponent has converted the influence which those united characters conferred upon him, into the means of obtaining the execution of a deed in his own favour, and injurious to the grantor.

It is argued, that the deed under reduction, so far from affording any presumption of fraud, was in itself perfectly rational and proper; that William Dickson had, by the various partial sales, incurred an irritancy under the entail 1776, and consequently exposed himself to a declaratur of contravention at the instance of the respondent, the next heir under that entail. Accordingly, the deed under reduction states in its narrative, as the consideration of granting it, that William Dickson had exposed himself to such declaratur of contravention; and that the respondent had agreed neither to object to the sales [327] already made, nor to pursue any such action of declaratur. But the sales made by William Dickson were beyond the reach of any challenge at the instance of the respondent, and William Dickson was exposed to no risk of forfeiture at his instance. The validity of the sales, notwithstanding the entail 1776, was the subject of the action of declaratur in 1786, by William Dickson against the heirs of entail. It was decided in that case, that the debts contracted by William Dickson were good against the estate, and that the suspension offered by the purchaser, on the ground of the sale being challengeable, was unfounded. By that decision, the freedom of William Dickson from the penalties of contravention was established by necessary implication, otherwise his title to prosecute such an action could never have been sustained.

In the case of *Stewart against Agnew* (Mar. 3, 1781. Fac. Coll. No. 150, p. 235), decided in March 1781, upon the authority of which the respondent himself admits that the decision of 1786 rested, the inefficacy of an entail to warrant the infliction of the penalties of contravention against the entailer, though nominally subjected to the fetters, was unequivocally recognised. In that case the question at issue was, whether or not an entail imposing upon the grantor, as well as the heirs, restrictions against alienating and affecting with debt, fortified with the usual irritant and resolute clauses, was good against the creditors of the entailer? The Court found that it was not; and the *ratio decidendi*, as appears from the report, was the necessity, in order to exclude creditors, that the [328] right of the contravener should be resolvable, "in which case the statute directs the next heir of tailzie to serve himself heir to him who died last infeft in the fee, and did not contravene."

"A provision totally inconsistent with the predicament of an entailor imposing restraints upon himself." In short, the debts of the entailor were found in that case good against the estate, upon the very ground that there could be no effectual resolute clause against the entailor; or, in other words, no possibility of declaring a contravention against him, and voiding his right. Accordingly, this very reasoning was adopted in the pleadings for William Dickson, in the action of 1786. In the information presented to the Court in that action, it is maintained, on the part of William Dickson, that the statute 1685, in so far as it afforded a security against creditors, could not apply to the case of an entailor: it is argued (information for pursuer in action of 1786), that by that statute, "in case of contravention, the next heir of tailzie is directed to serve himself heir to him who died last infeft in the fee, which shows clearly that the right of the maker of the entail could not thereby be resolved, and yet no entail can be effectual against creditors, without a clause resolving the right of the person contravening."

Supposing that William Dickson had incurred an irritancy, and exposed himself to an action of contravention, the deed under reduction was itself in fact a gross act of contravention, as it effects a complete alteration of that order of succession which was secured in the former entail, by prohibitory, [329] irritant and resolute clauses, as binding as those directed against the alienations of the estate. By the former entail, the destination of the lands is taken to various substitutes, and their heirs male; while, by the new deed, the destinations are taken to the respondent and various substitutes, and their heirs general; so that the respondent's daughters are now called to that succession which was formerly limited to his sons; and secondly, there is an alteration of the substitution, by introducing the daughter of Mr. David Dickson into the order of succession before Mr. Michael Dickson and the heirs male of his body, who stood before her in the former entail. The new deed, therefore, completely perverts the order of that succession in which it is its proposed object to secure the descent of the remaining estate; and thus the deed, so far from securing William Dickson against actions of contravention, necessarily exposed him to such an action at the instance of any heir of the first entail who chose to insist in it. It affords no answer to this, that the new deed under reduction does not stipulate for the whole heirs of entail, and only bears, that John Dickson, the respondent, had renounced his right of action against the grantor; for it is perfectly obvious that the pursuer would not have abandoned his right of property in the estate to purchase the forbearance of one heir, if he had been informed that the very deed containing that abandonment placed him at the mercy of many other persons having an equal title to vacate his right, and of persons who had not only a title, but a strong interest to take that step, as the [330] interposition of the respondent's numerous daughters produced as effectual an exclusion of the succeeding substitutes from the benefit of the entail, as if the estate had been alienated altogether by William Dickson.

No professional person, unbiassed by interest, could have advised William Dickson to execute such a deed. Holding an estate in fee under an entail executed by himself, he had obtained, in a former proceeding, a decree against the heirs, finding the estate affectable by his debts; which decree appeared from the pleadings to have been pronounced on the very ground that there was no way of resolving his right. Could a professional person *bona fide* advise such proprietor to admit, without discussion, that he had incurred an irritancy by the sales taking place under that decree? Could he advise such a proprietor, by way of purchasing the forbearance of the first substitute, to execute a new entail, which instantly denuded him of the fee of the estate in favour of the first substitute, and at the same time infringed the order of succession of the former entail in favour of the daughters of that first substitute? When the first substitute, himself a professional person, and the legal adviser of the proprietor, is found to recommend and procure the execution of such a deed, the circumstances of the case afford, in legal contemplation, a presumption of fraud, fully sufficient to invalidate the transaction.

The *bona fides* of the respondent, founded upon his alleged conviction of William Dickson's liability to a declaratur of contravention, his repeated assertions that that liability was unquestionable, are con-[331]-tradicted by the tenor of the deed under reduction, and the proceedings which have followed upon it. If the respondent

held it to be clear, that William Dickson was just as liable to the fetters of the entail executed by himself, as any of the other heirs,—how came the respondent to accept or act upon the deed under reduction? One of the clauses of that first entail provides, “that it shall not be lawful, nor in the power of the said William Dickson, or any of the heirs aforesaid, to alter the said tailzie and the order of succession thereby established,” and this prohibition is fortified by resolute clauses equally extensive. If the respondent, therefore, conceived it to be absurd to entertain a doubt of the efficacy of the prohibitions of that entail against the acts of William Dickson, the grantor, how did he accept as a valid and effectual deed, the deed now under reduction, which, by altering the order of succession, was just as gross an act of contravention as the former sales by William Dickson? But the respondent not only accepted the deed under reduction, but took infetment upon it, and actually holds the entailed estate of Kilbucko, as fiar under this new title. One of the clauses of the former entail, which the respondent affects now to consider as binding, is in the following terms: “Also that the said William Dickson, and the whole heirs of tailzie aforesaid, shall be obliged to possess and enjoy the lands and estate thereby disposed, in virtue of the tailzie before mentioned, and of these presents and infetments to follow thereon, and by no other right or title whatsoever.” So that at once the respondent must admit, that [332] he himself has incurred an irritancy, and forfeited all right to the estate, unless he assumes that very fact which he elsewhere declares to be absurd, that William Dickson was not bound by the limitations of his own entail, and had power to execute the deed: in which case he must *a fortiori* have had power to sell for payment of debt, without incurring a forfeiture.

The single ground upon which the respondent can maintain the validity of the deed under reduction is at variance with the truth of the narrative on which it proceeds. If he holds that the deed is good for any thing, he virtually admits that the former entail had no effect against William Dickson the grantor, that he had a right to alter the order of succession, and *a fortiori* the right to sell for the discharge of his debts; or in other words, the respondent declares, by his conduct, that he knew the narrative of the deed to be unfounded. The respondent, in answer to this alleges (Information for Defender, p. 37), that “when the deed in question was agreed upon, the parties had a full and deliberate conversation upon this point, and concurred in disapproving of every entail upon heirs-male, which is always absurd, and generally, at one time or other, attended with the worst of consequences. Though, therefore, the entail in 1776 was on heirs male, yet, as the great objects of that entail were now defeated, it appeared unnecessary, and even foolish, to adopt one of the most unreasonable things which it contained. Accordingly, with the pursuer’s fullest approbation, and by his own direction, the [333] entail was drawn in its present form, which, it is believed, is followed in all modern entails, which are not fettered by the restrictions of the old investitures.”

William Dickson denied that any such conversation had taken place; but if true and correctly stated, that conversation supports the argument of the appellants. The respondent’s defence of the prudence and propriety of the line of descent adopted in the new entail, is an evasion of that argument. The appellants refer to that alteration, not merely as an alteration in the respondent’s favour, but as showing that the respondent knew to be unfounded that assertion which he assigned in the narrative as the ground for William Dickson’s executing any deed at all. They refer to it, as showing that the respondent did not believe William Dickson to be bound by the fetters of the first entail, otherwise he would not have admitted an alteration of the order of succession, which invalidated the second entail, and endangered the right of the respondent himself and all the persons who were to take under it. The appellants do not complain of the respondent’s speculative opinions upon the absurdity of limitations to “heirs male;” but they maintain, as proof of fraud, that when the respondent was canvassing (as he admits, in the above passage, that he did,) the expediency of a new line of descent, he concealed from William Dickson that important fact, which he must have known and believed at the time, that upon the very same grounds which authorised such alteration, William Dickson was not liable to a declaratur of contravention, and therefore was not [334] bound, either in necessity or propriety, to grant any new deed, divesting himself of the fee of the estate.

This conversation, as described by the respondent, proves that William Dickson was misled as to the necessity of the new deed; that he was kept in ignorance of its real effect upon his situation; as upon the very grounds that he was authorized to alter the substitution, he must have been enabled to retain the fee without challenge, or dread of declaratur of contravention. If the great object of the entail of 1776 were so much defeated as to warrant a departure from its line of descent, why was William Dickson called upon to execute the new deed at all? And how can the respondent now, justifying that alteration by the authority of "modern entails, not fettered by the restrictions of the old investitures," plead *bona fides*, when he assigns in the narrative, as the reason for demanding from William Dickson the fee of his estate, that the restrictions of the investiture were in full force! From these circumstances it is clear that the respondent knew to be unfounded those pretended claims, which he assigns in the narrative as considerations for the execution of the deed. The transaction comes within the description given in our law books of those reducible on the head of circumvention. Stair, b. i. tit. 9. s. 9; Bankton, vol. i. p. 258. s. 62; Erskine, b. iii. tit. i. s. 16.

It was a deed injurious to the grantor, and procured from him by the grantee, his brother and legal adviser, either by the concealment of its real object, or upon pretences which, it appears from the [335] circumstances of the case, the respondent, the grantee, must be presumed to have known, and did actually know to be unfounded.

On the part of the Respondents.

The first argument pleaded in the name of William Dickson before Lord Balgray was, that the tailzie 1776 was still an obligatory deed, which prevented him from executing any new entail; but this was evidently inconsistent with the very basis of the pursuer's plea: and, accordingly, in Lord Balgray's first interlocutor, his Lordship, in "respect that the pursuer asserted and maintained that he was unlimited fiar of the estate of Killbucko, and had the right of disposing thereof as he thought proper, finds, that so far as he is concerned, he had power to execute the deed of entail, dated 21th April 1809." But, further, the right of the substitutes under the former deed, is now most effectually put an end to, in so far as founded upon the first entail; for it is evident, that if the last entail were set aside, then the whole estate was *instantly* alienated from the pursuer himself, and from every other branch of the family. It follows of necessary consequence, that none of the heirs of entail can have any right, because they have no interest, to challenge the present entail, independent of which there will remain no subject of any entail whatever, nor of any succession.

The question about William Dickson's powers being thus over-ruled, the appellants then had recourse to an allegation of fraud, which is also specifically repelled in Lord Balgray's second interlocutor. [336] It is said that the deed itself contained intrinsic evidence of fraud, particularly in two respects: first, because it reduced the right of William Dickson to that "of a mere liferent;" and, in the next place, because "it rendered the respondent himself the unlimited fiar of the estate, by omitting to impose the prohibition against altering the order of succession on him as the institute."

The latter objection is answered by reference to the entail, in which there is the following clause: "And with and under this restriction and limitation also, that the said John Dickson, and the other heirs succeeding to the said land and estate before disposed, are and shall be limited and restrained from doing or committing any acts, civil or criminal, and granting any deed, directly or indirectly, in any sort, whereby the lands and estate foresaid may be affected, adjudged, forfeited, or be any manner of way evicted from the heirs of tailzie, or the said order of succession be prejudiced or changed."

This clause, with all the other prohibitions and restrictions, is afterwards fortified by an irritant and resolute clause, in the following terms: "And with and under this irritancy, as it is hereby conditioned and provided, that in case the said John Dickson, or any of the heirs succeeding to the lands and estate before disposed, shall contravene the other before written conditions, provisions, restrictions, and limitations herein contained, or any of them; that is, shall fail or neglect to obey or perform the said other limitations or restrictions, or any of them, then, and

in either of these cases, [337] the said John Dickson, or other person or persons so contravening, shall, for themselves, amit, lose, and forfeit all right, title, and interest, which they have to the lands and estate before disposed, and such right shall become void and extinct."

The other prohibitory clause is in these words: " And that it shall not be lawful to, nor in the power of me, or any of the heirs aforesaid, to alter the present tailzie, and the order of succession thereby established, or to grant or do any act or deed which may import or infer any innovation or change thereof, directly or indirectly, in any sort."

It might no doubt be said, that the respondent is not an heir, but an institute, and that, therefore, this clause could not affect him; but the whole of this critical argument is obviated, by attending to the qualification added to the word " heirs." The heirs here mentioned are the heirs aforesaid; and, upon looking back to the preceding clauses, it appears, that the respondent John Dickson is expressly stated and considered as an heir. Thus, immediately after the dispositive clause, the prohibitory clauses are introduced as follows:

" But with and under the conditions, provisions, restrictions, limitations, clauses prohibitory, irritant and resolute declarations and reservations after written, but with and under these conditions always, that the said John Dickson, and the other heirs succeeding to the said lands and estate, shall be obliged to use and bear, and constantly retain, in all time hereafter, the surname of Dickson, title and designation of Dickson of Kilbucho: and with and under this condition, that I, during my life-[338]-time, and thereafter the other heirs of tailzie aforesaid, shall be obliged to pay annually the feu-duties, cess, stipend, and other public burdens and taxations to which the said lands and estate are liable."

When these clauses, in which it is unquestionable that John Dickson is described as one of the heirs, are connected with the words in the subsequent clause, " the heirs aforesaid," it is perfectly clear that the words " heirs aforesaid " include John Dickson as well as the other heirs in the previous clause. In every view, therefore, the argument, on which so much stress has been laid, proceeds upon a mistake in point of fact.

As to the argument for the appellants, concerning the restriction of W. Dickson's right to a life-rent:

In the memorial, which was the first paper for William Dickson, the following passage occurs:—" Although he admits the deed of entail, executed by him in the year 1809, to have been executed by him voluntarily, without any kind of compulsion, but merely at the request of, and to give satisfaction to his brothers and other near relations, yet he had not the most distant conception that the deed so executed by him was of the import and tendency, and was followed with the legal consequences which now, upon its being examined by persons of legal knowledge, turns out to be the case. He did not intend to deprive himself of those powers over his own property which belonged to him by law."

This passage consists of two different points, viz.: first, an admission as to the execution and pur-[339]-poses of the deed; and, secondly, an alleged misunderstanding of its import.

The first of these admits that the deed was voluntarily executed by the pursuer, in order to satisfy his brothers, and other near relations. But it may be asked, what satisfaction could it possibly give, if it did not restrain William Dickson from contracting debts, and selling the estate? And how could this be done, except by restricting him to a right of life-rent? By the entail of 1776, every restriction which was at that time thought necessary, or even possible, was imposed upon William Dickson, to prevent him from affecting or alienating the estate. And, according to the ideas which were then entertained of the law by the learned arbiters, and by every person concerned, that deed was completely effectual for the purpose. But after the decision in the case of Sheuchan ([2 Bl.] pp. 340, 341), which came to be applied to the present case, it was understood that the only way of securing the estate against William Dickson's debts was by restricting him to a life-rent. This, therefore, was necessarily the object of the deed 1809; and it was impossible that any thing less could give the smallest satisfaction to the relations of the family.

With respect to the second part of the paragraph, that W. Dickson did not know

the import or the tendency of the deed which he executed, and that he did not mean at all to deprive himself of his powers over his property, no statement can be more inadmissible or absurd. It is said that he did not know the meaning or consequences of the deed, till it was examined by persons of legal knowledge; but, [340] he could not be ignorant of its meaning; for the very first sentence of the deed is, that it was granted "for the purpose of preventing any further sales of what still remains of the estate." Surely these words are too plain to require the examination by persons of legal knowledge to make the meaning understood.

It was further said, that the narrative of the deed itself was false, and that the respondent knew it to be so; because, being bred to the law, he could not suppose that W. Dickson, on account of any contravention of the entail 1776, could be challenged by a declaratur of irritancy. But this argument refutes itself. If the respondent had thought the narrative of the deed false, or if he had not, on the contrary, been fully convinced of the truth and justice of that narrative, he could not have agreed to let it remain as it is, because he must, in that case, have foreseen that it might afterwards give a ground of challenge.

The entail, though ineffectual against creditors, was perfectly valid and complete as to the obligation upon William Dickson, so that his contravening the prohibitions which were fenced by regular, irritant, and resolute clauses, necessarily laid him open to the challenge of any heir of entail who chose to bring an action of declaratur for that purpose.

Mr. Cunningham, the purchaser in 1786, was not satisfied with the decree of the Court, even to the extent of finding the estate affectable by the debts; and therefore refused to pay the price till the respondent concurred in granting the conveyance.

The decision in the case of Vans Agnew of Sheuchan in 1781, upon which alone, as a precedent, the deci-[341]-sion in the case of Kilbucko in 1786 proceeded, has been under appeal, and is remitted to the Court of Session, where it is again the subject of discussion; so that it is far from being improbable, that the decision will be reversed (it has been since reversed). At all events, the present case is independent of whatever may be the ultimate decision in that or any other, where the question is upon the rigid statutory effect of entails, in a question with creditors, and not upon the plain and equitable interpretation of the meaning of the deed, as to the parties themselves. If there could now be a doubt as to the personal obligations of the deed 1776, it would not follow that a transaction which took place where different ideas were entertained, is to be considered as unreasonable and illegal.

The arrangement upon which the present entail proceeded was not only a fair and rational, but even a favourable, transaction to William Dickson. If the case had been stated to any man of business, or of common prudence, in the year 1809, and the question put, whether it would be advisable for the General to run the risk of an action of declaratur of irritancy, by which he might instantly forfeit his right to the estate, as the irritancy was not of that nature which could possibly be purged? Or if he should execute a deed for securing the remaining fragment of the estate from being alienated, reserving to himself an entire life-rent, no person would hesitate to say that the last alternative should be adopted.

Supposing, for the sake of argument, that the [342] matter was still a point upon which there might be a doubt, yet even this hypothetical view, which is the strongest that can be put for the appellants argument, would by no means serve their purpose. A *res dubia* between any parties, and especially between parties so nearly connected, is the proper subject of a transaction which is well known to be one of the most favoured contracts in the law of Scotland. Lord Stair (b. 1. t. 17. sect. 2.) says, "Transactions may be interposed in the matter of all contracts; and it is itself a most important contract, whereby all pleas and controversies may be prevented or terminated; for thereby the parties transacting quit some part of what they claim, to redeem the vexation and uncertain event of pleas. It is, therefore, the common interest, that transactions should be firmly and inviolably observed, which, both by the Roman law and our customs, have been held as sacred and necessary for mens quiet and peace."

The respondent certainly never refused his advice to his brother when it was asked; and he may, without assuming any merit to himself, say, that his brother

never had occasion to repent his following that advice. But, at the same time, the respondent did in no case pretend to dictate or direct his brother; and, in the present case, he was so far from stating what he did as a matter of advice, that he plainly and directly stated it as a matter of right, in which he was acting not as an adviser, but as a party.

It is argued, that the deed of entail 1809, instead of saving from a declaratur of irritancy, was itself a contravention which created an additional danger. But, in the first place, if the objection had any weight, it [343] would be entirely obviated by what William Dickson had done. By the debts he had contracted, and the sale he had made for payment of them, the subject would be completely swept away, in case the present entail were reduced, so that there would remain nothing to be lost by an irritancy upon the one side, or to be gained by a declaratur upon the other. It was therefore incompetent for any heir of entail to pursue such an action. A party having no interest can have no title.

In the second place, it is evident that after the contravention already incurred, by selling so large a part of the estate, the irritancy became altogether un purgeable, and of course no new irritancy, supposing such existed, could in this respect make the matter either better or worse with regard to William Dickson.

In the third place, it was observed, that the case was misstated by the appellants, when they supposed that the respondent undertook, for the heirs of entail in general, that they would not pursue an irritancy. The preamble of the deed expressly shows the contrary. It refers only to the declaratur of contravention and irritancy, "at the instance of the said John Dickson, and that the said John Dickson has, for my accommodation, agreed not to object," etc. The compromise was between William Dickson and the respondent alone; and though any challenge by remoter heirs was improbable, the respondent could not make, and therefore did not make, any engagement upon their part.

The deed of entail, made in 1776 in implement of the decree arbitral, was the only title on [344] which William Dickson possessed the estate of Kilbucho; and every condition which it contained was binding upon him. If the action of reduction, at the instance of David Dickson, for setting aside the previous trust-deed of 1767, had been successful, then he would have become unlimited fiar of the estate, and William would have had no right, excepting what David might please to give him, under the fetters of a strict entail. If, on the other hand, the action of reduction had been unsuccessful, then both David and William would have become mere annuitants for £100 each per annum. It was in consequence, therefore, of the arrangement under the direction of the arbiters, and by it alone, that David got the life-rent of the estate, burdened with £250 per annum to William, and that William got possession of the whole estate after his father's death. At the same time, the most essential part of that arrangement was the preservation of the estate by the entail then executed; and it was only upon the faith of that entail being completely effectual, that the trustees and the heirs substitute under the trust-deed consented to the arrangement taking place. The entail is accordingly ingrossed in the strongest terms that are known in the law or practice of Scotland; and although, in the amicable suit in 1786, it was found that creditors were not bound by any entail, in such circumstances, yet it was always held, that the maker of the deed himself was bound, by every legal as well as moral obligation, to observe it; so that the prohibitory, irritant and resolute clauses, which are all expressly directed against him, must, upon every contravention, by contracting debts, selling [345] part of the lands, or otherwise, be the ground of declaring an irritancy, or forfeiture of his right, at the instance of the immediate, or even the more remote substitute under the entail.

Considering the situation in which matters stood at the date of the transaction now in question, there are the strongest grounds for the finding in Lord Balgray's interlocutor, adopted by the unanimous judgment of the Court, that "the execution of the deed of entail 1809, was, under all circumstances, a measure highly proper, prudent, and expedient, on the part of the pursuer." The repeated sales by which the estate had been dilapidated, were contraventions of the prohibitory, irritant and resolute clauses of the entail 1776; which are declared to be binding upon William Dickson, as much as upon all the heirs of entail. If this were not the case,

the whole proceedings under the plan, suggested and carried into effect by the arbiters, would have been a mere delusion for misleading and disappointing the trustees of John Dickson, and all the members of the family who were interested in the succession. It follows, therefore, of necessary consequence, that when a further sale was proposed in the year 1809, the heirs of entail, and particularly the respondent, as the first of them, might not only have objected to that sale, but, by a declaratur of irritancy, have turned William Dickson out of possession. It was therefore not only a wise and prudent, but a most favourable, transaction for William Dickson; because by it, not only the sale to Mr. Forbes was allowed to be completed, and the price thereof applied in extinction of his debts, but [346] the right of challenging or disturbing his possession given up during his lifetime. Supposing the matter to have been doubtful, it was a proper subject for a transaction between the parties; and transactions as being the most useful, have always been considered as constituting the most sacred and inviolable obligations known in the law. Stair's Institutes, book i. tit. 17. sect. 2.

The interlocutors appealed from, find that it is admitted by the pursuer, that he voluntarily executed the entail in question; and this is supported by what appears upon the record. For in the first memorial given in to the Lord Ordinary in name of the pursuer, his words are: "He admits the deed of entail executed by him in 1809, to have been executed by him voluntarily, without any kind of compulsion, but merely at the request of and to give satisfaction to his brothers and other near relations;" which admission, when joined to the foundation of the pursuer's plea, that he had full power to execute the deed, corroborates the validity of the transaction.

The mode in which the transaction between the parties was concluded was that which was suggested by the Court, in their opinion upon the action of declaratur in 1786. Though the Court then found, that the first entail in 1776 could not be effectual against creditors, yet they were clear that the intention of the arbiters, and of all parties concerned, was to prevent the estate being affected in any way whatever; and that in order to accomplish the object in view, the right of William Dickson, as well as that of his father, ought to have been [347] restricted to a life-rent. This they held to be the only effectual mode of restraint, while the party was allowed to continue in the right of the estate, and therefore there was but one of two alternatives; either immediately declaring an irritancy, or now restricting the pursuer's right in the manner which it ought to have been from the beginning, to a life-rent. This restriction, as being the most favourable as well as the most amicable mode of adjusting matters, was adopted, and the necessity as well as propriety of the plan was verified by what happened within a few years, and which gave occasion to the attempt then made for disposing of the last fragment of the property.

The allegation of fraud is unfounded: William Dickson possessed an acute natural understanding, had received a liberal education, and been originally educated to the profession of the law as a writer. It is therefore absurd to suppose that he did not understand the meaning of the deed, till it was examined by persons of legal knowledge. The inductive clause in the preamble of the deed, bears, that it was "for the purpose of preventing any further sales of what still remains of the estate:" Could William Dickson, reading such a preamble, be ignorant that this deed deprived him of the absolute power of disposing of the estate?

For the appellants:—The Solicitor General, (Sir Robert Gifford), and Mr. J. A. Murray.

For the respondents:—Mr. Wetherell, and Mr. Charles Warren.

[348] In the course of the argument, the Lord Chancellor, upon the citation of authorities from the civil law, recognised as the law of Scotland by Stair in his Institutes, (*ante*, p. 312.) *De Transactione et Mota litis*, observed, that according to all law, and upon principle, where there is fairly a doubt as to the rights of parties, and an agreement without fraud, it is binding; that in case of doubt as to legitimacy, as in *Cann v. Cann* (1 P. W. 723.), an agreement between claimants to divide the property would be valid. It might indeed, in the case under appeal, be a question, whether the parties dealt with equal knowledge of the subject.

The case of *Gordon v. Gordon** (he said) stood on a different ground, because

* The bill prayed that articles of agreement executed by the plaintiff in favour

there was a suppression of a material fact by one of the parties; viz. the private marriage of the father, which the defendant knew, and called a mere ceremony. But the force of the argument in that case was, that the fact, whatever its character might have been, should have been communicated at the time of the agreement. Such communication was held to be essen-[349]-tial to the fairness and validity of the transaction between brothers, on a question of rights depending upon legitimacy.*

This case was argued in the year 1819; and, having stood over from time to time for consideration, was affirmed in the year 1820, with no other remark beyond those made upon the hearing of the appeal, than that the Lord Chancellor had considered the case frequently, and with anxious attention, and upon the whole could not advise the House to reverse the judgment in the court below.

Judgment affirmed.

[351]

SCOTLAND.

SHERIFF'S COURT; AND COURT OF SESSION (SECOND DIVISION).

HUGH DUNBAR,†—*Appellant*; JOHN and THOMAS HARVIE,—*Respondents*
[21st July, 1820].

[Mews' Dig. vi. 598, 615, 642, 797. As to proof (i.) of entries in excise-books, see 7 and 8 Geo. IV. c. 53, s. 19; (ii.) of regulations, minutes, etc., see Inland Revenue Regulation Act 1890, s. 21.]

A court of justice cannot delegate its jurisdiction, and ought not to be guided by any foreign opinion upon a question of law, *e.g.* the admissibility of evidence.

The certificate of the secretary of the Board of Excise, as to the accuracy and effect of accounts in the books of the Excise, ought not to be received in evidence.

Whether accounts of stock kept in the Excise books are evidence between third parties, as to the delivery of goods? *Quære.*

Copies of such accounts may be given in evidence. *Semb.* on the ground that the originals are public books;—but in such case, the copies produced must be proved by a witness, who has examined them with the originals, and can swear to their accuracy.

Whether proof *prout de jure* of delivery of goods can be allowed, where, subsequent to the alleged delivery, written statements of account containing partial settlements have been delivered, containing no notice of disputed articles? *Quære.* *Semb.* that in such a case, where the dealing was between a publican and a distiller who kept the accounts, it requires strong evidence of delivery of the goods, to rebut the presumption arising from the accounts delivered.

of his younger brother, the defendant, J. G. who disputed the legitimacy of the plaintiff, might be cancelled on the ground of fraud. The original hearing was at the Rolls on the 17th December 1816, when an issue was directed upon the question of legitimacy. The re-hearing was at the Rolls on the 9th December 1817. This case will probably be further noticed in the Appendix to the present volume. There is a report (1 Swanston, 166.) of a collateral point decided in the case, but it is not otherwise reported.

* Upon the subject of transactions of compromise, see in addition to the authorities above cited, *Frank v. Frank*, 1 Cases in Chanc. 85; *Stapilton v. Stapilton*, 1 Atk. 2; *Pullen v. Ready*, 2 Atk. 590; *Cory v. Cory*, 1 Vesey, sen. 19; *Penn v. Lord Baltimore*, Id. 143; *Taylor v. Rochford*, 2 Vesey, sen. 284; *Stockley v. Stockley*, 1 Ves. and Bea. 23.

† The form of pleading, and the conduct of causes in Scotland being a subject now under discussion, this case is reported more at length than is necessary for the purposes of the report, with a view to exhibit a familiar example of the ordinary course of litigation in Scotland, upon a question of fact, decided in the Court of Session before the passing of the Jury Court Act.

Whether the account books of the distiller in such a case afford a *semi-plena probatio*, and lay a ground for the oath in supplement! *Quære*.

The Court of Session having given judgment on the ground of evidence which ought to have been rejected, but some of which evidence was capable of being pro-[352]duced in an unobjectionable shape, and there being other evidence which might sustain the claim: on appeal against the judgment, the case was not remitted; but the judgment was reversed, on account of the small value of the matter in dispute, and the expense which a remit would cause.

The appellant, who was an innkeeper at Westmuir, was in the habit, during four or five years, of purchasing whisky from the respondents, who were distillers and spirit dealers "at Yoker."

When the goods were furnished, an invoice or account, specifying the quantity and price, was sent with them. The appellant's wife, who was unable to write or to read writing, was intrusted with the principal management of his business.

The respondents, when they received payments, marked them in the invoices, which was the only voucher or discharge for the appellant.

The transactions between the parties, which became the subject of discussion in the cause, extended from May 1808 to November 1810.

The first invoice or account proved in the cause, (and material to be stated) as delivered by the respondent to the appellant, is in the following terms:

" Mr. Dunbar,		To John Harvie,		
1808,				
May 3.	To balance per account rendered		£59	9 6
Aug. 24.	By cash		53	9 6
			<hr/>	
			£6 0 0	

This balance of £6 was not noticed in the next invoice or account, which was in these terms:

" Mr. Hugh Dunbar,		Yoker, Aug. 27, 1808.		
		Bought of John Harvie,		
62	gallons malt aqua, at 13s. 6d.		£11	17 0
1808, Nov. 30.	By cash		11	17 0
		(signed) Tho. Harvie."		

[353] The third invoice is in these terms:

" Mr. Hugh Dunbar,		Yoker, Dec. 5, 1808.		
		Bought of John Harvie,		
67	gallons malt aquavita, at 16s.		£53	12 0
1809, Mar. 15.	By cash		53	12 0
		(signed) Tho. Harvie."		

The fourth invoice or account is in the following terms:

" Mr. Hugh Dunbar,		Yoker, April 1, 1809.		
		Bought of John Harvie,		
66½	gallons male aquavita, at 15s 5d.		£51	10 9
To balance of old account			20	12 0
			<hr/>	
			£72 2 9	
1809, Aug. 16.	By cash		57	0 0
			<hr/>	
			£15 2 9	

At the foot of this account, in the hand-writing of one of the respondents, is the following jotting:

£51 10 9
6 0 0

£57 10 9

The cash credited in this last invoice or account was paid to the respondents by the appellant's wife, and the appellant acquiesced in the charge, as made in the account.

Some months after the delivery of the account last stated, the respondents called upon the appellant to pay the sum of £55 12s. as the price of a hogshead of whisky, alleged to have been delivered at his house on the 2d of June 1809, which, through inadvert-[354]-ence, had been omitted in the statement of accounts. The appellant, denying that he had received the hogshead in question, and relying upon the accounts delivered by the respondents, as before stated, refused to pay the sum demanded; whereupon the respondents raised an action against the appellant before the sheriff of Lanarkshire, concluding for payment of £481 16s. 6d. contained in an account then produced, deducting therefrom the sum of £438 1s. 9d. paid in part, and credited in the said account, with interest and expenses. On this account a balance was claimed of £43 14s. 9d. which, with the addition of £11 17s. 3d. being a balance admitted to have been paid by the appellant, made up the sum of £55 12s. *the price of the disputed hogshead of whisky* alleged to have been furnished upon the 2d of June 1809.

The appellant, in his defences, having denied the receipt of the hogshead of whisky, both parties joined issue in the inferior Court, on the fact that the delivery of the hogshead of whisky alleged to have been furnished on the 2d of June 1809, was the only point in dispute between them, and created in the balance of accounts the difference already stated.

In this action the respondents craved that the appellant and his wife might be ordained to undergo a judicial examination; and also, that they should be ordained to produce the invoice of the seventh or disputed article of the account.

The appellant and his wife were accordingly ordained to undergo a judicial examination, but the appellant did not appear; and on the 22d May 1811, he [355] was held as confessed, and a decree pronounced against him. Against this interlocutor he was afterwards repone; and subsequently, his wife, Janet Dunbar, gave a *judicial declaration*, in which she declares, "That the declarant and her husband received the whole articles of *aquaritar* stated in the account, libelled No. 2 of process, at the prices therein stated, excepting article 7, of date the 2d June 1809, which she denies having received; and she always received invoices from the pursuers with the spirits furnished: That the declarant made no other payments to the pursuers than what is credited in the said account which has been read over to her: that any payments which the declarant made to the pursuers were always marked in the accounts by one of the pursuers, and declares she cannot write; and further declares, that any payments she made were done at Glasgow: That the declarant has produced all the accounts in her possession relative to the spirits in question, and she never received any account of the spirits mentioned in the disputed article."

The declaration of the defender, Hugh Dunbar, was eventually not required, on a statement made by him that his wife was the person who took the chief management of his public-house, and was better qualified than he was to give an account of the different articles received.

Upon considering the declaration of the appellant's wife, the sheriff pronounced the following interlocutor: "Having considered the declaration of the defender's wife, *allows the pursuers a proof* prout de jure *of the disputed article of* [356] *the accounts, the defender of his defences, and to both a conjunct probation; and grants diligence and commission to the clerk of court to take the proof.*"

Against this interlocutor the appellant presented a petition, upon the ground that the memorandums which had been made at the foot of the different invoices, which he was in possession of, must *exclude* the admission of the proof which the respondents proposed to adduce, being parol evidence to contradict an account delivered in writing.

Upon advising the appellant's petition, the sheriff adhered to the interlocutor complained of, and in order that the appellant's case might receive full and complete discussion, he allowed the sheriff-depute's opinion to be had, after which, the following interlocutor was pronounced: "Having reconsidered the petition for the defender, and former procedure, and advised with the sheriff-depute, adheres to the sentence complained of."

After this interlocutor had been pronounced, the appellant advocated the cause to the Court of Session; it thereafter came before Lord Meadowbank as Ordinary, who, on hearing parties, appointed a condescendence to be given in by the respondents.

This condescendence was followed with answers. Upon advising which, Lord Meadowbank ordained informations to be printed, and laid before the Court. His Lordship at the same time issued the following note:

"Merchants accounts are put in, to a proverb, under 'errors excepted,' but after so many successive settlements as here occur, it seems to be a [357] novelty to allow an error to be established, as if every thing were open by entry in the pursuers books, and a proof, *prout de jure*, of the delivery of an article of great importance; this, however, is done by the Sheriff. It strikes the Ordinary, that, under the analogy of the statute (Scots Stat. of Limitations, 1597, c. 83), a proof of such error, posterior to settlements made according to the custom of the parties, ought only to be admitted by oath, or writ of the defender, if not detected on the face of settlements with the defender; for if this is required after the mere lapse of three years, *à fortiori*, should it be required where subsequent accounts have been rendered and settled, even though within the three years? The Ordinary thinks, however, that such a rule of practice, in a matter of such general importance, if not already adopted by decisions, ought to receive the consideration of the Inner House, rather than of a single Ordinary, before being entitled to his authority."

By the information printed in pursuance of the directions of the Lord Ordinary, the appellant insisted that such evidence as that proposed by the respondents was not admissible; and referred to the case, reported by Lord Kames in his Dictionary (ii. 135), of "Sir Walter Seton and Sir James Cockburn."

The respondents, in their information, argued, that the single point for the consideration of the Court was, whether the hogshead of whisky in dispute had been delivered to the appellant or not? And they pleaded, in point of law, that they were [358] entitled to establish this fact by parol evidence of their servants and clerks.

The respondents further contended that there was a difference between the case quoted and that in dispute, in the one the last account was signed by both parties, whereas, in the other, it was signed by only one of them; and that there were special circumstances in this case, which took it out of the general rule. They referred to entries* in their own books, and in the excise books, and other evidence which was contained in their information.† They further averred, and offered to prove, the *actual delivery* of the whisky in question into the appellant's premises, the Court below being of opinion, that this was necessary to make out their case.

On the 10th December 1813, the Court pronounced this interlocutor: "Upon report of Lord Meadowbank, and having advised the mutual informations for the parties, the Lords before answer ordain the pursuers to put in a condescendence, in terms of the act of sederunt, of the facts and circumstances which they aver and offer to prove in respect to the delivery of the whisky in question, and that *quam primum*."

The respondents accordingly gave in a condescendence, by which they undertook to prove,

Primo, That the cask intended for the whisky to be sent to Hugh Dunbar, and which he disputes, was cleaned, prepared, and filled by one of their workmen.

Secundo, That their clerk, who made the entries in the books, (already before the Court,) saw the [359] whisky measured, and saw it placed upon the cart.

Tertio, That the hogshead of whisky was actually conveyed to the house of Hugh Dunbar, and there delivered, along with the invoice and necessary *permit*, by the carters; who at the same time delivered a cask to Andrew Tennent, who lives a short distance farther, on the same road.

Quarto, That this permit was given up by Dunbar, in the usual manner, to the excise officer of the district, and was regularly transmitted to the permit examiner in the excise-office. It is proved by a certificate (see Appendix, p. 387), under the hand of Alexander Mitchell, permit examiner, that on the 2d of June 1809, a permit was granted for the removal of one cask, containing seventy-two gallons, *aquarital*, and was credited in Mr. Dunbar's stock in the excise books.

* See the Appendix. † See the Appendix to this case.

Quinto, That the excise officer of the district examined the stock in hand in Dunbar's cellar, compared it with the permit received, and made the necessary and usual return to the officer of the district, in whose books the disputed hogshead of whisky is accordingly entered. This is proved by certificate (see Appendix, p. 388), where the entry appears, "Hugh Dunbar, Westmuir, 2d June, seventy-two gallons."

Sexto, The excise officer on the 12th, and the supervisor of the district on the 28th of June 1809, examined and surveyed Hugh Dunbar's stock in hand; the latter comparing and checking off as correct the officer's survey. This is proved by a certificate (see Appendix, p. 389), subscribed by the supervisor, Alex-[360]-ander Williamson; and that there was in Dunbar's possession, "by permit, 2d June, seventy-two gallons *aquarivae*." And it is farther proved, that the excerpts contained in this certificate are faithfully taken from the excise books by W. Wintour, diary clerk, who farther certifies, that "the *stock books* from which these excerpts have been taken, appear to have been from time to time regularly *examined and checked* by the supervisor for the time, Alexander Williamson, then officiating in Glasgow, third district."

Lastly, this hogshead of whisky was regularly entered, as at "Dunbar's *debit*," throughout the complete and regular series of the excise books. This is proved by a certificate (see Appendix, p. 390), under the hand of Mr. Wintour, diary clerk.

The appellant, by his answers to the condescendence, pleaded, *in limine*, the incompetency of the proposed proof; and made the following objections to the admission of proof of the articles of the condescendence.

This article is wholly irrelevant. If there had been a particular cask, which could have been sent to the respondent only, and to no other person, the cleaning and filling such a cask with spirits might create a presumption, that it was at least intended to be sent to the respondent; but when the pursuers aver that the cask was prepared and filled by their workmen, they aver nothing specific, but what must occur with regard to every cask in their possession.

This article shows how far the pursuers can venture to go, in order to be allowed a proof. They [361] had no clerk at the time when it is alleged the whisky was sent, one of the pursuers having then performed all the duties of a clerk. That your Lordships may be enabled to judge with what view this article is stated, it is submitted, that the pursuers ought to name the clerk by whom it is asserted they will prove that the whisky was measured, and placed on a cart.

This article exhibits the same fallacy. For to induce your Lordships to believe, that several witnesses can be adduced to prove the delivery, the pursuers speak of the *carters*, though only one could have been necessary to take care of a single cart; and it is submitted, that they ought to say who the alleged "carters" are.

In point of fact, the defender states that no cask of whisky from the pursuers was delivered, either to himself or to Andrew Tennent, who is named in this article, on or about the 2d of June 1809; and your Lordships will observe, that if a fraud was committed by one of the pursuers carters, (which it will be shown he could easily commit), the proof proposed by the oath of the carter or carters is just a proof by the evidence of the perpetrator of the fraud.

No permit was given up by the defender to the excise officer of the district. The defender has explained in his condescendence, and repeats, that permits for the district in which he resides were, at the time in question, left in a house in *Camlachie*, without in general being seen by the persons to whom spirits were permitted, and were there received by the excise officer. The certificate by Alexander Mitchell, therefore, proves nothing; for though it [362] bears that a permit was granted, and *credited* in the respondent's stock on 2d June 1809, twenty such permits might have been given, and the quantities stated to account of the respondent, although not a drop of spirits had been added to his stock; for if the officer finds that the stock on hand of a dealer does not exceed the quantity stated, as permitted in the books, he has no occasion to inquire farther. It is only when there is an excess of stock above the quantity entered in the books as received by a dealer, that there can be any room for presuming illicit trade, and in that case the officer makes a seizure.

In point of fact, the proper officer of the district in which the defender lives, at the date of the alleged permit, was not James Cunningham, but — M'Vey. It will be observed, too, that though the pursuers firm is "John and Thomas Harvie," the entry in the certificate here mentioned is, "Thomas Harvie and Company."

This article, and the certificate, referred to in it, requires peculiar attention. First, when permits are granted, the quantity in them is always a little less than the quantity actually sent; and in proof of this the defender produces a discharged invoice from George Pinkerton, a respectable dealer in Glasgow, who furnished to the defender, on 25th of May 1809, sixty-six gallons of whisky; but the entry in the certificate, shows that the permit was only for sixty-five gallons. In the same manner, as the disputed article is stated at sixty-nine and one half gallons, the permit should have been a little less; but it bears to be for seventy-two [363] gallons. Secondly, by the certificate it appears, that on the 3d of April the defender had on hand twenty gallons; and on the day following sixty-five gallons were added to his stock, making in all eighty-five gallons. But on the 17th April, he had eighty gallons of stock on hand; or, in other words, he had only sold five gallons during the *fortnight*, between the 3d and 17th April. In the same manner, on the 1st May, he had seventy-five gallons on hand; and on the 15th May seventy gallons; thus showing regular sales of five gallons in each *fortnight*. On the 28th of May, the stock on hand was one hundred and twenty gallons; and if the defender had received the disputed cask, there would have been added to this stock sixty-nine and one half gallons, making in whole one hundred and eighty-nine and one half gallons. Now taking the usual rate of sales in a fortnight, being five gallons, the defender's stock on 12th June in that case would have been one hundred and eighty-four and one half gallons; whereas on that date, by the certificate, it amounts only to one hundred and twenty-eight gallons. In other words, on the supposition that he had received the cask in dispute, his sales for the fortnight preceding the 12th of June must have been fifty-seven and one half gallons; that is, more than *eleven times* the sales for each of the three preceding *fortnights*. Thus the certificate furnishes conclusive real evidence, that the disputed cask was not received by the respondent, and entered in his last stock.

Any quantity may be entered in the excise books as added to the stock of a dealer, without the risk of detection, although there has been no actual addition to his stock, all that is requisite being, that the [364] stock truly on hand shall not exceed the quantity which the excise books purport to have received into it.

On the 10th of March 1811, the Court pronounced this interlocutor: "Upon report of the Lord Justice Clerk, in absence of Lord Meadowbank, and having advised the mutual informations for the parties, with the condescendence for the pursuers, put in by order of Court, and answers thereto, advocate the cause, and before answer grant warrant for letters of incident diligence at the instance of both parties against witnesses, and havers, for proving the several facts and circumstances set forth by them in the said condescendence and answers, and allow to both parties a conjunct probation; grant commission to," etc.

Under the commission issued by virtue of this interlocutor, the following proofs were taken:—

Andrew Tennent depones, That though he was supplied with whisky by the respondents in the year 1809, "he cannot say whether he got spirits from them in the month of June in that year."

Daniel McFarlane depones, "That he has been about fifteen years in the service of John Harvie, and of John and Thomas Harvie, the pursuers. That for several years preceding the year 1809, and till Martinmas in that year, at which time the pursuers got a place of business in Glasgow, the deponent, and another man of the name of John Russell, carted all the whisky from the pursuers distillery to their customers. That he has on several occasions delivered whisky to the defender, and in particular about the middle of June 1809, as [365] the deponent thinks, he cleaned a cask at the distillery, and filled it with whisky for the defender; and he thinks the cask which he so cleaned would hold from sixty-six to sixty-eight gallons; that afterwards the deponent delivered the said cask of whisky at the defender's house in Westmuir, and his wife was present when the deponent so delivered it; that John Russell was not present when he so delivered it, but on the day of the delivery, Russell accompanied the deponent from Yoker to Glasgow; that the deponent had charge of one cart of whisky, and Russell had the charge of another cart; that after coming to Glasgow, the deponent and Russell delivered two small casks of whisky to James Taylor, in Blackford's Wynd; that after this, Russell and the deponent separated, and the deponent by himself delivered a cask to Robert McOmish, at the town-head of

Glasgow; and after this, the deponent delivered the cask of whisky at Westmuir to the defender, as before deponed to; and while at Westmuir, he delivered another cask of whisky to Andrew Tennent, smith there; and when he so delivered the cask of whisky at the defender's house, he gave the invoice thereof, and permit, to the defender's wife; that, at this time, Alexander Nisbet, at Knightswood coal-work, acted as clerk to the pursuers, and kept the book in which the whisky delivered to the customers was inserted." He further depones, "That in general it fell under the deponent's department to clean the casks which were to be filled with whisky for customers; that the cask above deponed to was among the last which he cleaned for the defender: Depones, that there [366] was some person in the house besides the defender's wife, who assisted him to carry the cask through the house to a back cellar: but who that person was the deponent cannot say: Depones, that one of the grounds of his recollection of having delivered the said cask to the defender in the month of June, in the year aforesaid, is, that on the same day he delivered two casks to James Taylor, as before deponed to; and Taylor, on that occasion, said to the deponent and Russell, who accompanied him, that the day being very warm, he supposed that a bottle of porter would be more agreeable to them than a dram, and they took the porter accordingly: Depones, that on no other occasion does he recollect of having delivered on the same day whisky to Taylor, M'Omish, Tennent, and the defender.* That he can assign no particular reason for recollecting having cleaned this cask for the defender, but at the time when the said cask was sent to the defender, it was the deponent's duty to clean all the casks;" and being specially interrogated, "what is the reason for his specifying the cleaning of this cask in particular in the month of June: depones, that in consequence of the dispute about it, his attention had at different times been specially called to the period at which he delivered it." He then mentions a conversation which he had on the subject [367] with the respondent Thomas Harvie; and being specially interrogated, whether or not the conversation he had with Mr. Harvie is one of the reasons for his naming the said month of June, depones affirmatively; but says, "that Mr. Harvie did not mention to him the time at which the disputed cask of whisky was delivered." It appears also by the depositions, that Mr. Harvie, in the course of this conversation, having mentioned that the deponent on the same day delivered whisky to Taylor, Tennent, and M'Omish, he depones, "that although he had not been informed by the pursuer Thomas Harvie, or any other person, he should have recollected that on the same day he delivered, as before deponed to, whisky to all these persons."

John Russell depones, "That, at Whitsunday 1810, the pursuers (respondents) got a place of business in Glasgow; that, in the summer before they so came to Glasgow, he recollects, that he and M'Farlane came to Glasgow with two casks of whisky; that M'Farlane had on his cart two casks to James Taylor in Blackford's Wynd, a cask to Robert M'Omish in the town-head, a cask to Andrew Tennent in Westmuir, and a hogshead to the defender, while the deponent had on his cart a small puncheon of whisky to Glen and Company in Rutherglen, and an ordinary puncheon to Thomas Gibson in Calton: that M'Farlane and the deponent went together to Taylor's, who offered them a dram, but the day being warm, they preferred a bottle of porter; that M'Farlane wished the deponent to take from his (M'Farlane's) cart the cask for M'Omish, and to go with it to [368] M'Omish's, but this the deponent refused to do, as it was out of his way, and he had a heavier load than M'Farlane; that the deponent thinks that the said quantities of whisky were delivered in the month of June, in the year aforesaid, as he recollects that at that time he was employed on the farm in hoeing potatoes."

Alexander Nisbet depones, "That in the year 1809, and for several preceding years, he assisted the pursuers in keeping their books;" and an extract or excerpt being taken from the waste-book, and being compared by the commissioner, and found to be correct, the witness depones, "That the whole entries in the original waste-book contained in the said excerpt are in his handwriting." (Appendix, p. 384.)

* Taylor and M'Omish were not examined; and their names do not appear in the excerpt of the Excise stock-book printed in the Appendix, p. 388. But it does appear in the excerpt from the day-book of the Respondent's Appendix, p. 380, that they are charged with goods on the same day (June 2) as the appellants.

Tennent depones, " That he recollects having been supplied by them (the respondents) with whisky in the year 1809; but he cannot say whether he got spirits from them in the month of June in that year, *as some of the invoices* which he got from them about that time have not been preserved by him." Tennent's wife depones " conform to the immediate preceding witness, her husband."

John McVey, excise officer, depones, " That when the deponent was first on the said division, *it was the practice of retailers to send the permits of spirits, entering their stocks*, to the brewery of Mr. Robert Aitken, in Camlachie, from whence the deponent regularly received them, as he had occasion to be there generally three or four times a day."

[369] James Cunningham, excise officer, depones " conform to the preceding witness."

Andrew Tennent, depones, " That about the year 1809 *the deponent*, to the best of his recollection, was in the practice of sending the permits, which *he received with the spirits*, sometimes to the brewery of Robert Aitken, in Camlachie, and sometimes to the shop of William Brown, grocer, in Parkhead."

Elizabeth Thomson, his wife, depones " conform to the preceding witness."

John McVey depones, " That when visiting the stock of the different spirit-dealers of the division, it is his uniform practice *to gauge it; and if he find it less than the stock for which they have credit, their credit in the stock-book is reduced immediately to the quantity actually in their possession.*"

James Cunningham depones " conform to the preceding witness."

The extracts of *accounts* from the account-books * of the respondents, and the stock-books of the excise, which are subjoined in the Appendix to this case, were also proved under the commission.

The Court, on the 15th November 1814, pronounced the following interlocutor: " On report of Lord Meadowbank, and having resumed consideration of and advised the mutual informations for the parties, condescendence, answers, proof adduced, and whole process, the Lords repel the defences, and decern against the defender for pay-[370]-ment of the sum of £55 12s. sterling, with interest thereof, from the date of citation in this action, and till payment; find the defender liable in expenses, allow an account thereof to be given in, and remit to the auditor to tax the same, and to report."

An error of £11 in this interlocutor was rectified by consent.

The appellant then presented a petition against the above interlocutor, which being followed with answers, the Court, upon advising the same, being of opinion that the case depended materially on the credit due to the excise books, made a remit to James Bruce, secretary to the Board of Excise for Scotland, to examine those books, and report what credit appeared to him to be due to the entries contained in them. On the 12th of June 1815, Mr. Bruce made the following report:—" I have considered this petition, and the answers, and I am of opinion, that the surveys mentioned in the excerpts (see the Appendix), engrossed in the answers, have every appearance of being taken from actual gauges of Dunbar's stock; and that the entries made in those books are held as sufficient evidence of the delivery and receipt of the exciseable articles therein mentioned, and particularly of the hogshead of whisky in question."

The agent for the appellant, when this report was put into process, waited upon Mr. Bruce, to inquire how he could, consistently with the known facts of the case, make such a report to the Court. The result of this interview is stated in the following " note," which was presented to the Court below: [371] " In this case your Lordships, before answer, remitted to Mr. Bruce, secretary to the excise, to peruse the petition and answers, and, if necessary, to call for the attendance of parties, and to inquire into the facts alleged by either party with regard to the excise books and permits mentioned in the pleadings, and to report the result of such inquiry to the Court, and particularly to state how far the entries in these books can be deemed conclusive evidence of the delivery of the hogshead of whisky in question into the stock of the petitioner (appellant)."

* And it appears that the respondents tendered the oath in supplement, which was refused by the appellants.

"The petition and answers, with the remit by the Court, were, by the agent for the pursuers (respondents), laid before Mr. Bruce, who on the 12th instant perused the same, and wrote out the report in process. The agent for the defender was rather surprised that Mr. Bruce should have made out a report, *without so much as seeing the disputed entries contained in the stock-book, kept for the division where the defender resides, and which was then lying in his (the agent's) possession.* Accordingly he took the liberty of waiting upon, and mentioning this circumstance to Mr. Bruce, who stated to him that the cause ought to have been remitted to the sheriff of the county, to inquire into the facts alleged by the parties, as tending to support or detract from the credit due to the excise books; that he had examined the persons in the excise-office, who made out the excerpts from the books mentioned in the pleadings, by which he was satisfied that these were fairly taken; and therefore *he had no occasion to [372] see any books on the subject, because, in his official capacity, he could never admit that there was any error in the excise books.* Mr. Bruce further stated, that the practice of *stamping entries* has been known to the honourable Board; and when the officer was detected in doing so, he was dismissed from the service.

"Correct, in so far as relates to the conversation with,

(signed) "James Bruce."

"15th June 1815."

The Court [on 7th July 1815] pronounced the following interlocutor: "The Lords having advised this petition, with the answers thereto, and report of Mr. Bruce, as directed by the Court, adhere to the interlocutor reclaimed against, and refuse the desire of the petition, with this variation, that the sum decerned for shall, as consented to by the respondents, be restricted to £43 14s. 9d. sterling, with interest thereof from the date of citation, and with expenses as formerly found due."

Against these interlocutors the appeal was presented.

For the Appellants, the Attorney-General, and Mr. Wetherell:

By the Scotch law, a settled account cannot be opened so as to admit proof of error. A party there is not permitted, as in the courts of equity in England, to surcharge and falsify. Even in those Courts there must be a demonstration of error in the accounts: suspicion and probability of error is not sufficient. *Clark v. Thirkill* *, *Seton v. Cockburn*. (Dict. of Decis. vol. 2, No. 135.)

[373] As to the excise books, they cannot be evidence as between third persons; if so, any person might be charged to any extent by a collusive entry in the excise books (see authorities pp. 378, 379).

Independently of the excise books, the case of the respondents rests upon the evidence of M'Farlane and Russell. The question related to three deliveries in 1809. They prove only one delivery. To have sustained their case, they should have proved the deliveries in April and August. M'Farlane, having carted all the whisky, could have proved all the deliveries; he only *thinks* that he delivered a cask about the middle of June. It appears in proof, that various other deliveries of whisky took place on the same day. They might have called the persons to whom it is alleged that such deliveries were made, to corroborate the evidence of M'Farlane, which they have omitted to do. Russell speaks only to belief, and proves nothing as to any delivery but one. The excise books prove no delivery to Taylor, M'Omish, etc. on the 2nd of June, as represented by the respondents witnesses.

To the admissibility of the excise books as evidence, there were certainly objections made in the Court below. The excise officer was not examined, but a person to prove the excerpt from the books, in which there is a material error: it omits an intermediate entry, which shows the danger of admitting such evidence. The permit is delivered to the excise by the person who removes the stock; not by the retailer, who receives it. In point of admissibility, there is no difference between original and con-[374]-firmatory evidence. If the party be dead, as in *Pitman v. Mador* (2 Salkeld, 690), the evidence is admissible, according to the authority of a class of cases. The admission of the *semiplena probatio*, according to the Scotch law, depends on the circumstances of the case. In the authorities referred to by Erskine (B. 4. tit. 2, s. 14) on that subject, the circumstances were very peculiar:

* Before the Vice-Chancellor, 1820. Not reported. It was a common bill to open a settled account.

the defender being dead, his oath of verity could not be taken, and on this account the oath of the pursuer was admitted. Where there are adverse witnesses, *semiplena probatio* is not admissible; here they have taken the oath of the defender's wife. According to Erskine, "the *semiplena probatio*, or oath in supplement," is to supply an imperfect or defective evidence by the "parties own oaths: *e.g.* in the case of furnishings made by shopkeepers, etc. where the quantities furnished, or the prices of them, are not proved by two concurring testimonies, etc. But where the imperfect evidence laid before the judge does not, in his apprehension, amount even to *semiplena probatio*, the parties oaths in supplement ought not to be put." In this case, the accounts of the respondent were very inaccurate: there were omissions on both sides of the account.

For the Respondents, Mr. C. Warren, and Mr. Stephen:

The defence made by the appellant is not that he has paid for the goods, but that they were not delivered. The evidence to prove that the cask in question was delivered at the house of the appellant is, 1. the entry in the books of the respondents and of the excise; 2. the depositions of the servants of the [375] respondents; 3. the evidence of Mr. Bruce. No objection to that evidence was raised in the Court below, either by the advocates or by the judges. Whatever may be thought of such evidence in England, it is admissible by law in the Courts of Scotland; and this House, sitting as a Court of Appeal from Scotch jurisdiction, must decide by the rules of the Scotch law.

It is admitted, that, according to the authority quoted from Erskine, merchants books are not full evidence; but the law of Scotland in such case admits the oath in supplement. If it be law, however inexpedient, it must be the rule of decision between the parties. The books afford a *semiplena probatio*, which, if supported by one witness, becomes *plena*, provided the books are correctly kept, and the merchant make oath, in supplement, that the transaction is there justly stated (Ersk. Inst. b. 4, tit. 2, s. 4): that proof the respondents have offered, and it has been rejected by the appellant. The invoice delivered to the appellant's wife has not been produced, though required. The word "balance," on which so much argument is built, occurs only in one of the jottings. As to the fact and time of the delivery, McFarlane could not have confounded June with August. His evidence is confirmed by Russell; and as to the conversation between witness and the party respecting the transaction, it ought not to affect the credit due to the evidence. It is in the necessary and ordinary course of conducting actions. A plaintiff would not act very wisely in bringing an action, and proceeding to trial, without knowing what his witnesses could prove.

The Lord Chancellor:— It is manifest from observations of the judges of the Court of Session, appearing in the notes, that if it had not been for the certificate of Mr. Bruce, as to the excise books, they would have decided against the respondents: whether they ought to have done so, is another question. It is difficult to ascertain on what principle the Court referred this point to Mr. Bruce. If, according to law, the Court could have dispensed with the production of the books themselves, on the ground that they were public documents, and could not without public inconvenience have been removed; then they should have required, as to such parts as were material to be given in evidence, copies properly attested and examined. That a court of justice should refer to any man, to know whether a document is or is not evidence, is to me a novelty. If the reference had been proper in itself, the report, considering how it was framed, is by no means satisfactory: Mr. Bruce admits that he did not examine, he did not even see, the books, but only conversed with the excise-officers, and upon their allegations and his own confidence is satisfied, and returns a certificate accordingly. Is it in Scotland, *presumptio juris et de jure*, that an exciseman cannot be mistaken?

For the Respondents:— It is said that because a subsequent account was settled, the omission to charge the item in question ought to be clearly shown. That demonstrative evidence is necessary to open an account, is an objection not now maintainable. As to *Seton v. Cockburn*, the question was between partners for an account. Balances of former accounts had been brought into subsequent accounts which were settled; under such circumstances the question was, whether the final account included [377] the settlement of previous accounts, vouchers having been

delivered up! In the present case, no vouchers passed; no formal account was delivered; the papers given in the hurry of business were mere memoranda of an account current, signed only by one party. By the English law, error may be shown even after an account has been settled.

If the demonstrative evidence said to be required in this case means direct evidence, as contradistinguished from presumptive, there is such evidence. The issue is upon a fact, whether a hogshead of whisky was delivered, and it is confined to a question of time. On this point there is the evidence of the man who delivered it to the wife, with an invoice or permit. His evidence is corroborated by another witness. A third witness proves the entry of the delivery in the books. In England, the practice is to prove the delivery by shop-books, and the servant who made the delivery. Upon an action of trover for a gold watch, where the plaintiffs contended that the defendants being watchmakers, with whom he had left the watch for repair, had delivered it to a stranger. The defendants, on the other hand, contending that it was delivered to the person appointed by the plaintiff to receive it. By the production of the shop books, an entry appeared, not in the hand-writing of the shopman, nor made in his presence; but seen by him soon after it was made: that evidence, given by the shopman, was received.*

[378] The Lord Chancellor:—What was the verdict in that case?

For the Respondents:—It does not appear. In another case (*Pitman v. Mador*, 2 Salk. 690), the shopman being dead, the shop-books were of themselves held to be evidence of delivery. To the evidence from the excise-books, it is objected that nothing but a certificate is produced: but this objection was not raised before the Court of Session: from which a presumption arises, that by the law of Scotland the certificate is good evidence without production of the books. If the objection had been taken, the respondent might have amended his case by producing the books; in England a new trial would not be granted, on the ground of the admission of improper evidence, if the objection was not taken at the trial. The excise-books were not produced to prove the delivery of the goods, but to show that the permit was delivered by the retailer, Mr. Dunbar, to the officer. McVey depones, that the permits are usually left by the retailer.

The Lord Chancellor:—Did you ever hear of a certificate being admitted, such as in this case? The excise books, if they be evidence at all, ought to be proved by the oath of a party who has made or seen a copy, and having compared it with the original, proves it to be accurate.†

[379] For the Respondents:—The appellant is estopped from making that objection, for he has used the books in evidence. It is not to be presumed, from the practice of the English law, or any general principles, that such a certificate is not good evidence by the law of Scotland.

The Lord Chancellor:—We have nothing but this certificate; the books are not before the Court. The judges below think all the other evidence trash, and rely upon this certificate.

For the Respondents:—In England questions are tried by the certificate of the bishop: So of the marshal of the King's host. The evidence of Mr. Bruce was taken by the Court for the behoof of the appellant. If his evidence were struck out, enough would remain to support the case of the respondent.

The Lord Chancellor:—Can you support the second interlocutor of the Court

* 1 Esp. N. P. 328, *Digby v. Stedman*. Upon this subject, see *Sikes v. Marshall*, 2 Esp. 705; 7 Jac. 1, c. 12. Lord Torrington's case, 1 Salk. 285; N. P. 282, 283. *Cooper v. Marsden*, 1 Esp. 1. *Harrison v. Blades*, 3 Camp. 357. *Calvert v. Arch. of Canterbury*, 2 Esp. 646.

See also upon the subject of evidence against third persons, by entries in private and public books, *Pritt v. Fairclough*, 3 Campb. 305. *Hagedorn v. Reid*, 3 Campb. 377, 379. *Higham v. Ridgway*, 10 East 109. *Doe v. Robson*, 15 East, 32. *Goss v. Watlington*, 3 Bro. and Bi. 132; *ex parte Taylor*, 1 Jac. and Wa. 483. *Hunt v. Andrews*, 3 Bar and Al. 341; *Wynne v. Tyrwhit*, 4 Bar. and Al. 376.

† See *Fuller v. Fitch et al.* Carthew, 346, where Holt, C. J. in an action of trespass, admitted in evidence a copy of a conviction by Commissioners of Excise, the original of which was made by entry in their books.

of Session, by which it appears, that on the report of Mr. Bruce they found their judgment, and adhere to their first interlocutor on the foundation of that report? Can these interlocutors be supported in these terms, unless the report of Mr. Bruce is supported?

For the Respondents:—The invoices and receipts are not evidence for want of stamps, according to the statute 48 Geo. III. c. 149. That point has been decided (*Wright v. Shawcross*, 2 B. and A. 504). The fraudulent intent of the appellant is apparent from his winking at the small overcharge against him in the former account, for fear that, in stirring the question, the greater error against [380] the respondents, and in his favour, might be discovered in the course of investigation.

The Lord Chancellor:—The cause is highly important, as involving difficult questions on the subject of evidence. Now, under the Jury Court Act, an issue would be directed in such a case. If the House of Lords affirm the judgment, it would be considered as a direction, and established as a rule, to admit such evidence (including the certificate) before a jury. The subject, however, is so trivial, that if it were not for the important principle which is brought into question, it would be right to decide the case *instantly*.

If all the interlocutors could be affirmed, that might be satisfactory. But as three of the Judges, who sustain the demand, express an opinion that they could not do so but upon the evidence of Mr. Bruce's certificate, it would be dangerous to affirm a judgment standing upon such ground.

It is contended, that by the law of Scotland all these matters—the parol testimony, the books, the certificates, the excerpts, and even the opinion of Mr. Bruce, are admissible evidence. I ought to be well assured on this point, before I establish such rules of evidence. It is marvellous if such things as the certificate of Mr. Bruce and the excerpts, (produced as they were), can be considered by the law of that country as admissible evidence.

What is truly the rule of law on these points in Scotland, it is highly important to know. Questions of fact, such as we now have to decide, will hereafter come before juries in Scotland, who must be guided by their own law of evidence. It is important, therefore, [381]—fore, to ascertain by the present decision, so much of that law as the question involves. If we should affirm the judgment of the Court below, without stating the grounds, the judgment on this appeal would be quoted before juries to sanction the admission of such evidence, including all the particulars which were admitted in this case. If, therefore, in the Court of Session, evidence was admitted which ought to have been rejected, together with evidence properly admissible, we ought to inform the Courts of Scotland what evidence we think admissible, and what ought to have been rejected. If I were to speak as an English lawyer, I should immediately express my opinion without doubt. But as a Scotch lawyer, I am required to consider what part of this evidence ought to be admitted, and what part to be rejected.

Lord Chancellor:—There is a case which stands for judgment, which I am extremely sorry ever to have seen here—it relates to the price of a cask of whisky; and the question is, whether the judgment of the Court of Session, which has fixed the keeper of a public-house with the price of that cask of whisky, is a judgment which is or is not supported by the evidence given in the cause. What was the real case it is a little difficult to state. What would have been the judgment of the Court of Session upon so much of the testimony which has been looked to in this case, as has about it (if I may so speak) the character of evidence, I do not know; because it appears to me, that there has been a great deal made use of in this case, as testimony, which has no pretence to [382] be considered as evidence that ought to be admitted. Endeavouring to separate so much of the testimony as has not the character of evidence, from so much of the testimony as has the character of evidence, I think, upon what I deem to have the character of evidence, that this case ought to be decided, not in favour of the respondents, but in favour of the appellant; and I am the rather inclined to advise you so to decide, because I am quite certain that if we were to take another course, and which is the only other course that we really could take, namely, to remit back to the Court of Session, to reconsider the case of this cask of whisky, we should put both parties to a very great expense. In the next place, if we did not remit it back to the Court of Session, the consequence of that would be, that the Court would take it for granted that in all similar cases

similar testimony was to be received in evidence: taking, therefore, the case, and considering it now upon so much of the testimony as is evidence, I think the respondents here, the pursuers below, have failed in making out, by proof as competent as ought to be offered in such a case, the delivery of this cask of whisky; and that that proof on their part ought to be much more clear than it is in this case; because, as to what is supplied to public-houses, the distillers are in truth the persons who keep the accounts between themselves and these public-houses; and where they have delivered accounts, the import of which is directly against the claims they now make, it would be a very unwholesome thing to apply to the general transactions of such persons, a principle which would call upon your lordships to decide, with respect to written [383] documents delivered by themselves, that those written documents did not contain the truth with respect to the delivery. It may have been in this case (I cannot undertake to say positively) that this cask of whisky got to the public-house, but I say there is not evidence in this case to sustain the claim, if you throw out of the case the testimony which ought not to be received. Under the circumstances I can only move your lordships, that this interlocutor be reversed; but that each party should pay his own costs.

Ordered and adjudged, that the interlocutors complained of be reversed, and the defender assolizied.

[384]

APPENDIX.

EXCERPTS from the Day Book of Messrs. J. and T. HARVIE.

Friday, 2d June, 1809.

39.	Sold Hugh Dunbar, Westmuir, 69½ gs. at 16s.	£55	12	0
44.	Andrew Tennant, ditto, 43½ gs. at 16s.	34	16	0
45.	James Taylor, Glasgow, 35½ gs. at 9s.	15	19	6
45.	Ditto, 39½ gs. at 9s.	17	15	6
41.	Robert McOmish, ditto, 66½ gs. at 9s. 6d.	31	10	9
67.	John Glen and Co. Rutherglen, 33½ gs. at 15s. 6d.	25	19	3
	Thomas			
63.	Thomson Walker, Duntochar, 44½ gs. at 15s. 6d.	36	16	3
74.	Thomas Gibson, Calton, 116 gs. at 8s. 6d.	62	1	0

Glasgow, 25th April, 1814.

This is the excerpt referred to in the deposition of Alexander Nisbet. And the commissioner certifies that the word "Thomas" therein inserted, in place of "Thomson," is of the commissioner's handwriting, and was interlined by him upon comparing the excerpt with the original entries.

(signed) *Alexander Nisbet,**Robert Davidson, Commissioner.*

[385] NOTARIAL EXCERPT from the Day Book of Messrs. JOHN and THOMAS HARVIE.

Wednesday, Dec. 2, 1807.	Sold Hugh Dunbar, Westmuir, 66½ gs. at 13s.	£43	4	6
Friday, Feb. 12, 1808.	Sold Hugh Dunbar, Westmuir, 68½ gs. at 13s.	41	10	0
Wednesday, Ap. 22, 1808.	Received from Hugh Dunbar, part	20	0	0
Tuesday, May 3, 1808.	Sold Hugh Dunbar, Westmuir, 47 gs. at 13s. 6d.	31	14	6
Wednesday, May 4, 1808.	Received Hugh Dunbar, part	40	0	0
Wednesday, Aug. 21, 1808.	Received from Hugh Dunbar, part	53	9	6
Saturday, Aug. 27, 1808.	Sold Hugh Dunbar, Westmuir, 62 gs. at 13s. 6d.	41	17	0
Tuesday, Nov. 29, 1808.	Received from Hugh Dunbar, part	41	17	0
Monday, Dec. 5, 1808.	Sold Hugh Dunbar, Westmuir, 67 gs. at 16s.	53	12	0
Wednesday, Mar. 15, 1809.	Received from Hugh Dunbar, part	53	12	0
Tuesday, Ap. 4, 1809.	Sold Hugh Dunbar, Westmuir, 66½ at 15s. 6d.	51	10	9
Friday, June 2, 1809.	Sold Hugh Dunbar, Westmuir, 69½ at 16s.	55	12	0
Wednesday, Aug. 16, 1809.	Received from Hugh Dunbar, part	57	0	0
Thursday, Aug. 17, 1809.	Sold Hugh Dunbar, Westmuir, 87 gs. at 16s.	69	12	0
Wednesday, Dec. 27, 1809.	Received from Hugh Dunbar in part of his account	40	0	0
Thursday, Dec. 28, 1809.	Sold Hugh Dunbar, Westmuir, 72½ gs. at 16s.	58	0	0
Wednesday, June 13, 1810.	Received from Hugh Dunbar in part of his account	100	0	0

Monday, June 18, 1810. Sold Hugh Dunbar, Westmuir, $41\frac{1}{2}$ gallons at
 15s. 6d. £32 3 3
 Wednesday, Nov. 14, 1810. Cr. Hugh Dunbar, in part of his account 32 3 3
Jas. Cummings, Witness. (signed) *Mich. Gilfillan*, N.P.
Murdoch Mathieson, Witness.

[386] EXCERPT from the Ledger of Messrs JOHN and THOMAS HARVIE, Spirit Dealers
 in Glasgow and Yoker.

HUGH DUNBAR, WESTMUIR.

1807.			
Dec. 2.	To cellar at 13	per gallon for $66\frac{1}{2}$	£43 4 6
1808.			
Feb. 12.	To do. at 13	" " $68\frac{1}{2}$	44 10 6
May 3.	To do. at 13/6	" " 47	31 14 6
Aug. 27.	To do. at 13/6	" " 62	41 17 0
Dec. 5.	To do. at 16	" " 67	53 12 0
1809.			
April 5.	To do. at 15/6	" " $66\frac{1}{2}$	51 10 9
June 2.	To do. at 16/	" " $69\frac{1}{2}$	55 12 0
Aug. 17.	To do. at 16/	" " 87	69 12 0
Dec. 27.	To do. at 16/	" " $72\frac{1}{2}$	58 0 0
1810.			
June 18.	To do. at 15/6	" " $41\frac{1}{2}$	32 3 3
			£481 16 6
1808.			
April 22.	By Cash		£20 0 0
May 4.	By do.		40 0 0
Aug. 24.	By do.		53 9 6
Nov. 29.	By do.		41 17 0
1809.			
March 15.	By do.		53 12 0
Aug. 16.	By do.		57 0 0
Dec. 27.	By do.		40 0 0
1810.			
June 13.	By do.		100 0 0
Nov. 14.	By do.		32 3 3
			£438 1 9

What is above and on the preceding pages written are true, full, and exact copies of the original entries in the day-book and ledger of Messrs. John and Thomas Harvie, spirit dealers in Glasgow, without addition, diminution, or alteration whatsoever, the same having been duly collated and compared by me, notary public at Glasgow, the 2d day of May, 1812 years, before these witnesses, James Cummings and Murdoch Mathieson, my clerks.

(signed) *Mich. Gilfillan*, N. P.

Jas. Cummings, Witness.

Murdoch Mathieson, Witness.

[387] ACCOUNT CURRENT between Hugh Dunbar and John and Thomas Harvie.

Dr. Mr. Hugh Dunbar, Change-keeper, Westmuir,

To John and Thomas Harvie.

1807.								
Dec. 2.	To	66 $\frac{1}{2}$	gallons aquavitae at 13	.	.	£43	4	6
1808.								
Feb. 12.	To	68 $\frac{1}{2}$	" "	13	.	44	10	0
May 3.	To	47	" "	13 6	.	31	14	6
Aug. 27.	To	62	" "	13/6	.	41	17	0
Dec. 5.	To	67	" "	16/	.	53	12	0
1809.								
April 5.	To	66 $\frac{1}{2}$	" "	15 6	.	51	10	9
June 2.	To	69 $\frac{1}{2}$	" "	16/	.	55	12	0
Aug. 17.	To	87	" "	16/	.	69	12	0
Dec. 27.	To	72 $\frac{1}{2}$	" "	16/	.	58	0	0
1810.								
June 18.	To	41 $\frac{1}{2}$	" "	15 6	.	32	3	3
						481	16	6
1808.								
April 22.	By	cash	.	.	.	£20	0	0
May 4.	By	do.	.	.	.	40	0	0
Aug. 24.	By	do.	.	.	.	53	9	6
Nov. 29.	By	do.	.	.	.	41	17	0
1809.								
March 15.	By	do.	.	.	.	53	12	0
Aug. 16.	By	do.	.	.	.	57	0	0
Dec. 27.	By	do.	.	.	.	40	0	0
1810.								
June 13.	By	do.	.	.	.	100	0	0
Nov. 14.	By	do.	.	.	.	32	3	3
			Balance due John and Thomas Harvie	.	.	43	14	9
						£481	16	6

CERTIFICATE from the Excise Books.

These do certify, That permit was granted for the removal of British aquavitae, from the stock of Thomas Harvie and Company, of Glasgow, to the stock of Hugh Dunbar, of Westmuir, viz. on the 4th of April 1809, one cask containing 72 gallons aquavitae; and on the 2d of June 1809, one cask containing 72 gallons aquavitae; and that both quantities of spirits were credited in Mr. Dunbar's stock, in the excise books.

Extracted from the excise books, at Edinburgh, this 17th day of March 1812, by

(signed) *Alexander Mitchell*, Permit-examiner.

spirit-dealer at Westmuir, by James Cunningham, officer of excise; which book includes the 6th of April and 5th July 1809. EXCERPT from Scheme of British Spirit Permits received by the above-mentioned officer of Glasgow, Eleventh Division, during Third Quarter, as taken from the book before described.

No. of Books and Permit.	From what		To whom sent.	Where.	Date of Permit.	No. of casks.	Quantity.	Quality.	Limitation of Permit.		By what Officer granted.
	Collection.	Division.							Days.	Hours.	
15 51	Glasgow	5th Brandy	John Fulton	R. Dunsmore	Shuttleston	May 31. e. 5.	01	63	Aque.	03	James Morrison.
02 32	Ditto	Lennox Mill	John Freeland	John Paul	Broomhouse Toll	June 1. m. 7.	01	30	Ditto	07	James Speers.
06 21	Linlithgow	Craigend	James Miller	John Fisher	Hogganfield	May 30. m. p. 11.	01	43	Ditto	30	Alex. Todd.
05 12	Glasgow	Hamilton	William Smeilie	Alex. Mair	Toll Cross	June 1. e. 7.	01	95	Ditto	06	James Jolly.
01 37	Ditto	Patrick	Th. Harvey & Co.	And. Tennent	Westmuir	2d. m. 10.	01	44	Ditto	05	Robert Aitken.
01 38	Ditto	Ditto	Ditto	Ditto	Westmuir	2d. m. 10.	01	72	Ditto	05	Ditto.
35 40	Ditto	Glasgow, 2d Bx.	Wilkie and Downs	Alex. Scott	Toll Cross	3d. m. 9.	01	130	Ditto	02	D. Campbell.
23 35	Ditto	Ditto, 7th Bx.	Robert Smith	T. Dumbreck	Drygate Toll	6th. m. 11.	01	64	Ditto	01	James Cullen.

The above is a true excerpt made by me from scheme, Excise-office, Edinburgh, December 29th, 1813.

[389] EXCERPT from that part of Eleventh Division of Glasgow Stock-book, for Third Quarter of Year ending 5th July 1809; stating the different Surveys made by the officer of Excise on the Spirit Stock belonging to Hugh Dunbar, spirit dealer at Westmuir, during that Quarter which included 6th April and 5th of July 1809.

Date of Survey.		Stock Aquavite.		Quantities of Spirits brought into Stocks, and Date of Permit.		Quantity sent out, and date of Permit.	
						Aquavite.	
April 3.	e. p. 3.	20	gallons transferred from last quarter's book	April	20	gallons	
" 17.	m. p. 11.	80	" by permit	" 4. m. 9.	65	"	
May 1.	m. p. 11.	75	"				
" 15.	m. p. 10.	70	"				
" 29.	m. p. 10.	120	" by permit	May 25. e. 1.	65	"	
June 12.	m. p. 10.	128	" by permit	June 2. m. 10.	72	"	
" 26.	e. p. 2.	120	"				
" 28.	m. p. 11.	100	" A. W.				

The stock of Hugh Dunbar, in Westmuir, was surveyed by me upon the 28th June 1809. I hereby certify, That the excerpts stated on this and the two preceding pages are faithfully made by me from the excise book, of the date and place therein mentioned.

Edinburgh, Excise-office, 29th Dec. 1813.

I hereby further certify, That the stock-book from which these excerpts have been taken appears to have been from time to time regularly examined and checked by the supervisor for the time, Alexander Williamson, then officiating in Glasgow, third district.

(signed) *Wm. Williamson*, Supr.
(signed) *Wm. Williamson*, Diary Clerk.

[390] I HEREBY certify, That I have searched those of the excise books, for the year 1809, in which Hugh Dunbar change-keeper at Westmuir's stock of spirits were then kept account of, and find recorded therein a permit dated 2d June 1809, for a cask containing 72 gallons of aquavitaæ, purporting to have been sent from the stock of Thomas Harvie and Company, to Hugh Dunbar at Westmuir; that those seventy-two gallons of aquavitaæ appear from the above-mentioned book to have been placed in the usual manner at that time to Dunbar's debit, by the then officer, and shown in his stock, on the officer's next succeeding survey, viz. 12th June, year foresaid.

(signed) W. Wintour, Diary Clerk.

Excise-office, Edinburgh, 29th Dec. 1813.

[391]

ENGLAND.

WRIT OF ERROR FROM THE KING'S BENCH.

JOSHUA ROWE,—*Plaintiff in Error*: ISAAC YOUNG,—*Defendant in Error*
[17th July, 1820.]

[An ordinary acceptance to pay at a particular place is now a general acceptance, unless it expressly states that the bill is to be paid there only. See Bills of Exchange Act 1882, s. 19 (2) (c), re-enacting 1 and 2 Geo. IV. c. 78, which was passed to override *Rowe v. Young*. As to duty of drawer or indorser to notify to holder dissent from qualified acceptance, see Act of 1882, s. 44 (3); as to presentment, see *ib.* s. 52; as to liability of acceptor, see *ib.* s. 54.]

If a bill of exchange be "accepted, payable at the house of P. and Co." it is a qualified acceptance restricting the place of payment, and the holder is bound to present the bill at that house for payment in order to charge the acceptor of the bill. If he brings an action upon the bill against the acceptor, he must in his declaration aver, and on the trial prove, that he made such presentment: and for want of such averment the declaration was held bad on demurrer.

The defendant in error was indorsee and holder of a bill of exchange, which the plaintiff in error, residing at Torpoint, had accepted, "*payable at Sir John Perring and Co.'s bankers, London.*" The bill, when it became due, was not presented at that banking-house for payment. But Mr. Young, having failed to make such presentment, nevertheless brought an action against Mr. Rowe in the Court of King's Bench.

In the first count,* upon which the whole question, both technically and materially, turns, the [392] declaration set forth the words of the acceptance as above stated, with an innuendo or explanation, thus: "*payable at, etc. that is to say, at the house of certain persons using in trade, etc. the names, style, and firm of Sir J. P. and Co. bankers, London.*"

In a subsequent part of the same count it was averred, that Rowe, "by reason of the premises, and according to the custom of merchants, became liable to pay the money specified in the bill according to the tenor and effect of the bill, *and of his acceptance.*" No allegation of a presentment at Sir John Perring and Co.'s for payment was contained in the first count. To this declaration, upon the ground of this omission in the first count, a demurrer was filed on behalf of Rowe, the defendant in the action.†

* Which was the only count in the declaration upon the bill of exchange; all the others were counts for money for goods sold and delivered, and upon an account stated.

† For thirty years before the argument of this case, the Court of King's Bench had been in the habit of holding an acceptance payable at a banker's to be a general acceptance.

The Court of King's Bench overruled the demurrer upon argument, or rather upon the statement of it, and gave judgment for the plaintiff Young.

Against this judgment a writ of error was brought in the House of Lords, assigning for error the want of averment in the first count, that the bill was presented for payment at the house of Sir J. Perring. The case was twice argued * before the House at [393] very great length, and with much ability: first, in the ordinary course, and afterwards before the Judges, for the purpose of proposing to them questions of law, for the information of the House. After the second argument, the four following questions were propounded to the Judges:

1. Whether, in this case, the bill of exchange [394] mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir John Perring and Co.'s bankers, London, (that is to say) at the house of certain persons using in trade and commerce the names, style, and firm of Sir John Perring and Co. bankers, London, the holder was bound to present it to that house for payment, and to aver in the declaration that the same was presented to that house for payment?

2. Whether, the said bill having been so accepted as aforesaid, such acceptance is in law to be considered as a qualified acceptance to pay the same at the said house of Sir John Perring and Co. bankers, London: or, as a general acceptance, to pay the same with an additional engagement or direction for payment thereof at that house?

3. Whether, if A. draw a bill upon B. in favour of C. for £100, and C. without the previous authority or subsequent assent of A. take an acceptance of the bill for the whole of the £100, but an acceptance qualified as to the time or place of payment, C. could, notwithstanding his taking such acceptance, maintain an action upon the bill against A.?

4. Whether, if A. were debtor to C. in £100 previous to his so drawing upon B. in favour of C. to the amount of £100, C. could, upon A.'s refusing his assent to an acceptance qualified as mentioned in the above question, maintain an action upon the original debt against A. without delivering to A. the bill so accepted, in case, at the time the bill was drawn, B. was also indebted to A. in a like sum of £100?

[395] There was a difference of opinion among the Judges, and they delivered successively the opinions which are printed in the Appendix to this Report. After

* By the Attorney-General and Mr. Wylde for the plaintiff; and by Mr. Holt, for the defendant in error. The arguments are omitted on account of their length; and if it could have been done with propriety, in a work professing to be a record of important decisions in the House of Lords, the whole case would have been omitted, on account of the increased expense which double reports of the same case inflict upon that part of the profession who are, or who conceive that they are, obliged to take both sets of reports. In ancient times, when business was less extensive, it was the practice of advocates to attend all the courts indiscriminately; and, having taken notes of what they heard in the course of their practice, to publish indiscriminately what they so collected. But of late years division of labour has been the consequence of increased business, and reporters, as well as advocates, usually confine themselves to a particular court. Formerly, reporters of cases in Chancery and the King's Bench made no scruple of reporting cases in the Common Pleas or Exchequer; but since the time when periodical reports of cases in the Common Pleas and Exchequer have been begun, and gentlemen have devoted themselves to attendance in those Courts for the purpose of reporting, no reporter in other courts interferes with the department which they have selected. The case now reported arose in the King's Bench, was removed by writ of error into Parliament, and appears in the ordinary reports of the Common Pleas. If this circumstance had furnished a sufficient reason to exclude a case so important in the principle of decision, so full of acute reasoning and deep research, comprising in the elaborate opinions, delivered by the Judges, so many valuable discussions on doctrines of law, and refined criticisms on points of pleading, not applicable merely to the case under consideration, but of universal application, from the pages of a work where the first inquiry would be made for such a case, it would have been, to the Editor most especially, a great relief to have been spared the unpalatable task of consideration whether such a case, under such circumstances, ought or ought not to be reported.

the Judges had delivered their opinions, the Lord Chancellor and Lord Redesdale spoke to the following effect :

Lord Chancellor: The writ in this case was brought on a judgment in the Court of King's Bench, in an action of assumpsit. That action was commenced by special original in Easter Term, 1816. The declaration consisted of a count on a bill of exchange, two counts for goods sold and delivered, three money counts, and an account stated. The breach contains an averment of a special request of payment in the usual form. The error is limited to the first count of the declaration, and that count is thus expressed: " For that whereas one James Meagher, on the 20th December 1815, at Gosport, to wit at London, in the parish of St. Mary-le-bow, in the Ward of Cheap, according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom, made and drew a certain bill of exchange in writing, bearing date the same day and year aforesaid, and then and there directed that bill of exchange to the said Joshua, by the name and addition of Joshua Rowe, Esquire, Torpoint, and thereby required the said Joshua, two months after the date thereof, to pay to his the said James's order £300 for value in account, and then delivered the said bill of exchange to the said Joshua, which bill of exchange he the said [396] Joshua afterwards, to wit, on the same day and year aforesaid, at Gosport, that is to say, at London aforesaid, in the parish and ward aforesaid, upon sight thereof, accepted *according to the said usage and custom of merchants, payable at Sir John Perring and Co.'s bankers, London.* (that is to say,) *at the house of certain persons using in trade and commerce the names, style, and firm of Sir J. Perring and Co. bankers, London;* and the said James, to whose order the said sum of money in the said bill of exchange specified was to be paid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the same parish and ward aforesaid, by his certain indorsement in writing, made and indorsed on the said bill of exchange, according to the usage and custom of merchants, ordered and appointed the said sum of money in the said bill of exchange mentioned, to be paid to the said Isaac, and then and there delivered the said bill of exchange so indorsed to him the said Isaac, of which indorsement the said Joshua afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, had notice, *by reason of which said premises, and according to the said custom of merchants,* he the said Joshua then and there became liable to pay the said Isaac the said sum of money specified in the said bill, according to the tenor and effect of the said bill of exchange, *and of his said acceptance thereof,* and of the said indorsement so made thereon as aforesaid; and being so liable, he the said Joshua, in consideration thereof, afterwards, to wit, on the same day [397] and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said Isaac, to pay him the said sum of money mentioned in the said bill of exchange, according to the tenor and effect of the said bill of exchange, *and of his said acceptance thereof,* and of the said indorsement so made thereon as aforesaid."

To this count there was the following demurrer: " And the said Joshua, by John Wells Bozon, his attorney, comes and defends the wrong and injury when, etc. and says, that the said first count of the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said Isaac to have or maintain his aforesaid action thereof against him the said Joshua, and that he the said Joshua is not bound by the law of the land to answer the same, and this he is ready to verify: wherefore, for want of a sufficient first count of this said declaration in this behalf, the said Joshua prays judgment, and that the said Isaac may be barred for having or maintaining his aforesaid action thereof against him, etc.: and the said Joshua, according to the form of the statute in such case made and provided, states and shows to the Court here, the following causes of demurrer to the said first count of the said declaration, that, *although it is stated and alleged in and by the said first count of the said declaration, that the said bill was accepted by the said Joshua, and made payable at Sir J. Perring and Co.'s bankers, London, yet it is not alleged or stated in, nor can* [398] *it be collected from, the first count of the declaration, that the said bill was ever presented or shown for payment thereof.*

either when it became due and payable, or before or since, at the said Sir J. Perring and Co.'s bankers, London, aforesaid." Then there is a rejoinder and replication.

The demurrer afterwards came on for argument in the Court of King's Bench, when the Court gave judgment in favour of the defendant in error, that is, by their judgment they asserted that it was unnecessary to state and allege, (that is the substance of it,) in and by the first count of the declaration, that the bill was accepted by Joshua; in fact, that it was not necessary it should be stated, or capable of being collected from the first count of the declaration, that the bill was ever presented or shown for payment thereof, either when it became due and payable, or before or since, at Sir J. Perring and Co.'s bankers, London.

The writ of error, therefore, raises this question: whether it was or not necessary in this first count of the declaration to allege, or state expressly, or to allege or state in substance and effect, so that it might be collected from the first count of the declaration, that the bill had been presented, and shown to the plaintiff in error, either when it became due and payable, or before that time, or since, at Sir J. Perring and Co.'s bankers, London? The question, stated in another way, may be thus: whether the acceptance, as set forth in this first count of the declaration, is to be considered a general acceptance, making the party accepting liable to pay every where, together with what in some cases is called an [399] expansion of the undertaking; and in other cases, an engagement or direction, in addition to the general unqualified acceptance to pay, (as the direction in this case to pay at Sir J. Perring and Co.'s) thrown in for the convenience of both parties, but which the holder of the bill is not bound to attend to, unless he chooses; or, on the other hand, whether this, from looking at the terms of the declaration, is what is in law called a qualified acceptance? Undoubtedly it is very fit this question should be brought to a final decision, because the state of the law, as actually administered in the Courts, is such, that it would be infinitely better to settle it in any way than to permit that sort of controversial state to exist any longer.

It has been correctly stated at the bar, that the Court of King's Bench has been of late years in the habit of holding this to be a general acceptance, with what they call an expansion, or a direction, or an engagement, which introduces not a qualified promise, but a sort of courtesy; a kind of accommodation between the parties, in addition to the effect of the general acceptance; which accommodation or courtesy, however, they decide that the holder of the bill is not at all bound to attend to. On the other hand, the Court of Common Pleas are in the habit of holding that this is a qualified acceptance; that the contract of the party is to pay at the place specified; and, as in matter of pleading, they deem it a qualified acceptance, the proof must accord with the declaration. They require the plaintiff to aver and prove the presentment at the place stipulated.

The principles of law, as applied to promissory [400] notes and bills of exchange, are simple and uniform in common cases. But the Court of King's Bench has held, that if a man promise to pay at a particular place, by a promissory note, the Wellington Bank for instance, the demand must be made there; which presentment is itself in point of law a demand; and the reason alleged is, because the place standing in the body of the note is part of the written contract, and you must declare upon it as it is, and prove it as you declare; yet the same Court decides otherwise in the cases of bills accepted, payable at specified places; and the reason assigned for this is, because the place specified is not in the body of the bill. Some how or other it seems to have been assumed, that not being in the body of the bill it is not to be considered as being in the body of the acceptance: a conclusion which it is extremely difficult, I think, to adopt. If you can infuse qualifications of various kinds, which unquestionably you may, into the acceptance, notwithstanding the generality of the bill as drawn, it seems rather difficult to make out, that if in the acceptance there is a qualification clearly and sufficiently expressed as to place, that such a qualification cannot be introduced into the acceptance as well as any other qualification; qualification as to time, as to mode of payment, as to contingencies upon which you will pay, and various qualifications which will be found in the cases.

The decisions of the Court of King's Bench as to bills accepted, payable at a given place, cannot easily be reconciled with their decisions as to promissory notes, with similar qualifications; and it [401] must, I think, be admitted that these decisions

of the Court of King's Bench are not all consistent with each other. It may be represented as the opinion of that Court in judgment, that this species of acceptance is a general acceptance, with that kind of expansion, direction, or engagement, to which I have been alluding. The Court of Common Pleas hold a different doctrine. Upon a question where so many Judges of high professional character and great learning have differed, it is impossible to give an opinion without much diffidence; but it is my duty to state my opinion whatever it may be.

The first question is, whether this is a qualified acceptance? Upon that the twelve Judges have given their opinion, and a great majority of them are of opinion that it is a qualified acceptance. Some of the Judges have given an opinion that it is a general acceptance, with an expansion, direction, or engagement, for the convenience of one or other of the parties: that the acceptance in this case meant, that if the party chose to go to Sir John Perring and Co.'s he would probably there get payment of the bill.

The next question is this: supposing it to be a qualified acceptance, was it necessary to aver the presentment, and to support that averment by proof? Now, upon that question, a great majority of the learned Judges, including those who thought it was a qualified acceptance, say that it is not necessary to notice it as such in the declaration, or to prove presentment: but that it must be considered as matter of defence, and that the defendant must state that he was ready to pay at the place, and must bring the money into Court, and bar the action by proving [402] the truth of that defence. A great majority of the Judges are of that opinion. Some of the Judges, (including one who has been most eminent in special pleading,) hold a different doctrine. They are of opinion that the plaintiff must declare upon the contract as it is, and make out his right to sue according to that contract. If that contract engages for payment at Sir John Perring and Co.'s he must make a demand at Sir John Perring and Co.'s, and he must state in his declaration that he has made such demand. The sum of their opinion is this, that the contract being upon a condition precedent, the plaintiff has no cause of action unless he has performed the condition; and further, unless he pleads and proves the performance.

I think I may venture to state, having with great pains read every case upon the subject, that a person may draw a bill of exchange as we are in the habit of drawing a promissory note, payable at a particular place. By the acceptance of such a bill, the acceptor promises to pay at that particular place, and the drawer binds himself to the same qualified contract, in default of payment by the acceptor. But it seems there is a great objection to the doctrine, that if a bill is drawn in general terms the acceptor may alter the contract by giving a special acceptance. The only material question appears to me to be, whether the acceptor has in fact accepted specially. I cannot imagine, that because the contract of A. the drawer is general, it is from thence to be reasoned, that B. the acceptor, having an option to undertake, or altogether refuse, the engagement, cannot qualify my acceptance. May I not say to [403] the holder of the bill, it is very true the drawer has drawn upon me, and expects me to make myself liable generally, but that is a liability which I do not choose to incur. If you will not take an acceptance at a specified time and place, which my convenience requires, I will not give you any acceptance. That an acceptor may qualify his acceptance is clearly established by cases including almost every species of qualification. If the qualification, as to place, cannot be introduced by the acceptor, it must be on account of some circumstance which belongs to place, and does not belong to time or mode of payment, or any other species of qualification whatever.

I am ready to express my full assent to the doctrine, that where a bill is drawn generally, considering that it is an address to the person who is to accept it generally, because it is drawn generally, it is the duty of the acceptor who intends to give a special acceptance, to accept in such terms that the nature of his contract may be seen in the terms he has used; that the acceptance may clearly appear to be qualified or special, which he insists is not general.

Then the first question in this case will arise upon the words, whether this is or is not a qualified acceptance. I really do not know how it is possible to say that this is not a qualified acceptance, I mean independently of the cases which have been decided. If a bill is drawn upon a person resident in London, and he accepts

it according to the usage and custom of merchants, payable at his bankers in London, putting for the moment the usage of merchants, and the effect of decided authorities, out of the question, [404] can any man read an acceptance in these terms, and say it is not only a contract to pay at Child's, where the funds would be deposited to pay it, but that it was a contract by virtue of which the holder of that bill might arrest the acceptor, and hold him to bail in any part of the world?

I cannot, after the maturest consideration, think that the words used do not clearly show that it was the intention of the party who gave this acceptance to come under an engagement which may be represented as a contract, to pay the bill at Sir J. Perring and Co.'s, London, and not to be liable elsewhere.

Then it is said, that the word "accepted" forms the general engagement: and that the words "payable at Sir J. Perring and Co.'s" cannot qualify and cut down the general engagement: and cases are cited which maintain a distinction between words of qualification in the body of a note, and words of qualification in the margin, or at the foot of the note. There are such cases of distinction between words in the body of the instrument, which have been held to form part of the contract, and words at the foot, or in the margin, which have been considered and held to constitute only a memorandum. I do not mean to disturb those cases; but I do not understand how it is, that from those cases it is to be inferred, that when the acceptor, *uno flatu*, writes the words, "accepted payable at such a house," the word "accepted" is to be taken to express the whole of the acceptor's contract; and although the sentence is not complete till the whole is written, the latter words are not to be taken as part of it, but are [405] to be construed distinctly as a direction, expansion, or engagement.

It appears to me that this is a qualified contract for payment at the place specified.

The *argumentum ab inconvenienti* has been strongly urged. The mode of reasoning was not quite analogous to the usual modes of reasoning in the courts below. Nor does the argument itself as presented rest on clear probabilities. The case is put in this way: Suppose a bill were drawn on each of the twelve Judges of England, just before they left town to proceed on their circuits, and they had accepted the bills payable at their respective bankers. If it be law that such an acceptance renders them liable to pay any where, the holders of those bills might, undoubtedly, if they pleased, arrest the Judges at their respective circuit towns, a little to the inconvenience of the administration of justice. It is said no man would think of arresting the Judges. I hope nobody would think of arresting the Judges; but I can feel for mercantile men as well as for Judges. It is a hardship that men should be exposed to the inconvenience of unexpected demands, which are not regulated by their contracts, but by a construction given to their contracts which they never intended, and have not expressed.

In this very case, (a circumstance which has been little considered) the acceptor lives at Torpoint. Is it a matter of no consequence to the acceptor living at Torpoint, and having his money in London, where the payment is demanded? At Torpoint, perhaps, he cannot pay, probably not without inconvenience. In London he has left a fund in the [406] hands of his bankers, for the purpose of payment. Is it no matter of inconvenience that the holder may from caprice (we have heard of such things as men, through caprice, refusing a tender of Bank of England notes,) is it no evil to the acceptor that he should be obliged to bring his money from London, if he foresees that the holder of his acceptance will not demand his money in London, but personally from him the acceptor; or if he cannot foresee whether he will demand his money in London or not, is he to keep money in London, and to have money at Torpoint also, and even about his person, to answer the exigency of the demand, as it may happen to be made at the one place or the other, or where ever he may happen to be when the demand is made?

There is another consideration which does not appear to me to have been sufficiently weighed. If the acceptor promises to pay at his bankers in London, and the holder calls upon him in Northumberland, the payment is not the same. He presumes that the demand is to be made at the bankers in London, and the funds are deposited there. But if the acceptor is unexpectedly to meet the demand in a distant place, the cost of the exchange and remittance backwards and forwards must be added. Take the case of a gentleman leaving Calcutta and coming to reside in London. Upon his departure he gives a bill of exchange in Calcutta, to be paid

there six months after he departs. He arrives in London, not bringing funds to pay that bill; he finds the bill sent home by another ship, and he is arrested the moment he lands. The sum which he pays here, [407] (if compelled,) is not the same which he had made preparation for paying, and would have paid in India. It appears, to me, therefore, that even with respect to the value of what is to be paid, there is a most essential difference in the contract.

Then, it is said, the admission of such special acceptances will be extremely inconvenient; and it was with a view to see what the balance of convenience and inconvenience would be, that the third and fourth questions were proposed to the Judges by order of the House. The objection urged is, that it may vary the right of the holder against the drawer and previous indorsers, unless he, the holder, gives notices, and does all the acts requisite to preserve their liability. The answer to that objection, as it seems to me, is plain: If once it be admitted that a man may by law accept specially, it is in consequence of the law that these difficulties arise. By deciding that no man shall accept specially a bill which is drawn generally, the difficulty is avoided. But if the law be, that although a bill is drawn generally, it may be accepted specially, it is the effect of the law to impose a duty upon the holder of giving notice to the drawer and previous indorsers, if he intends to keep alive their liability. That inconvenience certainly is not quite so large as if the acceptor refused to accept at all.

Again, it is objected that the rule in question will create great difficulty as it regards the indorsee: that some indorsees become so before and some after acceptance: if he becomes an indorsee before, he may find a special acceptance when he expected to have a general acceptance. But when the bill is indorsed [408] to him unaccepted, he does not know whether it will ever be accepted; and if he does not know that it will be ever accepted, he cannot tell whether it will be accepted generally or whether it will be accepted specially. He knows, therefore, at the time when he takes that bill by indorsement, that he is to look out for such an acceptor as he can find: perhaps no acceptor, but either a general acceptor or a special acceptor. What there is, in such a rule, inconsistent with law or convenience, I cannot discover.

This being a case in which the law is unsettled, we must resort to principle. If on principle a qualified acceptance may be given, the question is, whether the acceptance in this case is qualified? If it be an acceptance in which the contract of the party is to pay at Sir John Perring and Co.'s, then I state it to be, in pleading, a settled rule, that the plaintiff must declare according to the contract; he must aver all that the nature of that contract makes necessary. If so, how can it be said it is not to be shown by the demand in the declaration, but must be left to be brought forward by the defence? It appears to me that such a doctrine cannot be maintained.

With respect to the cases which have been cited of bonds, they differ altogether from a contract of this nature. Upon a bond the action is brought for the penalty. It must be, therefore, matter of defence to show that the sum due would have been paid at a particular place provided, for that will appear in the condition of the bond, when the defendant prays over of it. The defence consists in alleging performance of that part of the condition, [409] and that is an excuse for non-payment, so as to throw the costs on the plaintiff. These cases therefore have no application to cases of contract.

There is another set of cases in which it is said that if there is an antecedent debt the acceptance must be taken to be general. Between the acceptor and the holder there is no antecedent debt. There may be an antecedent debt between the drawer and the acceptor of the bill. I wish it could be asserted in all cases. Accommodation bills have ruined great numbers of men. With respect to the acceptor, it is not true that he must be antecedently the debtor. All the cases of qualified acceptance show the contrary. A man may accept to pay half the bill in money and half in goods. He may accept to pay out of the produce of a cargo consigned to him when that cargo shall arrive in England. In the case of a consignee his acceptance is almost universally qualified. Upon the expectation of cargoes coming from the West Indies, or other places, bills are accepted by consignees, payable in London.*

* The Lord Chancellor, in the course of his speech, stated, that he did not pro-

In every view of this case, I must state it as my [410] opinion, (though with much diffidence, recollecting that I am obliged to differ in opinion from those whose judgments no man can respect more than I do) that this is a contract to pay at Sir John Perring and Co.'s even as the contract is stated in the first count of the declaration, and inasmuch as that count wants this indispensable averment of a presentment for payment, according to the contract; the consequence is, that this judgment must be reversed. I do not think the decision will much affect the commercial world, for it will be easy to adopt forms of words which leave no doubt what is meant. I am perfectly sure, that if there is any inconvenience arising from this proposed decision, those who do not wish to suffer the apprehended inconvenience have nothing to do but to use two or three words, which will guard them from it.

The question is, what is the law settled, or to be settled, upon the contract as set forth in the first count of this declaration? I have already stated in a few words what my opinion is, and I sincerely believe it to be founded in clear principles of law. At the same time, I cannot but recollect that I am differing from those whose opinions I greatly respect. I do it with reluctance: But my duty is to express my own opinion.

Lord Redesdale:—I most fully concur in the opinion expressed by my noble and learned friend (the Lord Chancellor). It appears to me, that some of the learned Judges have totally forgotten acceptances for honour, which are not uncommon acceptances. If a person accepts, for the honour of the drawer, payable at a banker's [411] in London, all the reasoning, founded on the supposition that the acceptor was debtor to the drawer, vanishes; and I do not observe, that the learned Judges distinguished between the case of an acceptance for honour, and the common case of a bill drawn on the person to accept. It is impossible to say, that if these words were applied to an acceptance for honour, that any of the arguments founded on the supposed prior debt of the acceptor could be maintained.

Another part of the question which has been adverted to by the noble and learned Lord appears to me of infinite importance; I mean, the acceptance of a bill payable at a different place from the residence of the acceptor. This bill is accepted by a man resident at Torpoint, payable in London, at a certain banking-house. What is it that is asserted to be the effect of this acceptance? that he engages to have money both at Sir John Perring and Co.'s and at his own residence at Torpoint. If he accepted simply, he would engage only to have the money at Torpoint*; but, it is said, that because he accepts with this addition he engages to have the money at both places; this is making him engage for two things instead of one, and it seems to me that it [412] must have been his intention to engage for only one, that is, a payment in London: because otherwise he would have engaged for a different thing than that which he engages for by a general acceptance. It is perfectly clear, that money paid at Torpoint and in London are two different things; and if he is liable to be called upon at both places, his liability is rendered more inconvenient.

If it be the true doctrine of law that presentment at a place specified in the acceptance is not necessary, such a doctrine might furnish the means of unfair and fraudulent advantage in dealings between mercantile people residing at different places.

I do not mean to go through the whole case, or to notice all the arguments. The analogies, of rent payable on the premises, of awards directing money to be paid and received at a place, of bills and notes payable on demand, where no demand is held necessary, are omitted here. On the two first classes, see the arguments for the analogy, in the opinion of Bayley, J. and against it, in the opinion of Wood, B. *post*, in the Appendix. As to the latter case, where demand is part of the contract, yet proof of demand held unnecessary, see *Birks v. Trippett*, 1 Saund. 33, a.; and the opinion of Bayley, J. *quâ supra*.

* *Quare*, Whether, under a general acceptance, he would not be generally liable: that is, in all places wherever he may happen to be resident when the bill becomes due, and is presented for payment. See *Rumball v. Ball*, 10 Mod. 38; and Bayley on Bills, 3d edition, 187. I was apprehensive that my note of this passage was incorrect; but, upon collation with other notes, it is confirmed. The expression intended, perhaps, was, that he *would have accepted payable at Torpoint*.

Take the case stated by the noble and learned Lord, of a bill accepted, payable in India. Suppose a person accepts a bill payable in India, and leaves funds for the purpose of answering that bill, which is made payable in six months. He comes to London, and there the bill is demanded of him; because his acceptance, according to the proposed doctrine, is general, and the words, "*payable at Calcutta*," do not qualify that acceptance; the consequence of that would be, that the holder of the bill would gain the whole expense of the remittance from India to England, and we know perfectly well that makes a very considerable difference. In a recent appeal (*Graham v. Kibble*, 1 Bl. 126), argued before this House, it is a question whether, in an account of that description, the expense of remittance from India to England is or is not to be allowed; and it is part of the subject of appeal from the decision of the Court of Session in Scotland that [413] the appellant has not been allowed the expense of that remittance*.

It appears to me, therefore, perfectly clear, that if it be law, that the acceptance of a bill payable at a specified place is not a conditional acceptance, it may be used for the purpose of gross fraud, to make the acceptor pay that which he did not mean to pay, a sum which the other parties to the contract never expected him to pay. Many cases might be put as to the West Indies, and other places which were alluded to by some of the learned Judges, and into which it is not necessary to enter.

If the words which have been added to this acceptance are to be taken as nothing in favour of the acceptor, how is it that they have any operation in favour of other parties? If they are not a condition annexed to the acceptance, how is it, that with respect to the drawer of the bill, for the purpose of making a demand against him, and with respect to the indorser, for the purpose of making a demand against him, the holder of the bill must show the application to Perring and Co. in order to entitle him to bring his action?

It is said that this should be shown by plea. The majority of the Judges have been of opinion that it is a qualification of the acceptance, but that the defendant is to take advantage of it in pleading. To do that he is obliged to bring the money into Court; that is to say, he is to do the very thing which in the case of an acceptance in India, for instance, he [414] ought not to be obliged to do—he must bring the money from India to be enabled to do it; and therefore, the permitting him to take advantage of it, by way of pleading, bringing the money into Court, is not giving him the advantage for which he stipulated.†

Upon these grounds it appears to me that it is infinitely better to hold that these words amount [415] to a qualification of the acceptance, imposing a precedent condition, which must be shown upon the record: for the purpose of setting forth

* By the judgment since given, the cost of remittance has been in part allowed.

† *Quære* 1. Whether the defendant might not plead readiness, etc. and bring into Court the sum expressed in the bill, according to the rate of exchange, either at the time when the bill became due, or at the time of paying the money into Court. Suppose, for instance, a bill drawn upon a party resident in Ireland, for £1300, which he accepts, payable at Dublin; and afterwards, the acceptor, being in England, is sued for the amount. If, according to law, and the practice of the Court, he might plead that he was ready to pay at Dublin, etc. and pay into Court £1200, that being the supposed rate of exchange; the objection, so far, is obviated.

Quære 2. Whether, for the purpose of this argument, there is any difference between remittance and exchange, since the mode of remittance is by exchange. Or if there be any further incidental expenses, as a fair commission to the banker or merchant furnishing the bill, might, or might not, that also become the subject or part of a special plea; and the real value of the sum expressed in the bill, according to the rate of exchange, minus those incidental expenses, be paid into Court? If issue were taken upon such a plea, might not the proceeding be in a course similar to that which takes place in an action upon a bill returned protested from a foreign country? As in the cases of *Auriol v. Thomas*, 2 T. R. 52, upon a bill; and *Pollard v. Hevries*, 3 B. and P. 335, upon a note, viz. by assessment of a jury. See *Kearney v. King*, 1 B. and A. 301, as to the necessity of setting forth in the declaration, in what country, and currency, a bill is drawn, though it is not necessary to state the value of the currency. *Simmonds v. Parmenter*, 1 Wils. 185, 1 B. P. C. 43.

truly the acceptance and the performance of that condition must also be averred. Those matters being set forth then, it appears to me that the party is bound to prove that which he has averred in the pleading, which goes to show that the party taking such acceptance has complied with the condition entered into between him and the other party. On these grounds I perfectly concur with the noble and learned Lord that this judgment should be reversed.

Judgment reversed.

[416]

APPENDIX.

ROWE v. YOUNG.

BEST, J. The words "payable at Sir John Perring and Co. bankers, London," qualify the general term "accepted," and render a presentment of the bill at the house of Sir J. P. and Co. necessary; (provided the acceptor had funds at that house on the day on which the bill became due, and Sir J. P. and Co. would have paid the bill;) but I do not think that it was necessary to aver in the declaration, that the bill was presented at that house for payment. If the acceptor would avail himself of the want of presentment of the bill at Sir John Perring's, he must plead to the action brought on it, that he had funds in the hands of Sir J. P. and Co. sufficient to take it up on the day when it became due, and that Sir J. P. and Co. would have paid it, had it been presented at their house; and he must pay the amount of the bill into Court.

The first point to be settled is, whether the terms used amount to such a qualified acceptance, as makes the bill payable *only* at the bankers? or whether they are to be considered merely as giving notice to the holder, that if he will call at the bankers, he may obtain payment without having the effect of compelling him to present the bill at the bankers? or imposing any other duty on him than what is required from the holder of a bill, by a general acceptance.

The holder of a general acceptance must present his bill at the residence or place of trade of the acceptor: the qualified acceptance produces no other effect than that of changing the place of presentment from the counting-house of the acceptor, to the house of the acceptor's banker.

The drawee of a bill may accept it specially; and such acceptance may narrow his responsibility below what it would have been if he had accepted the bill according to its tenor. Special acceptances are recognised by a long series of decisions; from which it appears, that the drawee of a bill may limit his responsibility by any conditions which his own circumstances, or the situation of the drawer's funds may render expedient. [417] In *Smith v. Abbott* (Str. 1152), it was helden that a drawee may accept payable, when certain goods consigned to him are sold; and in *Julian v. Shobrooke* (2 Wils. 9), when in cash from the cargo of the ship *Thetis*. In *Walker v. Atwood* (11 Mod. 190), a bill payable at sight was accepted, payable three months after acceptance, and this was held to be a good conditional acceptance. If the time of payment may be postponed, the place of payment may be changed. It is another question, whether the holder is bound to take such an acceptance, and whether, if he take it without giving notice to the drawer and indorsers, and obtaining their assent, he does not discharge them from all liability; but, if he does receive such an acceptance, he is bound by the terms of it, as between himself and the acceptor.

Are the words "accepted payable at Sir John Perring and Co.'s bankers, London," sufficient to express a special acceptance, making the bill payable at that house? They all form one short sentence; the words "payable at" following immediately after the word "accepted," without any break; and as the word "accepted" raises an obligation in the writer to pay the bill when due, the words which follow "accepted" must be considered as confining the obligation to pay at the house of Sir J. P. and Co. What rule of construction allows us to say, that the first of several connected words is to be considered as forming the contract, and that the remaining words, although they seem to express a qualification of such contract, are to have no effect? With what justice can we hold a man to the obligatory part of the instrument which he has executed, and refuse him the advantage of the qualification which he has immediately annexed to it.

It has been said at the bar, that the acceptor is to be presumed to be the debtor

of the drawer : that the debtor is liable to his creditor every where ; that this liability cannot be narrowed, except by clear and express terms ; and that the terms used by this acceptor are not sufficiently clear to narrow his responsibility. I deny that, under the circumstances in which the trade of the world is now conducted, a drawee is to be taken as the debtor of the drawer ; but, if he is to be so taken, the drawing a bill for his debt, if it be accepted, restrains the [418] drawer from claiming his debt at any other time or place (in the first instance) than when and where the bill is payable. Further, I insist, that the terms used in this acceptance are sufficiently clear to fix the place of payment of this bill at the house of the bankers.

It is well known to be the practice of the consignors of goods, to draw on the consignees for the expected proceeds of such goods as soon as the goods are sent. The bills so drawn are often presented before the goods get to the hands of the consignees, and generally before they are sold. The special acceptances, in some of the cases to which I have referred, were evidently made under these circumstances. In those cases, the drawee is no debtor of the drawer ; nor can what is said as to the narrowing of a general liability down to a particular liability have any reference to them.

But, suppose the drawee to owe the drawer money, for which the former is liable to be proceeded against at any time and place, and without notice. When the one has drawn, and the other accepted, a bill, the general right to sue which the drawer before had, is, in consideration of the acknowledgment of the debt, and the security given for it by the acceptance, restrained ; and the drawer can have no action until the bill is arrived at maturity, and the drawee (if able to pay) has been requested to pay it. I know, as against an acceptor, it is not necessary to aver a prior presentment of the bill ; but, although such averment and proof be not required, I cannot persuade myself, that you may arrest an acceptor who has been always ready to pay his bill, without any notice of the person, in whose hands it is. The opinion, that an acceptor may be sued at any time and place, and without any other demand than the writ, has arisen from inattention to the forms of pleading. I shall, presently, endeavour to explain this matter. I am aware, that there is great authority for this doctrine ; but no authority, save that of your Lordships, will ever convince me, that it is part of the mercantile law of England. If this be the law, no merchant in the city of London can secure himself against arrests and the costs of vexatious actions. Having money constantly in his house equal to all that he has to pay, and even carrying a like sum with him wherever he goes, will not protect him. According to this doctrine, the debt may be [419] sworn to by the holder, previous to any application for payment, and the first demand be made by a sheriff's officer. The acceptor of a bill, seldom knows in whose hands it is, when it becomes due ; the holder is, frequently, at a considerable distance from the place of payment, and sends his bill to an agent unknown to the acceptor. The acceptor cannot do what other debtors may do, namely, seek out his creditor, and tender him his debt. The law will not require impossibilities ; and all that it is possible for an acceptor to do, is to be ready with his money at the time and place of payment.

As to the objection of want of precision in the terms used : let it be recollected that this is a mercantile contract, and that the loosest of all mercantile contracts is the acceptance of a bill of exchange. By the use of the single vague term " accepted," the drawee engages to pay the bill when it arrives at maturity : there is nothing like precision, nothing like a clear and unequivocal expression of obligation in this term, yet the acceptor is bound by it. Will you require more clearness and precision in the qualification, than the contract to which it is annexed ? But the words, however inartificial, are only capable of one meaning ; nor would any man reading the bill, and not puzzled by the decisions of Westminster-Hall, think of putting any other construction upon them, than, that the payment which the acceptor binds himself to make, is to be made at the house of his bankers, *and no where else*. Suppose, instead of using the word " accepted," the drawee had written " when this bill becomes due, I undertake that it shall be paid at the house of Sir J. P. and Co., bankers ;" could any man contend that, according to these words, he would have to be ready to pay it at any other place, than the house of Sir J. P. and Co. ? The word " accepted " imports, that, when the bill becomes due, the acceptor undertakes that it shall be paid ; surely, the words, " at Sir J. P. and Co.'s " must have the same meaning, when added to

the word "accepted," as, when added to other words, meaning nothing more or less than is expressed by the word "accepted." It has been asked at the bar, how long the acceptor is to leave the amount of the bill in the hands of his banker? I answer, that he is never to remove it. By his special acceptance, he has charged that money with the payment of the bill at his bankers: he has, therefore, no power [420] over the amount left at his banker's to pay it; it belongs to the holder of the bill, who may take it when he pleases. Should he not call for it within the time allowed to the holder of a banker's check to present the check at the banker's, and should the banker fail, the holder of the bill must lose his money: he would lose his money, if he took a check for his bill, and did not present such check in due time. It is decided in the case of *Saunderson v. Judge* (2 H. Bl. 509), that a memorandum that a note would be paid at the house of Saunderson and Co. was an undertaking, that there should be cash there to pay the note; and an order on Saunderson and Co. to pay it. Such an acceptance as is stated in the question is treated by all bankers as a draft on them, or order to pay the bill so accepted. A person who neglects to present such an acceptance on the day when it is due, must, therefore, subject himself to the same consequences, as one who keeps any other draft or a banker's check, beyond the day after that on which it was delivered to him, when the banker fails.

With respect to the cases of *Smith v. De la Fontaine* (Bayley on Bills of Exchange, 3d ed. p. 129, note b.), *Fenton v. Goundry* (13 East, 159), and the *nisi prius* decisions which followed those cases; I am far from saying, that the judgments of the Courts upon those cases were wrong; on the contrary, for the reasons which I shall presently offer, I should have concurred in those judgments, although not on the grounds stated by the judges who decided them. As to the *nisi prius* cases, I think it would have been much better for the law, if the crude opinions of judges at *nisi prius* had never been allowed to be quoted to those who are sitting in bank. Of *Smith v. De la Fontaine*, we have only a very short and very imperfect report; it does not appear that Lord Mansfield, or the Court of K. B. looked at the acceptance as a written contract, and considered what was the true legal construction of it. They proceeded upon some supposed understanding of the mercantile world, and did not give themselves the trouble of coming to any understanding on the subject. Lord Ellenborough and the rest of the judges seem to have taken the same course in *Fenton v. Goundry*. Where a construction is to be put on a mer-[421]-cantile contract, the Court do right to consider what has been the practice of merchants with reference to such a contract. But care must be taken to ascertain what the practice is; and I cannot think any court warranted by the opinion of one jury in pronouncing, that words which are incorporated in a contract form no part of it. It does not appear that any inquiry was ever made to learn the understanding of merchants on this subject, except by Lord Mansfield in *Smith v. De la Fontaine*.

As to the second branch of the first question: I am aware, that both the King's Bench and Common Pleas seem to agree, that, if the terms of an acceptance are obligatory on the holder to present the bill at the banker's, such presentment must be averred in the declaration. With the greatest respect for those who were Judges of the King's Bench, at the time when those cases were decided, I must say, much confusion seems to have prevailed amongst them on this subject. Lord Ellenborough, in his judgment in the action on the promissory note made payable at a particular place (*Saunderson v. Bowes*, 14 East, 500), answers his own argument in *Fenton v. Goundry*; nor can I subscribe to the propriety of the distinction taken between the effect of the same words in a note and a bill. In an acceptance, the words form a part of the original contract of the acceptor, as much as they form part of the original contract of the maker in a note. In the Common Pleas, the question of pleading does not seem to have been much considered. It was scarcely put to that Court by the argument at the bar, that the question of want of presentment ought to have been made matter of defence. If presentment at the banker's be not a condition, the performance of which must precede the payment of the bill, there is no necessity for averring such presentment in the declaration. By a general acceptance, the acceptor undertakes to pay the bill in London; but it has never yet been thought, that before you can recover against the acceptor, you must show a presentment on the day the bill became due. I cannot distinguish between the time of payment and place of payment, or discover any other difference between a general acceptance and a special

acceptance payable at a banker's, than that, in the former case, the acceptor undertakes to have the money to take up the bill at his house of busi-[422]-ness, in the latter, at his banker's. If presentment on the day of payment, or at the place of payment, were conditions precedent, the holder, although prevented by causes which he could not controul, must lose his debt, if the bill were not presented on the day of payment, for the condition could not be performed on any subsequent day; and he must be subjected to the same loss, if the banker fails, for not presenting it at the house of such banker, although the acceptor had made no provision for its payment. Such a rule must work injustice, and, therefore, cannot be law. The acceptor, if he would avail himself of the non-presentment of the bill, must show by his plea, that he was ready at the time and place of payment to take it up, but that the holder did not attend; and must bring the amount of the bill into Court. On shewing that a tender of the amount of the bill was prevented by the default of the party to whom it should have been made, the want of tender will be excused. In all cases, a party is excused from doing what he otherwise ought to have done, by shewing that the other party prevented him from doing it. Arbitrators sometimes direct money to be paid on a particular day at Lincoln's-Inn hall; and rents, annuities, and other payments, are agreed to be paid at certain specified times and places. In actions for the non-payment of the money in such cases, it is not usual to aver in the declaration, that the plaintiff attended at the appointed time and place, in order to receive his money; and the early books of entries contain pleas, that the party to pay was at the place with his money, and that he who was to receive did not attend.

Upon the second question, I submit, that such an acceptance is to be considered in law as a qualified acceptance, to pay the same at the house of Sir John Perring and Co. and not a general acceptance to pay the bill, with an additional engagement or direction for the payment of the same at that house. I have stated the grounds on which I have formed this opinion, in my answer to the first question.

The third question, whether the taking it without the previous authority or subsequent assent of A. would prevent C. from maintaining an action against A? seems to me to depend on the nature of the qualification in the acceptance. A qualification which may prejudice the drawer, would discharge [423] him, if taken without his assent—such as an acceptance postponing the payment of the bill. An acceptance at a different town from that in which the bill was drawn, might have the effect of postponing payment, and also of preventing so early a notice of non-payment as might have been received from the town in which the bill was drawn. No line can be drawn limiting the distance from the place to which the bill is addressed, at which it might be made payable by the acceptance, beyond the town in which it is drawn. A qualified acceptance, making the bill payable at another town, taken by the holder without the assent of the drawer, would discharge the drawer. But I can perceive no prejudice which can arise to the drawer from the holder taking an acceptance which changes the place of payment from the acceptor's counting-house to the house of his banker's, in the same town. I believe that bills so accepted are more easily discounted than those which are accepted generally; and the greatest part of the bills of men in trade are now accepted payable at a banker's. Whoever draws a bill now, knows that, most probably, it will be so accepted. To allow a drawer or holder to make any objection on account of such an acceptance, would be to indulge their caprice, or give them a pretence for calling for their debts before such debts are fairly due. I have considered an acceptance payable at a banker's as merely changing the place of payment from the acceptor's counting-house to the banker's; and not as narrowing a right to demand the money any where, or to sue the acceptor without demand or notice; because I cannot conceive that any such right exists. Bills of exchange are often addressed to a man at a particular house, from which I infer that they are to be presented for payment at such house; and that there he is to prepare himself to pay them. If addressed to him in London, the meaning is, not that the bill may be presented any where in London; but it is presumed that the situation of the acceptor's counting-house is too well known to render it necessary that it should be mentioned in the address of the bill. There is a case in Lord Raymond, in which Lord Holt is reported to have held, that, if a bill be accepted without mentioning the house at which it is to be paid, the holder is not obliged to receive it (*Mutford v. Walcot*, 1 Ld. Raym. 575); that [424] learned judge could not have thought, that mentioning the house, narrowed the holder's right.

In answer to the fourth question, I submit, that if A, on receiving notice from C, that the bill was accepted with a qualification as to the time or place of payment, refuses his assent to such acceptance, C. may treat the bill as not accepted, and proceed on it against A, without delivering up the bill to A. If the drawer will not assent to the acceptance, which the person on whom he draws thinks proper to put to the bill, he cannot complain if proceeded against as the drawer of a bill which the drawee has refused to accept. The bill is necessary to maintain the action against the drawer; and, therefore, the holder must be allowed to retain possession of it. A, having previously given such a bill for a debt due from A. to C. the latter is not obliged to declare on the bill, but may bring his action for the original debt.

I hope that what I have stated as legal answers to the questions proposed, will be found to secure complete justice to all the parties to a bill, and to promote the convenience of those who are engaged in these negotiations. By allowing acceptances to be made payable at their bankers, merchants are relieved from the risk attendant on keeping large sums of money in their own houses. By holding that such an acceptance does not make presentment at the banker's a condition precedent, a just debt cannot be lost through accident or the negligence of clerks in not presenting the bill at the proper time and place: nor is a holder obliged to incur the expense and trouble of a presentment, when he is certain that no provision is made for payment: whilst, on the other hand, by allowing the acceptor to plead his readiness to pay, and bring the money into Court, you prevent, by the penalty of costs, vexatious arrests and unnecessary actions. By allowing holders and drawers of bills to object to acceptances which may prejudice their right, but preventing either from refusing an acceptance, which, though not strictly according to the tenor of the bill, cannot possibly affect their interest, the rights of parties are secure, whilst their caprice is made to give way to the convenience of others.

The counsel, both of the plaintiff and the defendant, have enlarged upon the inconvenience to commercial men which is [425] likely to follow the establishment of what is contended for by the opposite party. There never was a case more free from apprehensions of this kind. Mercantile men only want certain rules upon these subjects. As soon as this House shall have declared what are the proper rules, all Judges will act upon them, and all mercantile men will regulate their transactions according to them. If the rule is established that the acceptor may by his acceptance make his bill payable only at his banker's, but that the words used by this acceptor are not sufficient to express such a qualified acceptance, future acceptors will use terms which express this qualification of their contract more clearly. If drawers apprehend that such an acceptance is likely to occasion a return of their bills as being refused acceptance, they will guard against this by requesting, in the body of their bills, the drawee to accept them payable either at his counting-house or his banker's. Every holder will then know, that he holds their bills subject to their being accepted either generally or specially, and will thus be prevented from returning them for want of a sufficient acceptance.

Richardson, J.*—This is the case of a bill of exchange, drawn by a person at Gosport, upon a person at Torpoint, requiring him, in general terms, to pay, at two months after date, a sum of money to the order of the drawer, which the drawee has accepted, payable at the house of trade of certain bankers in London. The question is, what effect does such an acceptance produce on the holder, as to the conduct to be pursued by him before he sues, and as to the averments to be inserted in his declaration, when he sues upon the bill? It has not been, and, I think, cannot be denied, that the drawee of a bill of exchange is at liberty to qualify his acceptance, as by annexing a condition, or by enlarging or diminishing the time of payment; and, as he may enlarge or diminish the time, so he may, by his acceptance, fix the place of payment; and, in all such cases, I think it follows, that, as he is no otherwise party to the bill than by his acceptance, the holder is bound to sue him according to his acceptance; for the acceptance is the only evidence of contract as to him. The time or place of payment [426] expressed in an acceptance is as much a part of the acceptor's contract, as the like expression of time or place in the body of a promissory note is part of

* The statement of the record, and the four questions with which the learned Judge prefaced his observations, are omitted. The two first questions he consolidated.

the maker's contract: both, I think, are entitled to equal regard in ascertaining the rights of the parties. What then is the meaning of the terms of this acceptance, "Payable at Sir John Perring and Co.'s, bankers, London?" I think the meaning is the same, as if the acceptor had said, "I undertake to pay this bill at the house of Sir John Perring and Co. bankers, London." I think that it is not a general acceptance with an additional engagement or direction as to the place of payment superadded, but, that it is to be considered in law as an acceptance to a certain extent qualified: and, that the legal extent of this qualification is the same as it is in other cases, where a man contracts to pay money at a particular place. It is material then to consider, what is the legal effect of a contract to pay money at a particular place? I apprehend it is this: that the debtor shall stand excused of damages and costs, if he is ready to pay the money at that place, according to his contract: but, that the debt is not lost to the creditor by an omission on his part to demand it there, except, perhaps, in cases where it can be shown that such omission has occasioned damage to the debtor. If so, it follows, that it is not necessary, on the part of the creditor suing for the debt, to aver in his declaration, that a demand was made at the place; but, that the defendant, by way of excuse against damages and costs, must show, that he was ready at the place to pay, but that no one was there on the part of the creditor to receive: and, for this purpose, he must plead a special plea in the nature of a plea of tender, and must bring the money into Court. Such, at least is the general rule, namely, that the money must be brought into Court: though I am not prepared to say that an exception might not arise, if the defendant, in any particular case, could show, that the money had since been lost by the neglect of the creditor to receive it at the time and place appointed. This, I apprehend, is the law in the case of covenants, and of bonds, with or without penalty, for payment of money at a particular place: and of rent, where a particular place of payment is expressed in the reservation: or, where it is not so expressed: in which latter case, the law makes it payable upon the land. I will mention some instances. In an [427] action of debt for £28 (Rast. 158. b.), the declaration stated, that the defendant, by his bill obligatory, sealed with his seal, at London, acknowledged himself to owe to the plaintiff £19 16s. of the money of Flanders, (parcel of the £28), which £19 16s. were then and still are of the value of £14 of English money, to be paid to plaintiff in the Cold Mart then next following. Then followed an averment, that the Cold Mart was a certain fair held at London, in the parish and ward aforesaid, from the 10th August, 1501, to the 20th September next following. The declaration then sets out another bill obligatory, for other £19 16s. Flemish, equal to £14 English, to be paid at the Paske Mart, with similar averments: and concludes, "yet the said defendant, although often requested, the said £39 12s. of Flemish money, nor the said £28 of English money, has not paid to the plaintiff, but to pay the same to him has hitherto refused, and still refuses." The defendant pleads, that the Cold Mart was a certain fair held at Bruges in Flanders, in parts beyond the seas, without the realm of England, from a certain day to a certain other day, and that the £19 16s. were worth only 60s. of English money, and makes a similar averment as to the Paske Mart. He then avers, that he was at the said fairs, called the Cold Mart and the Paske Mart, ready to pay to the plaintiff £6 of English money, if he, the plaintiff, had been there, and willing to deliver to the defendant the said bills: and that neither the plaintiff, nor any one for him, was then there to receive the said £6: and that he has always since been ready to pay, and brings the same into court: and concludes with traversing, that the markets were held in London: and also traversing, that the £19 16s. Flemish, were worth £14 English. The replication avers that £19 16s. Flemish were of the value of £14 English: and concludes to the country. Whereupon a jury *de medietate lingue* is awarded. In an action of debt (Rast. 175. a.), by the abbot of the monastery of Holy Cross of W. the declaration shows a demise of a manor and lands for a year, rendering £40 at W. aforesaid, at the four feasts of the year: that the defendant occupied for the year: and that the £40 is still in arrear to plaintiff, *per quod actio accrevit*: and concludes, without alleging [428] a demand at W. that defendant has not paid, although often requested. The defendant pleads certain acquittances as to part, and levy by distress for the residue. The plaintiff replies *non est factum*, as to the acquittances, and denies the levy by distress. In an action of debt (Rast. 322. b.) against executors, the declaration states that the testator, by his bill obligatory, acknowledged to owe to

plaintiff £17 10s. to be paid in three half years; that is to say, £6 10s. at Storebrich fair next, and the rest at other fairs, averring when the fairs were held, and concluding, without alleging demands at the fairs, that testator and executor have not paid, although often requested. The defendant pleads *ne unques* executor. The plaintiff replies. The defendant rejoins. The plaintiff there had a verdict, and judgment. To an action of debt for rent (Thompson's Entries, 159, pl. 167, *et seq.*), the defendant pleads, that he, on the said day, etc., for the space of half an hour before sunset of the said day, was at the same common dining-hall of Thavies Inn, situate, etc. ready, and offered to pay the plaintiff the said £3 rent, which he was bound to pay on that day, according to the form and effect of the said indenture; and that neither the plaintiff, nor any one authorised by him, was then there to receive; that he has always since been ready to pay, and brings the money into Court. The replication states, that the plaintiff receives the money, and for damages, protesting to the readiness and offer to pay, replies a subsequent demand and refusal (not alleged to be at the place.) The rejoinder denies the demand. To an action of debt for rent (2 Modus Intrandi, Pl. Gen. 234), the defendant pleads (after *oyer* of the writing) that he, on the day in the condition mentioned, for the space of an hour before sunset, and after, was at the said mansion-house in the said condition specified, ready to pay the said £40, according to the form and effect of the condition; and that neither the plaintiff, nor any one lawfully authorised by him, was then there to receive; *semper paratus*, and *profert in curiam*. The plaintiff replies, that he was there to receive, and traverses that the defendant was there ready to pay. The defendant rejoins, whereupon issue is joined. In [429] *Marshall v. Wisdale* (Freeman, 118), to an action for £10 rent, the defendant pleads a tender of £9, and that he paid the other £1 for taxes. The plea was held bad, because he did not plead the tender at the place where the rent was agreed to be paid. The Court said, it could not properly be paid any where else. In *Crouch v. Fastolfe* (Sir Tho. Ray, 118), to an action of debt for rent, the defendant pleads, that he was at the place on the day, from before sunrise to sunset, ready to pay, and that the plaintiff, nor any one in her behalf, etc. was there to receive; *semper paratus*, and *profert*. It was held a good plea, though no tender was alleged. These precedents and authorities, with many others which may be found in our old books of pleadings, and especially in cases of rent, which the law makes payable upon the land, seem to me to be strong evidence of what the law is in cases of contract to pay money at a particular place; and to establish two propositions which may be considered as general rules, though, like other general rules, subject perhaps to exceptions under special circumstances. First, that a demand at the place is not a condition precedent to the creditor's right to sue for the money, nor, of course, necessary to be averred in his declaration. Secondly, that the defendant may excuse himself by pleading that he was ready to pay the money at the place appointed; but that, in such plea, he must show that he has always since been ready, and must bring the money into Court. The same law appears to me to be applicable to the acceptances of bills of exchange such as this acceptance is, which I consider to be a contract by the acceptor to pay the money at the place by him expressed. I am aware that this opinion is inconsistent, not only with the cases of *Callaghan v. Aylett* (3 Taunt. 397), and *Gummon v. Schmoll* (5 Taunt. 314); but also with the opinions expressed by the Court of King's Bench in *Saunderson v. Bowes* (14 East, 500), and acted upon by the same Court in *Dickinson v. Bowes* (16 East, 110); and also acted upon by the Court of Exchequer Chamber in *Bowes v. Howe* in error (5 Taunt. 30). The two first mentioned cases, were cases of bills of exchange accepted, payable at a particular place; the three latter were cases of promissory notes, expressed in the body of [430] them to be payable at a particular place; and, in all of them, a demand at that place was considered as a condition precedent to the holder's right to sue upon them. I have felt the weight of these authorities, and it has not been without much consideration that I have felt myself at liberty now to dissent from them. But, considering that the general question, upon which so much difference of opinion has prevailed, is now before this Court of ultimate resort for a final decision, which must operate as a general rule in all future cases, it is very important, that that rule should be founded on true principles, and as far as is consistent with such principles, that it may be practically convenient. For this reason I have ventured to inquire into the grounds of these decisions. In the cases which

occurred in the Common Pleas, I do not find that the point on which my opinion is founded, (namely, that where money is to be paid, at a specified place, it is matter of defence, and that it is, therefore, incumbent on the defendant to show that he was ready at the place to pay,) was fully brought before the consideration of the Court: no authorities, at least, appear to have been cited in support of it. In the case of *Saunderson v. Bowes*, in the King's Bench, which was followed by the cases of *Dickinson v. Bowes*, and *Bowes v. Howe*, with deference, I think, that the Court fell into a mistake in supposing, as they seem to have done, that the rule requiring the defendant to show, by way of excuse, that he was ready with his money at the place appointed for payment, (which rule they admitted in the case of bond under penalty,) was confined to such cases where a penalty was to be excused, and where the defendant was called upon to plead the condition, of which he wished to avail himself. I humbly apprehend that there is no such distinction, and that I have shown by the precedents and authorities before cited, that the same rule equally applies to the cases of single bills, without penalty; and indeed, as I conceive, to all cases where the contract is to pay money at a particular place. I may be suggested that, if the doctrine, which I have ventured to express, be applicable to the acceptances of bills of exchange, it is extraordinary that no case has occurred, or, at least, that none has been cited, where such a plea has been pleaded by an acceptor. To this I should answer, that probably no case has occurred, where an acceptor has been sued without a previous demand of the money, or [431] without such circumstances existing as evinced that he was not ready to pay. And this leads me to remark, (though I am aware that convenience alone is not a legitimate ground of decision, unless it be consistent with law) that to require the defendant to aver and prove readiness to pay in the few, if any, cases, where, notwithstanding his readiness, he may be vexatiously sued, rather than to require the plaintiff, in all cases, to aver and prove an unavailing demand, will, as I humbly conceive, be a more convenient as well as a more just rule for both parties, and more merciful to defendants themselves. For if, as the fact is, in almost every case of an action brought against the acceptor of a bill, the defendant has failed to pay from mere inability; to require proof of the previous demand, will only add the expense of one more witness, sometimes brought from a distant part of the kingdom, to the burden, which the defendant was before unable to bear: whereas, on the other hand, if an action, without previous demand, should ever vexatiously be brought against an acceptor, who was really ready with his money at the place appointed according to his contract, he, by pleading his readiness, and bringing his money into Court, may discharge himself from damages and costs, and the plaintiff will justly be punished for his vexation by the payment of costs.

I have one other observation only to make on this part of the case. It may be said, that unless the holder be bound to demand payment at the place appointed, he may demand it at some other place, where the acceptor is not prepared with funds. I answer, that if such a case should occur, I think the acceptor would be entitled to a reasonable time to draw his funds to that place. For this, the case of *Halsted v. Vanleiden* (1 Rol. Ab. 443, pl. 5, 20), is an authority, where (the defendant having by deed acknowledged that he owed to the plaintiff £111, and covenanted that the same should be paid by C. at Rotterdam, in Holland, on the first demand that should be made) it was held, on a special verdict, that the plaintiff might make his demand at Dort, which is ten miles from Rotterdam, or in England; but that in such case the defendant ought to have a reasonable time to pay, regard being had to the distance.

[432] In answering the third question proposed by your Lordships, I think it necessary to distinguish between a qualification as to time, and a qualification as to place. Any qualification as to time, whether the time of payment be thereby accelerated or retarded, which the holder permits to be introduced into an acceptance without the concurrence of the drawer, must, I think, have the effect of discharging the drawer. I think it must have such effect, because it necessarily varies, and must be intended to prejudice his situation, as to the time when he may be called upon to pay on the acceptor's default, and as to the time when he must resort to his remedy over against the acceptor. As to place, I think it is not every qualification of place which may be introduced into an acceptance, without the privity of the drawer, that will necessarily discharge the drawer; but to produce that effect, I think the qualification

must be such as must vary, and may be intended to prejudice his situation. For instance, if a bill drawn upon a person in the Temple, be by him accepted, payable at the banking-house of Messrs. Child and Co. at Temple-bar, this, I think, would not have the effect of discharging the drawer. But, if such bill were accepted, payable at Dublin or Amsterdam, this, if taken without the privity of the drawer, would, I think, discharge him: because it would necessarily vary, and might reasonably be intended to prejudice his situation, as to the time when he could receive notice of the acceptor's default, and as to his remedy over against the acceptor. It may be difficult to lay down prospectively a precise rule, applicable to all cases, for defining the degree of distance from the residence of the drawer, at which he may be permitted by the holder to appoint, by his acceptance, the place of payment, without discharging the drawer. I should say, that to produce that effect, the distance must be such as would probably delay the drawer in his receipt of notice of the acceptor's default of payment, or throw some increased difficulty upon him in his remedy over against the acceptor.

In answer to the fourth question proposed by your Lordships, I think that in the case put, C. might maintain an action against A. upon the original debt, without first returning to A. the bill drawn by him, C. *having first cancelled the qualified acceptance* offered by B. to which A. is supposed to have refused [433] his consent. Such an acceptance, so offered by the drawee, but refused by the payee, because the drawer refuses his consent, is to be considered as no acceptance at all: the bill becomes a dishonoured bill, and consequently, the payee has an immediate remedy against the drawer, either upon the bill or upon the original debt.

Garrow, B. observing that it was well known in the mercantile world, that the Governor and Company of the Bank of England had determined to discount no bills which were not accepted, payable at a banker's, concurred with Best J. and Richardson J. in their opinions and reasons: and referred to them as containing his own views of the case.

Burrough, J.—In answer to the first question, I submit, that the usage and custom of merchants does not require that the drawee shall accept a bill of exchange in any given form. He may accept it by parol, or in writing, he may accept it generally: and, if he does so, he is, in the language of some of the cases, generally and universally liable: or, he may accept it specially; and then he is liable according to the tenor of the bill and his acceptance thereof. Whatever the acceptance may be, if an action be brought against the acceptor, the declaration must truly state the acceptance: for, the acceptance contains the terms on which he has agreed to the bill. I am of opinion, that the acceptance is a contract which must be construed, as all other contracts are, according to the intention of the party contracting, to be collected from the nature and words of the contract itself. The acceptance, if special, binds him *sub modo*, and not generally. There is neither hardship nor illegality in this. In the present case, the intention appears to me to have been to do away with the necessity and trouble of a personal application to the acceptor, upon the bill becoming due, and of his keeping money by him to pay it, and to substitute a much more convenient course in the first instance. No holder of a bill, when he goes to the banker's shop, expects to find the acceptor behind the counter: on the contrary, he knows he shall not find him there. On the face of this count, the bill is alleged to have been accepted according to the usage and custom of merchants: yet the doctrine of the case of *Smith v. De la Fontaine*, and other subsequent cases, is, that the acceptor, notwithstanding a special acceptance, is generally and universally liable. This is a doctrine [434] to which I cannot subscribe. The effect of such doctrine is, that, notwithstanding a well-known place is pointed out where the money may be obtained, the holder shall be at liberty to arrest the acceptor the moment the bill becomes due, and to turn a special and qualified undertaking into a general one, having very different consequences. It seems, however, to be now conceded, that this doctrine cannot be supported. But, then, it is said, that this special qualified acceptance makes no difference as to the averments in the declaration, except as to the statement of the acceptance. As I understand the acceptance stated in this declaration, I am of opinion, first, that it imports that there is a fund in the hands of the banker to answer the amount of the bill; and, secondly, I say, that this acceptance means to impose and does impose on the holder an act to be done by him, namely, to present the bill at the bankers for payment: if payment is not made on applica-

tion, the acceptor's contract is broken, and not till then. But the holder must state in his declaration the title to his action, which is, that the bill was presented and not paid, and so his cause of action has arisen against the acceptor.

The case of *Bishop v. Chitty* (Str. 1195.) in no way assists the case of the defendant in error. The underwriting of the order for the payment of the money in that case amounted to an acceptance, and it was declared on as such: the possession of the bill, with the order for payment of it, were, in my judgment, sufficient to throw on the plaintiff the burden of proof, that he had presented the order, and could not obtain payment of it. It was there holden by Lord Chief Justice Lee, to be the plaintiff's loss: for, he said, it was to all purposes a draft, which is always considered as actual payment when a reasonable time to receive it has elapsed. *Smith v. Abbott* (Str. 1152.) is an instance of a conditional or contingent acceptance, according to which it was incumbent on the plaintiff to state in his declaration, and to prove at the trial, that the contingency had happened. The acceptance was "to pay when goods consigned to him," (and for which the bill was drawn) "were sold." The Court held, that the acceptance was within the custom of merchants; and said, that the plaintiff might have [435] refused it. The court said also, "it will affect trade, if factors are not allowed to use this caution, when bills are drawn before they have an opportunity to dispose of the goods. A man, who is drawn upon at ten days sight, may accept for thirty, though the other might protest the bill." So, in this case, I say, it will affect trade, if a man is, at all events, contrary to his intention, to be deemed to have accepted generally; or, if his acceptance in this form is to be so constructed, as to make him liable to be held to bail as soon as the bill becomes due. The fallacy, in this case, seems to me to consist in supposing, that the acceptor has engaged for a personal payment at the bankers. This appears to me to be contrary to the intention and the effect of the acceptance, to be collected from the words of it. Suppose the acceptance to have been in this form: "Accepted to be paid by me, if, on application to Messrs. Perring and Co. my bankers, when the bill becomes due, it shall not be paid by them:" there is nothing in the usage and custom of merchants to show that such an acceptance would not have been good. But whether an acceptance be good or bad within the custom, if the party, who leaves the bill for acceptance, receives it back without objection, he must abide by it. If he cannot recover according to the custom, it is his own fault. The acceptor can only be liable to an indorsee on an acceptance within the custom. In my judgment, the acceptance in the case before the House is in effect such as I have supposed; that this was the intention of the party, I think there can be no doubt: the words of the acceptance appear to me to manifest it. In *Julian v. Shubrooke* (2 Wils. 9.), the defendant had accepted a bill on account of the ship *Thetis*, when in cash for the ship's cargo. It appears in the report of that case, that the acceptance was so stated in the declaration, and that the plaintiff averred in his declaration (as I think he was obliged to do) that, on the day when the bill became payable, the defendant was in cash for the said ship's cargo. This the plaintiff must have been bound to prove at the trial: because it was part of his case, and it consisted of matter in the affirmative. In the present case, the defendant in error must contend, that if the cause had gone to trial, on proof of the [436] acceptance, he would have established a *prima facie* case: for he might have urged, on the plea of *non assumptis*, that the objection (if any) was on the record. As this record is, the question arises on a special demurrer. I am of opinion, however, that the declaration is substantially defective. First, because a material averment is omitted, namely, the presentment of the bill for payment at the bankers, Sir John Perring and Co. which is matter in the affirmative, and, I think, that it lay on the plaintiff to aver it. Secondly, because the cases referred to in support of the assertion, that the answer was to come on the part of the defendant below, do not support that assertion. The cases supposed were covenant to pay money at a certain place on a certain day: (*ex gr.*) to pay to the plaintiff in an action of covenant £100 on the 1st of August, at or in the common dining-hall of Lincoln's Inn. It is said, that, in a declaration on such a covenant, the plaintiff's breach is good, "that the defendant did not pay the money on the day, at or in the common dining-hall aforesaid, but neglected and refused so to do." I admit that this is so: but it is so, because the defendant covenanted to do the act personally to the plaintiff at that place: and the breach is, that he did not do it at the day and place, but neglected and refused so to do. This is good in a declaration, which is to be certain to a certain

intent in general; and it implies, that the plaintiff was there ready to receive, - the parties having agreed to time and place. If this acceptance had amounted to an engagement by the acceptor to pay personally at Sir John Perring and Co.'s, the case alluded to might have had some weight. But this acceptance is not so, nor, from the language of it, can it be taken to be so meant; but, as appears to me, the contrary was intended, viz. that Sir John Perring and Co. the bankers, were, in the first instance, to be looked to for the money; and that the acceptor was to be resorted to in case of non-payment by them.

I will now shortly advert to the cases more immediately applicable to the subject; and the weight of those cases appears to me to be in favour of the plaintiff in error. The first case, to which I have occasion to refer, is *Smith v. De la Fontaine* (Holt, N. P. C. 366. note). In that case, Lord Mansfield is reported to have [437] held, that the words accompanying an acceptance "payable at a particular place," or the words "payable at, etc." were not words restricting or qualifying the acceptor's liability, but rendering him generally and universally liable; and that it was not necessary to prove a demand at the particular place in an action against such acceptor. If this was meant of an acceptance, by which the acceptor personally engaged to pay at a particular place, I should feel no objection to the observation; but, if it was meant to apply to cases wherein the acceptance has no such import, I do not think it law. The next case was that of *Saunderson v. Judge* (2 H. Bl. 509.), which does not affect the question in this cause. There the promissory note was in the ordinary form. It was made by one Sharp, and payable to Wilkinson, or order. At the foot of the note there was a memorandum, that he would pay it at the house of Saunderson and Co. The Court held, that this memorandum was no part of the note. If it was no part of the note, the holder, who was indorsee, was not privy to it: it did not bind him, because it was not transferred to him by the indorsement of the note. In *Parker v. Gordon* (7 East, 385.), the bill of exchange was accepted as in the present case; and there the court of King's Bench, consisting of Lord Ellenborough, Justices Grose, Lawrence, and Le Blanc, (Lord Ellenborough having nonsuited the plaintiff,) on motion to set aside the nonsuit, held, that the plaintiff, the holder, was bound to present it at the bankers within banking hours. They must have considered it as part of the acceptance. If it was no part of the acceptor's contract, the holder could not have been bound so to present it; but, on the contrary, he should have applied to the acceptor himself for the money. The next case in order of time is *Lyon v. Sandias and Sheriff* (1 Campb. 123.). The acceptance was of a bill of exchange, as here; Lord Ellenborough, in that case, appears to me to use expressions not warranted by law. He says, "how can you make three words, 'at Hankey and Co.'s,' more than a memorandum!" The answer appears to me to be, that they are more, for they are part of the acceptance. His Lordship then says, "the acceptor of a [438] bill of exchange is liable universally;" the observation on this is, that he is so, if he accept generally, but not otherwise; for his obligation and the extent of it must depend on the acceptance itself. His Lordship then proceeds to say, "this very point was brought before the Court some time ago, when the judges were all of opinion, that such words form no part of the contract, and did not require to be set out in the declaration." If I thought this to have been an opinion deliberately formed by that excellent and able man, I should have hesitated before I declared myself persuaded that it is not tenable. It appears to me, that it cannot now be contended, that such words are no part of the contract of the acceptor. When his Lordship says, "this point was brought before the Court some time ago," I presume he means to refer to the case of *Smith v. De la Fontaine*, in Lord Mansfield's time. That case was probably introductive of the confusion which has existed on this subject. The next case is *Ambrose v. Hopwood* (2 Taunt. 61.), where the Court of Common Pleas held, that in an action on an acceptance, like that in the present case, the declaration must aver, that it was presented at the place where the person, by whom it was made payable, resided. In a subsequent case (*Haffam v. Ellis*, 3 Taunt. 115.) in this House, it was holden to be sufficient to allege the bill to have been presented to the persons themselves. Still the case of *Ambrose v. Hopwood* shows it to have been the opinion of the Court of Common Pleas, that the declaration must aver a presentment consonant to the acceptance; and the acceptance throughout is treated as a substantial part of the contract. In *Callaghan v. Aylett* (3 Taunt. 397.), the acceptance was nearly like the acceptance

in this case. The bill was there accepted payable at Messrs. Ramsbottoms, bankers, London. The declaration alleged an acceptance generally. At the trial it was objected, that this was a variance; and that there was no proof of a presentment at the place. A verdict was taken for the plaintiff, and these points were reserved for the opinion of the Court. On argument, the Court of Common Pleas held, that this was a qualified acceptance, to which the holder (he having acquiesced in it) was obliged to conform, and directed [439] a nonsuit. Then follows in order of time the case of *Fenton v. Goundry* (13 East, 459.). In that case the acceptance was in this form, "payable at C. Sikes, Snaith and Co." And the bill was addressed to the defendant at "No. 54, Lower Shadwell, Wapping." It seems, that, in this case, the idea of the expansion of the promise to pay first arose. One would think, there had been a precedent independent general engagement, and that something expansive was added to it. The acceptance is one act: to call it an expansion of the promise, is, in substance, to make it a general engagement, and pleadable as such. It is the promise itself. It is one entire engagement; and the legal effect of it is, "I accept or agree to this bill, but you must go *first* to Sikes, Snaith and Co. for the money." This makes it a qualified or conditional engagement. In that case a learned person, who argued for the defendant, says, "where something is to be done by both parties at the same time, the defendant, who is sued for a breach of his part of the engagement, must show, that he did all that lay upon him to do, and that the plaintiff did not perform his part, which prevented the defendant's performance" (13 East, 465). I conceive the facts of that case do not warrant this observation: for the presentment is solely the act of the holder; and the payment is not to be made by the party himself, for no one expects to find the acceptor behind the banker's counter: therefore, there is nothing to be done by both parties at the same time; for the parties, from the nature of the engagement, are not to be present at the same time. This is an argument which probably had much weight; but I conceive that the foundation of it fails. In deciding the case, the Lord Chief Justice appears to have said (13 East, 469)—"It has become a frequent practice, in order to avoid the inconvenience to the holder of not having his bill honoured when he calls for payment at the party's ordinary place of residence, to intimate his other house of residence for the purpose, if I may so express it, which is at his banker's, where he engages, as it were, to be found at the usual hours of business." I am satisfied, that this observation is ill-founded. No one believes it to be the acceptor's place of residence, nor that he will be at all found there. The truth is, it is to avoid the inconvenience [440] of keeping funds in his own house, that he makes the bill, by his acceptance, payable by or at his bankers, which is not his house of residence, nor considered as such, but where he has cash or credit. It cannot but be observed, too, that there was floating in his Lordship's mind, a notion that the obligation to pay by the acceptor was general and universal: this is true of a general acceptance; but if it be argued as applicable to a special, qualified, or conditional acceptance, I cannot agree to it: for though the party who calls for the acceptance may refuse to take it if it be not general, yet, if he do accept it, and assent to its being special, he must pursue his remedy according to the terms of the contract itself: for an acceptance is as much a contract, as is a policy of assurance or a charter-party. Both the other learned Judges, in that case, appear to speak with considerable doubt on the subject: the Court hinted at a further consideration of the question, for judgment *nisi* only was given; but, as the reporter says, no further notice was taken of it. After this case, in *Gammon v. Schmoll* (5 Taunt. 344, S. C. 1 Marsh. 80), the Court of Common Pleas gave judgment on a question precisely similar to the present, on a full consideration of *Fenton v. Goundry*, and all the preceding decisions. That Court held, first, that the acceptance was a contract. Secondly, that the introduction in it of the words "payable at Batson's, London," qualified the contract; and that it was a condition precedent. Thirdly, that the holder must show, in pleading, that he has complied with it. One of the learned Judges (Chambre, J.), who concurred in this opinion, observed, that the reasons given in *Fenton v. Goundry* show, that the Judges were very doubtful as to this point. The case of *Huffam v. Ellis* (which I have before alluded to) came before this House on error. The bill was accepted, payable at Kensington, Styan, and Adams'; and it was averred in a declaration by an indorsee against the drawer, that the bill was presented to the persons using the name, style, and firm of Kensington, Styan, and Adams. This

House held, that this was a sufficient averment to satisfy the words "payable at Kensington, Styau, and Adams." The case of *Bowes v. Howe* (5 Taunt. 30), is a case of great weight. It was subsequent to all [441] the cases on this subject, which have been brought before the courts, except *Gammou v. Schmoll*; and that was in the following year. *Bowes v. Howe* was an action by one, who held a promissory note by assignment or indorsement, against the makers. The note was made payable at Workington Bank. The declaration averred, that the plaintiffs in error (the makers of the note) became insolvent before the action, and wholly declined and refused to pay it at Workington Bank. The plaintiff below had judgment, which was reversed in the Exchequer Chamber. The Lord Chief Baron, Sir Archibald Macdonald, delivered the judgment of the Court. He held that the question was, whether the allegation in the declaration dispensed with the necessity of presenting the notes (for there were counts on many other notes) at Workington Bank; and that it was clear that a demand was necessary unless dispensed with; and that the allegation was not sufficient to enable the plaintiff below to maintain his action. The words "at Workington Bank," were in the body of the note; the words "payable at Sir John Perring and Co.'s" are, in the case before this House, in the body of the acceptance; and I am of opinion, that there is no solid distinction between that which is incorporated in a note, and that which is incorporated in an acceptance. It is proper to advert to the case of *Head v. Sewell* (Holt, N. P. C. 363), which arose before Lord Chief Justice Gibbs at *nisi prius*. He held, in the case of such an acceptance as the present, that it was not necessary to prove a presentment at the place mentioned in the acceptance; and, following up the language of some of the cases, said, that the acceptor is generally and universally liable. It seems to me to be most strange, after the cases in his own Court, (one of which was not more than two years before) which were directly contrary to this opinion, that nothing further should have been done in this case of *Head v. Sewell*; that it should not have been brought before the Court. I am persuaded, that there must have been some circumstance in that case, which the reporter has not noticed. The case of *Richards v. Lord Milsington* (Id. 364, note), need only be mentioned shortly. That was an action on a promissory note, before the same Chief Justice at *nisi prius*. His Lordship said, "the words 'payable at Bruce and [442] Co.'s' are not introduced in the body of the note, they are only inserted in the margin." This case, therefore, has nothing to do with the subject. I have adverted to all the cases which appear to be applicable to the case before the House; and the result is, that I am of opinion, that the bill of exchange in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir John Perring and Co.'s bankers, London, the holder was bound to present it at that house, and to aver in his declaration that the same was presented at that house for payment.

As to the second question I am of opinion, that the acceptance is, in law, to be considered a qualified acceptance, that the bill shall be paid at the house of Sir John Perring and Co. bankers, London, and not as a general acceptance to pay the same, with an additional engagement or direction for the payment at that house. The acceptance is an entire contract; the holder, who receives it, must take it as it is, (if he does not dissent from it,) and it must be construed as it was meant, if the intention can be discovered, and the words are sufficient to effectuate it. I feel no doubt as to the intention, and can discover no legal ground to prevent its being carried into effect.

As to the third question proposed by your Lordships, I am of opinion that this must be considered, first, as to the time, secondly, as to the place. And first, as to the time; if B. accept a bill drawn on him at three months, and, by his acceptance, make it payable at four months, and thereby lengthen the time of payment, I think C. could not maintain an action against A. if this be done without his previous authority, or subsequent assent. And if it was accepted payable at a shorter time than three months, without such authority or assent, I think the law is the same; because the drawer might be liable to be called on sooner for the money than by the terms of his bill he had a right to expect. Secondly, as to the place; the question, as it appears to me, is, whether the variation is material? A general acceptance would have an implied relation to the drawee's place of abode. If the drawee accept it payable at his bankers in the same place, I am of opinion, that would not be material, and that a drawee may, within the custom of merchants, well appoint another

[443] place of payment, if no material inconvenience to the holder be thereby introduced.

In answer to the fourth question, I am of opinion, that, in the case comprehended in this question, C. the payee, could not maintain an action against A. the drawer, without delivering, or offering to deliver, up the bill to him; for, whilst the bill remains in C.'s hands, the drawer's remedy is suspended; and, when the drawer has the bill returned, it will appear that the drawee has not complied with the requisition in it, and the drawer is restored to his original situation. I do not think, that the debt owing from B. to A. in any way varies the case, as between A. and C., for C. receives the bill from A.; and, until C. has agreed to an acceptance materially different from the terms required by the bill, the transaction rests between A. the drawer, and C. the payee.

HOLROYD, J.—As to the first question, I am of opinion, that, in this case, the bill of exchange mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir John Perring and Co. bankers, London, (that is to say, at the house of certain persons using in trade and commerce, the names, style, and firm of Sir John Perring and Co. bankers, London,) the holder was not bound to present it at that house for payment, and to aver in the declaration that the same was presented at that house for payment.

As, in my way of considering the subject, the second question appears to me to be involved in the first, I shall state my opinions on the second question, before I give my reasons for either.

On the second question, I am of opinion, that the said bill, having been so accepted as aforesaid, such acceptance is in law to be considered not as a qualified acceptance, to pay the same at the said house of Sir John Perring and Co. bankers, London; but as a general acceptance to pay the same, with an additional engagement or direction for the payment thereof at that house. Though the allegation in the declaration has not treated the acceptance simply as a general acceptance, but has stated the place of payment as a part of it; yet, as the allegation is, that the defendant accepted the bill *according to the usage and custom of merchants*, payable at Sir John Perring and Co.'s, [444] bankers, London, the first question appears to me to involve in it that which is proposed to us as the second question, namely, what is the effect of such acceptance *according to the usage and custom of merchants*? in like manner as if the allegation had been simply that of a general acceptance, and as if the question had arisen at the trial on the proof of an acceptance made payable at the place.

In considering the first question, therefore, which will also dispose of the second, I shall, in the first place, consider what is in law to be now deemed the effect of this acceptance, according to the usage and custom of merchants. If it be in law to be considered not as a qualified, but as a general acceptance, *according to the usage and custom of merchants*, with an additional engagement or direction for payment at the specified house, it will stand, then, in my opinion, as if a mere general acceptance were stated in the declaration; and in an action against the acceptor upon a mere general acceptance, although he may be ignorant in whose hands the bill is, and, consequently, know not to whom to go to pay it, yet the constant course of proceeding in such action has always been not to allege a presentment to the acceptor for payment, nor to prove it at the trial.

The history of the cases before that of *Callaghan v. Ayllett*, and the grounds upon which those cases, as well as the case of *Fenton v. Goundry*, were decided, appear to me decisive upon the two questions. The doubts, which have arisen upon the effect of these acceptances, appear not to have been entertained until after that point had been decided as a point free from doubt, both by judges and jury, for a period of nearly twenty-six years; those decisions taking as their basis the generally received and known usage among merchants, as to the effect of these acceptances, both previous, and up to, and during all that period of time. The case of *Smith v. De la Fontaine*, according to the note which I have of the case, was decided in the year 1785, first upon a trial by jury before Lord Mansfield (to whom, Lord Ellenborough says, in *Fenton v. Goundry*, the law of bills of exchange was as familiar as to any judge who ever sat on the bench), and, afterwards, by the whole Court of King's Bench, who were so clearly of opinion, that the making of the acceptance to be payable at Messrs. Bid-[445]-dolph, Cox and Co.'s, was for the convenience of the

acceptor, and that there was no colour for the objection, that it was a special acceptance, and that the plaintiff ought to have proved an application at that house for payment in that action, which was an action against the acceptor; that the Court refused even a rule *nisi* to set aside the verdict for the plaintiff and enter a nonsuit. This continued to be acted upon as the law from thence till the year 1808, when the same point was determined by Lord Ellenborough in *Lyon v. Sundius*, which was a similar action on a like acceptance; Lord Ellenborough considering the point as settled and without doubt, and that the additional words were nothing more than a mere memorandum, the acceptor being liable universally: and so this continued, with the exception of *Callaghan v. Aylett*, which I shall notice presently, till *Fenton v. Goundry*, in Easter term 1811, when, on a demurrer to a count like the present, the Court of King's Bench decided, that the acceptance was to be considered in law as a general acceptance, with a mere intimation for convenience of the place designed for payment. Lord Ellenborough proceeds to decide the case upon the generally received opinion of the commercial world, as a matter quite clear of doubt, and upon what he had always understood to be the practice and doctrine concerning bills of exchange, since he had been familiar with them. The other judges of the Court, with the exception of Mr. Justice Le Blanc, who was absent from indisposition, also coincided with Lord Ellenborough in deciding upon the generally received opinion and practice which had long before prevailed. When the usage and custom of merchants respecting bills of exchange has been inquired into and ascertained, such usage and custom becomes matter of law, to be taken notice of as such by the judges; which is the reason why, though such usage and custom used formerly to be alleged in pleading as a fact, such allegation has for a long time been wholly discontinued.

Two cases, besides that of *Callaghan v. Aylett*, had indeed intervened, but they were both of them against the drawer, and appear to me to be not material to the present questions. One of them, *Parker v. Gordon* (7 East, 385), is in the King's Bench; the other, *Ambrose v. Hopwood* (2 Taunt. 61), is in the Common Pleas. [446] The acceptances were similar to the present: the one was a determination, that, *in order to charge the drawer*, a presentment at the place out of the usual banking-house hours was insufficient: and the other, that a presentment to the bankers, without saying at that place, was insufficient for that purpose; and, in neither case, did there appear to have been any presentment to the acceptor himself, personally, at all.

The case above referred to, of *Callaghan v. Aylett* (2 Campb. 519; S. C. 3 Taunt. 397), was a case which was decided by the Court of Common Pleas, (Mansfield, C. J. being absent), in Hilary term 1811, so lately as the very term next before the decision in *Fenton v. Goundry*; but the cause had been tried before him, and a verdict had been given for the plaintiff, subject to the opinion of the Court as to the necessity of proving that the bill had been presented at the bankers for payment. As far as can be collected from both the reports of that case, the Court do not, on that occasion, appear to have had the case of *Smith v. De la Fontaine* laid before them; or to have considered, whether there was any known, established, declared, or generally received understanding or usage upon the subject among merchants. But they appear to have decided in that case entirely upon the dry construction and effect of the acceptance, as a mere engagement to pay the bill at a particular house named by the acceptor; treating it as a mere naked question of construction, arising from the words, independently of any inquiry as to the usage and custom among merchants respecting it. The case of *Gummon v. Schmoll* has, indeed, been since decided by the Court of Common Pleas, (Mansfield, C. J. being then also absent), in which that Court appear to have decided again, upon the mere construction of the words alone, that the acceptance contained a condition precedent.

In *now* considering the question, whether the acceptance in the present case be a general or a qualified acceptance, it appears to me, that, upon a question of this nature, it is an important inquiry and consideration, whether there was any, and what, generally received, declared, or known usage and custom among merchants, more especially, if any such had been ratified and confirmed in judicature by judges and jurors: and that alone appears to me to be in itself decisive of the [447] question, both upon the law and justice of the case. The parties thereto must, I think, be taken, in an instrument of a peculiarly commercial nature, both to have given and received this acceptance, (and consequently to have meant and understood it), accord-

ing to such generally received, known, and declared understanding, and usage, and custom. After the decision of *Smith v. De la Fontaine*, both by the jury and the Court, especially when confirmed afterwards by *Lyon v. Sandius*, in the year 1808, it must, I think, be deemed, that there had been, upon the subject, both before, and up to, and during that period, and until the determination of *Callaghan v. Aylett*, a generally received and known opinion, and usage, and custom among merchants, by which those acceptances were meant and taken as general acceptances, with a mere intimation of a place for payment; and not as qualified acceptances, which might be refused: an opinion, usage, and custom ratified and confirmed by those judicial determinations; and continually acted upon, both before and during that period, by the constant reception of all such acceptances, without any instance being brought forward of the refusal of any, as being a qualified acceptance. In a question, therefore, as to the effect of such an acceptance, (which is, really, only a question, what the parties meant and understood by the acceptance, which the one had given and the other had received,) it must, as it appears to me, be taken, that the one of them meant, and that the other understood him to mean, by the acceptance so given and received, nothing but what was the generally received understanding upon the subject, of persons most generally giving and receiving such mercantile instruments, namely, merchants; especially when that had been inquired into, ascertained, determined, declared, and confirmed by judicial decisions.

But even if this supposed generally received understanding, usage, and custom, is to be considered as unascertained and uncertain, and that the effect of this acceptance is, for its construction, to be taken from itself alone; still I cannot but think, that it is to be deemed only as a general acceptance to pay, with an additional engagement or direction for the payment at the specified house. In this view of the question, the legal principles and rules of construction, as well as the nature [448] of an acceptance in itself, appear to me to be most material to be attended to.

Let us consider the nature of an acceptance in itself. The bill is brought merely for acceptance, that is to say, for a declared assent, that the acceptor will pay it according to the usage and custom of merchants. A mere declared assent by the drawee to pay, or any thing amounting thereto, is, in law, an acceptance. By the first word, "accepted," which is the thing which the very bringing of the bill requires the drawee to do, and which the drawer has a right to expect that the drawee will do, if he has effects in hand, which his acceptance of the bill implies:—I say, by the very first word, "accepted," the drawee has declared his assent to pay the bill; and, as I think, to pay it in such manner as the drawer has required, unless that which is added so qualifies this assent, as to be inconsistent with an assent to pay it as required. If it be not thus inconsistent upon the face of it, the holder is not to suppose that it was meant to do away or alter the effect of what the acceptor had before written and signified; and, if the acceptor did so mean, he should have so expressed himself, or should have stated, that he would not accept the bill as required, (that is, to pay it according to the usage and custom of merchants,) but that, though he would not so accept it, he would engage to pay it at such a particular place, if the holder would take that engagement.

The words of the acceptance are those of the drawee only, and not of the drawer or of the holder, and are to be taken, although according to the intent, yet where that is not sufficiently ascertained, most strongly against the person using those words. The maxim of law, *verbo fortius accipiuntur contra proferentem*, and Lord Bacon's observations thereon, appear to me very applicable to this case, supposing this to be considered as a mere question of construction. He says that this rule "is author of much quiet and certainty, and that in two sorts: first, because it favoureth acts and conveyances executed, taking them still beneficially for the grantees and possessors; and, secondly, because it makes an end of many questions and doubts about the construction of words: for, if the labour were only to pick out the intention of the parties, every judge would [449] have a several sense; whereas this rule doth give them a sway to take the law *more certainly* one way (Reg. 3)." This rule, I think, requires the drawee, especially where it is to defeat in any degree the rightful expectations of the drawer, that the bill shall be unqualifiedly accepted as he has drawn it; and where the drawee has, in the first instance, declared his assent to pay it, if he meant to qualify or do it away, or alter it in the whole, or in part, or to

clog that which is yet absolute, with any condition not beneficial either to the drawer or to the bill-holder, this rule, in my opinion, requires the drawee, in such case, to use, in addition, such words as clearly and unequivocally express or show such qualification, alteration, or condition. If the acceptance in question be considered as qualified, it must be by construing it, as if the drawee had inserted, what he has omitted, the word "only;" and what, if he so meant, the rules of construction, I think, require that he should have stated. The words "payable at Sir John Perring and Co's, bankers, London," may mean either that the bill *may* be paid there, or an intimation that it *will* be paid there, (that is, if the holder bring it there); or it may be intended as an obligation binding also upon the holder, that it *shall* be paid there, and there only. But if the writer had meant the last, I think that, in order to bind the holder to consider that he did so mean, he should so have expressed himself.

For these reasons, I am of opinion, that the acceptance in question, so as aforesaid alleged in the declaration, is to be considered, not as a qualified, but as a general acceptance to pay, with an additional engagement or direction for the payment thereof at the specified house; and, consequently, that the holder was not bound to present it at that house for payment, and to aver, in the declaration, that the same was presented at that house for payment.

But supposing that this acceptance be to be considered as a qualified acceptance to pay the bill at the specified house, still the first question proposed to us involves a further question; for it would not, in my opinion, from thence follow, that the holder was bound to present it at that house for payment, and aver in the declaration that it was so presented; for I still [450] think, that the holder would not, even in that case, be by law bound so to present it, or so to aver in the declaration.

The acceptance, even taking it to be a qualified acceptance, is still, I think, an undertaking to pay the bill at a particular time and place, absolutely and at all events, and not subject to any *expressed* or implied condition, which must previously be performed by the holder. Upon a promise or undertaking, either to pay a bill of exchange or money, or to do any other particular act, whether at a particular time and place or not, the very non-feasance alone is a breach of the contract, and the promisee need do no more in support of his action for such breach than to prove the promise; the non-feasance being a negative, the *feasance*, or that which in law is an excuse for it, is matter purely of defence, and the *onus probandi* thereof lies upon the defendant. The person therefore, so promising or undertaking, in order to defend himself, must either establish, that he has done the thing according to his engagement, or he must excuse his non-performance. It is not sufficient for a defendant, in his excuse, to say, that the plaintiff was not present at the time and place to demand and receive the money; but he must, in order to defend himself, allege and prove, that he did all in his power towards the performance, and that his not doing more was owing to the refusal or default of the plaintiff. He must establish either a tender and refusal, or that he, the defendant, was ready at the time and place to pay, but that the plaintiff did not come, nor was present to receive. The circumstances excusing the non-performance, and throwing the fault on the plaintiff, are matters in defence. This appears, I think, by Lord Hobart's opinion in *Baker v. Spain* (Hob. 8), and by the resolution of the Court of Common Pleas, there cited, in *Bushby's case*, as to the payment of rent, which is payable on the land. So Littleton says (s. 340), "Also upon such case of feoffment in mortgage, a question hath been demanded, in what place the feoffor is bound to tender the money to the feoffee at the day appointed etc.!" And some have said upon the land so holden in mortgage, because the condition is depending upon the land. And they have said, that if the feoffor be upon the land there ready to pay the money to the feoffee at the day set, and the feoffee be not then there, then the feoffor is quit and [451] excused of the payment of the money; for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him, for he is bound to seek the feoffee if he be then in any other place within the realm of England." The difference of opinion, there, was upon this point; viz. whether the mortgage-money was to be paid at a particular place, viz. upon the land, or not; but, in either case, whether it was to be *there* paid or not, the feoffor, who was to pay the money, was bound to do all in his power towards his performance, before he could be excused for his non-performance. If no time be fixed for the performance, then indeed the obligor,

who is to pay the money at a particular place, is to do more (and this doctrine should be remembered when the case of *Sanderson v. Bowes* comes to be considered); he must, according to Co. Litt. (211. a.), "give the obligee notice, that, on such a day, at the place limited, he will pay the money, and then the obligee must attend there to receive it; for if the obligor then and there tender the money, he shall save the penalty of the bond for ever." Lord Coke then adds, "The same law it is, if a man make a feoffment in fee upon condition, if the feoffor, at any time during his life, pay to the feoffee £20 at such a place certain, that then, etc. In this case the feoffor must give notice to the feoffee when he will pay it; for without such notice as is aforesaid the tender will not be sufficient." In both these cases, therefore, in order to save the bond or feoffment, the obligor and feoffor must attend and be ready with the money at the place, though the obligee or feoffee be absent; for the tender of which he there speaks is a tender (or rather what he calls a tender), though the obligee or feoffee be absent; for he is speaking of a tender, which would not be an excuse without such notice; which is, therefore, a tender by the one in the absence of the other; and he immediately adds, "but in both these cases, if at any time the obligor or feoffor meet the obligee or feoffee at the place, he may tender the money." The forms of declaring, not only upon awards, but upon other instruments for the non-payment of money at a particular place, are confirmatory of this doctrine. In Rastell's Entries are three precedents; two in debt on bills obligatory for money to be paid at particular marts or fairs (ante, opinion of Richardson, J. pp. 427, 428), and the other for rent, payable at [452] a particular place on particular feasts (175). The declarations did not contain any allegation of presenting the bills for payment or any demand of the money at the marts, fairs, or place; but to one of those declarations, one upon some of the bills obligatory payable at different marts or fairs, the defendant pleaded that he was at the fairs ready to pay the plaintiff, if the plaintiff had been there, and would have delivered to him the bills aforesaid; and that neither the plaintiff, nor any for him, was then there to receive the same, with an allegation that he has been always since ready to pay, and a *profert* of the money into court. A bill of exchange, in an action against the acceptor, stands, I think, upon the same footing as a bill obligatory, or any other engagement for the payment of money, so far as regards the necessity of alleging in the declaration, or of proving at the trial, a presentment of the bill, or a demand of the money. In an action against the acceptor, where he accepts generally, such allegation is never made, nor such proof required or given; though such a presentment is, no doubt, usually made *in fact* in such cases, before the action is brought, yet the nature of the instrument itself (viz. a bill of exchange) has not rendered such an allegation or proof necessary, except where the action is brought to charge the *drawer* or indorser. The nature of the instrument, therefore, cannot, as it seems to me, make such allegation or proof more necessary where the acceptor adds a place for payment, than in other cases where the obligor or promiser adds a place for payment.

In either case, such allegation or proof is, I think, not requisite on the part of the plaintiff; but, if the defendant, or his bankers, or any one for him, had his money ready at the time and place, and would have paid it if the bill had been then and there presented for payment, it is matter of defence, and may be pleaded by him; which removes, I think, the hardship and mischief which, it is supposed, may result from not requiring an allegation and proof of presentment for payment at the specified place to be made and given by the plaintiff. Independently of the question of general or qualified acceptance, Lord Ellenborough and my brother Bayley, in *Fenton v. Goundry*, both of them acceded to and confirmed this reasoning, as will be seen [453] in 13 East (470 and 472). Their opinions, in that case, upon this point, appear to me to be material in showing, that the case of *Sanderson v. Bowes*, which was determined by the same judges very shortly afterwards, was determined on grounds not at all inconsistent with their opinions in their decision in *Fenton v. Goundry*. My brother Bayley, too, upon another occasion, at Nisi Prius, in Hilary term, 1809, in *Wild v. Rennards* (1 Camp. 425, note), held the same doctrine, that if a promissory note is made payable at a particular place, in an action *against the maker*, there is no necessity of proving that it was presented there for payment; and, in Michaelmas term 1810, in *Nicholls v. Bowes* (2 Camp. 498), Lord Ellen-

borough held the same. But it is said that the decision in *Sanderson v. Bowes* (11 East, 500), in Michaelmas term 1811, by the Court of King's Bench, and the decision of *Bowes v. Howe* (5 Taunt. 30), in Trinity term 1813, by the Court of Exchequer chamber, which is founded thereon, are inconsistent with this doctrine. The above precedents in *Rastell* were not known, or, at least, not brought forward in either of those two cases; and, if those two cases were not distinguishable from the present, but were so much in point as, at first, they may appear, it might be for consideration whether those cases were not still open to a revision, like the decisions which for a time prevailed in favour of actions upon legacies, and of actions against femes covert with separate maintenances. But, when those two cases come to be looked at and considered, they are, it appears to me, very distinguishable from the present, and also from *Fenton v. Goundry*, on this very point. In the present case, and in *Fenton v. Goundry*, the instrument declared on, a bill of exchange, was payable *at a certain time*. In *Sanderson v. Bowes*, and in *Bowes v. Howe*, the instrument declared on (a promissory note) was *not payable at a particular time*, but generally, entirely at the pleasure of the holder of the note, and so Lord Ellenborough observes (14 East, 501), where he distinguishes *Sanderson v. Bowes* from cases where money was to be paid, or something to be done *at a particular time*, as well as place. The cases of *Sanderson v. Bowes*, and *Bowes v. Howe*, were both cases of promissory notes of the Workington bank, payable on [454] *demand* to bearer at the workington bank. The notes being made payable to bearer, not at any specific time, but merely *on his, the bearer's demand*, the promisers could not comply with the above mentioned rule laid down in Co. Litt. (211. a.), of giving notice when they would pay the money at their bank, as they could not know who the bearer was *till* the money was *demand*ed. Nor was it to be paid but *upon demand*, which might, therefore, be deemed a condition precedent, quite consistently with my reasoning, and also, with Lord Ellenborough's and my brother Bayley's, as applicable to cases where the money was to be paid at a time and place certain; and, if the demand thus became in those two cases a condition precedent, the place as well as time of the demand must necessarily form a part of that condition, and may require to be averred, as it was in those two cases decided.

For these reasons, therefore, I think, even if the acceptance, as stated in the first count, be to be considered as a qualified acceptance, that the holder was not, in the present case, bound to present it at the house for payment, or aver in the declaration that the same was so presented.

In answer to the third question proposed by your Lordships, I think, that if A. draw a bill upon B. in favour of C. for £100, and C. without the previous authority or subsequent assent of A. take an acceptance for the bill for the whole of the £100, but an acceptance qualified as to the time or place of payment, C. could not maintain an action *upon the bill* against A.

In the case put by this question, the drawer has a right, I think, or at least may be considered as having reason to expect, either that his bill, if accepted, will be accepted to be paid in such manner as he has required, that is to say, according to the tenor and effect of the bill, and the usage and custom of merchants; or, that due notice will be given by the person taking the bill from him, according to such usage and custom, in case the bill be not so accepted. He *may* be injured, if the bill be not so accepted as he has required (*primâ facie*, at least, it is, I think, to be so considered); and, in default of such acceptance, he has a right, I think, to due notice of such default, in order that he may take such steps as he may think proper to [455] avert such possible injury. The holder may either receive or refuse a qualified acceptance. If he refuse, he must give due notice; and, if the bill be a foreign one, he must also protest it, in order to charge the drawer. If he do not refuse, but do receive the qualified acceptance, in that case, by assenting to the qualifications imposed by the acceptor in varying the time and place, he becomes party to a fresh and different contract with the acceptor, to which the drawer was neither party nor privy: the contract is an entirely new one, assuming a new shape; the bill is converted into and becomes a different or new bill, having a different tenor and effect from the old one, viz. such as the qualifications of the acceptance, either as to time or place, have ingrafted into it. C. by taking a different security, viz. this qualified acceptance, instead of having the one which the drawer had a right, or had reason

to expect, and which C. was to require should be given him, has, I think, no right to maintain an action against the drawer upon this bill, the nature and effect of which has been altered by his having taken this qualified acceptance of it. In *Boehm v. Garcias* (1 Campb. 425, note), (sittings after Michaelmas term 1807,) it was held by Lord Ellenborough, that the drawee has no right to vary the acceptance from the terms of the bill, unless they be unequivocally and unambiguously the same: and, therefore, where an action was brought against the drawer on a bill drawn at Lisbon, payable in *effectivè*, and not in *Fals reals*, where the drawees offered to accept it, payable in *Fals denaros*, (another sort of currency, which was refused,) Lord Ellenborough held, that the plaintiff had a right to refuse this acceptance, though the defendant proposed to show, that *Fals denaros* were sufficient to answer what was meant by *effective*: and wherever the holder may refuse the acceptance by reason of its being qualified, (as he may, I think, wherever the same is qualified, either as to time or place,) he cannot, I think, if he take the acceptance, sue the drawer upon the bill.

In answer to the fourth question proposed by your Lordships, I think, that if A. was debtor to C. in £100 previous to his so drawing upon B. in favour of C. to the amount of £100, C. could, upon A.'s refusing his assent to an acceptance, qualified as mentioned in the third question, maintain an action upon [456] the original debt against A. without delivering to A. the bill so accepted: in case, at the time the bill was drawn, B. was also indebted to A. in a like sum of £100.

The bill itself, having been dishonoured, has become no satisfaction for the original debt: the right of action upon the original debt, therefore, remains; and though, if A. pay or tender to C. the original debt, with the expenses, etc. incurred upon the dishonoured bill, he will be entitled to have that bill delivered up again to him: yet, until A. has so done, the right to the bill, as it appears to me, which was given by him to C. as a security for, or in order to discharge that debt, remains in C. who may, I think, bring an action, either upon the original debt, or upon the bill; or may bring an action, including both those causes of action, in case they be of such a nature as to be capable of being joined together in one action. The original debt is not extinguished, but the right of action upon it remains, or is revived by reason of the dishonour of the bill; and C. I think, has a right to retain the bill, which was given to him as a security, or for the discharge of his debt, and to use it either as a ground of action in itself, or as a medium of proof for establishing his original debt: and the circumstance of B.'s being also indebted to A. in a like sum of £100 appears to me to make no difference as to C.'s rights of action; for A. only by doing what by law he is bound to do, (namely, by payment of his debt, etc. to C.) may entitle himself to the possession of the bill, and thereby avoid any injury, which he may, otherwise, sustain by the want of it in seeking his remedy against B. for the recovery of that debt.

PARK, J. With respect to the first question, as the bill of exchange is alleged to have been accepted according to the usage and custom of merchants, payable at a particular banker's in London, I am of opinion that the holder was bound to present it at that house for payment: and to aver in his declaration that the same was presented at that house for payment.

To come to that conclusion, it appears to me to be only necessary to consider who the parties to the contract are; and what contract the defendant on this record has entered into. The plaintiff, or the payee, it is true, originally took a bill drawn upon the defendant generally: but when the defendant had that bill presented to him for acceptance, he said by his [457] acceptance, I do not choose to enter into this general engagement, for my avocations may, at the time when the bill shall become due, call upon me to be in some distant part of the kingdom; and, therefore, both for your convenience and mine, I will specially accept it, payable at a particular banker's, or where my strong box or money is; and there you shall go for your money, and not follow and arrest me at a place where I have none: this is the defendant's contract. I admit that the holder might refuse to take such an acceptance; but, having taken it, can he enforce the contract against the contractor, without showing that the contractor has not complied with his own conditional acceptance? May not the acceptor justly say, if the holder should attempt to enforce it contrary to the acceptor's engagement, *non habet in foedera veni*? I think he may;

for, that the acceptor has a right to make a special acceptance, differing from that which the drawer had wished to impose upon him, as to time, place, or amount, is admitted by those who argue for the defendant in error. This has ever been considered as law from the time of Marius, who wrote in the sixteenth century on bills of exchange (Mar. p. 17, 1th ed.). The law upon these points, both as to the right of the drawee to make a special acceptance, and, as to the right of the holder to refuse it, is well stated, as your Lordships will find it, in *Petit v. Benson* (Comb. 452). If, then, the drawee may refuse to enter into any other than a special acceptance, when he has made it, and it is received by the holder, surely, it becomes as much the original contract of the acceptor as if he had written a promise to pay on certain conditions; or had promised to pay at a certain banker's, and no where else. The true sense of the case seems to be, and the principle is, that, whenever the place, at which the contractor is to perform it, forms a part of his express contract, and the duty is not merely collateral to it, it is necessary both to aver and prove a failure on that precise point on the part of the defendant. Thus, in 1 Rolle's Abridgment (Tit. Condition, p. 444, l. 7, and p. 445, l. 52), it is said, "If a place of payment is limited by the condition, the party is not bound to pay in any other place." Here, the duty is created by the instrument itself, with certain limits and qualifications. [458] No duty to be perfected by the acceptor arose anterior to the very instrument itself; and the acceptor can only be answerable to the extent of his engagement, by his qualified acceptance.

If we were to speak of the convenience of this or that practice, there can be no question that it would be most convenient that the presentment of the bill at the place where it is made payable should be deemed a condition precedent; for it would be very inconvenient that acceptors, such as the original defendant, should be made liable to answer every where, when it is notorious that they have made provision at a particular place, where alone they engage to pay. There is no antecedent duty as against the defendant, save that arising on the bill; and, therefore, the instrument or bill must be looked at for the purpose of seeing what the duty is.

This case has not been fitly compared to the case of bonds: for there the penalty creates the debt, and the party is liable upon it, but is to discharge himself from the penalty by bringing himself within the terms of the condition: that, therefore, must be matter of defence. But where a suit is in *assumpsit* upon a contract, the plaintiff must show that he has done every thing which lay upon him to do, in order to bring himself within the contract, and entitle him to sue upon it. Now here, by the terms of this acceptance, a promise is made by the acceptor to pay at Perring and Co.'s: the plaintiff, who sues, then must bring himself within those terms, by showing that he made a demand at the place where the defendant said he would pay; and he cannot be made liable beyond the extent of his contract. Where a defendant contracts generally to pay a sum of money, he is liable to a creditor every where; but, where a person binds himself to pay at a particular place, he is not liable at any other place, till default be made at the particular place. For, otherwise, suppose a bill drawn upon one just before going the circuit (and this case is put by one of the most learned judges who ever adorned the Court of Common Pleas, I mean Mr. Justice Chambre (In *Gummon v. Schmoll*, 5 Taunt. 350)), which will fall due during the absence of such drawee; such a person living in chambers leaves no servant on his departure, excepting, perhaps, a laundress; what can be done in such a case, except to deposit the money with [459] a banker, and make the bill payable at that banker's? Otherwise such person would be liable to be arrested at any place in the course of his journey, where he might have no money, which, indeed, he would be the less likely to have after making provision at his banker's. I agree with that learned judge, that it is a great convenience to the public to maintain these special acceptances.

But, it is said at the bar, if you can show that you had your money at your banker's, you would have a complete defence. Is it, then, no vexation to be causelessly arrested? Is a lawsuit no vexation? Is it nothing to be £20 or £30 out of pocket, though you gain your cause? And this evil is only met by the trifling inconvenience of an obligation on the plaintiff to call a witness to prove a presentment. Indeed, if we speak of inconvenience, it is all the other way; for, instead of the trifling inconvenience arising to a holder from the necessity of calling one witness, to prove a presentment, every banker must, if the other view of the case be adopted, keep a number of clerks to go daily to all parts of the town, for the purpose of receiv-

ing payment of bills. So greatly was this inconvenience felt, that the Bank of England will not discount any bill that is not payable at a banker's.

But we have been told at the bar that the weight of authority is against the plaintiff in error. Let us examine the cases, and see whether the decisions in the Court of King's Bench, and one or two at *nisi prius*, before Lord Chief Justice Gibbs, carry with them the same weight of reason as those decided by the Court of Common Pleas sitting in bank; or, whether the Court of King's Bench has, in this respect, been consistent with itself.

The first case is *Smith v. De la Fontaine*, of which there is a short note in my brother Bayley's Treatise on Bills of Exchange (p. 129, note b. 3d ed.); however, a more full account is given of it in a note to Mr. Holt's *nisi prius* cases (p. 366), which is taken from a manuscript of my brother Holroyd; and there seems no doubt, that in 1785 Lord Mansfield at *nisi prius*, and the Court of King's Bench afterwards, decided, that words similar to those here used were not words restricting or qualifying the acceptor's [460] liability, but rendering him liable generally; and that it was not necessary to prove a demand at the particular place in an action against the acceptor. But how has this been followed up? *Lyon v. Sundius* (1 Camp. 422) is a mere *nisi prius* opinion, before the decisions of either *Callaghan v. Aylett*, or *Fenton v. Goundry*. Then came the case of *Fenton v. Goundry* (13 East), in which the Court undoubtedly held that doctrine which is now under discussion; and which treated an acceptance like the present not as a conditional acceptance, but as a mere expansion of the promise to pay. But how is that consistent with the doctrine laid down in *Parker v. Gordon* (7 East, 385), by two of the Judges (Lord Ellenborough, C. J. and Grose, J.), who were parties to the decision of *Fenton v. Goundry*? *Parker v. Gordon* was an action against the drawer; and I, therefore, do not quote the case as an authority, except to show that such words as these were considered as a special acceptance. "If a party (says Lord Ellenborough in the last mentioned case) choose to take an acceptance at an appointed place, it is to be presumed that he will inform himself of the proper time for receiving payment at such place, and he must apply accordingly." And, in *Elford v. Teed* (1 M. and S. 28), his Lordship says that the case of *Parker v. Gordon* was conformable with the doctrine which he had usually held. Lawrence, J. says, in *Parker v. Gordon*, "The party might have refused to take the *special acceptance*; but if he choose to take the acceptance in that manner, payable at the banker's, does he not agree to take it payable at the usual banking hours?" And Le Blanc, J. says, in the same case, "If a party will take an acceptance, payable at a banker's, he must present it at a proper time, according to the known method of conducting the banking business; otherwise the greatest inconveniences to trade would ensue."

Two very modern cases have been quoted to your Lordships to show that Lord Chief Justice Gibbs concurred with the decision of the Court of King's Bench in *Fenton v. Goundry*; namely, the cases of *Head v. Sewell*, and *Richards v. Lord Milsington* (Holt, N. P. C. 363). I will speak of *Head v. Sewell* first. It is sufficient to observe, that it was only a *nisi prius* case; next, it is so singular a case, that either the note is incorrect, or the [461] opinion of the Lord Chief Justice is not delivered with that very learned person's usual accuracy and precision. For, in the year 1816, he begins his observations by saying, that after thirty-five years experience he had never known the objection to prevail, and therefore could not admit the necessity of the proof. What! had he not known of the case of *Callaghan v. Aylett*, decided in 1811, five years before, in the Common Pleas, by Mr. Justice Heath, Mr. Justice Lawrence, and Mr. Justice Chambre, as eminent persons as ever sat on that bench; and which case, in consequence of its having been much opposed the following term in *Fenton v. Goundry*, made them the common talk in Westminster Hall? Had he not heard of the case of *Gannon v. Schmoll*, then quoted to him, and decided two years before, in the very same Court by his then colleagues, Mr. Justice Heath, Mr. Justice Chambre, and the very learned person who afterwards succeeded him in the Chief Justiceship, in both of which cases the objection prevailed? And then again, though his Lordship is stated to have said, that he never knew the objection prevail, he concludes by saying he knows there are conflicting cases. The other case of *Richards v. Lord Milsington* he decides that he may preserve his own consistency in a former case of *Price v. Mitchell* (4 Camp. 200); but, upon looking at that case, it

will be found a mere memorandum at the foot of a note, which never was held to be a condition, but a mere *memorandum* or direction. I, therefore, do not consider these cases as adding much weight to the authority of the King's Bench.

But I find the King's Bench, in *Sanderson v. Bowes* (11 East, 500), which was confirmed by an unanimous judgment in the Exchequer chamber (*Bowes v. Howe*, 5 Taunt. 30), deciding diametrically opposite to the case of *Fenton v. Goundry*; and every word of the judgment of that great and eminent judge Lord Ellenborough is, in my mind, conclusive in favour of the plaintiff in error. Agreeing, as I do, with the learned editor of the Treatise on Bills of Exchange (Bayley on Bills, 185, note 1, 3d ed.), that it is difficult to reconcile in principle with the case of *Sanderson v. Bowes*, that of *Fenton v. Goundry*; and *Sanderson v. Bowes*, being the last in decision, ratified by the decision of the twelve Judges of England, and most agreeable to good sense, reason, and convenience, I think that it ought to prevail. The only [462] difference between *Sanderson v. Bowes*, and this case is, that *Sanderson v. Bowes* was an action against the maker of a promissory note; this case is against the acceptor of a bill of exchange; but I need not inform your Lordships, that the Courts in Westminster Hall have long thought the analogy between notes and bills so strong, that the rules established as to one ought also to prevail as to the other; *Heglyu v. Adamson* (2 Burr. 669), *Brown v. Harraden* (1 T. R. 118), fully prove this position. Then let us read the case of *Sanderson v. Bowes*; and if "bill" be read for "note," is not every word of Lord Ellenborough's luminous reasoning decisive of the present question! In that case the Court of King's Bench held presentment at the banking-house necessary. *Bowes v. Howe* (5 Taunt. 30), contains the affirmation of this proposition, though there was a reversal upon another point in that particular cause. And, in conformity to that opinion, Lord Ellenborough, in a subsequent case of *Roche v. Campbell* (3 Camp. 247), held, that it was a fatal variance in a declaration not to state that the note was payable at a particular place where the note was so payable. And his Lordship's language is peculiarly emphatical and applicable to this case: for he says, "This declaration represents the promissory note as containing an absolute and unqualified promise to pay the money. But, by the instrument produced, the maker only promises to pay upon the specific condition that the payment is demanded at a particular place. We have lately held (alluding to *Sanderson v. Bowes*) that where the place of the payment is mentioned in the body of the note it forms a material part of the instrument." So, here, the acceptor only undertakes to pay upon the specific condition that the payment is demanded at a particular place; this, and no other, is the contract of the acceptor.

Having thus shown the inconsistency of these decisions, and that *Sanderson v. Bowes* has not only had the judgment of the King's Bench in favour of that opinion, which I presume to deliver, but the confirmation, as to this point, of the whole Exchequer Chamber, can I hesitate in saying, that the strong current of authority is in favour of the plaintiff in error, when I add, the authority of Judges Heath, Lawrence, and Chambre, [463] in *Callaghan v. Aglett*, declaring that, doubtless, there may be a qualified acceptance of a bill which a holder is not bound to receive, but, that if he acquiesce in it, he must conform to the terms of the acceptance; and the further authority of Judges Heath, Chambre, and Dallas, in *Gawmon v. Schmoll*. Mr. Justice Heath (in *Gawmon v. Schmoll*, 5 Taunt. 353), treats it as a condition precedent, which must be shown to be performed. The reasoning of Mr. Justice Chambre does not seem to have been sufficiently adverted to; and nobody will deny his ability as a lawyer, and his great skill as a pleader. That learned Judge says, "I think the case is clear, upon rules of plain common sense and understanding, without going into all the cases. A man is not bound to receive a limited and qualified acceptance; he may refuse it, and resort to the drawer; but, if he do receive it, he must conform to the terms of it." "What is the meaning of these words, *accepted, payable at*? They have a meaning; they impose a condition; and the person receiving such an acceptance must comply with the condition, and in pleading must show his compliance. It would greatly circumscribe the negotiation of bills of exchange if this were not so; for they would, instead of being of general accommodation, be restrained in their use to such persons in trade as have a fixed place of business. I have already endeavoured to show your Lordships that the inconvenience to holders of bills and to bankers would become ruinous by the number of clerks which they

must employ, if such an acceptance is to be held to make the acceptor universally liable.

On these authorities, and upon the principles of common sense and understanding, I am of opinion, on the first question, that the holder was bound to present this bill at Sir John Perring's house for payment, and to aver that it was so presented.

As to the second question, viz. whether such an acceptance is to be considered in law as a qualified acceptance, I answer, that the whole of my reasoning, with which I have troubled your Lordships, is founded upon the affirmative of that proposition. All the text writers upon bills of exchange are clear on this point. I take it, that any acceptance varying from [464] the absolute tenor of that which the drawer expected by the language which he used in drawing the bill, either in the sum, the time, the place, or the mode of payment, is a conditional acceptance, which the holder is not bound to receive; but, if he do, the acceptor is liable for no more than he has undertaken. This doctrine of qualified acceptance, as to *part* of the money, is spoken of in Marius (pp. 17, 21), and in Molloy (b. 2, ch. 10, s. 21). So, in the latter book, a partial acceptance as to time is mentioned (Id. s. 28). This is confirmed in Beawes's *Lex Mercatoria* (p. 481, 4th ed. fol.), and by Mr. Justice Bayley (Bayley on Bills, pp. 85, 86, 3d ed.). It was treated as a qualified acceptance in *Sanderson v. Bowes*; and by Mr. Justice Lawrence, in *Parker v. Gordon*; and again in *Callaghan v. Aylett*, and *Gannon v. Schmoll*, in the Common Pleas: I therefore feel no difficulty in stating to your Lordships, that I conceive this to be a conditional acceptance.

The third question, in my view of the case, is not of difficult solution. Marius supposes (p. 17), that if the holder take from the acceptor an acceptance, even for a *part* only of the money drawn for, he may do so, provided he protests and gives notice to the drawer, and the bill is not thereby void; nor, according to what he says in page 21, does it prevent the holder from having recourse against the drawer. This is stated in the case of *so material* a change as a defalcation of part of the sum drawn for. But to the case put by your Lordships, I answer, that, if the qualification, either as to time or place, works neither injury nor inconvenience to the drawer, the holder is not prevented (in case of non-payment) from his remedy against the drawer, because he has taken such qualified acceptance. In the case out of which this question arises it neither produces the one nor the other: but it is a custom productive of great convenience to every one concerned in trade, and without which qualification bills of exchange are not discountable.

As to the fourth question, I am of opinion, that C. could not maintain his action for the original debt against A. the drawer, without delivering up to him the bill so accepted. Because, having once accepted such bill in lieu of and in satisfaction of his debt, he cannot recover for the original debt without relin-[465]-quishing the supposed security: which, being an acceptance by B. (whom the question supposes to be indebted to the drawer,) will amount, at all events, to an acknowledgment of the debt. For, although it is not always true that the drawee is a debtor of the drawer, yet perhaps, when the drawee accepts, it is *prima facie* evidence of a debt. The case of *Kearslake v. Morgan* (5 T. R. 513), where it was held, that to an action for goods sold and delivered, it was a good plea to say that the defendant had indorsed to the plaintiff a promissory note, payable to him, the defendant, "for and on account of" the said debt, is not inapplicable to this question, to show that C. could not maintain an action for his original debt while he held in his hands a bill given to him by the defendant to that amount. I, therefore, answer to the fourth question, in the negative.

BAYLEY, J. In answer to the first question, I submit that the effect of such an acceptance is this, that to entitle the holder to sue the drawer or indorser, it casts an obligation upon him to present the bill at Sir John Perring and Co.'s for payment, and to aver in his declaration, that the same was so presented; but that, as against the acceptor himself, the holder is not bound so to present it; that he is under no obligation to aver any such presentment in his declaration; and that the only consequence of his neglect to present is this, that the acceptor may set up any loss he has sustained thereby as matter of defence. This question is raised upon a demurrer to the plaintiff's declaration. The point, therefore, is not whether a neglect to present may not, even as against an acceptor, in some cases, constitute a defence, but whether the presentment is or is not an essential part of the plaintiff's title. A presentment is a demand at the place of payment, and to determine this point, the rules which the

law has laid down as to cases in which a demand is or is not necessary, must be considered. One of these rules I take to be this, that where a man engages to pay upon demand what is to be considered his own debt, he is liable to be sued upon that engagement, without any previous demand; and that a tender or readiness to pay must come by way of defence from the defendant; but that if he engage to pay upon demand what was not his debt, what he is [466] under no obligation to pay, what but for such engagement he would never be liable to pay to any one, a demand is essential, and part of the plaintiff's title. If a man make a note payable on demand, it is settled by law that a special demand need not be stated in the declaration, nor proved upon the trial. And what is the reason? Because the note is considered as given for what is to be considered the party's own debt. In common actions of *assumpsit* the promise is always stated to be to pay when thereto afterwards requested; yet a special request is never stated or proved; and the distinction in this respect is correctly taken in *Birks v. Trippet* (1 Saund. 33, a). That case was *assumpsit* on a promise to pay £10 upon request, if the defendant did not perform an award between him and the plaintiff: the defendant pleaded a bad plea, to which there was a demurrer: and then Saunders, for the defendant, objected, that the plaintiff had not laid any request of the penalty of £10. "For the declaration is, that the defendant promised to pay upon request, if he did not perform the award; and the request is material, for he took a difference between a mere duty and a collateral sum. For where a mere duty is promised to be paid upon request, as if, in consideration of all monies lent to the defendant, he promised to pay them again upon request, no actual request is necessary, but the bringing of the action is a sufficient request; but otherwise it is upon a promise to pay a collateral sum upon request: for there an actual request ought to be made before the action brought. Now here the promise of payment of £10 upon request is collateral, and is a penalty, and not a precedent duty, and therefore there ought to have been a request before the action brought;" and of that opinion was the whole Court, and judgment was given for the defendant. There are many other cases (see 1 Wms.'s Saund. 33, a, note 2) to the same effect, but the principle is so well established that it is unnecessary to cite them. Another rule upon the subject of demands I take to be this: that the fixing a special time and place for payment will not make an actual demand at that time and place necessary, as part of the plaintiff's title in a case, in which, otherwise, the demand would not be necessary; but that in that case also a tender or readiness to pay at the time and place is matter of defence, and of defence [463] * only. An award directs money to be paid at a given time and place. In an action on such award, does the declaration allege any demand at that time or place? certainly not. Upon an application *inde* for an attachment, is not the attachment constantly granted, though personal demand was not made at the time or place; and though attendance at the time or place is not stated? In *assumpsit* on the award the declaration would be, that the defendant promised to perform the award, and that the award directed payment at a given time and place: in substance, therefore, (incorporating the promise and the award together,) it is a promise to pay what is properly a debt of the defendant's at a given time and place; and yet the declaration never states either attendance by the plaintiff at the place, or a demand by the plaintiff at the place: the utmost which it states is, that the defendant did not pay at the time or place, or at any other time or place. To debt on bond, the defendant, after oyer of the condition of the bond, which was the performance of an award, pleaded no award made. The plaintiff replied an award made directing the defendant to pay the plaintiff £66 at his house at Seven Oaks, on the 22d October, between the hours of ten and twelve; but that the defendant did not pay the £66, which he ought to have paid on that day, according to the form and effect of the award (Lutw. 558). There are three precedents to this effect in Mr. Caldwell's book upon Awards (pp. 318, 322, 323), the first in *assumpsit*, the other two in debt; and there are many similar precedents in other books. The first stated, that an action had been brought to recover a balance of account; that the cause was referred, that each party undertook to the other to perform the award; and that the award was, that the defendants should pay £ , being the balance of account due from the defendants, at the office of L. and M., situated in, etc. between ten and twelve o'clock, etc. Whereof defendants had notice; yet they did not pay the plaintiffs the said sum, or any part thereof, on, etc. at the said office of L. and M., or elsewhere, or at

* Pages 167 to 182 are wrongly numbered in H. Bligh.

any other time whatever: although defendants afterwards, viz. on, etc. at, etc. were required by plaintiffs so to pay the same. The second stated, that differences had arisen, and were referred; that the arbitrator [464] awarded; that on a balance of all accounts between the parties, there was due and owing from defendant to plaintiff £61 10s. which he directed to be paid on the 10th of June, between eleven and one, at the house of one G. H. plaintiff's attorney, whereof defendant had notice; yet defendant did not pay the same, or any part thereof, at the time and place appointed for the payment thereof as aforesaid; nor hath he since paid the same, but hath wholly failed, and made default, whereby an action hath accrued, etc.—Now, upon what principle do these declarations omit to state attendance at the place, or demand at the place? Clearly upon this, that the money awarded to be paid became a debt from the defendant; that he was under a general obligation to pay, and not confined to time or place; and that, therefore, attendance at time and place was not part of the plaintiff's title: but readiness to pay at time and place was matter only of defence. Mr. Caldwell, (p. 194), lays it down, that where the money is to be paid at a certain time and place, the plaintiff must aver that he attended there at the time appointed, and remained until the period within which payment was to be made: but this position is evidently founded on a mistaken notion of the case of *Phillips v. Knightly* (Fitzg. 53. 1 Barnard. 84): there, according to Fitzgibbon, the plaintiff was, upon receiving the money, to give the defendant a covenant of indemnity; there were, therefore, to be two concurrent acts: viz. the payment of the money, and giving of the covenant; and the plaintiff could not sue for money without showing a readiness on his part to give the covenant, which he had not done. This case, therefore, is not at variance with the established precedents, and I have only noticed it, that a mistake in a useful book may be corrected. Another class of cases which I will mention, are cases of rents. Rent is reserved in some cases generally, and then the proper place for the payment, the place appointed by law, is the land out of which it issues. In some cases it is expressly made payable at some other place: and yet, in either case, is there a precedent either in debt on the *reddendum*, or in covenant, of an averment that the plaintiff was at the time and place to demand it? The declaration in such cases is always general, that on such a day so much of the said rent became due and in [465] arrear, and that defendant, although often requested, had not paid. So, in covenant upon a mortgage deed to pay the mortgage-money on a given day, in Lincoln's-Inn Hall, or in any other place: or in debt upon a single bill to pay money for a past consideration, at a given place, the declaration never alleges attendance or demand by the plaintiff, but merely alleges non-payment by the defendant. Now, what can be the principle of all these cases? What but this, that the money to be paid is a debt from the defendant; that it is due generally and universally; that it will continue due, though there be a neglect on the part of the creditor to attend at the time and place to receive: that it is matter of defence on the part of the defendant to show that he was in attendance to pay, but that the plaintiff was not in readiness to receive; and that defence will, generally speaking, be in bar of damages only, not in bar of the debt, and must be accompanied with a bringing of the debt into court. The instances in which this is made matter of defence will throw light upon the point. Most of those instances occur in demands for rent; but no distinction in principle can be drawn between cases of rent, and cases of other debts. I will mention some of these cases.—Lease for years, rendering £10 (22 H. 6. 57. Pl. 7) yearly at Easter, and for performing of covenants, each bound in £20. Non-payment of rent at Easter, and therefore the £20 claimed. Plea, ready to pay at the day on the land, and no one attended to receive; and the plea was held good. In *Kidwelly v. Brand* (Plowd. 69. Dyer, 68. a.), rent of land at Lomer was reserved, payable at Hlde; and the question was, whether the landlord could re-enter for non-payment of rent without demand: it was adjudged (though there are cases since to the contrary) that he might: the reason given is, that the rent being made payable at a place off the land, it lost its character of rent, and became like a sum in gross, and then it was the tenant's duty to offer it, not the landlord's to demand; "Lessee ought to offer it for his own indemnity, as the obligor ought upon an obligation, or as the grantor of an annuity ought to offer the annuity at the day, to excuse himself of damages." *Buskin v. Edwards* (Cro. El. 415. 535) corrects that case, by showing, that a [466] payment due from a tenant still remained a rent, though made payable at the Royal Exchange in London. The propriety of what is said in Plowden, in case it had been a sum in gross, is not questioned. The inference, then,

to be fairly drawn from the case in *Plowden*, corrected as it is by the case in *Croke Elizabeth*, is this, that if a sum in gross be made payable at a certain time and place, and the sum is properly a debt from the person who is to pay it, it is his duty to attend at the time and place, and offer it; but it is not the duty of the person who is to receive it to demand it; and yet the offer is essential to protect him, not against payment of the sum itself, (which, as being due, ought to be paid) but against damages.

In *Brooke's Abridgment* (*Dette*, pl. 216) is this position:—"In debt for rent, tender on the land and refusal of plaintiff is no plea, for he shall answer to the *debet*; but the contrary is avowry; for there is to be a return, and there ought not to have been distress if tender was made." Now what is the meaning of this passage? evidently this, that in debt it is no plea in bar of the action; it is a bar of damages only, not of the debt; and, therefore, he must answer to the *debet* by bringing the money into the court upon the tender, which in the case of a plea in bar to an avowry he need not do. *Brownlow v. Herley* (1 Lord Raym. 82) is an authority to show that, upon a plea of tender on the land at the day in an action of debt, the rent must be brought into court; and *Horne v. Lewin* (Id. 639, Salk. 583) to show, that upon a plea in bar to an avowry it need not be brought into court. In *Osburn v. Beversham* (1 Vent. 322, 3 Keb. 800, 2 Lev. 209), in debt for rent, the plea was readiness at time and place, and ever since, and prefest of the money. To this plea there was a demurrer, grounded on two objections. 1st, *Non obtulit*, for when time and place are certain, *semper paratus* without an *obtulit* is no plea. 2d, It is pleaded in bar generally; it should have been in bar of damages only; and the Court thought both objections good. Levinz makes a query on the first ground, because the rent is demandable, (*i.e.* Plaintiff should have demanded it,) "otherwise," says he, "of a sum in gross, which is payable without demand." In *Crouch v. Fastolfe* (S. T. Raym. 118) cited yesterday, by my brother Richardson, to debt [467] for rent, there was a plea of attendance at the day and place; that the defendant was ready to pay; and that no one came to receive. To this plea there was a demurrer, because tender was not alleged; but it was resolved to be well enough, and adjudged for the defendant. A precedent of such a plea is in *Thompson's Entries* (Lib. Placit. 150); however, in *Horne v. Lewin* (Lord Raym. 641) a *paratus* without an *obtulit* was held insufficient. It is immaterial to the point which I am considering, whether there ought to be a tender or not, and quite sufficient for my view of the subject, if with a tender it would be a bar of damages. Now what are the legal conclusions which I draw, and the legal positions which I consider as resulting from the authorities with which I have troubled your Lordships? They are these, that, if a man, in respect of any debt which he owes, engage to pay it upon demand, or engage to pay at a given time and place, it is not a necessary part of the plaintiff's title to make such demand, or attend at such time and place; that he is not bound in his declaration to state any such demand or attendance; that a neglect to demand or attend will not bar his right to the debt, and enable the defendant to keep it; but that the defendant may show readiness on his part to exonerate himself from any damages.

I now come to apply these principles to bills of exchange. The acceptor is, by the law and custom of merchants, considered as the principal debtor; the drawer and indorser as sureties only, liable on his default, and not otherwise. His engagement is general, that he will pay; that of the drawer and indorsers is conditional, namely, that if due diligence be used, they will pay, if the acceptor does not. The engagement of the acceptor is, either that he has effects in hand, or that he is secure of having them by the time the bill becomes due. In the language of the Lord Chief Justice Eyre, "The theory of a bill of exchange is, that the bill is an assignment to the payee of a debt due from the acceptor to the drawer, and the acceptance imports that the acceptor is a debtor to the drawer, or at least has effects of the drawer's in his hands." The acceptor, therefore, has, or ought to have, in his hands, or under his control, the fund by which payment ought to be [468] made; and it is his duty so to apply it. The drawer or indorsers have no control over the fund, and consequently no duty with respect to it. This difference of situation and character between the drawer and indorsers and acceptors, has produced a settled distinction in the manner of suing them. The action against drawer and indorser invariably shows that due diligence has been used; the action against the acceptor invariably omits it. In an action against the drawer and indorsers the declaration invariably avers presentment of the

bill, its dishonour, and notice thereof to the defendant. In an action against the acceptor no such averments are made. Every bill is to be properly presented for payment; and in an action thereon against the drawer or indorser, a presentment according to the usage and custom of merchant must be averred and proved. In an action thereon against the acceptor, presentment (generally speaking) need not be averred or proved. This is clear, settled, undisputed law. Not that in practice such presentment is likely to be omitted: the risk of losing the responsibility of the drawer and indorsers generally secures it: but if there were to be an omission, that is no reason why the acceptor, who has, or ought to have, funds to discharge it, should keep those funds to himself, or should refuse so to apply them.

If a bill be addressed to A. in Bedford-square, and he accept it generally, in an action against the drawer or indorser presentment must be alleged and proved: in an action against A. presentment need not be alleged or proved. If A. have changed his residence, and accepted it payable at his new abode, does this make any difference?—presentment need not be averred in the one case—need it be averred in the other? If the necessity exist, there must be some reason for it. What is that reason? Though I am putting the case where the bill is still payable at the party's own house, and this is the case where the bill is made payable at a banker's, does this make any difference: does it vary the character or situation of the acceptor, so as to put him in the situation of a surety only instead of a principal, and if due diligence be not used, exonerate him from all liability, and enable him to keep the money to himself? The form of the acceptance in this case is material. The declaration states it thus: "Which bill of ex-[469] change, he the said Joshua accepted, according to the said usage and custom of merchants, payable at Sir John Perring and Co.'s, bankers, London: that is to say, at the house of certain persons using in trade and commerce the names, style, and firm of Sir John Perring and Co., bankers, London." By whom the bill is to be paid at Sir John Perring and Co.'s, whether by the defendant, or by Sir John Perring and Co., the acceptance does not state: whether Sir John Perring and Co. were bankers for the defendant is not stated. In the first place, it is not in a form to require Sir John Perring and Co. to pledge their credit for the payment of the bill: it is at most only an authority to them to pay; and, unless Sir John Perring and Co. choose to make themselves responsible, they can never be sued for the money. Why it is to be paid there; whether, because Sir John Perring and Co. were the defendant's bankers, or because he was an inmate or member of that house, is not stated. I will take it, however, for granted, for the sake of argument, that it is made payable there, because Sir John Perring and Co. were the defendant's bankers. Sir John Perring and Co. then, are to be agents for the defendants in this transaction. Will making the bill payable at an agent's change the situation of the acceptor, and make it incumbent on the holder, in an action against the acceptor, to aver and prove presentment at such agent's, when they would not be bound to aver or prove presentment at the acceptors? That such presentment will generally be made there can be no doubt, because, otherwise, the security of the drawer and indorsers will be lost: but though presentment is in fact made, there may be cases in which the party may fail in proving it. The party presenting the bill may remove out of the reach of the holder, or may die. Is it right, or is it law, that because the holder fails in that link of evidence he is to lose his debt? Before the necessity of such averment is established I wish to draw your Lordships attention to the consequence. If the effect of such an acceptance be to make this averment and proof essential, it follows, that the holder has a right to object to this burthen, and reject the acceptance. Right to reject is admitted in *Bishop v. Chitty*, *Callaghan v. Aylett*, and in *Gammon v. Schmoll* (per Chambre and Dallas, Js.). Will this [470] produce no confusion in the course of trade, when this mode of acceptance prevails to such an extent as it does? The bill is generally left for acceptance at the house of the drawee by a clerk, and called for on the next morning. Suppose a party leaves a bill drawn on the drawee generally, at the house of the drawee, and that on calling for it he finds it accepted, payable at a banker's: if this mode of acceptance cast an additional burthen on him, he may take away the bill, strike out the acceptance, treat it as dishonoured, protest it, if it be a foreign bill, and at once commence actions upon it against all the parties. It may be said that this has never yet been done, and that

the apprehension is chimerical. But why has it not been done? Because it has been, for a series of years, the rooted understanding in commerce, that an acceptance at a banker's throws no additional burthen upon the holder; but that it is merely an intimation that there the acceptor would be ready to pay it: once establish, that such an acceptance is conditional, and that the burthen of proving presentment at the banker's is thrown on the holder, and from that moment every such acceptance must be rejected. What will the drawer and indorser say! They will say, "If you take such an acceptance you do it at your peril; and we are discharged." The acceptor has no right by the acceptance which he takes to cast a burthen upon them. They are entitled to expect that if any acceptance is taken, it shall be such an acceptance as does not make such additional averment and proof essential. Taking such an acceptance, then, if it has the effect contended for, would discharge them, unless they had immediate notice of such acceptance, and assented thereto. It may be said, that notice then may be given to them; but will your Lordships come to a decision which imposes on the holder the necessity of giving notice to all the parties to the bill? If I were to state, that there are daily in London one hundred such acceptances given, I should speak far within the truth. If these acceptances be conditional, notice ought to be daily sent by the post to the drawer and indorsers of each bill, not that the bill is dishonoured, but that it is accepted payable at a banker's. The fact that no such notice is given, notwithstanding the prevalence of such acceptances, and the perfect acquiescence therein, shows stronger even than positive authorities what [471] has been the understanding, usage, and custom of the mercantile world concerning them; and, bills of exchange being mercantile instruments in daily occurrence, if they have received a mercantile construction, the construction put on them by the mercantile world ought to be their construction in a court of law.

I have troubled your Lordships so much at length on the principles which, in my view, govern this case, that I shall address the house but shortly on the decisions. The point came first before the Court (as far as we can learn from printed reports) in *Smith v. De la Fontaine*: that case was tried before Lord Mansfield, in 1785, and from that time to the year 1806 the question does not appear to have been agitated. Then came *Callaghan v. Ayllett*, in 1811, in which the decision was adverse to that of *Smith v. De la Fontaine*. The case of *Callaghan v. Ayllett* was in the same year followed by that of *Fenton v. Goundry*; and I will only excuse the Court of King's Bench for coming to a decision on that case, (adverse as it was to the decision in *Callaghan v. Ayllett*) at the moment, because Lord Ellenborough (and that learned person, while at the bar, had most extensive experience in cases of bills of exchange) laid the foundation of his judgment in *Fenton v. Goundry* on the invariable usage, to which he adverted in energetic language: on that ground only the Court of King's Bench did not take time to consider in that case.

The case of *Fenton v. Goundry* was followed by that of *Gannon v. Schmolli*, which I will only notice on account of the case of inconvenience there put by Chambre, J., and to the case put by him I will add one or two other supposed cases. A bill is brought to me for acceptance just as I am setting off for the circuit; I tell the holder that I am going to be absent from town, and that I can only accept the bill payable at my bankers; he refuses this acceptance, on the ground that it will give him additional trouble and inconvenience; and the bill is consequently dishonoured. Suppose the case of a bill drawn in the West Indies, on a merchant in England, who accepts it payable at a banker's: the merchant finding the bill not debited to him, supposes there may have been some neglect on the part of the holder, but finds the bill protested for non-acceptance; that the person who presented it for accept-[472]-ance was a notary; that the acceptance has been struck out, and the bill returned to the drawer in the West Indies; and that the holder has recovered 20 per cent., or whatever difference may have been occasioned by the existing rate of exchange beyond the nominal amount of the bill.

Many of the principles now insisted on may seem at variance, I admit, with the decision in *Sanderson v. Boves*, and the other cases on promissory notes. I could distinguish those cases from *Fenton v. Goundry*; for in the latter case, the acceptance payable at the place was no part of the original conformation of the bill itself; but, in the former cases, the words restrictive of the payment were incorporated in

the original form of the instrument. But I do not wish to answer those cases on these grounds; for I am free to confess that I doubt the propriety of those decisions, although I was myself a party to them; and I think it more manly to say, that I consider my opinions in those cases erroneously formed, than to attempt to distinguish those cases from *Fenton v. Goundry*, by the use of nice and subtle differences. I hope, therefore, that the case of *Sanderson v. Bowes* will not be followed as a precedent; for, as far as I can judge, the principles for which I have been contending apply to promissory notes as well as bills of exchange. The case of *Bishop v. Chitty* (Str. 1195), proceeded partly, and I think, principally, on the ground that there was actual *laches* on the part of the holder, and *laches* which prejudiced the acceptor. In that case, the acceptance was, "Messrs. Caswell and Mount, pay this bill when due, for Thomas Chitty;" it was, therefore, in a form entitling the holder to call upon Caswell and Mount to pledge their responsibility for the payment of the bill. In the case before the Court the holder has no right to call upon Sir John Perring and Co. to pledge their responsibility for payment; nor can they be sued if they refuse to pay it; there is no privity between them and the holder: this principle is established in the case of *Williams v. Everett* (14 East, 582). In *Bishop v. Chitty*, the bill fell due on the 2d of January, and Caswell and Mount paid till the 19th of that month, and the bill was not presented till the 21st: Lee, C. J. held, that it was the loss of the plaintiff; for this acceptance was in the nature of a draft, [473] which is always considered as actual payment, when a reasonable time to receive it is elapsed. The form, therefore, of the acceptance in that case, which was in the nature of a draft on Caswell and Mount, and the neglect of the holder to call to receive it, distinguish it from the case before the Court. In *Sebag v. Abithol* (1 M. and S. 464), a bill was accepted, payable three months after date, at a banker's in London: the bill, by reason of its being mislaid, was not presented for payment, but the acceptor was some months afterwards informed of its being mislaid, and it was held he was not discharged; and the drawer was allowed to set it off in an action brought against him by the acceptor, although the banker, at whose house the bill was payable, had failed about four months after such information was given, and though the acceptor had at all times, up to the failure of the bankers, a balance in their hands sufficient to cover the acceptance. For these reasons, considering that the money payable by a bill becomes by the acceptance the debt of the acceptor; that he is looked upon as the immediate debtor; that, by making his acceptance payable at his banker's, without putting it in a form to pledge his banker's liability, he only specifies a place, where he by himself, or his agent, will be ready to pay; considering, that he may have no funds in his banker's hands, or has full power to withdraw them; that much trouble and inconvenience, and confusion, may result from holding that this is a conditional and restrictive acceptance; and, that every inconvenience will be sufficiently obviated by holding, that neglect by the holder will be matter of defence to the extent to which such neglect causes loss, I submit in answer to the first question, that, as against the acceptor, the holder of this bill was not bound to present it at Sir John Perring's for payment, nor to aver such presentment in his declaration.

On the second question proposed for the consideration of the Judges, I shall content myself with saying, that, for the reasons which I have already stated, I am of opinion, that, as against the acceptor, such acceptance is a general acceptance, with an engagement or direction that payment may be obtained at the banking-house, with this addition only, that, if the ac-[474]ceptor should be able to prove, that by any neglect in the holder in not duly presenting, he had sustained any loss, he should be relieved to the extent of such loss.

In answer to the third question, I submit, that a distinction is to be taken between an acceptance qualified as to time, and an acceptance qualified as to place. If C. take from B. an acceptance qualified as to time, giving B. a longer time for payment of the bill than the bill itself specifies, I consider it as quite clear that C. could not sue A. upon the bill. The holder of a bill has no right to give the drawer time. If he do, he does it at his peril. *English v. Darley* (2 B. and P. 61) establishes, that indulgence to the acceptor after the bill is dishonoured, discharges the drawer and indorsers; and there are many other cases to the same effect: if so, indulgence to him before the bill is due must have the same effect. An acceptance qualified as to

place, will, or will not, take away from C. the right to maintain an action against A. upon the bill, according as such acceptance does, or does not, throw upon A. an additional burthen, or cast upon him any prejudice. If the bill be payable at a place where the drawee lives, his house is *prima facie* the place at which it is to be paid, but the usage of merchants warrants the drawer in naming any other house at the same place for payment. If the drawee has no house at the place where the bill is made payable, the holder has a right to require from him an acceptance specifying some house in particular in that place, for its presentment. This doctrine is laid down by Holt, C. J. in the case cited by my brother Holroyd (Lord Raym. 575). But, if naming a particular house casts upon the drawer any new burthen or prejudice, the holder, by allowing such house to be named, has done, as to him, what he was not warranted in doing, and the drawer is discharged. The question then is, Does the qualification as to place cast on the holder a new burthen or prejudice? and, if it oblige him to prove at his peril, in an action against the acceptor, what upon a general acceptance he would not be bound to prove, it does cast upon him a new burthen.

In answer to the fourth question, I am of opinion, that C. would not be at liberty to maintain an action against A. on his [475] original debt, without delivering to A. the bill so accepted; because A. has, by the bill offered to C. a credit upon B. and C. has consented to that credit; and C. has no right to double payment from A. and B. *Kearslake v. Morgan* (5 T. R. 513) is an authority in point, to show, that if a debtor pay his creditor by a note or bill, which the creditor takes on account of his debt, such taking of a bill will be an answer to an action brought by the creditor against his debtor for that debt, unless the creditor gives up such bill.

Wood, B. In answer to the first question, I am of opinion, that the bill of exchange mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, "payable at Sir John Perring and Co. bankers, London," that is to say, at the house of certain persons using in trade and commerce the name, style, and firm of Sir John Perring and Co. bankers, London, the holder was bound to present it at that house for payment, and to aver in his declaration that the same was presented at that house for payment.

It is clear, that the drawee of a bill of exchange, if he choose to accept it, may do it generally, or may make a special or qualified acceptance. The holder may refuse to take a special or qualified acceptance; but, if he do take it, he is bound by it, as that constitutes the contract between him and the acceptor. There are many cases which might be cited to prove this position, but I will only trouble your Lordships with one. In *Petit v. Benson* (Comb. 152), a bill was drawn upon the defendant, who accepted it by indorsement, in this manner, "I do accept this bill, to be paid half in money and half in bills;" and the question was, whether there could be a qualification of an acceptance, for it was alleged that his writing upon the bill was sufficient to charge him with the whole sum: so that the question here must have been, whether the words "to be paid half in money and half in bills" would not be rejected, and the acceptance stand as a general acceptance? "But 'twas proved by divers merchants, that the custom among them was quite otherwise; and that *there might* be a qualification of an acceptance; for he that may refuse the bill totally, may accept it in part. [476] But he to whom the bill is due may refuse such acceptance, and protest it, so as to charge the first drawer; and, though there be an acceptance, yet, after that, he hath the same liberty of charging the first drawer as he before had:" that is, although there be an acceptance written, if he refuses to take it, he may strike it out and charge the first drawer. It is observable that the case says, the custom was proved by several merchants: at that time, it was usual to set out the custom of merchants in the declaration, and to prove it by witnesses, which accounts for the words "'twas proved by divers merchants;" but it was afterwards, in the same reign (W. 3), held, that the court was bound to take judicial notice of the law-merchant; and, therefore, it is not usual now to set out the custom, but to allege that, according to the custom of merchants, such an one drew a bill, and such an one, according to the custom of merchants, accepted, &c.

As there may be a qualified acceptance, is the acceptance in question a qualified acceptance? What makes a qualified acceptance? Why, the words used by the party in his acceptance. Do the words "payable at Sir John Perring and Co's

bankers, London," mean nothing? Are they mere surplusage? If so, then this bill ought to have been presented for payment at Torpoint. To make such constructions would, I conceive, be contrary to the usage of merchants, and the plain sense and meaning of words. Acceptance imports a promise; and the acceptance in question is a promise to pay at a particular place, that is to say, at a banker's in London. An acceptance is an *actual promise* to pay, [per Curiam, in *Mitford v. Walcot* (12 Mod. 410)]. There are two conflicting decisions of the Courts of King's Bench and Common Bench upon the point in question, viz. the case of *Fenton v. Goundry*, in K. B. and the case of *Gammon v. Schmoll*, determined by the Court of C. B. On those cases I will not trouble your Lordships with my comments: but I must observe, that there is a very material case of *Sanderson v. Bowes*, which, though my brother Bayley does not seem *now* to think so, I hold to be good law. In that case, a promissory note was made payable at a banking-house, and the Court held presentment at the banking-house [477] a condition precedent to the maintenance of the action. I cannot distinguish the case in question, in principle, from this of *Sanderson v. Bowes*, where the defendant *promised to pay at the banking-house at Workington*, to one R. Nelson, or bearer. The Court of King's Bench on demurrer, held, *that it was necessary to present the note for payment at the banking-house at Workington*, which seems to me to be contrary to the former decision of that court in the case of *Fenton v. Goundry*, which was the case of a bill of exchange accepted payable at a particular banker's (like the acceptance in this case). The distinction which the Court of K. B. took, was, that the acceptance was no part of the original conformation of the bill itself, but that the words in the note, (in *Sanderson v. Bowes*) restrictive of payment at the place named, were incorporated *in the original form of the instrument* which alone created the contract and duty of the party. Try this case by that principle: what alone creates the contract and duty of the acceptor? Why his acceptance. There is no antecedent debt due from the acceptor to the holder. What is incorporated in the original form of the acceptance? The place of payment. It is true, that acceptance is a subsequent act to the first conformation of the bill: it is a subsequent contract between the acceptor and holder; but, it is the only contract which there is *between* them. It is, in point of law, a promise of the acceptor to pay the bill at a specific place. The declaration states, and incorporates in the acceptance as there stated, the very words "payable at Sir John Perring and Co.'s, bankers," and the promise alleged is to pay according to his said acceptance. The plaintiff by his declaration does not reject these words as surplusage, but considers them as forming part of the acceptance. Suppose, instead of a note, a bill had been drawn on Bowes and Co. and they had accepted it payable at their banking-house at Workington, and subscribed the acceptance, can it be contended, that, in one case, the holder is bound to present at the place, and, in the other, not? I say, therefore, as was said in *Sanderson v. Bowes*, that a demand by the holder of payment of the bill at the specific place was a condition precedent, in order to give himself a title to receive the money.

As to the second branch of the first question, viz. Whether the plaintiff is bound to aver in the declaration, that the bill was [478] presented at the house of Perring and Co. for payment? I take it to be a condition precedent that it should be presented for payment at the appointed place; and, if so, without doubt, the plaintiff cannot maintain his action without averring performance of that condition precedent, and so the court of King's Bench held in *Sanderson v. Bowes*. It is not necessary, as between the holder and acceptor, that the holder should aver presentment on the day when the bill becomes due; because the acceptor is liable at all times afterwards, whenever it shall be presented at the appointed place. His liability is not confined to any day; his liability is to pay any time after the bill becomes due, if presented at the appointed place. The presentment on a particular day can only be material to charge the drawer. It has been argued, that presentment need not be averred, but, that it is matter of defence. I think, that it may be matter of defence although not averred; and that, at the trial, the plaintiff ought to be called on to prove it; otherwise, after verdict, it might be presumed that it had been proved to be presented according to the acceptance. If a bill directs the payment at a certain place, it ought to be paid there without other demand than at the place, though the acceptor lives at a place remote (Conn. Dig. tit. Merchant, 200).

The place where a bill is to be paid is so important, that, if it be directed to a person generally, and he will not accept it to be paid at a certain place, the holder may protest it. If a bill be accepted at Amsterdam, and no house named where the payment is to be, the party need not to acquiesce in it, but may protest the bill; but, if he will acquiesce, it is well enough (12 Mod. 410. *Mitford v. Walcott*). Then, according to the doctrine contended for, although the law requires a place of payment to be named, yet, when it is named, you are not obliged to resort to it for payment. The mischief to the commercial world, and to all who have any concern with bills, would be very great, if the holder were not bound to present for payment at the appointed place; but, on the contrary, might, at once, without any presentment, bring an action against the acceptor. The acceptor would have no means of avoiding an action (and, perhaps, an arrest); for his acceptance may have been in circulation, and may be in the hands of persons [483] of whom he knows nothing: so that he cannot tell to whom to send or tender his money, or how he is to get discharged; and the first notice which he has of who the holder is may be by an action. Common sense and common justice, and the convenience of mankind, all concur in telling one, that a man, who has agreed to take an acceptance payable at a specified place, should be bound to have recourse to that place for payment before he can sue the acceptor. It has been argued, that the defendant should not have demurred, but should have pleaded that he was ready to pay at the appointed place, but nobody came to receive payment. That, I conceive, was not necessary: because the first act to be done (which is a condition precedent) is the presentment of the bill for payment at the appointed place; and the plaintiff must show that to maintain his action; and so was the determination in *Sanderson v. Bowes*. But, considering the presentment and payment to be concurrent acts, the party who brings the action (not he who defends it) must show that he has done what is necessary on his part to maintain that action, namely, that he has been ready with his bill to present, and thereon to receive payment at the appointed place. In answer to the arguments raised from forms of pleading, I say, that the defendant may avail himself of this objection in different shapes: 1st, as in this case, by demurrer; 2dly, he may plead the general issue, and, for want of proof of presentment, apply for a nonsuit; or, 3dly, he may plead specially, that he was ready at the appointed place to pay, and that no presentment was made, or, generally, that the bill was never presented at the appointed place. It has been argued, that presentment for payment need not be averred, and that it never is averred in a declaration against the acceptor; and I agree, that, where the acceptance is general, it is so; and the reason is this, because the acceptor is always liable: his acceptance operates as a promise to pay, not only at the time when the bill is due, but at all times afterwards when requested, or on demand; and the bringing the action is in law a request or demand. But, where place is of the essence of the contract, as in the case in question, though it be not necessary, to aver presentment at the day, it is necessary to aver presentment at the place on some day before bringing the action. One who is indebted promiseth [484] to pay it upon request: in an action upon the case upon that promise, the party needs not to express the assumpsit with the request, it being an old debt; but otherwise it is, where there is such a promise *without any duty precedent* (4 Leon. 2. *Pulmant's case*). In debt or detainee, the very bringing of the action and demand of the writ is a demand and request (per Jones, J. *Godb. 103. Horn and Stub's case*). Acceptance after the time of payment elapsed, and a promise then to pay according to the tenor of the bill, is good, and amounts to a promise to pay the money generally (1 Salk. 129. *Mitford v. Walcott*). Arguments have been drawn from forms of pleading in actions on bonds or obligations and other actions in debt, and it is contended that it lies on the defendant to plead either a tender, or that he was ready to pay and bring the money into court. These rules are not applicable to this case: this is not an action of debt or *indebitatus assumpsit* on an antecedent debt. It is well established, that an action of debt will not lie on the acceptance of a bill of exchange; it is an action on the custom of merchants for damages only, without any antecedent debt. As to debt on bonds or obligations, they create an immediate debt, and the defendant must show that he has done all that was necessary on his part to perform the condition, and that it was the fault of the obligee that it was not completed. But, when the plaintiff brings an action for a demand depending

on a condition precedent on his part to be performed, there he must aver performance to maintain the action, as in *Sanderson v. Bowes*.

In answer to the second question, I am of opinion, that this bill having been so accepted as aforesaid, such acceptance is, in law, to be considered as a qualified acceptance to pay the same at the said house of Sir John Perring & Co. bankers, *only*; and, that it is *not* a general acceptance to pay the same with an additional engagement or direction for the payment thereof at that house, for the following reasons: It is the custom of merchants and opulent persons to keep their monies at bankers, and to accept bills to be paid at their bankers, that they may not be under the necessity of keeping money at their own houses, or intrusting money to their servants in their absence to take up acceptances, or of carrying money about [485] their persons to answer such acceptances, if demands should be made upon them personally. Such special acceptances are conveniences to both holder and acceptor. But this object, so far as respects the acceptor, would be totally frustrated, if, at the election of the holder, he, the holder, could reject the appointment of the place of payment in the acceptance as mere surplusage, and demand payment wherever he pleased. What authority is there either in law or common sense to say, that a promise (and an acceptance is a promise) to pay at a particular appointed place by name, is to be expanded (for that I think is the phrase) into a promise to pay in every corner of the kingdom where the acceptor may happen to be, as well as at the particular appointed place. The acceptor is under no previous obligation to pay; he owes no debt to the holder prior to his acceptance; his acceptance is the only thing which constitutes the compact between him and the holder. The expression of one particular place, according to a well-known maxim, is the exclusion of any other. There is no law or custom of merchants to justify such an *expansion*, or rather, I should say, *expulsion* of men's words and meanings. I remember cases of this sort. A person has given a promissory note payable at a particular time, and has *signed* it; and, after he has signed it so that he has *completed* the instrument, he has put upon the side or bottom of the note a memorandum of a particular place where it will be paid. In such a case the particular place is no part of the note, and does not control its general operation: it is no variance in a declaration to omit such a memorandum: it may, perhaps, amount to evidence of an additional engagement that it shall be paid at that place. But, here, the acceptance is only one single continued sentence, at the end of which, probably, stands the signature of the acceptor.

In answer to the third question, I am of opinion, that, if A. draw a bill on B. in favour of C. for £100, and C. without the previous authority or subsequent assent of A. take an acceptance of the bill for the whole of the £100, but an acceptance qualified as to the time or place of payment, C. could, notwithstanding such acceptance, maintain an action upon the bill against A. unless the qualification as to time or place produces a damage or injury to A. for the following reasons: If the [486] holder, without such previous authority or subsequent assent of A. the drawer, enlarge the time of payment by the acceptor, that may injure the drawer and operate to discharge him: or, if he take an acceptance payable at a distant place, so that, if the bill be dishonoured, notice cannot be given to the drawer so soon as it might if the acceptance had been general, that may injure the drawer and discharge him as for want of due notice. But, in the case of a bill drawn on a person in London, and accepted payable at a banker's in London, I should think such special acceptance would not operate to discharge the drawer, if due notice was given to the drawer of the non-payment, because in such a case the special acceptance does the drawer no injury.

In answer to the fourth question proposed by your Lordships, I am of opinion, that if A. were debtor to C. in £100 previous to his so drawing upon B. in favour of C. to the amount of £100, C. could not, upon A.'s refusing his assent to an acceptance, qualified as mentioned in the above question, maintain an action upon the original debt against A. without delivering to A. the bill so accepted: in case, at the time the bill was drawn, B. was also indebted to A. in a like sum of £100. Lest I should have mistaken this question, I will take the liberty of offering some reasons or explanations. If C. take the draft of A. upon B., for a debt due from A. to C., C. is bound to use his endeavour to get it accepted and paid; and, if it be not honoured,

is bound to return it to A. in due time, and to deliver it up to A., and, that being done, it is the same, then, as if no bill or draft had been given; and C. may then maintain his action against A. for his original debt. If the bill have been left for acceptance, and B. have written a qualified acceptance upon it, which C. does not choose to take, he should inform B. that he will not take an acceptance so qualified, and require a general acceptance; and if that be refused he should strike out what was written, and return the bill to A. as an unaccepted bill, in which case C. may resort to his original debt against A. If C. without A.'s previous authority or subsequent assent, accepts and assents to B.'s acceptance, so qualified as to time or place as materially to alter the condition of the drawer, in that case he can only resort to B.; the acceptor, according to the terms of his acceptance, and A. will be dis-[487]-charged from his debt to C., for which he gave the bill; and B. will be discharged, as against A. from his original debt, for which he gave his acceptance, and can only be sued on his special acceptance.

GRAHAM, B. The general question is, whether the words of this acceptance form a condition precedent, and constitute a qualified acceptance, or a general acceptance with an additional engagement or direction for payment at the house mentioned. If these words do constitute a condition precedent, it was necessary before action brought to demand payment at the place mentioned, and to aver in the declaration that the plaintiff had so done. When a man accepts a bill, it is the most solemn, because it is the most public recognition of the drawer's right to demand the amount of it from him. The acceptance is an obligation to pay all over the world, and the question is whether, generally speaking, in the intention of the acceptor and the understanding of the holder, the words "payable at Sir J. Perring and Co.'s," contract this general obligation to an engagement that the acceptor will pay the drawer there, and no where else, (as some seem to think), or, at least, not till it be proved that a demand was made there in vain. In my apprehension such an acceptance is no qualification of the general liability of the acceptor. It is a substitution of the banker's for the person and abode of the acceptor, for mutual convenience; and means only to charge the drawer and indorser *in transitu*, that the holder, instead of calling upon the acceptor, should make his demand at the banker's. No demand is necessary against the acceptor: he is liable without demand; but, to charge the drawer, you must prove a demand on the acceptor, or on the person whom he has identified with himself for that purpose. The question, then, will be, does a man mean to impose a condition, or to suggest, for mutual convenience, a place, where, with least trouble to both, the money may be had? But this question, of daily occurrence, simple as it may seem, and of easy solution to some, is rendered complicated and difficult by great and conflicting authorities.

As to the balance of authority, I think it cannot be doubted, from the case of *Smith v. De la Fontaine*, in 1785, what Lord Mansfield's opinion was. His great experience and knowledge [488] of mercantile transactions and high character carry with them strong evidence of the prevailing opinion. *Saunderson and others v. Judge* (2 H. B. 509), in 1795, was an action on a promissory note (and, for the present, I make no distinction between notes and bills) against the indorser. Sharp, the maker, promised to pay to Wilkinson or order; and, at the foot of the note, there was a memorandum, that he would pay it at the house of Saunderson and Co. with whom he had a cash-account. Wilkinson indorsed to Judge, he to Sanders and Co. and they to Saunderson and Co. Sharp, before the note became due, absconded, and Saunderson wrote by the post to Judge, giving him notice of the non-payment. The declaration was in the general form, without stating the memorandum, or any thing tantamount to an application to the plaintiffs. At the trial, the plaintiffs were nonsuited, as they had not proved an actual demand on the maker; and the language of the court, consisting of Eyre, C. J. Heath, Buller, and Rooke, judges, after the argument upon the motion for a new trial, forms the foundation of my opinion. They said, 'It was no part of the contract that the note should be paid at the house of Saunderson and Co.; and therefore that was not necessary to be stated in the declaration: the maker merely appointed the house of his banker as the place where he was to be called upon for payment. It is not necessary that a demand should be personal; it is sufficient if it is made at the house of the maker, and it is the same thing in effect if it be made at the place where he appoints; and as the demand was to be made at the

house of the plaintiffs themselves it was sufficient for them to turn to their books." But, it may be said, this was the case of a detached memorandum. I will say a few words on the subject of the supposed difference between such a memorandum at the bottom of a note, and an acceptance of a bill of exchange payable at a particular place. The case of *Lyon v. Sandius* (1 Campb. 423), was an action by the indorsee of a bill of exchange against the acceptor; the declaration stated only a general acceptance. It was precisely this case, the acceptance being "payable at Messrs. Hankey and Co.'s." The very same objection was taken by Mr. Park; and I am free [489] to say, that the words of Lord Ellenborough carry conviction to my mind, and form the foundation of my opinion. "How can you make the words *payable at Hankey and Co.'s* more than a mere memorandum? The acceptor of a bill of exchange is liable universally. This very point was brought before the court some time ago," (alluding probably to *Sanderson v. Judge*, of which Mr. Park said he had some impression on his mind), "when," says Lord Ellenborough, "the judges were all of opinion that such words formed no part of the contract, and did not require to be set out in the declaration." It is difficult to believe, I had almost said impossible, that the case should have rested there, if that had not been the opinion of all the Judges of the King's Bench; and, as proof, in the very next year (1809), at the Hilary term sittings, Mr. Justice Bayley held, in the case of a promissory note (*Wild v. Rennards*, 1 Campb. 425. n.), that in an action against the maker there was no necessity to prove that it was presented where payable. These authorities are followed by the decision in *Fenton v. Goundry*, on the fullest consideration of *Callaghan v. Aylet*, then lately determined in the Common Pleas. I cannot help adding the two decisions at *Nisi Prius* of Lord Chief Justice Gibbs (*Head v. Sewell*, *Richards v. Milsington*, Holt, N. P. C. 363, 364); these, together with the common form of declarations, make a weight of authority which it is difficult to counterpoise.

But it is said, in order to diminish the weight of these authorities, that the Court of King's Bench have not always been consistent. And first, it is said, that in *Parker v. Gordon* (7 East, 386), they have recognized the propriety of an application at the place of payment. But that was an action against the drawer; and it is universally true, that to charge the drawer you must prove a demand on, and refusal by, the acceptor or his substitute. If, therefore, he says, "I accept, payable at my banker's," he says, "it is there I am to be called upon for payment; that is my house; there it is where I am to be found, and I authorize you to consider me as personally present there for the purpose of payment;" and, if so, the holder may be presumed to know the banking hours. And if the holder were not bound to this, he must have gone, as Lord Ellenborough [490] says (in *Parker v. Gordon*, 7 East, 386), "a step farther, and proved a demand on the acceptor, for otherwise no demand is made on the acceptor. Secondly, it is said, that they have impaired, if not contradicted, the case of *Fenton v. Goundry*, by that of *Sanderson v. Bowes*: this argument or assertion is founded on the supposed perfect analogy between bills of exchange and promissory notes. I perfectly agree, that in some cases place may be essential, and may be rendered so by the terms and occasion of the acceptance. A case may be put of a man, who remitting all his property to England, and taking his departure from India, accepts a bill for £5000 at six months payable in London: he loses his passage: it could never be said in such a case that the acceptor engaged to pay in India, or at the Cape of Good Hope, on his way home. The case of bankers issuing notes payable at their banks, as in *Sanderson v. Bowes*, may be one of these cases; but I deny the alleged analogy between bills of exchange and promissory notes. The maker of a promissory note may express his own terms. He is, as it were, drawer and acceptor: the note must be taken as he issues it. But in the case of bills of exchange the drawer has a right to an unqualified acceptance, and an indorser *in transitu* is entitled to the same right. If these acceptances were construed as special, and as qualifying the general liability of the acceptor, who is bound to pay, it would hurt the credit of bills. The acceptor is the person whose credit principally supports the bill: he is considered as always liable; but if an accidental or careless omission to call at the place appointed destroy the acceptance of the bill, the confidence attached to the acceptance is gone, and the credit depends on the punctual observance of the terms of the condition. The proof of a demand and refusal is not easy; and in many cases might fail, or be brought in doubt by contradictory evidence. The case of *Fenton v. Goundry*,

then, can hardly be said to be impugned by that of *Saunderson v. Bours*. At all events, the latter case may be considered as wanting the weight of the former; but it is sufficient to distinguish them by the difference of the subject-matter of each case. It is, thirdly, said this is an order on the banker; I grant, that it is an authority to the banker to pay, and in [491] effect, an order; but we must not by refinement stagger prevailing notions. If it be an order on the banker, *Bishop v. Chitty* is a dangerous precedent: no man of business ever thought that such a note or memorandum converted the bill of exchange into an order on the banker; and, that by not calling at the banker's he lost the benefit of his acceptance, and took the credit of the banker in the place of the acceptor. As to the cases in the Common Pleas, I shall not oppose to the case of *Ambrose v. Hopwood* (2 Taunt. 61), that of *Huffam v. Ellis* (M. 51 G. 3. K. B. See Bayley on Bills, 98. n. 1. 3d ed.), in the King's Bench, and House of Lords; in the latter, the declaration followed the case in the Common Pleas, and the words, according to the tenor, might include the house. In *Callaghan v. Aylett*, and *Gammon v. Schmoll*, is to be found the great counterpoise to the authority of the Court of King's Bench; but, I must say, that the reasons given are not such as belonged to the authority of the judges, who are reported to have given them. In *Callaghan v. Aylett*, Mr. Justice Heath says, "there can be no difference in this respect between an action against the drawer, and an action against the acceptor." But, there is this difference, when the acceptor accepts "payable at the house," he means to limit his ubiquity, by saying that he is to be found there for the purpose of payment; and if the holder do not seek him there, he makes default in calling on the acceptor. If, without such direction, the holder omit to call at the house of the acceptor, he cannot, on account of that omission, charge the drawer or indorsers: but it is too much to say, that by that omission he discharges the acceptor, who is at all times liable, though no demand of payment was ever made, even at his house. Mr. Justice Heath avoids the authority of *Saunderson v. Judge*, by saying, that there "it was a memorandum at the foot of the note, not a part of the instrument." That leads to nice, I had almost said, frivolous, distinctions: for, according to that doctrine, if I say, "I accept R. G." and add at the foot of the bill, "payable at Messrs. G. and Co." it is a mere memorandum; but if I say, "I accept, payable at Messrs. G. and Co." it is embodied in my acceptance, and forms a condition precedent. Does it make [492] a difference, that in one case the acceptance is all in one tenor, as "I accept, R. G. payable at my banker's," and that in the other I write, "I accept, R. G.," and underneath, "payable at my bankers?" A man, whether he accepts in the former or latter form, means the same thing; for when he writes the words "payable, etc." he is usually determined in what place to write, by the room or vacancy on the paper. Are the minds of men in business to be harassed with such untenable and insuperable distinctions? In *Gammon v. Schmoll*, Mr. Justice Chambre puts the case of a bill drawn upon a judge just going the circuit. I dare say it has happened to him, as it has happened to me. But can it be supposed that any man of character, on such or like occasion, would make his bill so payable if he had not cash or credit at his banker's? And who would refuse to call at the banker's? No holder in his senses would forbear to follow the directions of the acceptor, because it is undoubtedly done for his convenience; no man in his senses would refuse an application to the banker of the judge where he would be sure of his money, for the gratification of coming down to Exeter for the sake of arresting him; but if it turn out that an acceptance payable at a particular place is a mere shift, or act of roguery, it would be idle, and, in some instances (as in directions to obscure corners and streets,) almost impossible to attempt to find out a sneaking lodger in a garret to satisfy this indispensable condition. What holder, or what attorney, would arrest a man of credit under such circumstances, or would disgrace a Judge? Such acceptances will always give credit to bills; and the practice will continue, though your Lordships should decide that they do not *qualify* the general liability of an acceptor; and perhaps the mercantile world will thank your Lordships for not imposing upon them the knowledge of precedent conditions, or a speculation, as to the different positions on a note, by the occupation of which the words "payable at, etc." become either a mere memorandum, or a condition precedent. But cases might be put of various kinds, these may all be met by way of defence. It is said, (1 Rolle's Abridgment, 140) and I take it to be law, "If the condition of an obligation be to pay £10 at a given day at

S., he (the obligor) is not bound to pay in any other place ;" and " so in that case the obligee is not bound to receive it in any other [493] place ;" and so Coke, Littleton, 211 ; " For if the obligor then (that is, when by notice the obligor has fixed the place) and there tenders the money, he shall save the penalty of the bond for ever." But he saves only the penalty and costs ; he must pay the debt. An acceptance is, by the custom of merchants, a debt ; though, independently of that custom, neither debt nor assumpsit would lie for want of consideration. But in all these cases the fulfilment of the condition comes by way of defence. The obligee is not bound in the outset to state his demand at the place ; the defendant must plead his performance of the condition, and, proving it, he is quit of the damages and penalty ; but he must bring the money into court. Place may, undoubtedly, be essential ; and here both obligor and obligee understand each other that so it is to be considered.

In answer to the third question, I am of opinion, that if the holder of a bill for acceptance take an acceptance, varying in time or place of payment, where place creates inconvenience, and obstructs or impedes the circulation of the bill, or, when new terms or conditions are introduced, he makes it his own. This is obvious in the case of enlargement of time. So, if the acceptance be payable at Paris, Dublin, or Edinburgh, where the place is evidently made a condition of the payment ; in such a case, I think that the drawer would be discharged.

In answer to the fourth question, I am of opinion, that if, in the case put, C. take an acceptance, materially qualified as to time or place, and A. dissent, and C. still keep the bill, he makes it his own, and cannot sue A. on his original debt : but if C. give timely notice to A. and immediately offer to return the bill to A. I think his original cause of action would remain.

Once settle the uniformity of practice, and the evil is over. But, according to the law as laid down by the court of King's Bench, you have a plain simple declaration and proof. According to the law laid down by the court of Common Pleas you have a new form of declaration, and a proof which, in many instances, may be difficult, and may lead to controversy and contradiction.

RICHARDS, C. B., as to the first question, was of opinion that the holder of the bill was not bound to present it at Sir John Perring's and Co. for payment, nor to aver presentment there.

[494] As to the second, that the acceptance of the bill in question was not a qualified acceptance, constituting an undertaking to pay the bill at the house of Sir J. P. and Co., but a general acceptance, constituting an undertaking to pay the same every where, with an additional engagement or direction for the payment thereof at that house.

As to the third, that if the payee C. were, without the previous authority or subsequent assent of the drawer A. to take an acceptance qualified as to time or place, by taking such an acceptance he would discharge the drawer A.

As to the fourth, that if A. were to refuse his assent to such a qualified acceptance, C. having received the bill for the debt of £100 due from A. could not sue A. for the debt till he had re-delivered the bill to A.

DALLAS, C. J. With respect to the first question, I am of opinion that the holder was bound to present the bill at the banking house of Sir J. P. and Co., and so to aver in the declaration.

As to the second question, I think that the bill, having been so accepted, is, in law, to be considered as a conditional acceptance, and not as a general acceptance to pay, with an additional engagement or direction for payment at the house mentioned. And as the case which has given occasion to your Lordships questions has arisen from contradictory decisions in the courts below, and as, in the recent cases, all that could be found of former decision has been brought under the consideration of the respective courts, and their disagreement in opinion has still continued, and continues, (as appears from the answers hitherto given,) it is obvious that the present is a case which can very little depend upon mere authorities ; the authorities have, however, been already fully referred to, and my reasons will therefore chiefly and shortly be given upon general grounds. And, first, I admit the presumption of law to be, (though in the present state of commerce the fact is frequently otherwise,) that the drawing a bill of exchange pre-supposes an antecedent debt, and the acceptance is an admission that such a debt is due. And so considered, it is, no doubt, clear,

that the debtor may be called upon to pay without reference to time or place. But if, in the bill itself, the drawer were to name a particular place for payment, instead of such place [495] being specified in the acceptance only, such bill would be a bill qualified as to payment both with respect to time and place. And the acceptance being according to the tenor of the bill, the acceptor, as to payment, would be bound accordingly. This, I am aware, would be the act of the drawer himself, and therefore not falling within part of the reasoning, as it applies to the acceptor, a distinction to which I shall hereafter advert more fully. It is, I apprehend, equally clear, that by a bill drawn generally, the drawer transfers his rights against the drawee, as modified by the bill, to the extent of the bill; and that the drawer may enter into any contract with the payee, which the drawer might have done with the drawee before such transfer made, not affecting thereby, in substance, the rights of the drawee. I assume, therefore, for the present, that if the bill had purported to be an order to pay at the house of Perring and Co., and the acceptor had accepted such bill, he would not have been bound to pay elsewhere till application for payment there had been made and failed. I shall endeavour to show hereafter, that what the drawer may do by the bill, as between him and the drawee, may be done by the acceptance, as between the acceptor and the payee. To take, first, the case of the drawer of the bill: he may draw it in any form which he thinks fit, provided the form be such as is warranted by the usage of merchants, without which it will not be a bill of exchange; but it will scarcely be contended, that drawing it restrictive as to place of payment would be a violation of such usage. A bill general and absolute, in the first instance, drawn and accepted generally, operates according to the terms of the bill; and the bill itself need only to be looked to, the acceptance referring to and not varying from the bill. But to a bill so drawn, the drawee may refuse acceptance; and he may propose to accept conditionally, the payee being at liberty to receive or refuse such conditional acceptance; if he refuse, he must go back to the drawer, who will have his remedy against the drawee, and in this, the first and most simple view of the subject, the bill itself is at an end.

Suppose, however, the case of a partial and qualified or conditional acceptance, and that an acceptance may be such in many respects has been admitted by all the learned Judges in succession; indeed the very questions put by your Lordships [496] recognize the distinction, and adapt themselves to it. What, then, is meant by conditional acceptance, or in what respects may an acceptance be conditional? It may be so as to time, as to sum, as to place, as to mode of payment. It will be sufficient to refer to the authorities which have been cited as to each of these shortly, and one will be sufficient under each head; and I mention them, not because the point itself is doubtful, but for what is said in each case. And, first, as to amount. A foreign bill was drawn upon the defendant, and he accepted it to pay £100 part thereof; he was sued on the acceptance, and on demurrer, insisted that a *partial acceptance was not good within the custom of merchants*; but the Court held otherwise, and judgment was given for the plaintiff (*Wegerstoffs v. Keene*, Str. 211). Next as to time. A bill was drawn, and no time fixed for its payment; it was presented on the 18th of April, and accepted payable the 8th of September; this being stated in the declaration, the defendant demurred, and insisted, that as no time was prescribed for payment the bill was payable at sight, and that a promise to pay two or three months after sight was not an acceptance within the custom of merchants; but the Court held that it was an acceptance within the custom, and the demurrer was over-ruled (*Walker v. Attwood*, 11 Mod. 190). Thirdly, as to place. On this point also there are numerous authorities; but as it is in this respect that the present controversy has arisen, I assume only, at present, that this also may be conditional, reserving myself to examine the authorities and doctrine hereafter. Lastly, as to mode of payment. A bill was accepted, to be paid, half in money, and half in bills, and the question was, whether there could be a qualification of an acceptance? And it was proved by divers merchants that there might be, for that he who might refuse the bill totally, might accept it in part; but that the holder was not bound to acquiesce in such acceptance; *Petit v. Benson* (Comb. 152). If, then, there may be a conditional acceptance as to sum, as to time, and as to mode of payment, such acceptance, as to these, qualifying the liability to pay, it is difficult to conceive why there should be any difference as to place, at least as between the acceptor and the

payee so taking the conditional accept-[497]-ance; nor do I conceive, speaking with deference to other opinions, that there is any distinction which, upon principle, can be supported. Losing sight of place, however, for the moment, let the effect of a conditional acceptance be examined in the other respects already mentioned. And first as to amount; he who takes an acceptance for less than the sum expressed in the bill cannot claim from the acceptor more; though, as to the drawer, how it may affect him will form matter of distinct consideration. So, as to time, the holder is likewise bound by the terms under which he has consented to take the acceptance: and why? Because, on the one hand, the payee not being bound to take an acceptance, except according to the tenor of the bill; and, on the other hand, the acceptor being only bound to accept as he may choose to accept, when the acceptance varies from the tenor of the bill, and the payee, notwithstanding, takes such acceptance, he consents to take the bill according to the tenor of the acceptance, and not according to the tenor of the bill.

So, it is as to sum, as to time, as to mode of payment; in each of which cases the acceptance, it is admitted, forms the contract between the immediate parties. Is there, then, any difference in this respect, as to place, and as to place only? In the argument at the bar, (and herein the case seems to me now narrowed to a single point,) it has not been disputed that there may be a conditional acceptance as to place, restrictive of payment, and making presentment necessary at such place, provided it be by words of express and unequivocal import: but it is denied that to make a bill payable at one place is an exclusion of others: and in *Fenton v. Goundry*, I observe, Mr. Justice Holroyd, who there argued against the restricted liability, seems to have taken the same distinction. "The case has been argued (he said) as if the terms of the acceptance had been payable at Sikes and Co.'s *only*," not contending, that if so drawn the payment would not have been restricted; and Lord Ellenborough is made immediately to observe, "Is it more than an expansion of the promise?" An observation, which his Lordship could not have made, if by the word *only* the promise had been, in terms, restricted; and, in the same way, in the case of *Gammon v. Schmoll*, in the Court of Common Pleas, it was not denied at the bar, that if the acceptance had [498] been at the place named, and not elsewhere, in such case the acceptance would have been clearly qualified, and conditional and restricted as to place. And so, yesterday, it was admitted by my brother Holroyd, and so, to-day, it is admitted by my Lord Chief Baron. The question, therefore, in this view of the subject, comes round to be merely a question of construction, namely, what do the words of acceptance import in the particular instance? and are they conditional as to place of payment or not? There are no technical words, by which, generally speaking, a condition must be created; and, whether it be a condition precedent, a concurrent act, or a mutual promise, must be collected from the intention of the parties, reference being had to the words made use of, and the subject-matter in question. And so again, it has been admitted by both the learned Judges to whom I have last referred. "Intention (said my brother Holroyd, in express terms) is that which ought to govern." Now conditional or qualified, as opposed to absolute, I can only say imports some qualification or restriction of that, which would be otherwise unconditional. This is self-evident, it will be agreed, when the condition is established, but so to state it, it is said, is but begging the question, or leaving it at least where it was before, the question being, whether the words operate by way of condition, and not upon the effect of the condition when established. Still, however, I can only say, the very departure from generality of expression to me, imports some modification of that generality; and, if simple and absolute acceptance have a clear and simple operation, and will bind a party to pay wherever his acceptance may be presented, it seems to me but reasonable to intend, that when he accepts, payable at a particular place, he means to exclude, in the first instance, a liability to demand in any other place. And, looking to intention, and taking as admitted, that it ought to govern, I cannot permit myself to doubt, that the words made use of in this instance are, in fairness of construction, just as clear as if express words of restriction had been introduced. The maxim referred to from Lord Bacon, by my brother Holroyd, (I speak it with deference) appears to me too technical as applied to such an instrument as a bill of exchange; nor would it govern in another view: for in a promissory note it is agreed that express words of restriction are not necessary:

[499] words of appointment and specification being of themselves sufficient. In none of these is the word "*only*" to be found, nor any words beyond those which belong to this particular case; and yet the rule of construction, as mere construction, must, in each instance, be the same. I think this upon the mere ground of the words themselves, but I think so, still more strongly, on the sense and reason of the thing. I will, first, put the case of a bill accepted payable in a town different from that in which the abode of the acceptor may be, as for instance, and to avoid extreme cases, a bill accepted in Birmingham payable in London; and I will further suppose it to be a bill according to the original simplicity of such transactions, that is, for an antecedent debt from the acceptor to the drawer of the bill. By his acceptance payable in London the acceptor promises to have a fund in London when the bill shall be presented; he may have sufficient to pay the bill, but not beyond it, and yet, according to the argument which would reject the words of specification as words of limitation, he must have that which he may not possess, that is, a double sum or sums, one forthcoming in London, and another in Birmingham, to take his chance as to the place where, in fact, the bill may be presented when due; or be left exposed to an arrest, as the immediate consequence of non-payment. I am aware, it may be said that such would be his situation under the original debt to the drawer, and that such would continue to be his situation under a general acceptance; but it is for the express purpose of guarding against this, and on other grounds of personal and commercial convenience, to which I shall presently advert, that the practice has obtained of partial and qualified acceptance as to place, and to which, as between the immediate parties, I do not see any possible objection. It has been very properly said, in one of the cases cited at the bar, the convenience of the thing is generally in support of such qualification; most persons keep their money at their banker's, and make all their payments there; there, they or their appointed agents for this purpose are to be found, and there, if any where, is the fund out of which the payment is to be made. To this it may be added, that the very prevalence of the practice proves the convenience; and though I will admit, that mere concurrence is not to make the law, yet, in all commercial transactions it is [500] greatly to be regarded, as the footing and foundation on which men deal together; and the course of such dealing, as between merchants, is often that which of itself constitutes the law. It is scarcely necessary to refer to the stronger cases of a bill accepted in London, payable in Dublin or Edinburgh, or a bill accepted in the West Indies, payable in London. And suppose that, in this latter case, the party accepting has remitted to his correspondent in London the produce of his plantation, for the express purpose of meeting the bill, will it be said that notwithstanding he may still be arrested in the West Indies, because for the original debt he was liable to be arrested any where? And yet the argument which treats as of no effect specification of place of payment stops nothing short of this extent. Nor do I see, in any one respect, where the line is to be drawn, or the distinction to be made. If, then, it would be so in the instance of a bill accepted in one town payable in another, or in one country payable in another, let the case be considered of a bill, the parties living in the same place, and accepted payable at a particular banking-house. It is scarcely necessary to say, that to the holder it can be no inconvenience to present it there; but on the other hand, I admit it would be scarcely any inconvenience to the acceptor to have it presented at his counting-house, or place of abode; for, even if it were an absolute acceptance, it would still, according to all probability, be paid by a draft on his banker, the acceptance on the bill only operating as such order; but, even in this view, it weighs something, though possibly not much, that this would be to subject the payment of a bill to a double instead of a single operation, namely, the having two places to apply to instead of one; and, though this would be an inconvenience imposed upon the holder by himself, still that which is not in the natural course of dealing raises a presumption that such departure from it was not meant. And what would be thought of the conduct of a holder, who, having a bill payable at a banker's, instead of going there should go to the house of the acceptor merely to get his draft for the bill, or should further insist on a specific payment in money or bank-notes?

To wind up, therefore, what I have to observe upon this part of the subject, on the reason and fitness of the thing, on principles of justice and mercantile convenience, and from the [501] very nature of such transactions, I think a particular place of

payment being part of the acceptance of the bill, imposes upon the holder, because he is the willing holder of such acceptance, the necessity of presenting it, in the first instance, there; and leaves the acceptor only liable to pay, where he has provided and fixed a fund for payment, and has consented to pay, in order that he may not be called upon to pay where he has no such fund, nor given any such consent. Nor can I quit this part of the subject without adding, that I do not see a possible inconvenience which can result from so deciding; for the holder need not take a bill so accepted; and where the remedy is so obvious, and it turns simply on such a point, except that confusion in this respect has crept into the subject by disagreement in the decisions of courts of law, and that it is fit the law should be settled and uniform, the question seems to me hardly worthy of the attention which it has excited, and the consideration which it has undergone.

Deeming, then, presentment at the appointed place to be a condition precedent, I will only further say, that I think it necessary that such presentment should be averred and proved; and, that non-presentment and having funds ought not to come by way of defence, as, in the case of promissory notes, has been decided by all the courts in Westminster-hall, and from which, notwithstanding what I have heard this day, I do not myself feel disposed to dissent. Presentment, according to Lord Ellenborough's opinion in *Sanderson v. Bowes*, at the appointed place, is a condition precedent; and for want of such an averment the declaration is bad. The argument, therefore, as to this point, resolves itself into the question, whether condition precedent or not? For, admit it to be so, then, in this respect, there is no difference between the two courts, and the cases of promissory notes apply to bills of exchange; while, on the other hand, if it be not a condition precedent, it is of course not necessary to be averred.

Quitting now the general ground, I come next to the analogies which result from other cases mentioned, if not of the same, yet of a similar description. And first as to promissory notes. It is scarcely necessary to advert to what has been said as to the similarity, or the distinction between promissory notes and bills of exchange. In some respects, undoubtedly, they are [502] different, in others it may almost be said they run into each other. A bill has, indeed, generally, three parties, the drawer, the drawee, (if accepting, becoming the acceptor,) and the payee; but there may be only two parties, as where a person draws a bill on another payable to his own order, and this, in legal operation, is rather a promissory note than a bill. It is usual, however, to declare on it as a bill; not admitting the identity of drawer and payee; and, if accepted, the defendant may be charged in one count as the drawer, in another as indorser, and in the third, as the maker of a promissory note. I forbear to allude to the cases which turned upon the distinction in the address of the note between "at" and "to," in one of which it was said by Lord Ellenborough (in *Shuttleworth v. Stevens*, 1 Campb. 407)—"This is properly declared on as a bill of exchange, though it might have been treated as a promissory note at the option of the holder;" and, in another of which (*Richards v. Milsington*, Holt, N.P.C. 364. n.), it was observed by Lord Chief Justice Gibbs, "It would be difficult to say, in most cases, that what is law, as regards bills of exchange, is not law as it respects promissory notes;" but paramount in point of application is what was said by Lord Mansfield in *Heylyn v. Adamson* (Burr. 669), and which has been so often mentioned that I shall content myself with merely referring to it.

Such, then, being the similarity, and, in some instances, the identity, of promissory notes and bills of exchange, let it be seen what has been determined with respect to promissory notes; premising only, that here, at least, there is no clashing of authorities; for though the decisions in the King's Bench, as far as respects promissory notes, are denied to have application to bills of exchange, the decisions in the Common Pleas, as to bills of exchange, of necessity include promissory notes; and so far, then, as concerns promissory notes, there is no difference of opinion whatever. What then has been decided respecting promissory notes? In this, the decisions of the two courts agree: namely, that a promissory note, containing in the body of it a promise to pay at a particular place, requires a demand of payment there, in order to give the holder a cause of action if it be not paid. Now on what grounds of reasoning do such [503] decisions stand? To take one case of the many,—In *Sanderson v. Bowes*, it is said by Lord Ellenborough, "An action on a note will not

lie unless the plaintiff has demanded payment at the appointed place. And I cannot but say that it is very convenient that such a condition should be incorporated in the note itself; for it would be very inconvenient that the makers of notes of this description should be liable to answer them every where, when it is notorious that they have made provision for them at a particular place, where only they engage to pay them;—and, having thus stated the ground of convenience, his Lordship added,—"then if the request at the place be a condition precedent, it should have been averred, and for want of such an averment the declaration is bad." Apply this doctrine to bills of exchange.—If convenience require that the makers of promissory notes should be liable only where they have expressly made provision to pay, how is it possible, in this respect, to distinguish promissory notes from bills of exchange? Is not the convenience precisely the same in the one case as in the other?—and being the same, how is it to depend on the form of the instrument? Call it what you will, or make it what you may, it is in payment, in each instance, that the transaction is to end; and the note or bill is the means, and nothing more, by which payment is to be procured; as far, therefore, as to a particular place of payment being pointed out, or a specific place of deposit being established, the reasoning applicable to each is precisely the same; and it seems to me impossible to distinguish between the two. An expression of Lord Ellenborough's has, however, been much observed upon, namely, "that a specification of place is but an expansion of the promise to pay." It will not be supposed that I mean to follow any of the verbal or critical remarks which have been made in this respect, at the bar, or in the courts below. Whatever peculiarity of expression might, at times, belong to this noble and very eminent person, it was, generally speaking, a peculiarity of force adapted to his peculiar vigour and energy of thought. But to the substance of the expression as authority it will be necessary to advert, in order to see how it has been understood and explained by those who have applied it in support of the doctrine of non-restricted acceptance. In *Gammon v. Schmoll*, the leading counsel at the bar, who was to support [504] the doctrine of universal liability, explained it in this way: "every general acceptor has a double liability; he is in default, first, if the bill is presented to him personally, wherever he may be, and he does not pay it; secondly, he is in default if it be presented at his place of abode, and not paid; to these, by a qualified acceptance, he adds the obligation to pay it if it be produced at the place," that is, the place specified. He must be prepared "with *triple* funds to pay the bill, as well where his person is, as where his abode is, and also, at the particular place mentioned: this is what Lord Ellenborough means by an expansion of the promise." This is a complication of expansibility which seems to me a strange departure from simplicity of proceeding; and, for myself, I can only say, I would not so understand it, if I could understand it to any other effect; but it is impossible to deny, whatever might be intended by the mode of expression itself, that in sum and substance it does amount to this. But whether every man who accepts a bill of exchange, by his acceptance at a specific place undertakes to pay at every other place if required, and to have a triple instead of a double or a single fund to the amount of the bill accepted; or whether he makes his own situation worse, by making that of the holder, in one respect at least, better, that is, by pointing out to him a definite place of payment, instead of leaving him to search where he, the acceptor, is to be found, when the bill becomes due, it is not for me to pronounce, but for your Lordships to consider. Or why, again, this should be in the case of a bill of exchange and not of a promissory note, is that which I am not able to understand.

I now come to that, which it is said, however, makes the distinction between bills of exchange and promissory notes, so as to make the reasoning as to the latter inapplicable to the former. And this distinction is said to consist in the form and nature of the respective instruments. First, then, as to the *form*. In a promissory note, it is said, the words are incorporated in the very body of the instrument, which creates the contract and duty of the party; whereas, in a bill of exchange, they are no part of the bill itself, but distinct as acceptance, and collateral to it. A promissory note is merely the promise of the maker; the acceptance of a bill of exchange is a compliance with the order of the drawer. To a promissory note [505] there are but two parties; to a bill of exchange there are three, and the drawer has rights as

well as the acceptor and payee. And to this I agree. But here again, at least, as between the acceptor and the payee, there is no distinction: in each instance a debt must be pre-supposed, and in each it is an undertaking to pay. It is said, that in the case of a promissory note the instrument creates the contract; and, no doubt, it does, that is, the contract to pay in the particular manner, but not the antecedent debt: the obligation to pay existed anterior to the note; and though, in the case of a bill of exchange, the debt had also pre-existence, the precise obligation to pay is created by the acceptance, and, be it promissory note, or be it bill accepted, it is, in each instance, but a promise to pay; and, without such promise the bill itself, as to the acceptor, would be a mere nullity.

To advert, however, to the situation of the drawer, and this brings me to the third question. And, first, with respect to time: in this the learned judges all agree that giving time will discharge the drawer. Extending the time mentioned in the bill would be giving more time than the drawer has said by the bill he chooses to give, which, as against the drawer, the payee can have no right to do; and, taking an acceptance at a shorter date, if, in case of non-payment, it would give an immediate action against the drawer, would thereby make him liable sooner than he undertook to be; he being liable only in case of non-payment by the acceptor, and this at the end of the stipulated time. I need scarcely add, it would be the same as to place, if place, from its nature, should resolve itself into time. It remains, therefore, only to consider place as unconnected with and independent of time. And, so considered, it may, or it may not, be material to the drawer. Suppose all the parties to live in the same town, whether the bill be accepted at the counting-house, or at the banking-house, can make no real difference to the drawer; in other cases, from distance, it might be material; but, at all events, I think, that if it put the drawer under greater difficulties than he otherwise would be under in point of proof of proper presentment, if bringing an action himself, it is a difficulty which I hold the payee has no right to impose upon the drawer, whose rights should remain unaltered, as ascertained by the [506] bill: whether those rights were altered or not would depend on the particular case. Perhaps, however, it would be more reasonable and convenient than making it depend on situation in each particular case, which might generate innumerable questions and give rise to great uncertainty, to hold, at once, the drawer discharged, the payee having taken such acceptance without notice, and thus acting at his own peril; and thus all inconvenience would be guarded against, by making it necessary to give notice to the drawer.

With respect to the last question, I am of opinion, that under the circumstances stated, C. could not maintain an action against A. without delivering up the bill, and this for the reasons given by several of the learned Judges, and which I do not feel it necessary to repeat.

In the above observations, I may appear to have built much on the decisions as to promissory notes; but it has been said these decisions themselves, perhaps, in point of law ought not to have taken place. To this I can only answer—first, that it is impossible for me to doubt of the validity of these decisions, numerous as they are, recognized and confirmed as they have been by every court, and never, in a single instance, having till this day been drawn into doubt by even a single Judge. If the law so settled is now to be considered as unsettled, I know not on what foundation, in point of law, any decision can stand: but, *here*, disclaiming even those decisions as decisions, and recognizing only the principle on which they proceed, I say, that, if the case of a promissory note were to occur *now* for the first time, it ought to be decided as those cases have been decided; and further, that without deriving authority from the decisions as such, the principles on which they have proceeded, and ought still to *rest*, apply equally, in my judgment, to bills of exchange. On the whole, therefore, my opinion is formed, as to bills of exchange, even without reference to the decisions as to promissory notes, and still less have I referred to the cases of promissory notes for the purpose of proving the decisions of the Court of King's Bench inconsistent each with the other, but for the purpose of respectfully adopting the decisions of that Court where they agree with the decisions of the other Courts, and thus affording principles decisive, in point of law, of the same question as to bills of exchange. And here, with-[507]-out repeating what has been said by other Judges in answer to the cases put of actions in debt on bond, or demand of rent,

I will only further say, that these do not appear to me to be cases analogous to bills of exchange, which depend on peculiar and appropriate grounds of commercial law, altogether distinct and different, and which, it must be agreed, the custom and usage of merchants is to decide. And this leads me to the only point on which (independent of the different opinion entertained by several of the learned Judges, and of the very able reasons by which their judgments have been supported) I am bound to say I feel some degree of difficulty; and that is, as to what has been said of the understanding and usage of merchants with respect to the question under consideration. If qualified acceptances as to place have hitherto circulated on a settled and general understanding, that place does not operate by way of limitation as to payment; as far as concerns the first question, which points to the usage of merchants, I am bound to admit, that I ought to have answered differently; and, further, that if so, the greatest part of my observations fall to the ground. Looking, also, to the second question, the consequence would, I apprehend, be the same, that is, as to the legal effect; for a bill of exchange, being altogether the creature of mercantile usage, recognized, however, by the law, such usage would constitute the law as applicable to such an instrument: it is not to be overlooked, that it has been asserted by high authority, that, in circulation and practice, supported by mercantile opinion and understanding, a conditional acceptance does not operate as I conceive it to do. Not meaning to doubt that such information has been given; still, if the decision is to turn on this single ground, I could wish the fact in some way or other to be regularly ascertained. I will take the law from the learned Judges, whose office it is to expound the law: but, if the law is to depend upon fact, and fact on testimony, I desire, if possible, to have testimony through the regular channel. This creates a difficulty with me, subject to which, I will only in conclusion add, that, for the reasons which I have given, I adhere to the answer, which I have humbly presumed to submit.

ABBOTT, C. J.—In answer to the first and second questions, I think the defendant in error was not bound, in order to entitle himself to sue the plaintiff in error, who is the acceptor of the [508] bill in question, to present the bill for payment at the banking-house of Sir John Perring and Co. nor to aver in his declaration that the bill had been so presented; for, I think, the acceptance is not to be considered in law as a qualified acceptance to pay the bill at the house of Sir John Perring and Co.; but, as a general acceptance to pay the same, with an additional direction to the holder to call for payment at that house, instead of calling at the house of the acceptor, as he would otherwise do.

These two questions appear to me to depend entirely upon the meaning and import of the words "payable at Sir John Perring and Co.'s, bankers." There can be no doubt that the drawee may qualify, because he may refuse his acceptance. The question is, whether he is to be considered as having done so by this expression? I conceive that the true meaning and import of all phrases is to be sought in usage, rather than in a strict and literal interpretation of the words of the phrase; and, that in mercantile instruments the usage of trade and commerce is that to which we are to resort. There are many words and phrases in all languages, of which the meaning varies with the subject and occasion to which they are applied. I shall take leave to postpone the delivery of the grounds of my opinion on these two questions until after I have stated my opinion on the third question, and the reasons of that opinion.

I understand the expression "take an acceptance," as used in this third question, to mean consent to such an acceptance; and, so understanding it, I am of opinion that C. could not, in the case proposed, maintain an action upon the bill against A. upon the refusal of payment by the acceptor. There is not, I apprehend, any doubt or difference of opinion upon so much of this question as supposes an acceptance qualified as to time; and, in my humble opinion, a qualification as to the place of payment has the same effect as a qualification as to the time of payment.

I conceive, that in estimation of law all bills are to be considered as drawn for value, if not actually in the hands of the drawee at the time of drawing, (which seems to have been usually the case in the infancy of those instruments) at least intended by the drawer, and expected by the drawee to be placed in the hands of the latter before the maturity of the bill. [509] And a person who draws a bill under such

circumstances may be permitted to elect for himself the time and place of payment; because, if the drawee should refuse to pay according to such election, he would be able to sue him for the sum which constitutes the value of the bill, either immediately, if the value has been previously received, or so soon as it shall be received, according to the intention upon which the bill is drawn. By an intention to place value in the hands of the drawer, I mean an intention to place it in the course of some mercantile transaction between the parties, such as the consignment of merchandise in pursuance of orders of the drawee, constituting the relation of seller and buyer; or a consignment for sale on account of the consignor, constituting the relation of principal and factor or agent; and not a mere promise to provide for the bill at maturity, by the transmission of money or other bills for that special purpose. The latter practice has indeed prevailed to a great extent in modern times, and bills of exchange have become rather instruments for raising money, or postponing payment of debts by a fictitious credit, than instruments of real mercantile transactions. But notwithstanding such practice, I apprehend they are to be considered in courts of law as founded upon real and mercantile transactions, according to their primitive object and use; because, if they are to be considered as founded upon other transactions, or to be governed by other principles, they will cease to be according to the usage and custom of merchants, upon which usage and custom alone their validity in the law of England depends: and which is referred to in every declaration in an action upon a bill of exchange; and if the drawer of a bill has a right to elect in this manner the time and place of payment, I think it cannot be competent to any holder of the bill to substitute a new election of his own, and to assent to any variation in these particulars, without the consent of the drawer, either precedent or subsequent. The holder cannot consent to an enlarged time of payment, because, in the interval, the drawee may fail, and he cannot be allowed to enforce the drawer to prolong the credit beyond the period that he himself may have chosen, nor can he consent to abridge the time; because by so doing he will obtain an earlier recourse against the drawer than the drawer intended to give. A bill of exchange is ordinarily addressed to the drawee at his usual place of trade or residence, and it is to such a bill that I understand the question to refer; this address, however, is intended only as a direction to the payee or holder as to the place where the drawee may be found, in order that the bill may be presented to him for acceptance and payment, and not as a designation of a precise or definite house or place of payment. And, consequently, a general acceptance of the bill leaves the bill according to its original tenor, and does not add any designation of the place of payment. Any introduction, therefore, of a definite and precise place of payment, at which alone the presentment is to be made, is a departure from the generality of the bill; and the holder who consents to take such an acceptance, does, by that act, consent to narrow what the drawer had left at large, and to fix a single place for the demand of that money, which, but for such his act, would be demandable by the drawer, or for his use, anywhere and everywhere. To such a limitation, I humbly conceive that the drawer has a right to object: and, consequently, to say to the holder, that by so doing he has taken the drawee for his own special debtor, in exclusion of the drawer, or, in common speech, he has made the bill his own. I am aware, that upon a refusal to pay at the designated place the acceptor of the bill becomes a debtor generally; but then, in order to enforce that general obligation, either the person who seeks to enforce it must prove the refusal, or at least (and which, in my opinion, is the more correct view of such a case) the party against whom the general obligation is sought to be enforced, may, by way of defence, allege and prove that he was ready with the money at the day and place appointed, and has at all times since been ready with it. I am aware also, that in the case supposed by this third question, which is the case of a bill made payable to a person named therein, the drawer cannot sue the acceptor upon the bill, without averring and proving a presentment for payment by the holder to the acceptor, and a refusal of payment by the latter; and I am sensible, that in many instances it may be a matter of entire indifference to the drawer, whether he shall prove a presentment for payment at the place specially designated by the acceptance, or at the place of abode or usual business of the drawee, to whom he has addressed his bill. But though this may be a matter of indifference in many cases, it [511] will not be so in all; if we suppose the drawee to live in some

street or square in London or Westminster, and to designate another place of payment in some other street or square, in either of those cities the proof of a presentment at the place designated may be as easy as the proof of a presentment at the place of residence or business: but if we suppose the drawee to live at London, and to designate Salisbury or Exeter as the place of payment, or *vice versa*, the proof may not be so easy to the drawer, who may have connections in one of those cities, furnishing an opportunity of finding the witness who made the presentment, and no such connections in the other: for there is frequently no sort of connection between the drawer and ultimate holder of a bill: the latter is often a person wholly unknown to the drawer. This difference may be considered generally as varying, and increasing or diminishing, with the distance of the places, though not by that circumstance alone; and if the effect of such a qualified acceptance be made to depend upon the convenience or inconvenience to the drawer in the particular case, a door will be opened to an infinity of questions which cannot be answered but by reference to the distance of the places, accompanied also with an inquiry into the particular circumstances and connections of the drawer in respect of the places. And I apprehend, my Lords, that a rule of law, liable to such questions in practice, ought not to be established without an absolute necessity, especially in mercantile cases, which, above all others, require to be governed by plain, prompt, and easy rules. My opinion, however, upon this question, is founded less upon consideration of particular convenience, than upon the general principle to which I have before alluded: namely, that the drawer has a right to have from the drawee, considered as his debtor in the way that I have mentioned, a general and unqualified acknowledgment of his debt, and promise of payment: and that no assignee of his demand can, without his assent, permit any limit or qualification at the dictation of the drawee, or by consent between those two persons. All that I have thus urged in relation to bills addressed generally to the drawee at his place of abode or business, will, I apprehend, apply with increased force to bills which, by their original form and tenor, require the payment to be made at some particular place designated therein: [512] because, in these cases, an acceptance substituting another and different place of payment will be a manifest departure from the declared intention of the drawer. There is another class or form of bills of exchange not noticed in the questions, but to which I advert, because I conceive the considerations belonging to it deserve attention: I mean, bills made payable to the order of the drawer, or which is the same in effect, to the drawer or his order. If a bill so drawn be indorsed to another without value, the indorsee becomes a mere agent of the drawer, and, of course, can never sue him upon the bill. If indorsed for value, either in the first, or any subsequent instance, the rights of the holder against the drawer do not differ from those arising on a bill drawn in favour of a person therein named. But the remedy of the drawer, to whom such a bill may be returned for nonpayment against the acceptor, is, in some respects, different; the drawer of such a bill may, in this event, sue the acceptor by a special declaration, setting forth the indorsement and return of the bill, and thereby entitle himself to recover, in addition to the principal sum, the expense of exchange and re-exchange paid by him to the indorsee, which is the usual mode in the case of foreign bills: and, if he sue in this form, he must allege and prove a presentment and protest for nonpayment. But the drawer may strike out his indorsement, and treat the bill as having remained continually in his own hands unassigned, which is the usual practice in the case of inland bills: and, in such an action, I apprehend it is not necessary to aver or prove a presentment for payment, the bill being accepted generally. I take this to be law: because, in all the numerous actions which have been brought upon bills of this description I have never known a presentment for payment actually proved at the trial: nor the want of such proof, or of the averment, ever made a ground of objection in any stage of the proceedings. In the case of such a bill, therefore, it is obvious, that if the indorsee take an acceptance, qualified as to the place of payment, so as to render the proof of a presentment at that place necessary to the maintenance of an action by the drawer against the acceptor, he will thereby cast an additional burthen upon the drawer, if the latter can be compelled to take up the bill: and I conceive the law will [513] not allow him to do this. I have expressed my sentiments thus at length upon the third question, because my opinion upon the first and second questions, to which I now revert, depends very mainly upon the opinion which I entertain on the third question.

I consider an acceptance qualified as to the place of payment to be followed by the consequences that I have mentioned, where the holder consents to receive it; and, if I am right in this, then the holder must of necessity have a right to refuse such an acceptance, because he cannot be compelled to take an acceptance which may deprive him of his recourse against the drawer; and this seems to have been the opinion of those learned judges, who, in the decided cases to which your Lordships have been referred, considered an acceptance like the present to be a qualified acceptance. If, then, the holder may refuse such acceptance, or if, consenting to take it, he loses his recourse against the drawer, I must say, I am entirely at a loss to discover how it can have happened, that in no one of the thousands and tens of thousands of bills which have been accepted in this form in England, in the course of the last thirty years, any holder of the bill has ever refused to take such an acceptance, or any drawer contended that he was discharged by the holder's consent to take it. I say, that neither of those things has happened, because I have never heard of them either in or out of a court of justice. Upon this consideration, I am satisfied, that according to the usage and custom of merchants, these words, "payable at, etc." are not understood to furnish a qualification, or to import that the acceptor will cause payment to be made, if the holder will present the bill at the place appointed, but not elsewhere, or otherwise. And I am particularly desirous to seek the meaning of these words in the usage of merchants at the Exchange, rather than in Westminster Hall; because a difference of opinion as to their meaning has for some time prevailed, not only among the judges now present, but also among some of those revered persons who are now no more. I must, however, add, that the words themselves are not apt words of condition or exclusion; and that if their meaning be doubtful, they are to be interpreted most strongly against the person using them, that is, the acceptor; and the most strong interpretation against him is that which excludes, and not that which admits the qualification. Much was argued by the learned counsel for the plaintiff in error, as to the inconvenience which may ensue from the interpretation which I put upon these words; especially in the case of a gentleman or a lawyer, who should be suddenly called upon for payment at a distant place, after having provided and left funds in the hands of his banker to discharge his acceptance. But this supposed inconvenience appears to me to rest almost wholly in suggestion and imagination. If a bill addressed to a person at his place of abode be accepted generally, I apprehend the holder may, if he will be perverse or foolish enough to do so, take out a writ against the acceptor, as soon as the bill becomes due, without calling at his house for payment, in like manner as any other person may do who is a creditor for goods sold for the ordinary supply of a family; so that the supposed inconvenience is equal in both forms of acceptance, but in practice it can rarely happen in either; because the holder who neglects to present his bill, loses his recourse against the drawer, which no prudent man will choose to do. And, if an acceptance in the form of the present, mentioning a banking-house, is to be deemed a qualified acceptance, I apprehend the same interpretation must be given to the words, if a house of any other description be mentioned, such as the house of any agent or friend, or even the house or place of business of the drawee, if he happen to have two, and the bill be directed to one of them, or if he be about to change his place of trade or residence before the bill will become due; or, if the bill be addressed to him at his only place of residence or business, without the addition of his place of abode, as "to A. B. merchant, London." There is also another ground upon which, it seems to me, as at present advised, that I might answer the first question in the negative; and that is this: Admitting a place of payment to be specially designated by the acceptance, I apprehend that the money is nevertheless due generally from the acceptor; and that in an action against him, his readiness to pay at the place appointed should be advanced by him as matter of defence by a special plea averring that fact, and bringing the money into court for the plaintiff's use, as in the common case of a plea of tender, [515] (unless indeed he can excuse himself by showing that the money has been lost by the intermediate failure of his banker, which is a point of so much doubt that I hope to be excused from giving an opinion upon it at present); and, according to the ordinary rules of pleading, a plaintiff need not allege any matter the want whereof furnishes a ground of special defence only, and not a general answer to his demand, or general defeasance of his right, unless it be the case of a condition precedent, the effect whereof is to postpone the demand until

the matter of the condition be performed; and I have already observed that the words "payable at the house of Sir J. P. and Co." do not appear to me to be proper words of condition. But I hope to be excused from expressing myself with confidence upon this point, by reason of the difficulty there may be in drawing an effectual distinction between the designation of a place of payment in the acceptance, and the designation thereof in the body of the bill itself, or in the body of a promissory note payable upon demand to the bearer, as was the case of *Sanderson v. Bowes*, and one or two others which have been cited; and in which it was decided, that a presentment of the note at the place therein designated was a condition precedent to a right of action for the money. If the like question shall ever arise again, I shall consider it with the utmost deference and respect to the great learning and talents by which those decisions were pronounced, though at present I am not entirely satisfied, that, even in the case of such a note, a readiness to pay at the appointed place is not properly matter of defence alone. It is, I hope, sufficient for me to say at present, that the words of the instrument now in question are not precisely the same, and that they are found in an instrument of a different character, namely, in a bill of exchange; wherein a time certain is appointed for the payment, and of which, as before observed, I think the acceptance must be considered as given in pursuance of an antecedent duty to the drawer, assignable by the custom of merchants, and not as creating a new duty in itself, which, in the case of *Sanderson v. Bowes*, the promissory note was considered to do.

In answer to the fourth question, I am of opinion that an action could not be maintained under the circumstances therein mentioned; or, rather, that the delivery of the bill by the [516] drawer to the payee, such bill still remaining in his hands, or outstanding, would furnish a defence to the action according to the case of *Kearslake v. Morgan* (5 T. R. 513); because, if the drawer could be compelled to pay the original debt under circumstances furnishing a right of action against his drawee, and thereby taking *his* funds out of the hands of the drawee, he might, in the result, be found to pay the amount twice: directly by himself, and indirectly through the medium of his drawee. I shall be understood to speak of a case wherein the holder had consented to take the qualified acceptance. I have clearly intimated that in my opinion he may refuse to do so; and if he does refuse, he may, in my opinion, treat the bill as dishonoured, and sue the drawer upon it.

[517] IN the discussion of the foregoing case three principal questions were made:

1. Whether the modern theory of law is to rest upon the ancient practice as to the acceptance of bills of exchange, according to which the acceptor was antecedently a debtor, or person having in his hands the funds of the drawer; or whether the extensive practice now established in commerce, of drawing bills, to which the acceptor lends his name and credit for the accommodation of the drawer, has altered the theory of law as it is supposed to have existed formerly; and accordingly, whether the acceptor becomes a debtor by and upon the terms of his acceptance only, as a contract then first made by him, without reference to any antecedent debt or debts.

2d. What is the true construction of the contract in this particular case:

3. Whether an action of debt will lie upon such contract or acceptance:

The two first questions have been satisfactorily investigated in the proceedings before the House of Lords in this case.

As to the last question, it was touched slightly, but passed without discussion. It is a question, in an abstract view, seemingly of little importance, but as connected with a consideration of the general principles of commercial jurisprudence, as involving a controversy upon the technical rules of pleading, on which the issue of suits, and the fate of suitors, are made to depend, and peculiarly as exhibiting one among many examples of the progressive change of legal opinions, it is a question well deserving a more studious investigation than the opportunities of the editor will afford.*

* This Note was printed three years ago, (Dec. 1820,) at the end of a pamphlet, containing a short report of the case now reported at length. The editor having in that note invited the aid of persons better qualified to discuss the question, the invitation has been accepted, without reference to the previous labours of the editor, by a

[518] To form a satisfactory opinion, it is material, in the first place, to consider accurately the early cases upon bills of exchange and promissory notes, and to examine the grounds and reasons of each decision. Upon such a review, it will appear that it is little more than a century since it was the solemn decision of an English Court of Justice, that no person but an actual merchant (Lutw. Rep. 891, 1585) could draw a bill of exchange. When this notion was removed by more liberal decisions,* it seems to have been doubted whether an action of debt, or *indebitatus assumpsit*, could lie against any of the parties to, and whether, on the bill or note. Yet in some of the cases it is suggested, that *indebitatus assumpsit* may be maintained on the bill or note as a contract between the privies to it, or in their names, and that the bill or note may be offered in evidence.† Afterwards it was held in some cases that debt,‡ in others that *indeb. assumpsit*, would lie against the maker of a note (or drawer of a bill), where it was expressed to be for value received. But still the great technical objections prevailed as between the drawer or maker, and payee, where value received was not expressed upon the face of the bill or note: and as between all other parties for a supposed want of privity of contract.

At last, when the extension of commerce impressed upon the Courts the necessity of weighing the convenience of mankind against technicalities, which grew out of an obsolete state of society, and rested, but with much inconsistency of decision, upon grounds which no longer existed; when the custom of merchants, which is the foundation and substance of the law of commerce, began to be considered as a branch of the law of nations—a part of the law of England, and, as such, to be [519] recognised in our courts of justice||; it was held and decided, without much hesitation, that an action of *indebitatus assumpsit* for money lent,¶ or for money paid, had, and received, by defendant to the use of plaintiff, might be maintained by the indorsee against the acceptor (*Tatlock v. Harris*) or the indorser (*Kessebower v. Tims*), and even by the bearer of a lost cash-note, which he fairly purchased, against the giver (*Grant v. Vaughan*). And, in the cases of bills and notes, that actions of *indebitatus assumpsit* were maintainable although the bills or notes were not expressed to be for value received (*White v. Ledwick*, Bayley on Bills, 16), although not a shilling had passed between plaintiff and defendant (*Ward v. Evans*, 2 Lord Raym. 930), and no evidence was given that the defendant had received value in the case of a bill (*Vere v. Lewis*, 3 T. R. 182).

To ascertain what are the circumstances in which an action of debt may be maintained, what is the definition and rule prescribed by the textwriters, is the second object of inquiry.**

It is reported in one case to have been held that *indebitatus assumpsit* will lie in

gentleman who has published "An Analysis of the case of *Rowe v. Young*." At the end of that analysis (sect. 3, p. 64), the author discusses this same question, whether debt will lie upon a bill of exchange. To that discussion the editor refers the Profession, that it may be seen in what manner and degree the original argument is amplified, improved, or varied by a different assortment of the authorities and topics of discussion.

* Carth. 82; 2 Ventr. 292; Comberb. 152; 1 Shower, 125; 12 Mod. 336, 380; Salk. 125.

† *Brown v. London*, 1 Freeman, 14; *Welch v. Craig*, 1 Mod. 285; 1 Vent. 152; Stra. 680; 8 Mod. 373; Salk. 125; 12 Mod. 37. In many of these early cases it does not appear by or against whom the action is brought.

‡ *Morgan's Prec.* 158; *Rumball v. Ball*, 10 Mod. 38; and *Bishop v. Young*, 2 Bos. and Pul. 78.

§ *Hodges v. Steward*, Skinner, 346; 12 Mod. 345; *Clarke v. Martin*, Lord Raym. 758; 12 Mod. 380; 2 Vent. 292.

|| See the argument of Judge Buller, in *Master v. Miller*, 4 Term Rep. 343, and *Pillan v. Mierop*, Burr. Rep.; *Tatlock v. Harris*, 3 T. R. and the several cases of bills drawn payable to the order of fictitious payees. See *Gibson v. Minet*, 1 H. Blac. 569; and *Gibson v. Hunter*, 6 B. P. C. with the note prefixed.

¶ Lord Raym. 758; 12 Mod. 380; Burr. Rep. 1525; see also 6 T. R. 123; *Kessebower v. Tims*, B. R. Pasch. 22 Geo. 3.

** See this point of the argument discussed in the note to *Eyre v. The Bank of England*, ante, vol. 1, p. 606.

no case but where debt lies.* But the matter is accurately defined in a book of great authority, where (Com. Dig. tit. Debt, A. 8) it is said, that "debt lies upon every express and implied (*ibid.* A. 9) contract to pay a sum certain." A bill of exchange, within the very terms of this definition and rule, is a request and undertaking (*Collis v. Emmet*, 11. Black. 321) by the drawer; and when accepted, a contract by the acceptor for the payment of a sum certain [520] absolutely, in money only (*Martin v. Chantry*, Stra. 1271; Bayley on Bills, p. 4) and in specie (Anon. Bull. N. Pri. 172). It is a mercantile contract entered into by the acceptor, and not as a mere guarantee. On this ground a distinction is made between the original acceptor of a bill, and a second acceptor, to guarantee the credit of the first, which has been held to be a collateral undertaking that the bill shall be paid, and requires a special declaration (*Jackson v. Hudson*, 2 Camp. N. P. C. 14).

That the acceptance is an express, or at least an implied, contract by the acceptor, to pay a sum certain, is assumed by all the Judges and the Lord Chancellor in their arguments (arguments *passim*, and opinion of Wood, B. p. 37) upon the case now reported, and may be proved, if requisite, by a multitude of preceding authorities. The question as to privity of contract, or the communication of the rights and benefit of the contract between the original and adopted parties to a bill of exchange, must also depend upon the principles of commercial law, as applicable to instruments of a negotiable nature. It is almost, if not altogether, identical with the question, whether the acceptor incurs an assignable debt by his acceptance, or what is the nature of his contract. In theory, a bill of exchange is an assignment to the payee of a debt due from the acceptor to the drawer. The acceptance imports either that the acceptor is a debtor, or that he holds effects of the drawer.† Acceptance of a bill imports, and is *prima facie* evidence, that the acceptor has effects of the drawer in his hands (*Master v. Miller*, 4 T. R. 339); it is an admission of effects. The acceptor by his acceptance gives faith to the bill; and the holder, giving credit to the fact, pays the value on receiving the bill (Burr. Rep. 1675, (*qq*) per Aston, J.) Giving a bill is an assignment (*Grant v. Farghloin*, Burr. per Yates, J.), or appropriation (*Tatlock v. Harris*, 3 T. R. 182.) of so much property, which becomes money had and received to the use of the holder. [521] The act of drawing a bill implies an undertaking to the payee, and every other person to whom the bill may afterwards be transferred, that the drawee will undertake in writing (or bind himself by a promise) to pay, and will pay, when due, the sum, etc. (Bayley on Bills, p. 21). The acceptance is evidence in an action by the holder against the acceptor, that he has received value (*Vere v. Lewis*) from the drawer.

Such are the doctrines of law as to the obligation of the acceptor, and the relation between him and the holder considered as payee; doctrines promulgated by judges of various learning, and the highest celebrity in municipal as well as commercial jurisprudence. Upon equal authority is founded the doctrine as to the relation of other parties in a bill of exchange. Every indorser is in contemplation of law a new drawer (*Smallwood v. Vernon*, Stra. Rep. 178; see Bayley on Bills, 47). And as between indorsee and indorser, though neither of them are actual parties to the original contract, and the whole transaction amounts to no more than money or other consideration passing from the one, and the writing a name by the other, yet this constitutes a mercantile privity, which is recognised by municipal courts, and becomes the foundation of the remedies which they administer in favour of the indorsee against the indorser (*Kessborough v. Tins*, *qut supra*), as well as the acceptor and drawer of the bill. The action in such cases may be either upon the bill as negotiable by the custom of merchants, or an *indebitatus assumpsit* (which is in the nature of an action of debt), (*vide ante*, p. 519, note) for money lent, etc., and the bill, with its acceptance or indorsement, may be given in evidence. But essentially, in both cases, the custom of merchants is the true principle of the remedy and foundation of the action. The distinction sounds more in name than in sub-

* *Hard's* case, Salk. 23; and *quære*, Whether the terms of the proposition are not convertible?

† Dict. of Eyre, C. B. in *Gibson v. Minot*, 1 H. Blac. p. 602. It may be accepted for honour, but the law in that case implies the same obligation.

stance*. For upon what ground but the custom of merchants can the bill be offered in evidence of money paid as between [522] indorsee and indorser, or acceptor. If there is other evidence of a consideration, the proof of the bill is superfluous.

How far the rigid maxims of municipal law have bent to the necessities of human intercourse appears by the doctrine, no longer disputed, that a bill of exchange, although it be a mere *chose in action*, yet the common mercantile transfer of it by writing a name, or even by simple delivery, is sufficient to vest the *legal* as well as the equitable interest in the indorsee or deliverer, and entitles him to sue thereon in his own name (see Chitty on Bills, p. 6).

This principle of decision has been extended beyond the cases of negotiable instruments. For where a *respondentia* bond had been given, on which the obligee had made a special indorsement to facilitate assignment, upon an action by an assignee of the bond, De Grey, C. J. held, that "the defendant had promised to pay any person who should become entitled to the money;" and there was a verdict for the plaintiff.†

Upon the strength of these authorities an opinion might, perhaps, without presumption, be hazarded: that all the parties, original and derivative, to the negotiable mercantile instrument called a bill of exchange, are equally, by creation or by adoption, parties to the contract which is, expressly as to some, and by implication at least as to all, for the payment of a sum certain.

If so, the circumstances here concur, which, according to the definition (Com. Dig. *quâ sup.*) of Chief Baron Comyns, are requisite to support an action of debt.

It is indeed stated, in a subsequent head of the Digest, that "debt will *not* (*id. ibid.* B.) lie against the acceptor of a bill of exchange." But this doctrine seems to be contradicted by the principle of the rule before stated, and is asserted upon the authority of a case (Anon. Hardres, 485), which was decided in the infancy of commerce, at a time when it was supposed, and seriously adjudged, that no person but an actual merchant (Lutw. 891, 1585) could draw a bill of ex-[523]-change—when it was held, that the bill must import to be for value received: that *indebitatus assumpsit* would not lie against the acceptor, and that the acceptor was liable only as a surety, and not as a principal debtor.

The revolution which has now taken place in judicial opinions, and the liberal doctrines upon this subject, which are now become settled principles of law, and applied daily in practice, seem to confirm the supposition, that there is, according to the law-merchant, which is a part of the law of England, an implied privity of contract between all the parties to a bill, primitive and derivative, or adoptive (see *Simmons v. Parminter*, 1 Wils. 185; Co. Litt. 172).

In all cases of the transfer of negotiable instruments the question seems to be, whether the instrument itself is not by the law-merchant *prima facie* or presumptive evidence of a consideration passing from hand to hand as the bill passes, but liable to be rebutted by evidence on the general issue, or special plea, that the holder gave no consideration.

An abstract of some of the principal cases cited in the foregoing note are here subjoined, with observations upon some later authorities which appear to bear upon the question of privity.

In Anon. Hardr. 485, held, that the payee cannot maintain debt against the acceptor, and it was said in that case, that the promises of the acceptor no more create a *duty* than a promise by a stranger to pay, etc. if the creditor will forbear. Upon the clear distinction between the acceptor of a bill, and a mere guarantee, see *Jackson v. Hudson*, 2 Camp. 447.

* It was upon a question of this kind that Lord Chief Justice Holt fell into a dispute with the mercantile interest in the City, as to the manner of declaring upon a promissory note before the statute of Anne, as upon a specialty by the custom of merchants, which he said was mere obstinacy, as there was so easy a method by *indeb. assumpsit* for money lent. See 2 Lord Raym. 758, and Burr. 1525, *post*. p. 525.

† *Fenner v. Mears*, Black. Rep. 1272. As to the authority of this case, see the observations of Lord Kenyon, in *Johnson v. Collings*, 1 East, 98.

In *Welch v. Craig*, Stra. 680, 8 Mod. 373, held, that debt will not lie upon a note. But it does not appear who was the defendant in the action.

In *Morgan's Precedents*, 458, is an entry of a declaration in debt by administratrix of payee of note against the maker.

In *Rumball v. Ball*, 10 Mod. 38, action of debt brought on a note, by payee against maker, and held good.

In *Brown v. London*, 1 Freeman, 14; 1 Mod. 285; 1 Ventr. 152, held that indeb. assumpsit would not lie against the acceptor of a bill; but Twisden, J. doubted. The ground of this decision is [524] said in Lev. 298, to have been, because the custom was not set out in the count.

In *Skinner*, 346, it is said that *indeb. assumpsit* (or debt, *qu.*) will only lie against the drawer upon a bill importing to have been given for value received.

In *Salk*, 23, it was held that *indeb. assumpsit* will lie in no case but where debt lies: That *indeb. assumpsit* (and therefore, *scmb.* debt *ante*, p. 549, note) lies against the drawer, though not against the acceptor, of a bill of exchange. The reason for this decision is given in *Skinner*, 346, namely, "for the apparent consideration." See *Vere v. Lewis*, *infra*.

In *Salk*, 125, and 12 Mod. 37, it is given as general doctrine, that indeb. ass. will not lie on a bill of exchange, as it is said, "for want of consideration, as it is but evidence of a promise to pay, which is but a *nudum pactum*." But it is to be observed, that the action was by the indorsee against the drawer, and in the last resolution of the judges, as given both in *Salkeld* and 12 Mod. it is said, that "the action should have been special on the bill, or a general indeb. ass. for money received to his (the indorsee's) use." See *Carter v. Palmer*, 12 Mod. 380, a case before the statute of Anne, where, upon a motion in arrest of judgment, a declaration upon a note on the custom, etc. as if it had been a bill, was held bad. But Holt, C. J. said, it might have been taken as evidence of money lent. In *Nicholson v. Sadgwick*, Ld. Raym. 180, the action (and verdict for plaintiff) being upon a note payable to bearer, the judgment was arrested on the ground of want of privity; but it was said the plaintiff might have maintained the action in the name of the payee, or if it had been payable to order, the (immediate) indorsee might have brought an action against the maker. And it was said to have been resolved in *Hodges v. Steward*, that the indorsement to the bearer binds the party who immediately indorses to him. In 12 Mod. 345, it is held that the first indorser (payee) striking out the names of all the indorsees of a bill, purporting to have been for value received, may maintain *indeb. assumpsit* against the drawer. In that action, Holt, C. J. is reported to have said, the action will lie, for the bill was given as a security for money lent, and without [525] doubt it was a debt; and the court, it is said, resolved it was a plain debt, and that one might bring debt, or indeb. ass. upon a bill of exchange, because it is in the nature of a security.

In 12 Mod. 380; and in Burr. Rep. 1525, it is laid down as indisputable, that indeb. ass. for money lent will lie upon a note. See also *Smith v. Kendall*, 6 T. R. 123. In *Clerke v. Martin*, Ld. Raym. 758, the action being upon a note payable to plaintiff or order; one count of the declaration was upon indeb. ass. for money lent, and another upon the custom, as on a bill of exchange. The defendant pleaded non assumpsit, and the jury gave a general verdict for the plaintiff with entire damages. Upon motion in arrest of judgment, Holt, C. J. was "totis viribus against the action." He said, "that such actions were innovations upon the common-law: " That "it was a new sort of specially invented in Lombard-street, which attempted, in these matters of bills of exchange, to give laws to Westminster Hall: That the continuing to declare upon these notes on the custom of merchants proceeded from obstinacy, as he had expressed his opinion against them, and since there was so easy a method, as to declare upon a general indeb. ass. for money lent. But as the damages were given generally, it could not be intended that they were given on the count of indeb. ass." And judgment was accordingly arrested.

So in *Grant v. Vaughan*, Burr. 1516, it was held that an action for money had and received may be maintained by the bearer against the giver of a cash note upon a banker, made payable "to ship Fortune, or bearer."

In *Tatlock v. Harris*, 3 T. R. 174, the indorsee of a bill recovered against the acceptor upon counts for money had and received, and money paid.

In *Vere v. Lewis*, 3 T. R. 182, the indorsee of a bill recovered upon the money-counts against the acceptor, although there was no evidence that he had received value for the bill. The Court said *the acceptance was evidence that he had received value from the drawers*.

In *Kesschouer v. Tims*, B. R. Pasch. 22 G. 3, it was held that the indorsee of a note might maintain indeb. ass. for money lent against the indorser.

[526] In *Bishop v. Young*, 2 B. and P. 78, (a decision by the present Lord Chancellor, when C. J. of the C. P.) an action of debt by the payee against the maker of a promissory note, expressed to be for value received, was upon demurrer held maintainable. What the decision might have been as between other parties, the Chief Justice said he would not express.

The case of *Barlow v. Bishop*, 1 East, 432, has been supposed (Chitty, 470,) to establish a rule, that the plaintiff can in no case recover under the money-counts, unless money has actually been received by the party sued, and for the use of the plaintiff. But in that case the plaintiff had received the note by indorsement from a married woman, and he had therefore no title or interest in the note; which could be no evidence for him of any thing.

If, (as Lord Kenyon observed in that case,) the indorsement had "been in the name of the husband, it might have been available" as a note indorsed, or as evidence of a consideration to the maker. But the indorsement being in her own name (as the Judge observed) "it was impossible to say that she could pass away the interest of her husband by it;" or, (it might be added,) that the plaintiff could make use of that which belonged to another, as evidence of a demand made by him against the defendant, who might have been sued a second time upon the same demand by the husband, when he had recovered possession of the note. It is indeed observed by the C. J. as reported at the end of the case, "that the plaintiff could not recover on the money counts, as no money passed between the parties." But if the maker of a negotiable note incurs the same responsibility to the holder as the acceptor of a bill, *quære*, how this extrajudicial dictum is reconcileable with the decision in *Vere v. Lewis*, ante, p. 525!

In *Waynam v. Bend*, 1 Camp. 174, the action was by an indorsee against the maker of a promissory note, made payable to *T. or bearer*. An indorsement being stated in the declaration. Lord Ellenborough said, that though unnecessary, yet as an indorsement was stated in the count, on the note, it must be proved; and that the plaintiff could not recover on the money-counts, as he was not *an original party* [527] *to the bill*, and there was no evidence of any value received by the defendant from him; but a witness being afterwards found to prove the indorsement, there was a verdict for the plaintiff on the count on the note. This case, it must be observed, contains no more than a *dictum* at *nisi prius*, and that the note was made payable to bearer; in which case the courts, as in actions brought upon bankers cheques and cash-notes, for obvious reasons, and upon the same principle, require proof of a consideration paid by the holder. At the end of the case of *Waynam v. Bend*, three authorities, on the point in question, are cited in a note subjoined by the reporter: *Johnson v. Collings*, 1 East, 98; *Whitewell v. Bennett*, 3 B. and P. 559; *Houle v. Barter*, 3 East, 177; but without any remarks upon the case, or the application of the authorities.

In *Johnson v. Collings* the decision was, that a promise to accept a bill before it was drawn was not in law an acceptance. And as it could not support the count on the acceptance of the bill, so being no acceptance it could be no evidence in support of the general counts for money had, etc. Lord Kenyon merely said, as to the other counts, that there was no evidence to support them.

In *Whitewell v. Bennett*, the bill produced in evidence varied from that stated in the declaration. A banker's check had been given for the amount by the acceptor to the payee post dated, for the purpose of preventing the receipt of the money, until it should be ascertained, whether a bill of the drawer, in the hands of the acceptor, would be paid. The presumption of law in support of the money-counts arising from the acceptance of the bill, was rebutted by the circumstance of post dating the check, by a conversation which took place at the time of the acceptance, and other circumstances; and it was expressly found by the verdict that the defendant, at the time when he accepted the bill, had no effects in his hands.

In *Houle v. Barter*, 3 East, 177, a bill being made payable to the order of the drawer, and indorsed by him, the plaintiff, in order to give additional credit to the bill, without the privity of the defendant, the acceptor, indorsed it upon the request of the drawer, and re-delivered it to him. The defendant having become bankrupt before the bill became due, and the plaintiff being obliged to pay the amount to the in-[528]-dorsee, the Court held, that he was *not a surety*, because he incurred no liability at the request of the defendant, and as his demand was upon the bill, which he might have proved under the commission, it was discharged by the certificate. The question turned wholly upon the nature of the collateral contract upon the bill itself, whether considered as a mercantile instrument, or as evidence of money paid and received. If the plaintiff could have been considered as a party to the instrument, according to the custom of the merchants, the demand was barred by the certificate.

Since the decision of this case on appeal, an act has been passed (1 and 2 Geo. IV. c. 78), reciting, that the practice and understanding among merchants was contrary to this decision; and enacting, that an acceptance made payable at a banker's, without further expression, shall be deemed a general acceptance; but if it is expressed to be payable at a banker's, or other place *only*, that it shall be deemed a qualified acceptance, and the acceptor shall not be liable to pay the bill, except in default of payment on demand at the banker's or other place.

[529]

SCOTLAND.

AN APPEAL FROM COURT OF SESSION.

CRAIGDALLIE AND OTHERS,—*Appellants*; AIKMAN AND OTHERS,—*Respondents*
[21 July 1820].

[3 Scots R.R. 607. See S.C. 1 Dow 1, and 3 Scots R.R. 1, and notes *ad loc. cit.* Considered in *Galbraith v. Smith*, 1837, 15 Shaw, 808; *Smith v. Galbraith*, 1813, 5 Dunlop, 665, at pp. 671, 677, 678, 680; *Craigie v. Marshall*, 1850, 12 Dunlop, 523, at pp. 531, 535, 560; *Couper v. Burn*, 1859, 22 Dunlop, 120, at pp. 131, 141, 145.]

In the year 1736, a meeting-house was built by contributions of materials, money and labour, and collections at the church door, of persons professing the principles of those who seceded at that time from the Church of Scotland. The meeting-house, and the ground on which it was built, were vested in certain persons, as trustees for the use of the society, and managers of the house of public worship for the Associate Congregation of Perth.

A schism took place in 1496 among the members of this religious community; and several of the members, including the representatives of some of the trustees, to whom the legal right of property had devolved, separated themselves from the rest of the community, and absolved themselves from the authority of the Associate Synod, which was the constituted authority for the government of the community. This separation took place on grounds of alleged difference of opinion, on a question as to the power of the civil magistrates in religious concerns, which the Court of Session pronounced to be unintelligible.

Held, that in a case where it was difficult to ascertain who were the legal owners, as representatives of the contributors, the use of the meeting house belongs to those who adhere to the religious principles of those by whom it was erected; and those who had separated themselves from the Associate Synod, and declined their jurisdiction, were held to have forfeited their right to the property: although it had been judicially declared that there was no intelligible difference of opinion between them and the adherents of the Synod.

The question in this case arose upon a dispute between the members of a congregation of seceders [530] from the church of Scotland, respecting the right to the

use of a meeting-house, built by contribution soon after the time of the secession, (1731.) on a piece of ground which was disposed to certain persons, who declared that they held the ground, and buildings to be erected, in trust for the use of the Society and Managers of the house of public worship, for the Associate Congregation of Perth. This was one of the bodies which seceded from the church of Scotland, in 1731, upon the question of patronage or appointment to vacant churches. The Seceders generally, and this congregation in particular, adhered to the doctrines and discipline of the church of Scotland. These consisted of the confession of faith, the larger and shorter catechisms, certain propositions respecting church government, the ordination of ministers, and the directory of worship, which had been agreed upon by the assembly of divines, at Westminster, soon after the revolution of 1688, approved of by the general assembly of the church of Scotland, and established by the fifth act of the second session of the first parliament of William and Mary. The church government then established was, by Kirk session,* presbyteries, synods, and [531] general assemblies, all which, except the last, were preserved by the Seceders.

In the confession of faith annexed to this act, one of the articles is in the following words: "The civil magistrate may not assume to himself the administration of the word and sacraments, or the power of the keys of the kingdom of heaven; yet he hath authority, and it is his duty to take order, that unity and peace be preserved in the church; that the truth of God be kept pure and entire; that all blasphemies and heresies be suppressed; all corruptions and abuses in worship and discipline prevented or reformed; and all the ordinances of God duly settled, administered, and observed: for the better effecting whereof, he hath power to call synods, to be present at them, and provide that whatsoever is transacted in them be according to the mind of God."

The national covenant of Scotland, and the solemn league and covenant of the three nations, which had been adopted by the first assembly of the church, were adopted also by the Seceders. These, as the standard principles of religious doctrine and discipline in their church, were recognised by the Seceders in their "act, declaration and testimony for the [532] doctrine, worship, discipline and government of the church of Scotland, issued at Perth in the year 1736;" and by a formula or series of interrogatories, which were proposed to persons desirous to become members of the church of the Seceders, and to which their assent was required. By the second question of the formula, the candidate for admission was interrogated, "whether he sincerely owned and believed the whole doctrines contained in the confession of faith?" The fourth question was in these words: "Do you acknowledge the perpetual obligation of the national covenant of Scotland, particularly as explained in 1638, to abjure prelacy, and the five articles of Perth, and of the solemn league and covenant? And do you acknowledge that public covenanting is a moral duty under the New Testament dispensation, to be performed, when God, in his providence, calls for it?"

In the year 1795, upon the petition of a member of the Associate Synod, a com-

* Originally, by stat. 1597. By act 1606 Episcopacy was restored; Presbytery again 1638; Episcopacy again 1662; and, finally, Presbytery by stat. 1689. The Kirk Session is composed of the clergyman of the parish, and of certain persons called elders, selected from the congregation of each parish, and ordained by a clergyman. This is the lowest court in the church, having jurisdiction in spiritual matters only over its own parish.

A Presbytery is composed of the clergymen of a district, together with one elder from each of the Kirk Sessions within that district. This is the court next above the Kirk Session, exercising jurisdiction over the district from which the members are selected.

A Synod is formed by the union of a certain number of Presbyteries, over which its jurisdiction extends.

The General Assembly is composed of representatives from all the different Presbyteries, from the Universities and the Royal Burghs. This is the supreme ecclesiastical court. Its power extends over the whole kingdom in all ecclesiastical subjects, and there is no appeal against its judgments.

mittee was appointed to review the questions in the formula, and to bring in an overture (the heads of an act) for uniting the members in their sentiments, respecting the power ascribed in the confession of faith to the civil magistrate in matters of religion, and respecting the nature of the obligation of the national covenants upon posterity; in the mean time, allowing presbyteries to exercise forbearance as to licence and ordination, with respect to the articles in question. After a report had been made by the committee, proposing an act of forbearance, and various meetings and discussions upon the subject, that measure was abandoned.

[533] At a meeting of the session, on the 13th of April 1797, a petition, on behalf of those who maintained the principles of the appellants, was presented against any alteration in the substance of the formula; but assenting, for the sake of peace, to prefatory explanation, as the following passage in the petition imports.

"At the same time, as certain expressions in the said formula, or in other ecclesiastical standards, and our national covenants, have been understood by some as favouring persecution for conscience sake, and ascribing an exorbitant power of religious interference to the civil magistrate; we are far from wishing the synod to request, from any candidate, his licence or ordination, or approbation of any such principles of which we disapprove; and, as there is a diversity of opinion as to the obligation of our covenants, national and solemn league, we consider them as binding on posterity only, so far as these covenants respect a solemn engagement of adherence unto all the truths and ordinances of the Lord Jesus Christ, as contained in our confession and catechisms. If the prefixing an explication of this nature to the old formula would satisfy our brethren, who object to said formula, we will agree thereto."

At a meeting of the synod, in April 1797, a resolution passed by a majority of voices, adopting the following preamble (as an explanation) to the formula: "Whereas some parts of the standard books of this synod have been interpreted as favouring compulsory measures in religion, the synod hereby declare, that they do not require an approbation of any such principle, from any candidate for [534] licence or ordination: And whereas a controversy has arisen among us respecting the nature and kind of the obligation of our solemn covenants on posterity, whether it be entirely of the same kind upon us as upon our ancestors, who swore them; the synod hereby declare, that while they hold the obligation of our covenants upon posterity, they do not interfere with that controversy which hath arisen respecting the nature and kind of it, and recommend to all the members to suppress that controversy, as tending to gender strife rather than godly edifying."

Against the adoption of this preamble various petitions were presented to the synod, which, having been considered and rejected, the measure was finally approved, and the preamble retained, by a resolution of the synod in 1799.

This resolution was followed by a protest and declinature on the part of several ministers. In one of these, after reciting the points in dispute, his opinions upon the subject, and the measures adopted by the majority of the synod, the minister, "in his own name, and in the name of all the members of the congregation who should adhere to him, protests against the proceedings of the synod, relative to, etc. and, until the preamble should be removed, declines the authority and jurisdiction of the associated burgher synod, and of all presbyteries subordinate to it," etc.

In consequence of this protest and declinature, the synod declared the minister, protesting, to be no longer a member of their body, and excluded him from the pulpit of their meeting-house, where he [535] had been accustomed to preach. Here upon a complaint was preferred to the sheriff, and afterwards an action was brought in the court of session by the appellants, "to have it declared, that the meeting-house, etc. belonged to them, etc. as adhering to the original principles of the secession, and whose ancestors contributed to the purchase," etc. A counter action was raised by the respondents, to have it declared that the parties (protesting and declining the jurisdiction of the synod) had lost all interest in the subjects. These actions being conjoined, the court, by an interlocutor, dated the 1st of February 1801, found, "that the property of the subjects in question is held in trust for a society of persons who contributed their money, either by specific subscriptions, or by contribution at the church doors, for purchasing the ground, and building, repairing, and upholding the house or houses thereon, or of paying off the debt con-

tracted for these purposes, *such persons always by themselves, or along with others, joining with them, forming a congregation of Christians continuing in communion with and subject to the ecclesiastical discipline of a body of dissenting protestants, calling themselves 'the Associate Presbytery and Synod of Burgher Seceders,'* and remit to the lord ordinary to proceed accordingly."

Against this judgment an appeal was presented to the House of Lords, which was argued in the year 1813, when, after a long hearing: The Lords, by their judgment, found, "as matter of fact, sufficiently established by proof, that the ground and buildings in question, were purchased and erected with intent [536] that the same should be used and enjoyed for the purpose of religious worship, by a number of persons agreeing at the time in their religious opinions and persuasions, and therefore intending to continue in communion with each other; and that the society of such persons acceded to a body, termed in the pleadings, 'The Associate Synod;' and find, that it does not expressly appear as matter of fact, for what purpose it was intended at the time such purchase and erections were made, or at the time such accession took place, that the ground and buildings should be used and enjoyed, in case the whole body of persons using and enjoying the same should change their religious principles and persuasions; or, if in consequence of the adherence of some such persons to their original religious principles and persuasions, and the non-adherence of others of them thereto, such persons should cease to agree in their original principles and persuasions, and should cease to continue in communion with each other, and should cease, either as to the whole body, or as to any part of the members composing the same, to adhere to the body, termed in the pleadings, 'The Associate Synod;'" and it is therefore ordered and adjudged, that, with these findings, the cause be remitted back to the Court of Session in Scotland, to review all the interlocutors complained of in the said appeal; and upon such review, to do therein what shall appear to them to be meet and just."

In prosecution of this judgment, the appellants presented a petition to the First Division of the Court of Session, praying them to apply the remit; and [537] after some steps of procedure, unnecessary to be here detailed, having appointed the appellants to give in a condescendence, stating the facts and circumstances they might consider necessary to be investigated, with a view to the application of the remit, a condescendence was accordingly lodged; and that being followed by answers, replies, and duplies, the Court, on advising the whole cause, pronounced the following interlocutor:

"The Lords having resumed consideration of this petition, with condescendence, answers, replies, duplies, and whole cause, find, that the pursuers, James Craigdallie and others, have failed to condescend upon any acts done, or opinions professed by the associate synod, or by the defenders, Jedidiah Aikman and others, from which this Court, as far as they are capable of understanding the subject, can infer, much less find, that the said defenders have deviated from the original principles and standards of the associate presbytery and synod. Farther find, that the pursuers have failed in rendering intelligible to the Court, on what ground it is that they aver, that there does at this moment exist any *real* difference between their principles and those of the defenders; for the Lords further find, that the act of forbearance, as it is termed, on which the pursuers found, as proving the apostacy of the defenders from the original principles of the secession, and the new formula, were never adopted by the defenders, but were either rejected or dismissed as inexpedient; and that the preamble to the formula, which was adopted by the associate synod in the [538] year 1797, is substantially and almost *verbatim* the same, as the explication which the pursuers proposed in their petition of the 13th April 1797, to be prefixed to the formula; and to which, if it would have satisfied their brethren, they declared that they were willing to agree; therefore, on the whole, find it to be unnecessary now to enter into any of the inquiries ordered by the House of Lords, under the supposition, that the defenders had departed from the original standards and principles of the association, and that the pursuers must be considered merely as so many individuals, who have thought proper voluntarily to separate themselves from the congregation to which they belonged, without any assignable cause, and without any fault on the part of the defenders, and, therefore, have no right to disturb

the defenders in the possession of the place of worship originally built for the profession of principles from which the pursuers have not shown that the defenders have deviated; therefore, sustain the defences, and assoilzie; and in the counter-action of declarator, at the instance of the defenders Jedidiah Aikman and others, decern and declare in terms of the libel; but find no expenses due to either party."

The appellants, conceiving themselves to be aggrieved by this interlocutor, again appealed to the House of Lords.

The Lord Chancellor:—There is a cause which has been repeatedly before the House, and one of the most difficult and distressing which I ever met with; [539] I mean the cause of *Craigdallie v. Aikman*. This arose in a controversy, which seems to have very much engaged the feelings of the different parties. The question was, who were entitled to the use of a chapel, which had been built, partly by previous subscription, partly by money received at the doors of the chapel after it was built, and partly by money subscribed in several different ways? The history of the case may be stated without going at great length into the transactions. There having been a secession from the established church of Scotland, a question arose between these parties, who are seceders, whether this chapel, which had been erected for the use of one particular class of seceders from the established church, belonged to the one party or the other? And this suit was instituted for the purpose of having it determined, to whom the property in this chapel belonged, or rather who were to have the use of it; because the origin of the chapel, and the manner in which it was purchased, left it one of the most difficult things in the world to determine where the property rested.

When this matter was formerly before the House, we acted upon this principle, that if we could find out what were the religious principles of those who originally attended the chapel, we should hold the building appropriated to the use of persons who adhere to the same religious principles; and in that view, it became necessary to determine whether any, and if so, which of the persons, who were contending for the use of this place of worship, adhered to or had ceased to adhere to those which were originally the religious principles which led to the establishment of this place of worship, with a view to deter-[540]-mine what was to be done if the right principle was to appropriate the building to those who continued to hold those religious principles, and were in communion with those who did so. By the judgment of the House in 1813, it is found that the ground and buildings in question were purchased and erected, with intent that the same should be used and employed for the purposes of religious worship, by a number of persons agreeing at the time in their religious opinions and persuasions, and therefore intending to continue in communion with each other; and that the society of such persons acceded to a body, termed in the pleadings "the Associate Synod." That it does not expressly appear as matter of fact, for what purposes it was intended, at the time such purchase and erections were made, or at the time such accession took place, that the said ground and buildings should be used and enjoyed, in case the whole body of persons using and enjoying the same should change their religious principles and persuasions; or if, in consequence of the adherence of some of such persons to their original religious principles and persuasions, and the non-adherence of others of them thereto, such persons should cease to agree in their religious principles and persuasions, and should cease to continue in communion with each other, and should cease either as the whole body, or as to any part of the members composing the same, to adhere to the body termed in the pleadings, "the Associate Synod." By this judgment it was intended, that the congregation originally, if I may so represent them, were persons who adhered to the doctrines of what is known in Scotland by the name of the Associate Synod. This place for [541] religious worship being built by the contributions of a great many persons, adhering to the doctrines of the Associate Synod. If the whole body of those who now frequent the place, no longer adhered to the doctrines held by the Associate Synod, then it became a question for whom, at present, this building should be held in trust, which was purchased by money originally subscribed by those who held the opinion of that synod. The question then would be, whether any of the members now desiring to have the use of this place of religious worship, could be considered as entitled to the use of a building purchased by persons adhering to those religious opinions? And supposing that there

is a division of religious opinions in the persons at present wishing to enjoy this building, the question then would be, which of them adhered to the opinions of those who had built the place of worship, and which of them differed from those opinions? Those who still adhered to those religious principles being more properly to be considered as the *cestui que* trusts of those who held this place of worship in trust, than those who have departed altogether from the religious principles of those who founded this place, if I may so express it.

I cannot read this judgment of the House without your perceiving, that the House felt infinite difficulty how to proceed with a case so very singularly circumstanced as this was; but, however, it was remitted to the Court of Session; and being remitted to the Court of Session, the appellants presented a petition to the First Division of the Court, praying their Lordships to review the interlocutors having [542] regard to the proceedings of this House; and in the mean time, to find that the petitioners, and those who adhered to them, should have exclusive possession of the meeting-house in question; or, at all events, to find that they were entitled to possession for the forenoon, and for the afternoon and evening of each Sunday, alternately; or to grant to the petitioners such other relief in the premises as the Court should think fit. The Court, however, found itself under the same difficulty as this House, in order to know what it should decree; and accordingly, they appointed the appellants to lodge a condescendence of such facts and circumstances as appeared to them right to be ascertained, in order to the application of the remit from the House of Lords.

The appellants accordingly gave in a condescendence, which was followed by different pleadings; and in those pleadings it was maintained, that a certain preamble, which has been very much heard of in the course of the cause, was in perfect harmony with the original, and the strictest principles of the association; and that, at all events, it was originally proposed by the appellants themselves, and was ultimately adopted merely in consequence of their zeal in its behalf.

The Court pronounced an interlocutor,* in which it describes the utter impossibility of seeing any thing like what was intelligible in the proceeding; and I do not know how this House is to relieve the [543] parties from the consequence. The Court of Session, in Scotland, were full as likely to know what were the principles and standards of the Associate Presbytery and Synod of Scotland, as any of your Lordships; and are as well, if not better than your Lordships, able to decide whether any acts done, or opinions professed by the defenders, Jedidiah Aikman and others, were opinions and facts which were a deviation, on the part of the defenders, from the principles and standards of the Associate Presbytery and Synod. If they were obliged to qualify their finding, as they do, intimating that they doubt whether they understood the subject at all under the words, "as far as they are capable of understanding the subject;" I hope I may be permitted, without offence to you, to say that there may be some doubt whether we understand the subject, not only because the Court of Session was much more likely to understand the matter than we are; but because I have had the mortification, I know not how many times over, to endeavour myself to understand what these principles were, and whether they have, or have not, deviated from them; and I have made the attempt to understand it, till I find it, at least, on my part to be quite hopeless.

The questions, therefore, in this case are, whether the interlocutors by which the defences are sustained, and these parties assoilzied, are right? And, to be sure, if they cannot show that the defenders, or any of them, had departed from the original standard and principles of their association, and if the Court is satisfied that the pursuers have not departed from these principles, but have thought proper, volun-[544]-tarily, to separate from the congregation to which they belonged, the inquiries directed by the judgment of the House would be altogether unnecessary; for the inquiries directed by that judgment aimed at having it ascertained, whether the defenders and pursuers, or either, and if so, which of them, had departed from the original principles of the congregation? and according to what the Court of Session now tell us, they cannot find out, nor has either party enabled them to find out, that either the one or the other had departed from the original principles of their association; and the consequence of that is, that those who have not attended the meeting, but who are yet insisting that they have interests in the property in

* The Lord Chancellor read the interlocutor, which is printed *ante*, p. 537.

which the meeting is held, are to be considered as persons voluntarily separating themselves from the congregation without cause: and all I can say upon the subject is, that after racking my mind again and again upon the subject, I really do not know what more to make of it.

On the other part of the interlocutor I entertain a doubt, namely, upon that part of it whereby, "in the counter-action of declarator, at the instance of the defenders Aikman and others, they decern and declare in terms of the libel;" in which terms, among other things prayed, are, that those defenders may forfeit all their interest in the property. Now I can conceive that, consistently with the declaration contained in this interlocutor, there being no difference of religious opinion among those persons, as far as the Court of Session could understand the subject, that it might be right to decern in the terms of the libel; namely, that those who are now engaged in [545] the worship, according to these religious opinions and religious principles, the same in the judgment of the Court of Session should not be disturbed in that religious worship; but I doubt extremely, whether, on the other hand, if the parties had interest, I mean interest in the lands and buildings, you can go further than to say, that they shall permit the religious worship to proceed as it has hitherto proceeded; and that they shall not make use of the interest they have in the land and buildings to prevent that. But it would be going a great way to say, that because they have for the present separated from the rest of the congregation, and although this very interlocutor finds there is no difference of opinion between them, that you should take out of them, if they have in them, any interest in the lands and buildings, etc. You may direct that land and those buildings to be enjoyed for the purposes to which they were originally devoted; but if they have any interest in the land and buildings, I doubt very much the propriety of a declaration, that they have forfeited that interest. That does not appear to me at this moment necessary to make good the effect of the interlocutor; but I will take it into further consideration till Friday.

The Lord Chancellor: In that case of Craigdallie and Aikman, there was one point which I reserved in some measure for further consideration; but in looking through the case again, my opinion is, that I shall act most properly in advising you to affirm that judgment generally.

Judgment affirmed.

[547]

SCOTLAND.

COURT OF SESSION (FIRST DIVISION).

ALEXANDER M'DONALD,—*Appellant*; ALEXANDER ROSS and others,
Respondents [19th July, 1820].

[See *Tidcombe v. Cholmley* (1701), Colles, p. 166, and note thereto.]

Army Agents having distinct accounts with the Colonel and the Paymaster of a regiment, upon the assurance of the Paymaster that he was authorized by the Colonel, and on his account, to provide certain articles for the regiment, transfer to the debit of the Colonel a sum standing in their books, originally debited to the Paymaster; and having settled accounts, and received the balance due from the Paymaster, sue the Colonel for the balance claimed as due from him, including the sum upon the debit transferred. Pending this action the Paymaster, on the requisition of the Agents, furnishes them with a letter from the Colonel, as the authority for the charge against him. The Agents being fully satisfied as to the meaning and extent of this authority, in the course of their pleadings maintain, strenuously, the right of the Paymaster to act under it; and judgment, in the first instance, is given in their favour. After they had obtained this judgment, apprehending the possibility that it might be reversed, they retransfer the sum in dispute from the debit of the Colonel to the debit of the Paymaster, giving him notice of that fact, and of the proceedings in and state of the action against the Colonel. The

former judgment, on representation, was reversed; and it was held, by the Court below, and the House of Lords on Appeal, that the Agents were entitled in an action of relief against the Paymaster, to recover the sum in dispute, and the costs of the action against the Colonel.

If an action is brought for the benefit and through the intervention of another, he is bound to bear the costs of the action.

[543] On the 14th of August 1794, Alexander McDonell of Glengary, being authorized by government to raise a regiment of Highland fencible infantry, appointed the Respondents Ross and Ogilvie agents for the regiment. The appellant was about the same time appointed paymaster, of which Glengary apprised the respondents Ross and Ogilvie by a letter, dated in August 1794, by which he also directed them "to honour all drafts which might be drawn by the appellant as paymaster, and to pay no attention to the drafts of any other person, nor to issue money to them." This letter was mislaid, and not produced in the cause.

The regiment was not completed and embodied till May 1795; and during the intermediate period the Appellant, as paymaster, drew bills upon Ross and Ogilvie, as agents, to a large amount, for the use of the regiment, without specifying the different heads of service to which these drafts were to be applied. After the regiment was embodied the appellant was continued as paymaster, and went on as before, drawing generally on account of the regiment, without specifying the different heads of service for which he drew; the drafts in the mean time stood at his debit in their books, he being entitled to a counter credit when the particular distributions should be rendered.

The money issued by government on account of a regiment, consists of, first, the levy money for recruits; secondly, the pay and subsistence to officers and men; thirdly, contingent money for incidental expenses, such as stationery, removing [549] baggage, etc.; and, lastly, money for furnishing regular clothing and accoutrements.

The levy money is issued to the agents, and is drawn *for by the colonel*, or any person whose drafts on that account he authorizes to be answered. In the letter of service the levy money to be allowed is specified, and a general letter of instructions accompanies it, directing a part to be retained from each recruit, for providing slop clothing and necessaries. This is done by the officer who enlists him. He generally does so, by obtaining the articles from the regimental store, and paying for it out of the retained bounty. With the original furnishing, or subsequently replacing of these necessaries, the colonel has no concern.

The pay and subsistence of the men is also issued to the agents, and drawn from them *by the paymaster*. The colonel has no power to draw for this money.

The contingent accounts, in like manner, are to be drawn for monthly by the paymaster; the commanding officer certifying that the account is correctly stated.

The money issued for the regular clothing and accoutrements is termed the off- reckonings. It amounts to more than is absolutely necessary for that purpose, and forms part of the emoluments of the colonel: it is the property of the colonel alone; and the paymaster-general will not pay any part of this money without an assignment of it from the colonel. When the assignment is in favour of the agents, as is usually the case, a separate [550] account is opened for it, termed the Clothing Account.

This fund is kept separate for the colonel; it is not paid into his personal account for pay and subsistence; and no person can draw upon it without express power from him to do so.

Army agents are bound to honour all drafts made by the paymaster in that capacity. These drafts are always in advance, and to account generally, without specifying the particular service to which the sums so drawn are to be applied. The drafts are placed to the debit of the paymaster until their accounts or distributions are transmitted, when the different articles are classed under their proper heads.

During the whole period of the appellant's continuing paymaster, the agents were in advance above the sums they received from government. Of these advances they complained to the paymaster, and requested him to send particular accounts of the application of the money. The paymaster, however, was not able to make out

complete accounts of the different sums he had expended for the regiment; and matters continued in this state, the agents being constantly in advance for the regiment, till 1796, when the appellant resigned his situation as paymaster, and the colonel soon after resigned his commission. The agency of the regiment was transferred by the succeeding colonel from Ross and Ogilvie to McDonald, Bruce, and Co. on the 25th of December 1796. Immediately upon this change the appellant called upon the agents, to have his accounts adjusted, and exhibited to them the sub-[551]-joined Supplementary Distribution, or Account of Necessaries *, alleged to have been

* Account of Necessaries provided for the Glengary Regiment by Captain
M'Donald, Paymaster :

Art. 1795.

1. April 24.	To cash paid Mr. Graham, for false tails	£1 16 0
2. May 18.	To do, paid Duncan McAlister, for 70 pair shoes, at 1s. 6d.	15 15 6
3. June 17.	To do, paid Mutus, for stocks, cockades, and drummers caps	16 11 6
4. 20.	To do, paid Mr. McLean, for plaids	1 19 0½
5.	To do, for 461¾ yards linen, at 1s. 3d. per yard	£28 17 2¾
6.	To do, for 12½ yds. cambric, at 3s. 9d.	2 6 10½
7.	To do, for 20 yds. drab cloth for watch coats, at 2s. 1d.	2 6 8
8.	To do, for 380 yards blue cloth for do., at 2s.	s. d. 30 16 0
9.	To do, for 92 yds. green baize, at 1 1	6 2 8
10.	To do, for 63 yds. green linen, at 1 1	3 8 3
11.	To do, for 3 yds. blue thread, at 2 6	0 7 6
12.	To do, for ½ yard wham, at 6 6	0 3 3
13.	To do, for 1 grs. of buttons, at 5 6	1 2 0
		75 1 5½
14.	To do, paid Wilson, hair-dresser, for false tails	1 17 0
15.	To do, for 17 pair of shoes, at 1s. 6d.	3 16 6
16.	To do, paid do., for 2 dozen serjeants bonnets, at 16s.	1 12 0
17.	To do, paid do. 50½ doz. privates do., 11s.	35 7 0
18.	To do, paid carriage for do.	0 5 0
19.	To do, paid for 50 dz. pair of shoes, 5s.	127 10 0
		161 11 0
20.	To do, paid for 13¼ dz. stocks, at 15s.	32 12 6
21.	To do, paid 11 dozen cockades to do., at 5s.	11 0 0
		15 12 6
22.	To do, paid Mr. Ascoli, for feathers	56 10 3
23.	To do, paid Mr. Stevens, for 20½ dozen brushes, for the use of the regiment	1 10 0
24.	To do, paid Mr. Campbell, Glasgow, for cockades and rosettes	9 7 6
25.	To 1 pattern serjeant's shirt, 6s.; and 6 privates do., 1s. 2d.	1 11 0
26.	To making ten watch coats, at 2s. 6d.	1 5 0
27.	To paid Cuphart, for false tails, combs, razors, etc.	17 10 0
28.	To paid bill Mr. William Shairp for plaids and tartan	51 10 0
29.	To cash paid Russell's account for shoes at Irvine	5 17 0
30.	To 1 piece of garters given the quartermaster, for the use of the regiment	0 0 0
31. Oct. 19.	To amount paid for shoes	11 0 0
32.	To amount paid Wormald, Fountaine, and Co. for 8 pieces drab fearnoughts, 224 yards, at 3s. 1d. per yard, for watch coats	37 6 8
33.	To 2 pieces drab serge, at 1s. per yard	1 0 0

disbursed by him for the regiment during the year 1795, the balance amounting to £686 6s. 1 $\frac{1}{4}$ d. in payment of which [552] he said he had applied the different sums drawn from the agents.

He required them to give him credit for this sum, and state it to the debit of the colonel, because it consisted of furnishings of that description, which the colonel was bound to furnish his regiment with from the fund called the *off-reckonings*, allotted by government for that purpose: *and the appellant stated to them, that he had express orders from the colonel to pay all such accounts.* The agents con-[553]-sequently allowed this sum as an article of credit to the appellant, and charged it against the colonel. But when a copy of the colonel's account was presented to his agent, an objection was made to the charge of £686 6s. 1 $\frac{1}{4}$ d. upon the ground that the articles of which it was composed were not necessary for the regiment, *and had been bought without authority from the colonel.*

34.	To 14 yards white cloth, at 6s. 6d.	£4 11 0
35.	To 5 bonnets given the quartermaster for the band	0 6 8
36. Nov. 11.	To 248 yards linen, at 1s. 4d.	16 10 8
37.	To 6 shirts ready made, at 6s. 4d.	1 18 0
38.	To pairs of gaiters, per invoice, account remitted	12 9 10
39.	To 630 turn-screws and gun-worms, brushes and prickers	23 12 6
40.	To 250 privs. bonnets, at 1s. 3 $\frac{1}{4}$ d.	£34 4 0
41.	To 32 serjeants do., at 1s. 6d.	2 8 0
42.	To carriage of do.	1 8 0
		38 0 0
43.	To insurance on £610 for clothing, etc. per account, dated March 11, 1796.	13 13 8
44. May 4.	To freight and carriage from London of 11 bales and a box, to G. Hamilton and Co. per account	£6 2 0
45. June 4.	To cartage of 11 bales tartan from Ban- nockburn	5 12 6
46.	To 2 carts from Glasgow to Irvine, per M'Nab	1 9 0
47.	To 9 extra earts from Kilmarnock to Car- lisle, 105 miles, at 6d.	23 12 6
48.	To 9 do. from Carlisle to Brampton 10 miles, at 4 $\frac{1}{2}$ d.	1 13 9
49.	To 9 do. from Brampton to Haltichistle, 12 miles, at 4 $\frac{1}{2}$ d.	2 0 6
50.	To 9 do. from Haltichistle to Hexham, 15 miles, at 4 $\frac{1}{2}$ d.	2 10 7 $\frac{1}{2}$
51.	To 13 do. from Hexham to Newcastle, 21 miles, at 4 $\frac{1}{2}$ d.	5 2 4 $\frac{1}{2}$
		48 3 3
	Sum	£721 13 5 $\frac{3}{4}$

Cr.

1795.	By allowance for watch coats, from 8th May to 24th December 1795	21 10 4 $\frac{1}{2}$
	By do. do. from 25th Dec. 1795 to June 1796	13 17 0
	Balance, Captain M'Donald	35 7 4 $\frac{1}{2}$
	Remains	£686 6 1 $\frac{1}{4}$

(signed) A. M'Donald, Paymaster.

N.B. If the allowance for watch coats from the 14th August to the 8th May is allowed by government, of course it will be put to the credit of this account.

[554] This objection the agents communicated by letter to the appellant, who, in his answer to them, stated, "that he had Glengary's order (a copy of which he would send them whenever he got his papers from Edinburgh) for whatever had been furnished, and requested them to make no alteration in their accounts."

In consequence of this communication with the appellant, the account in question was allowed to remain as it stood debited to the colonel, upon the presumption that the orders which the appellant had stated he held for furnishing these articles would be forthcoming, and would be obligatory upon the colonel. After placing this sum to the colonel's debit, the appellant made an arrangement with Ross and Ogilvie for the balance of his account; who, after again writing to the appellant to request that he would send them the order alluded to by him as a voucher for the charge against Glengary, raised an action against Glengary, for the payment of the balance of his account, including, *inter alia*, the amount of the necessaries already mentioned. In defence, Glengary stated, that this particular sum had been debited to him without proper authority, and that he was therefore not bound to pay it.

Upon this defence, Ross and Ogilvie again wrote to the appellant in these terms: "Your charge of £686 6s. 1½d. for necessaries furnished the Glengary Fencibles, being disputed by Mr. Alexander M'Donell of Glengary, we request you will have the goodness to transmit to Mr. Anderson, W.S. Edinburgh, *the original instructions given you by Glengary*, or any other document in your [555] possession, which may support any part of the same."

In consequence of this communication, the letter of instructions was produced by the appellant, and exhibited in the process against Glengary,—it is as follows:

"29th May 1795.

"Dear Sir: As I am about to leave this quarter for the North, in my absence it may save you further trouble to have these instructions to show, when you see it proper. You will be particular in your advancing money to officers, not exceed five guineas, as bounty, for each man brought and passed at the inspection, according to orders, in regard to appearance; and you will also, previous to the settling of their accounts, require to have the men paraded as furnished by each officer, and let those serjeants who were employed to recruit for me, as well as the Reverend Alexander M'Dowell, be there present, so as to establish their claims, and prevent future disputes. You will also be so good as to subsist the supernumerary serjeants of my appointment till vacancies occur, so as to relieve me of that burden. And I hereby beg of you to settle with the different men enlisted by me, or on my account by those so employed. As also, I authorize you to settle my private accounts, properly vouched, that may appear against me; as likewise those things ordered by my sister Miss M'Donell. You will also please to *settle what appears proper to you in regard to the clothing* and other appointments of the regiment. I have moreover to request of you to get all accounts for or against [556] me drawn up, whether between us, or between me and any other, in regard to my military transactions, or transactions whatever, subsequent to our first concerns; and by attending to all these things with all possible convenient dispatch, you will infinitely oblige. Dear sir, Yours, etc.
(signed) A. M'Donell."

Ross and Ogilvie considering this letter a sufficient authority to the appellant to furnish the necessaries in question, on the 8th of June 1802, proceeded with their action against Glengary.

In the course of the action against Glengary the respondents presented a petition, in which the following passage occurs:

"Glengary apprised Ross and Ogilvie of the paymaster's appointment, by a letter, dated August 1794 (which has unfortunately fallen aside), and directed them to honour *all* drafts which might be drawn by him the paymaster, and to pay no attention to the drafts of any other persons, or to issue money to them. The paymaster was not merely empowered to draw the pay and usual allowances of the regiment, but was also authorized, as has been admitted by the defender (M'Donell of Glengary) to uplift the levy money, the allowance for haversacks, and a variety of other allowances, with which, as paymaster, he had nothing to do. He was likewise empowered to draw the pay and allowances due to the colonel himself—a power which is seldom or never entrusted to the paymaster—and with these discharge the private accounts of Glengary. In short, this paymaster [557] acted as sole manager

of the colonel, in all transactions relating to the regiment, whether falling within his own province or not; and during the experience of half a century, Ross and Ogilvie have never known an instance of such unlimited trust and confidence being placed in any person in a similar situation." In another part of their pleadings they express themselves as follows: "Glengary was desirous to shake himself loose, if possible, from his obligation to repay to the agents the money they had advanced the paymaster by his instruction, and upon his responsibility, and which had been applied to the use of the regiment. He did not pretend either that the money was not actually advanced by the agents, or that it had not been applied to the use of the regiment, but he insisted that the agents had no right to make the advances to the paymaster without his authority; his object was, to have the paymaster to deal with instead of Ross and Ogilvie; in which case he would have set against the advances the balance which he pretended to be due to him by the paymaster on his own private account. In this way he wished to roll over the agents upon the paymaster, when demanding payment of a sum admittedly advanced and applied to the use of the regiment, which was advanced solely on his responsibility, and for which he was at any rate liable, as colonel of the regiment. It was a matter of indifference to Ross and Ogilvie which of the two paid the advances they had made. Had they considered both equally liable, they would have preferred coming against the paymaster, who was [558] equally able to pay with the colonel, and whom they always found more willing to settle his accounts: but they considered the colonel as the party primarily liable to them, and they did not wish to lend themselves to a scheme which they conceived to be unjust, by refusing to give to the paymaster the credit to which he was entitled."

Lord Hermand, ordinary, pronounced judgment in their favour; but in consequence of some doubts which had arisen, in a letter, dated on the 6th of July 1806, and addressed to the appellant, Ross and Ogilvie apprised the appellant "*that they had recharged to his account the sum of £686 6s. 1½d. for clothing disbursements, until allowed to them by the Court of Session.*"

On the 9th of July 1808, after reconsidering the case, Lord Hermand pronounced an interlocutor, sustaining the claim of Ross and Ogilvie. Against this interlocutor Glengary put in a representation; in which he asserted: 1st, That the furnishings comprising the account in question, neither were necessary for the regiment, nor were made by the appellant; and 2dly, That Ross and Ogilvie had not made any advance for payment of the necessaries, but had merely transferred the account in question from the debit of the appellant to Mr. M'Donell's debit, upon finding that the appellant was their debtor to the extent of £2000.

The Lord Ordinary thereupon appointed Ross and Ogilvie to explain "at what time, whether it was while they continued agents for the Glengary regiment, or after the agency was transferred to another house, that they placed the account of [559] £686 6s. 1½d. now pursued for, to the representer's debit. As also, whether they actually paid that account in any other way than by placing it to the credit of the paymaster."

In the answer to this representation, Ross and Ogilvie stated to the Lord Ordinary, that owing to the great embarrassment and confusion into which their bankruptcy had thrown their affairs, their agent had not been able to get sufficient information within the short space limited for giving in the answers, to enable them to reply pointedly to the interrogatories put by the Lord Ordinary. Ross and Ogilvie endeavoured to show that these new averments made by Glengary were not only altogether unfounded, but were contradicted by his former admissions in the cause. Upon advising the representation, with answers, the Lord Ordinary pronounced an interlocutor, by which he found, "That prior to the regulations 1798, as stated in other cases, which have occurred subsequent to the interlocutor represented against, paymasters were appointed by the colonel, or by the field officers and captains jointly, though in the circumstances of this case it is immaterial in which of these ways the paymaster of the Glengary regiment may have been appointed: Finds, that in so far as concerns the business of the regiment, no extraordinary powers were conferred on Lyndale, the original paymaster, by the letter of the 29th May 1795, relating chiefly to the settlement of accounts already contracted, nor any thing more than would have been implied from the nature of his office, and in particular that it did not empower him to draw upon the respon-[560]-dents for the expense

of alleged furnishings out of the off- reckonings, a construction confirmed by the conduct of Lyndale himself, who cannot be presumed to have lain out of so large a sum as £686 6s. 1d. sterling, the amount of the account objected to, as well as by the conduct of the pursuers, who, while they continued agents for the regiment, did not state that account to the debit of the representer: Finds it stated by the representer, and not denied, that Lyndale was removed from the office of paymaster in June 1796, and that in July thereafter, the representer resigned the regiment; after which the new colonel transferred the agency from the pursuers to McDonald, Bruce, and Co. London: Finds it instructed by the books of the respondents, that the account in question was not paid on or before the 30th September 1796, seeing that account is not stated in the account rendered upon that day: Finds that by the deliverance on the representation, the respondents were directed to say explicitly at what time, whether it was while they continued agents for the Glengary regiment, or after the agency was transferred to another house, that they placed the account of £686 6s. 1d. now pursued for, to the respondents' debit; as also, whether they actually paid that account in any other way than by placing it to the credit of the paymaster: Finds that no direct answer has been made to these plain questions, which are evaded on the ground of the want of information from the respondents themselves, or their agents in London, whence it was to be inferred that no safe answer could be given: Finds [561] that the account £686 6s. 1d. was not placed to the representer's debit till after the respondents had been deprived of their agency, as well as that said account was not actually paid, but merely by an operation on the books transferred to the credit of the paymaster: Finds that the representer cannot be affected by such irregular transfer, alters the interlocutor represented against, sustains the defences so far as respects said account, and decerns, reserving to the respondents to state what balance, exclusive of said account, if any, be due to them."

Against this interlocutor the respondents Ross and Ogilvie prepared a representation, and at the same time raised an action of relief against the appellant, in which they concluded that the defender should be decreed to repeat and pay back to the pursuers the foresaid sum of £686 6s. 1½d. with interest thereof since the same was credited to him, and also that he should be ordained to make payment to the pursuers of "the expenses of the foresaid action presently depending against the said Alexander McDonnell of Glengary, and which hitherto have been wholly incurred in discussing objections to payment of the foresaid sum," and of the expenses of this action.

This action being brought into Court, various orders were made upon the defender to put in defences.

In the meantime Lord Hermand, in the action against Glengary, refused the representation for the respondents, and adhered to his former interlocutor.

The respondents prepared a petition against these [562] judgments of the Lord Ordinary, and at the same time they lodged a minute in the process against the appellant, in which, after mentioning the procedure in the process with Glengary, they state, "that, as Lord Hermand had adhered to his interlocutor before mentioned, upon advising a full representation and answers, a petition against his Lordship's judgment had been prepared and lodged yesterday, and will probably be under the consideration of the court to-morrow. A copy of that petition was herewith produced, that the defender in this action might see that the pursuers have done every thing in their power to make the claim against Glengary effectual, and might satisfy himself that the argument was properly stated; and, as it is unquestionable that, if the pursuers shall ultimately fail in recovering this sum from Glengary, the defender must make repetition to them of the foresaid account, credited to him on the faith that it was a proper charge against Glengary, he may hold himself in readiness to make repetition, or to take such steps to substantiate his charge against Glengary as he may think advisable." Lord Armadale, ordinary, allowed this minute to be seen.

The petition for the respondents in the other action having been appointed to be answered, answers were given in for Glengary accordingly. Upon this the respondents lodged another minute in the process against the appellant, stating, "That upon the 23d October last, the agent for the pursuers had sent to the agent for the defender a copy of the answers which had been given in for Glengary to the said petition; but that, in order to prevent [563] the possibility of the defender's pleading ignorance of the proceedings in the original action, and that he might be prepared

to obviate any statements in these answers which he judged erroneous, the pursuers now produced in process a printed copy of the answers for Glengary, and intimated to the defender that the case stood in the short roll of the First Division for determination upon the 2d of December."

The Lords of the First Division, upon advising the petition for the respondents, with answers, adhered to the Lord Ordinary's interlocutor, and found the respondents liable in expenses; whereupon the respondents enrolled the action, against which the present is an appeal, to ask decree against the defender.

The appellant gave in defences to the following effect:

"First, The defender does not conceive that Messrs. Ross and Ogilvie have any claim against him for advances made on account of the regiment raised by Glengary, as they were made to him in the capacity of paymaster and agent for Glengary.

"Secondly, Messrs. Ross and Ogilvie, by having mislaid the letter of credit lodged with them by Glengary in August 1794, lost their recourse on Glengary: by this their neglect the defendant ought not to suffer.

"Thirdly, If Messrs. Ross and Ogilvie had disallowed the articles in the defender's account when it was claimed, he would have recovered the money from the regiment, which he cannot now do.

"Fourthly, This claim is prescribed."

[564] When the case was debated before the Lord Ordinary, he pronounced an interlocutor, by which, in respect of the contingency between this action and the original action, still in dependence before the First Division of the Court, he made avizandum with the cause to the Lords of that division; and gave directions that the case might be reported.

The case was accordingly reported, and the following judgment was pronounced:

"Upon report of the Lord President, and having advised the mutual informations of the parties, the Lords repel the defences, find the defender liable in terms of the conclusions of the libel, and decern, find expenses due, and allow an account thereof to be given in, and remit to the auditor to tax the same, and to report."

The appellant preferred a reclaiming petition against the interlocutor above recited; but it was refused without answers.

Against this interlocutor the appeal was presented.

For the Appellants, Mr. Charles Warren, Mr. Robert Grant.

For the Respondents, Mr. Scarlett, Mr. West (now Sir Edward West, Chief Justice of Bombay).

The Lord Chancellor:—This case involves two questions; the first is, Whether, under the circumstances of the case, Mr. M'Donald was liable to pay Messrs. Ross and Ogilvie the amount of money demanded by their summons? The next question is, Whether, supposing the Court of Session to have been right in awarding payment by him of that sum, [565] they ought to have charged him with the expenses of the antecedent proceeding, by which the now respondents sought to charge with that debt M'Donell of Glengary?

When it was argued at the bar, it appeared to me proper in this case, attending to all the circumstances of it, that we should have time to consider it. I had more doubt with respect to the point, whether this appellant ought to have been charged with the expenses of the antecedent proceeding, than on the question, whether he should be charged with the sum of six hundred and odd pounds: but on looking at it again and again, I offer it to you as my opinion, that the decision of the Court of Session is right on both points. In the first place, I think the appellant is chargeable in the account, under the circumstances here stated, at the suit of these respondents; and looking at the whole nature of the proceeding in the action that was brought against Glengary, as a principal, it appears to me that is fairly to be considered as an action for the benefit and behoof, and in a great measure through their intervention, the action of Mr. M'Donald himself, and that therefore he ought to pay the costs of that action. The consequence of that is, that on moving, according to the forms of this House, for a reversal of this judgment, for my own part I must say, Non-content, meaning thereby that the judgment should be affirmed, but without costs.

Judgment affirmed.

[566]

COURT OF CHANCERY, IRELAND.

By ORIGINAL APPEAL.

MARIA RYLANDS and RICHARD FRANKLIN GOUGH, *Appellants*; The Right honourable DAVID LATOUCHE, PETER LATOUCHE the elder, ROBERT LATOUCHE, and JOHN LATOUCHE, Esqrs.,—*Respondents*.

By REVIVOR AND AMENDMENT.

MARIA RYLANDS, RICHARD FRANKLIN GOUGH, and JOHN FRANKLIN, *Appellants*; PETER LATOUCHE, and ROBERT LATOUCHE, and GEORGE LATOUCHE, JOHN DAVID LATOUCHE, and PETER LATOUCHE the younger, Esqrs.,—*Respondents* [19th July 1820].

[Mews' Dig. i. 335: ix. 1500, 1831.]

A suit having been instituted by a devisor and revived by a party as devisee, whose supposed right is displaced by the discovery of a later will, the cause cannot be continued for the benefit of the effective devisee, by agreement between that devisee and the plaintiff in the suit, so as to enable the devisee under the second will (not being a party to the suit) to appeal against the decree; and an appeal cause cannot be heard before the Court of Appeal until he is made a party in the suit below.

In such a case, where the suit had been originally instituted by the devisor, and upon his death revived by the party claiming under the first will, *scilicet*, that the proper course to be adopted by the devisee under the second, is not (as in this case) to file a supplemental bill, praying to have the benefit of the proceedings in the revived suit, but to revive, *de novo*, the suit as abated on the death of the devisor.

[567] The case is different where a decree is defective only because incidental parties are not before the Court; as in the case of an assignment in trust for payment of debts, reserving the surplus if the assignee obtains a decree, and afterwards it appears that he had assigned his interest before the decree, his assignees may, by supplemental bill, have the benefit of that decree. (*Scotch Binks v. Binks*, note p. 593.)

A decree for redemption and general account, etc. having been made in the original and revived causes in favour of the supposed devisee, it cannot be restricted in the supplemental suit to an account to be taken as between the executors and mortgagees, etc. to the time of the death of the devisor, dismissing the bill as it regards the interest of the devisee: for the devisee is a necessary party to the account.

The devisee having taken the benefit of an insolvent act, and made the assignee a party to the suit, who, by his answer, disclaimed all knowledge of the assignment, and refused to undertake the trust for the creditors, he cannot be compelled to act, and the suit remains imperfect until another assignee is appointed and made a party.

A decree made in such a state of the cause is erroneous.

* In and before the year 1803, Thomas Gough, the father of the appellant Maria Rylands, was seised and possessed of lands which he held for lives under John Latouche as head landlord. At the same date John, David and Peter Latouche, carried on business as bankers, and being creditors of Gough upon a bill of exchange, brought an action against him, and obtained possession of the lands under a custodiam, which was granted to David Latouche. The custodiam proving unproductive, a mortgage [568] of the lands was executed by Thomas Gough to David Latouche, as trustee for the other

* This case is reported chiefly as an example of the ordinary course and issue of Irish appeals in the appellate jurisdiction; but some of the questions discussed, are points decided of pleading and practice, are not unworthy of attention.

partners, but without prejudice to the custodiam: and finally, after various transactions not material to the issue of this cause, the lands were sold by Gough to John Latouche, under alleged circumstances of fraud, duress, and oppression.

On the 8th of November 1803, Thomas Gough filed a bill in the Court of Chancery in Ireland against David, John, and Peter Latouche, stating several transactions of debt, outlawry, mortgage, and sale, (as before in part set forth), impeaching the sale for fraud, and praying that the respondents might account for the rents and profits of the lands, and that he might be restored to the possession on the usual terms of redemption.

The defendants by their answer, insisted on the fairness of the transactions, and the validity of the sale.

Gough died pending the cause, in November 1804, leaving a will dated the 19th of August 1804, by which he devised property, including the lands in question, to John Hamilton and William Crawford, in trust for the appellant Maria, then a minor, and appointed Hamilton and Crawford his executors. Hamilton and Crawford proved the will, and with the appellant Maria, by her testamentary guardians, revived the suit, which afterwards by order, made on her attaining twenty-one, was carried on in her own name.

After the reviving of the suit, it was discovered that Gough had made another will, dated 30th of September 1804, by which he devised all his estates [569] to the appellant Richard Franklin Gough, charged with some legacies, and amongst others a legacy to the appellant Maria, and appointed the appellant Richard Franklin Gough residuary devisee and legatee.

The second will was established under a decree of the Court, obtained in a suit instituted by Richard Franklin Gough, who thereupon agreed with Maria Rylands and Hamilton and Crawford, that the suit which had been revived by them as above stated, should be continued in their names for the benefit of the appellant Richard Franklin Gough.

The cause was prosecuted accordingly, and the plaintiffs and defendants respectively having examined witnesses on the questions at issue, the cause was heard before Lord Chancellor Ponsonby on the pleadings and proofs: and on the 28th of June 1806, it was decreed, that under the circumstances of the case the deed of sale dated the 1st of August 1786, ought to be deemed fraudulent and void as against the plaintiffs in the cause: and accordingly, that the same should be brought in and cancelled, and that the plaintiffs should be entitled to a redemption of the mortgage of the 25th of October 1783, on payment of the balance (if any) which should appear to be due on the foot of the same: and that it should be referred to a master to take an account of the sums due to the defendants, David, John, and Peter Latouche, on the foot of the mortgage: and also, an account of all sums advanced by the defendants, or any of them, as well in the discharge of the debts of Thomas Gough, as also of the sums paid to him or for his use, and [570] by his desire, in his lifetime: and that the master should also take an account of what the defendants, or any of them, had received, or without their wilful default might have received, out of the mortgaged premises, from the 9th of July 1781, being the time when they entered into possession thereof under the custodiam: and that the rent reserved by any lease, which should appear to have been *bonâ fide* made by the defendants, should be charged from the date thereof, and that the master should set a fair rent on the other parts of the premises: and that in taking the accounts, the master should set off the sums with which the defendants should be chargeable, first in discharging the interest, and next the principal of their demands: and thereupon should strike a balance, and the costs and further directions were reserved until the return of the master's report.

The cause was afterwards re-heard before Lord Chancellor Ponsonby, on the petition of John Latouche: and on the 29th of April 1807, it was ordered that the former decree should be affirmed.

By the report on the 23d of December 1807, the master upon the whole of the accounts found that there was a balance of £6286 17s. 1d. due to the plaintiffs on the day of his report. Against this report several exceptions were taken by the defendants, on the ground that the master, in taking the accounts, had not received certain statements copied and signed by Gough as evidence against the plaintiffs.

On this ground most of the exceptions were allowed, and upon reference back to the master to review his report according to rules made on hearing the exceptions, he found by his amended report, [571] that after all credits and allowances there was a balance due to the defendants of £4755 ls. 9d. Against this amended report both plaintiffs and defendants filed exceptions, which were over-ruled by decree on further directions, on the 27th of June 1808, whereby it was ordered that the balance found due by the amended report should be paid with interest in three months, and thereupon possession of the lands, with the title deeds, be given to the plaintiffs, and in default of payment the bill to be dismissed. This sum, according to the decree, was paid by R. F. Gough.

Hamilton and Crawford died after the date of this decree, leaving the appellant Maria the only plaintiff on the record. John Latouche also died after the decree and before the appeal, leaving Robert Latouche his heir at law, and Robert and John Latouche his executors. In January 1812, Robert and John Latouche appealed against the decrees of June 1806, and April 1807, but withdrew their appeal in March 1812. Maria Rylands (together with R. F. Gough) appealed against the order of the 23d of March 1808, and the decree of the 27th of June 1808.

After the appeal was presented, the cause abated by the death of the respondent David Latouche, and was revived against the respondents George Latouche, John David Latouche, and Peter Latouche the younger, who were executors, and obtained probate of the will of David Latouche.

On the 20th of May 1818, the appeal was called on for hearing, and on the statement of the appellant's counsel, (no counsel appearing for the respondent,) [572] cuts,) the House were of opinion that the appellant, Richard Franklin Gough, ought to have been made a party to the suit in Ireland, which could not, by agreement, be carried on for his benefit, and on this ground adjourned the appeal *sine die*: directing by their order, that the appellants should be at liberty to take such proceedings in the Court of Chancery in Ireland as they might be advised, to make the proper persons parties to the cause there, and to bring all proper parties before the House.

After the decree had been made which established the last will of Thomas Gough, the appellants Richard Franklin Gough, and John Franklin, who had been appointed executors, obtained probate of that will from the Court of Prerogative in Ireland.

The appellant, Richard Franklin Gough, afterwards took the benefit of an Act passed in the fifty-third year of the reign of Geo. 3, "for the relief of Insolvent Debtors in Ireland."

On the 7th of November 1818, the appellant, Richard Franklin Gough, exhibited a bill in the Court of Chancery in Ireland against the respondents, and against Henrietta Gough the surviving executrix of the first will of Thomas Gough, (the three other executors, namely, John Hamilton, William Crawford and George Lloyd being dead,) and against John Franklin, his co-executor under the second will, and Maria Rylands, and against John Massy, who was chosen assignee of his estate and effects under the said insolvent act: praying among other things, that Richard Franklin Gough and John Franklin might have the benefit of the suit instituted by Thomas Gough, and revived by John [573] Hamilton, William Crawford, George Lloyd, Henrietta Gough and Maria Rylands, and of all proceedings, orders and decrees in the original and revived suit, so that Richard Franklin Gough might be entitled to appeal therefrom.

The respondents put in a demurrer to the bill, which, on argument, was over-ruled by the Master of the Rolls: but other causes of demurrer, which were assigned *ore tenus*, having been allowed, the appellant Richard Franklin Gough appealed from this decision to the Lord Chancellor, who reversed the order of the Master of the Rolls.

On the 6th of April 1819, the respondent Robert Latouche filed his answer to this bill, and thereby contended that the appellant Richard Franklin Gough ought not to have the benefit of the decrees made in the revived cause, and that any right, or beneficial interest, which the appellant Richard Franklin Gough had in the cause, and the subject-matter thereof, were legally vested in John Massy.

On the 8th of April 1819, the defendant John Latouche answered the bill.

On the 24th of April 1819, the other respondents, Peter Latouche the elder, George Latouche, John David Latouche, and Peter Latouche the younger, answered

the bill: and they as well as John Latouche, by their answers, raised the same objections as the respondent Robert Latouche had done to the relief sought by the bill of Richard Franklin Gough.

The several other parties, defendants, also answered the bill, and the defendant John Massy by his answer stated, that he was appointed assignee of the appellant Richard Franklin Gough's estate and [574] effects, without his knowledge, consent, or concurrence; that he never accepted the trust, nor acted under it; that he did not intend to undertake, and was desirous to be released from the trust.

The cause was afterwards set down on the bill and answers, and was heard before the Lord Chancellor on the 4th and 5th days of May 1819; and on the 10th of May it was decreed, "That as between the plaintiff and the defendants Robert Latouche, John Latouche, Peter Latouche the elder, George Latouche, John David Latouche, and Peter Latouche the younger, the plaintiff *as executor* of Thomas Gough, be, and he accordingly is hereby decreed, entitled to the benefit of the proceedings in the pleadings mentioned, as prayed by his bill. And it is further ordered, that as between the said plaintiff and said defendants, the remainder of plaintiff's bill, claiming *as devisee* of said Thomas Gough, be, and the same is hereby dismissed with costs, to be taxed by the master in this cause, against the plaintiff, and as to the defendant John Massy, assignee of Richard Franklin Gough, an insolvent in the pleadings named," it is further ordered, "that the plaintiff's bill in this cause, and all and every the matters and things therein contained, be, and the same are hereby dismissed, with costs, to be taxed by the master against the plaintiff."

On the 24th June 1819, it was ordered by the House on the petition of the appellants, that they should be at liberty to amend their original appeal, by making the appellant John Franklin a party appellant, which was accordingly done.

[575] The respondent John Latouche, one of the executors of the will of John Latouche the elder, died after the decree, leaving the respondent, Robert Latouche, surviving executor.

Under these circumstances, the appeal was again brought to hearing before the House in the year 1820.

For the Appellants, Mr. Horne, Mr. Blake (since appointed Deputy Remembrancer of the Court of Exchequer in Ireland). For the Respondents, Mr. Hart, Mr. Wetherell (since appointed Solicitor-general).

Lord Redesdale: This is a decree giving the benefit of the former decree to the plaintiff in his character of executor, which was an immaterial part of that decree. Substantially, it related to the interest claimed by the plaintiff in that suit as devisee; and the bill is dismissed as to the devisee, in whose absence the account cannot be taken.

The Lord Chancellor: The decree in the original suit was made upon the bill, and in favour of Maria Rylands. If she is not entitled to that decree, how can another person in a supplemental suit, professing to carry on the former suit, have the benefit of such a decree?

Lord Redesdale: The fact that Gough was insolvent and discharged by act of parliament, could not have been known to Lord Ponsonby. The decree dismissing the bill as to the right of the devisee, extinguishes the whole right of the appellant, and yet is not made a substantive ground of appeal. [576] This proceeding, looking to its origin, is on the appeal of Maria Rylands. In the original appeal Richard Franklin Gough was made an appellant, although he had nothing to do with the cause. For the purpose of making him appellant, it was then supposed that Maria Rylands had no interest. The House ought, on the former hearing, to have dismissed the appeal, without prejudice to any suit to be instituted by Richard Franklin Gough.

To the parties as executors the Court could only give the benefit of the decree in favour of Thomas Gough, so far as the account of receipts and payments to the time of his death extended.

Subsequent to the death of Thomas Gough his devisee became the party entitled, and as Richard Franklin Gough proves to be the devisee, he cannot have the benefit of proceedings in a former suit to which the party in that suit was not entitled. Such a decree might pass by consent, but not otherwise. Perhaps the appeal might stand over, with liberty to re-hear the cause on the supplemental suit. But another

supplemental bill will be necessary to bring an assignee of Richard Franklin Gough before the Court. Then it must be considered whether you can be entitled to the supposed interest of Maria Rylands. The proper course would have been to revive the proceedings as they stood on the death of Thomas Gough.

Mr. Blake: There have been cases where third persons have been allowed to take the benefit of a decree.

Lord Redesdale: There is a difference between [577] the cases of persons who are incidental parties, as legatees, creditors, &c. and sole subsisting independent parties. Suppose the case of a bill to execute a trust to sell an estate for payment of debts, and a person is made a party as the representative of a surviving trustee, who proves not to be so; in such a case, if the suit is perfect in other respects, the error might perhaps be corrected, and the benefit of the proceedings had by a supplemental suit. But here is a substantial defect of parties.

Lord Redesdale: The suit in this case was instituted by Thomas Gough, and on his death revived by Maria Rylands, who obtained a decree. It had in the mean time been discovered, that the will under which she claimed as devisee had been superseded by a subsequent will, which was established by a decree of the Court, obtained in a suit instituted by Richard Franklin Gough, the devisee, in the second will. Then followed an agreement, which it was not competent to the parties to make, that Richard Franklin Gough should have the benefit of the suit pending on behalf of Maria Rylands in the character of devisee. The decree was made in the cause, and the appeal brought before the House substantially as the appeal of Maria Rylands, who had, in fact, no interest in the suit. The cause stood over, by permission of the House, to correct that mistake. A bill was then filed by Richard Franklin Gough against the Latouches, and the assignee of his estate, to have the benefit of the former suit. The decree upon that bill gives him the benefit of the former suit as executor. That, [578] at the utmost, can only extend to the accounts to be taken up to the time of the death of Thomas Gough. Beyond that interest the claim upon the former suit is a mere nullity. As to all other matters the bill is dismissed; and according to the decree, the title can be sustained in the character of executor only, and not as devisee. In addition to this difficulty, and supposing the title as devisee sustainable, the assignment under the insolvent act took all estate and right out of Richard Franklin Gough, and vested it in the assignee. On the hearing of the supplemental suit the assignee declared, that he had never assented to undertake the trust or administration of the insolvent estate. The law does not compel an acceptance of such a trust, and in consequence of this refusal on record, the parties are left in the same situation as if there had been no assignee. In this predicament how can you proceed? If the respondents had appealed, the House might have determined the question so far as you are entitled as executor; but, in fact, the present subject-matter of appeal respects the interest of a devisee, and not an executor.

Mr. Horne: We may have the benefit of the account if we assent to confine it to the lifetime of Thomas Gough.

Lord Redesdale: The Court has decreed, that a certain balance is due upon the mortgage. The executor, therefore, has no interest.

Mr. Horne: We ask as personal representatives the benefit of the original decree.

[579] Mr. Blake: The sum reported due has been paid but we seek to recover it; that must be by payment to the personal representatives.

Lord Redesdale: The original bill prays that the deed conveying the whole estate may be declared void. The decree accordingly, in the revived suit instituted by Maria Rylands in the character of devisee, declares the deed to be fraudulent and void, and directs accounts of all monies due on the mortgage, &c. and all rents and profits, &c. as on the claim of a devisee. The master takes the account of the rents and profits to the date of the report. To the sum reported due on the first report Maria Rylands could not have title as executrix, but as devisee. You now seek to have the benefit of the decree in that suit, which includes the rents and profit from the death of Thomas Gough.

Mr. Horne: We give up so much of the decree. The appellants contend that the mortgage debt was overpaid during the life of Thomas Gough by receipt of rents, and they claim to be entitled to the surplus.

Lord Redesdale: Why did the Court dismiss the bill as to the right of the devisee?

Mr. Blake: It was supposed that the question as to the realty was concluded, and there remained only a question of account.

Lord Redesdale: Instead of filing a bill to have [580] the benefit of the proceedings you should have revived the suit of Thomas Gough.

Mr. Horne: The conduct of the parties has given validity to the decree.

Mr. Hart: No such fact is put in issue.

Lord Redesdale: The account stated by the master, from the death of Gough in 1804, amounts to £ Suppose the House were of opinion that the report is right, we are sustaining the transaction without proper parties. This is in substance a decree for redemption. I do not see how it is possible to cure the defects of the case. If the respondents had appealed so far as the decree gives the benefit of the former proceedings, and the appellants so far as the bill is dismissed in respect of the rights of the devisee, some course might have been adopted. But in the actual state of the cause, supposing the House were of opinion that it is possible or probable that the principal and interest of the mortgage were liquidated by receipt of rents and profits during the life of Gough?

Mr. Horne: You might send the cause back to take the accounts.

Lord Redesdale: We could do no such thing in the absence of the devisee, or those to whom his right is transferred.

Mr. Blake: The bill was originally filed by [581] Maria Rylands as devisee, and the personal representatives also were parties. The cause might, perhaps, be reheard on the supplemental bill.

Lord Redesdale: The devisee or his representative must be a party.

Mr. Blake: In *Binks v. Binks** in Chancery, August 1814, a mortgagee filed a bill for a sale under a trust. Before the decree he conveyed his whole interest, and his assignees were permitted to have the benefit of the decree which he obtained.

The Lord Chancellor: You have never heard of such a case before or since. I never heard of such a practice.

Lord Redesdale: The case of *Binks v. Binks* is not an authority in point. There the party assigned for payment of debts, reserving the surplus, and the assignee had an interest and right to prosecute the suit. There the decree was defective only because incidental parties were not before the Court. Here the party prosecuting the suit had no interest according to the case made by the bill, and no right to the decree. It seems to me impossible to dispose of the case in its present circumstances; the question in substance being, whether Richard Franklin Gough is entitled to recover from the respondent a sum which he paid representing Maria Rylands as a devisee. The estate is only redeemable by the de-[582]-visee, or those who claim in his right, and how can the cause proceed without a nominal assignee, at least, to represent the creditors?

Lord Redesdale: This case was first before the House in 1818. We were then embarrassed by the state of it.† According to the state of the pleadings at that time, Maria Rylands appeared to have the whole beneficial interest, but in fact had only a legacy under the second will, which the parties agreed to keep out of view in that suit, and to continue the proceedings for the benefit of Richard Franklin Gough. The decree was for accounts and redemption in favour of Maria Rylands, as devisee, and the other plaintiffs as executors under the first will of Thomas Gough. On the ground of this private agreement Richard Franklin Gough made himself a party to the original appeal, stating the second will and the agreement. Under these circumstances the House, finding it impossible to proceed on such an agreement, retained the appeal, giving liberty to the parties to supply the defects of their case by such proceedings as they might be advised to institute. A suit was thereupon commenced by Richard Franklin Gough. The cause was heard on the 10th of May 1819, and the decree declares the plaintiff to be entitled as executor of Thomas Gough inaccurately, for he was not sole executor. It declares, that as such he is entitled to [583] the benefit of the former decree, that is, of all the proceedings: as to the rest

* See the note at the end of the case, where an abstract of the facts of this case is given from the Registrar's book.

† Here the noble lord stated the facts from the pleadings as they were set forth in the appeal cases, according to which it appeared that Richard Franklin Gough, who had made himself a party to the original appeal, had no interest in the property

of the prayer, the bill is dismissed. The decree, therefore, appears to be in favour of one of two subsisting executors; and the claim of the plaintiff in that suit as devisee is dismissed, both as against Messrs. Latouche and Massey the assignee. This is a singular mode of proceeding. Supposing Richard Franklin Gough entitled in this suit as one of two executors, something was necessary to be done as to the co-executor; and it seems that the parties are conscious of this defect, as they have made him a party to the appeal. The whole proceeding has been so strangely managed that it becomes difficult to know what course ought to be pursued. In the court below it has been declared that Richard Franklin Gough is entitled to the benefit of the proceedings in the former suit. But the question material for consideration is, whether we have before the House proper parties to maintain the interests mentioned in the appeal? What is the nature of the suit? A bill to have the benefit of former proceedings, not to carry on the unexecuted part of a decree, but to continue the whole for the purpose of reversing a part. The facts require attention; * and the difference in characters and relations of the defendants. David Latouche was mortgagee and custodee; John Latouche was head landlord and purchaser of the lands. The [584] original decree declared the purchase void as against Maria Rylands and her trustees, under the first will, who were also executors. The decree undoubtedly operated upon them in their characters of personal representatives, but in substance was founded on their rights as devisees, under the first will of Thomas Gough. It could stand upon no other right. As executors they might be required to discharge the debt on the mortgage security. But the decree declared the plaintiffs in that suit to be entitled to a redemption of the lands, on payment of the balance (if any) due on the mortgage. To that relief, and to have the purchase declared fraudulent and void, they could only be entitled as devisees in trust. As to that part of the decree, John Latouche, as purchaser, was the only defendant interested. David Latouche was mortgagee and custodee, and the account directed was general; comprehending all these parties without distinction, although standing in such different rights and characters. This confusion might be a matter of indifference to the defendants, who being connected, might adjust the accounts between themselves; but for the sake of regularity in the administration of justice, it is to be regretted that decrees in Ireland are so imperfectly drawn up. The effect of the decree was to make the estate redeemable, according to the result of the account. The suit was instituted in respect of real estate, which was first mortgaged and afterwards sold. It was to be reconveyed, on payment of what should appear to be due on balance of all the accounts. On taking the accounts, which of necessity comprised rents accrued since the death of Gough [585] in 1801, a balance was found due to the plaintiffs. Exceptions to this report were filed, on the ground that the account was improperly taken, and these exceptions were in part allowed. Upon the second report the balance was in favour of the defendants; and it is observable, that in the schedule to this second report the master charges the defendants with rents received since the death of Thomas Gough. After the decree, founded upon the second report, was pronounced, Richard Franklin Gough paid what was found due upon the accounts, and took a reconveyance of the estate. After this payment and reconveyance the appeal is presented against the orders by which the exceptions are allowed in favour of the Respondents, and the object of the Appellants is to have these orders reversed, and the former report re-established. The proceedings are so irregular that it is difficult to know how to deal with the case. The original decree cannot be carried into execution for the benefit of the plaintiffs in the supplemental suit, for it was void as a proceeding, by parties having no interest. Upon the subject of costs it may be fit to consider that the respondents have been improperly put to expense, in consequence of the appellants having concealed the fact that a later will existed. The appeal in its present state cannot be heard for the purpose of deciding whether the account is properly taken, what is the balance, and to which party due. Those are inquiries which cannot be made without considering the title, and in the absence of the devisee; yet the bill being instituted by Richard

* Here the noble lord read the facts from the case, as shortly stated in the beginning of the Report. Many of the facts stated in the bill to make a case of oppression, which formed the ground of the original suit, are omitted in the report, as being irrelevant to the points before the House.

Franklin Gough in that character, it is declared that he has no title as [586] devisee to the benefit of the proceedings, but only as executor. It has been dismissed, and that is not made the ground of appeal. As executor the appellant cannot be entitled to the benefit of the proceedings. It is difficult to frame any order in such a case. It would have been better if the former appeal had been at once dismissed. It was retained as an indulgence to the parties, to give an opportunity of making their case perfect. They have not done so: and the House can give no judgment on the merits of the case: but an order may be pronounced in terms which point out to the parties the errors in their proceedings, that they may now endeavour to correct them. It might be to the following effect * :

"The matter of the revived and amended petition of appeal, wherein Maria Rylands, Richard Franklin Gough and John Franklin, are Appellants, and Peter Latouche, Robert Latouche, George Latouche, John David Latouche and Peter Latouche, junior, are Respondents, having come on to be heard before this House, and it appearing to the House, from the petition of appeal and the cases delivered on the part of the Appellants, and the proceedings of the Court of Chancery in Ireland delivered to the House, that the original petition of appeal had been presented by Maria Rylands, widow, and Richard Franklin Gough, only complaining of an order of the Court of Chancery in Ireland, bearing date the 23d of [587] March 1808, and a decree of the said Court, bearing date the 27th of June 1808, made in a cause in which the said Maria Rylands, John Hamilton and William Crawford, were plaintiffs, and the Right Honourable David Latouche and others were defendants, and that Richard Franklin Gough, who was named in the case delivered on the part of the Appellants as a joint appellant with the said Maria Rylands, was no party to the said cause in which such order and decree so appealed from were pronounced: and it also appearing to the House that the proceedings in the said cause were founded on an original bill filed by Thomas Gough, deceased, against the said David Latouche, John Latouche, and others, impeaching a sale and conveyance made by the said Thomas Gough to the said John Latouche, and a mortgage made by him to the said David Latouche of divers lands in the county of the city of Limerick, which the said Thomas Gough held by lease for lives, with a covenant for perpetual renewal of such lease, and that the said Thomas Gough having died before the said cause had been brought to a hearing, the said Maria Rylands claiming to be beneficial devisee of the said lands under the will of the said Thomas Gough, and the said John Hamilton and William Crawford claiming to be executors of such will, and the only executors who had proved the same in the Ecclesiastical Court, and George Lloyd and Henrietta Gough, two other executors named in the said will, had filed a bill of revivor and supplement, founded on the said bill filed by the said Thomas Gough, and had, claiming in [588] those rights on the 28th of June 1806, obtained a decree of the said Court of Chancery, setting aside the conveyance of the said leasehold estate, and ordering divers accounts to be taken between the parties to such suit, and that the said order of the 23d of March 1808, and the said decree of the 27th of June 1808, had been made in such cause, in which the said Richard Franklin Gough had been a party, but having been struck out by amendment, was no party at the hearing: and it appearing by a bill filed by the said Richard Franklin Gough against the said Maria Rylands and others, that the will of the said Thomas Gough, under which the said Maria Rylands, John Hamilton and William Crawford, claimed, had been revoked by a subsequent will, by which the real and personal property of the said Thomas Gough had been devised to the said Richard Franklin Gough: and the said Richard Franklin Gough and John Franklin (who has now made himself a party to the said petition of appeal by amendment, together with the said Maria Rylands and Richard Franklin Gough) had been appointed executors of such will, and had proved the same, and that therefore neither the said Maria Rylands nor the said John Hamilton or William Crawford, as devisees and executors of the said Thomas Gough, or the said George Lloyd and Henrietta Gough, had any right to revive the suit so instituted by the said Thomas Gough as his devisees, but that

* This order was proposed for the consideration of the House, but it was not moved, and does not appear in the journals. The cause has since abated by the death of one of the parties, and has not been again before the House.

such right was (as now appears) vested in the said Richard Franklin Gough, and that the said Richard Franklin Gough and John Franklin are [589] the executors and personal representatives of the said Thomas Gough; and the matter of the said petition of appeal presented by the said Maria Rylands and Richard Franklin Gough having been called on to be heard before the House on the 20th of May 1818, and it appearing to the House that under the circumstances then disclosed the House could not properly proceed to hear the matter of the said appeal, and having therefore adjourned the consideration thereof, and on the 10th day of June 1818, ordered that the parties should be at liberty to take such proceedings in the Court of Chancery in Ireland as they might be advised, in order to make proper parties to the cause, and bring all proper parties before the House; and it appearing to the House that the said Richard Franklin Gough afterwards filed a bill in the said Court of Chancery in Ireland against the Respondents and against the said Maria Rylands and John Franklin, and against John Massey, chosen assignee of the estate and effects of the said Richard Franklin Gough, who had been discharged from prison under an act of the 53d year of his late Majesty's reign, for relief of insolvent debtors, praying that he might have the benefit of the suit instituted by the said Thomas Gough, and revived by the said Maria Rylands and others, and of all proceedings, orders, and decrees in the said original and revived suit, so that the said Richard Franklin Gough might be entitled to appeal therefrom; and it appearing that such cause was heard in the said Court on the 10th day of May 1819, when it was decreed, that as between the plaintiff [590] Richard Franklin Gough, and the defendants Robert Latouche, and others, Respondents in the revived and amended appeal, the said Richard Franklin Gough as executor of the said Thomas Gough was, and he was thereby declared to be, entitled to the benefit of the proceedings in the pleadings mentioned, as prayed by this bill; and that as between the plaintiff and the said defendants the remainder of the said bill claiming as devisee of the said Thomas Gough should be dismissed; and as to the defendant John Massey, assignee of the said Richard Franklin Gough, the said bill should also be dismissed, and the said Maria Rylands and Richard Franklin Gough, who had presented such original petition of appeal, thereupon obtained the order of the House as of course, that they should be at liberty to amend their original appeal, and make the appellant John Franklin a party thereto; and the matter of the said appeal coming on to be heard before the House on the 5th day of this instant, July, it appearing to their Lordships, that under the circumstances of the case the House could not proceed to pronounce any decision on the said appeal, inasmuch as already by the said decree of the 10th of May 1819, which has not been appealed from by any of the parties, it was declared, that as between the said Richard Franklin Gough and the defendants, the Respondents and John Latouche deceased, the said Richard Franklin Gough, as executor of the said Thomas Gough, was entitled to the benefit of the proceedings mentioned in the pleadings in the suit instituted by him as [591] prayed by this bill; but such decree had declared no right of the said John Franklin as his co-executor, and by such decree the said bill of the said Richard Franklin Gough had been dismissed, as between the said Richard Franklin Gough claiming as devisee of the said Thomas Gough, and the said Respondents and the said John Latouche deceased; and the said bill had also, by the said decree, been dismissed against the said John Massey, so that there is no person before the House in whom the property of the said Richard Franklin Gough is vested, in consequence of his discharge under the said act for relief of insolvent debtors; and inasmuch as the said decree of the 28th of June 1806, was and could only have been obtained by the said Maria Rylands, John Hamilton and William Crawford, as devisees as well as executors of the said Thomas Gough, and the same and the subsequent order of the 23d of March 1808, and the subsequent decree of the 27th of June 1808, were founded on the supposed rights of the said Maria Rylands, John Hamilton and William Crawford, as devisees as well as executors of the said Thomas Gough, the House cannot proceed to determine the merits of the appeal against the said order of the 23d of March 1808, and the said decree of the 27th of June 1808, without having before them the said Richard Franklin Gough in the character of devisee in the will of the said Thomas Gough, and also without having before them such person as may be entitled to be assignee of the estate of the said Richard Franklin Gough, under the said act for relief of

insolvent debtors, [592] especially as it appears on the face of the proceedings before the House, that the said decree of the 28th of June 1806, on which the said order and decree appealed from were founded, was obtained by persons who had no right to the estate in question; and in consequence of a private agreement between them and the said Richard Franklin Gough, to which the defendants in the said cause do not appear to have been parties or privies, and which agreement does not appear to have been disclosed to the Court at the time of such decree, or during the subsequent proceedings, and therefore may be deemed to have been a fraud on the said Court, and on the other parties to the said suit, and it therefore may be objected at the hearing of the said appeal, that the said decree of the 28th of June 1806, and the subsequent proceedings thereon, were absolutely void, or were void so far as the same respected the said leasehold estate, it is therefore ordered, by the Lords spiritual and temporal in parliament assembled, that the hearing of the said appeal do stand over, with liberty for the several parties interested to take such proceedings as they may be advised in the said Court of Chancery, respecting the said suit instituted by the said Thomas Gough, and the suit instituted by the said Maria Rylands, John Hamilton, and William Crawford, and the said suit instituted by the said Richard Franklin Gough, and to bring before this House parties competent to litigate the questions which may arise thereupon between the Appellants and the Respondents, and the right of the Appellants to prosecute the said appeal; and [593] it is further ordered, that the Appellants do pay to the Respondents fifty pounds for their costs for attending the hearing of this appeal in the present session."

Reg. Lib. A. 1813, fo. 1718, b. BINKS v. BINKS.

[Mews' Dig. i. 336.]

In 1809 Thomas Binks, as creditor, etc. filed a bill in Chancery against Lord Rokeby, Fred. Turner, and Phil. M'Farlane, stating an indenture of assignment and mortgage, dated in 1806, by which certain hereditaments, the property of Lord Rokeby, were vested in the defendants Turner and M'Farlane, as trustees for a term of years, to secure the payment of debts owing by Lord Rokeby to defendant Thomas Binks, etc. and upon trust in default of payment, to sell, etc. and assign or pay over the residue, etc. to Lord Rokeby. The bill further stated, that payment was not made according to the trust, and prayed an account of the debt and interest, and immediate payment, or in default, that the estate might be sold for payment, according to the trust.

The cause was heard at the Rolls in July 1811, and by the decree it was ordered, that the defendant Lord Rokeby should pay, etc.; or in default of payment, that an account should be taken of what was due to Thomas Binks, etc., and that so much of the estate should be sold as would be sufficient to pay, etc.; the surplus, if any, to be paid to the defendants Turner and M'Farlane, to be applied upon the trusts of the indenture of 1806. By the report, dated the 8th of August 1812, the Master found the sum due to Thomas Binks, the estate was sold pursuant to the decree and the report of purchase was confirmed by an order, dated on the 15th of January 1813. At this stage of the cause it was discovered that Thomas Binks, being indebted to various persons by mortgage, specialty, and simple contract, had in March 1810, before the date of the decree, assigned all his interest in the estate and debt, comprised in and secured by the deed of 1806, to Richard Binks, Antony Steel, and William Walter, in trust to recover the debt secured by that deed, and to apply the money [594] so recovered in payment of the debts of Thomas Binks, enumerated in a schedule annexed to the deed of 1810. In this state of things Richard Binks, Antony Steel, and William Walter, filed a supplemental bill, stating the facts before mentioned; and further, that the solicitor who conducted the cause for Thomas Binks did not know of the deed of assignment of 1810, when the decree was pronounced in the original cause, nor until after the estate had been purchased by, etc.; that the decree, therefore, had been obtained by mistake, and the purchaser

refused to complete his purchase unless R. B. A. S. and W. W. were made parties to the cause, and consented to the payment of the purchase-moneys into the Bank, in trust, etc.; that the plaintiffs were willing to confirm the proceedings in the former cause, and join in the conveyance; and the plaintiffs submitted that they ought to, and prayed that they might, have the same benefit of the suit instituted by Thomas Binks, and the decree pronounced, and other proceedings had in that cause, as if they had been parties to the cause originally. The defendants Thomas Binks and Anne his wife, by their answer, admitted the facts, and submitted, etc. The defendant Lord Rokeby, by his answer, submitted, that inasmuch as the decree was founded in mistake, and erroneous, it ought not to be carried into execution, and the plaintiffs ought not to have the benefit, etc.; and insisted upon the objection as if he had demurred to the bill. The defendants Turner and M'Farlane admitted the facts, and submitted, etc.

The supplemental cause was heard before the Vice-Chancellor on the 17th of August 1814, when it was "Ordered and decreed, that the former decree and order should be carried on and prosecuted between the present parties, in the manner as the same were directed as to the then parties," and that the Master should tax the costs, etc.

[595]

(CHANCERY, ENGLAND.)

PHILIP WESTERN WOOD,—*Appellant*: JOSHUA ROWE,—*Respondent* [1820].

[Mews' Dig. iii. 2040: v. 445: xiii. 1781. Considered in *Askew v. Mollington* 1851, 9 Hare 65, at pp. 69, 70: and see *Pryer v. Gribble* 1875, L.R. 10 Ch., 531, at p. 539. See now Judicature Act 1873, s. 21 (5). *In re Gaudet Frères S.S.Co.* 1879, 12 Ch. D. 882: *Hart v. Hart* 1881, 18 Ch. D. 670.]

A BILL being filed against two parties praying accounts and relief against both: after one of the defendants had put in an answer, an agreement is made between the plaintiff and the two defendants by their agent, who is also interested as a party to the agreement, containing various provisions as to the transactions of mortgage and partnership in mines, which were the subject of the bill, besides other matters of agreement; and providing that "all proceedings in law and equity shall cease between the plaintiff and the two defendants." This agreement, that all proceedings, etc. shall cease, etc. cannot be pleaded in bar to the whole suit by the defendant who has not answered.

Such a plea may operate to displace the equitable relief sought by the bill, so far as it regards the party who pleads, but as a bar to the whole suit it cannot be pleaded.

Such a plea is, in effect, a plea of one part of the agreement in bar of the whole suit, which is inadmissible.

The object of a plea to a bill in equity is to reduce the subject matter of litigation to a single point, and to avoid the expense which would be incurred by entering into all the subject matter of the dispute, which is not effected by a plea of an agreement, making provisions as to the subjects of the suit in a way which the decree in the cause could not effect.

Courts of equity cannot decree the performance of one part of an agreement, leaving the other parts unperformed.

If an agreement be made subsequent to the filing of a bill between the parties to the suit and other parties, for the purpose of putting an end to the proceedings in the suit, and other purposes, it cannot be pleaded in bar to the bill by one of the parties. If it could be so pleaded, it must contain averments: that the conditions of the agreement have been performed, or [596] those circumstances could not be performed; and that the other parties not joining in the plea are ready to perform the agreement; and events by which the agreement is affected ought also to be noticed in the averments. But *ex h.* that in such a case the court not having the power to compel the performance

of the agreement on the plea, a bill must be filed for the purpose, including all the parties, and all the subjects of the agreement.

It lies upon the party seeking the performance to take the steps necessary to enforce it, and not upon the other party bound by the agreement, being plaintiff in the original suit, to intercept the effect of the agreement by filing a supplemental bill.

An executory agreement is a cause of action, and cannot be pleaded in bar to another cause of action.

Such an agreement is totally different from a release under seal, but considered as in the nature of a release, it could only be applied to such part of the relief sought by the bill as relates to the questions at issue between the plaintiff and the party who proposes to have the benefit of the agreement by way of plea. It could not be pleaded in bar to the whole relief; for the cause must, at all events, proceed as to the relief sought against the other parties.

Such a plea, containing no averments, that all the parties to the agreement are ready to perform it, is not only insufficient for want of proper averments, but could not be made a good plea by any amendment; because it is not a proper subject of plea, but a mere right of action, and cannot be a bar to another suit instituted by the party against whom the right of action is claimed, especially where a long time has elapsed between the date of the agreement and the pleading of it.

Semb. That affidavits (filed upon interlocutory proceedings) are to be considered as matters of record, and that the facts disclosed by affidavits so filed may be viewed by the court in deciding upon the validity of a plea.—*Quære.*

The Respondent Joshua Rowe, in 1816, filed a bill in Chancery against the Appellant Mat[597]-thew Wood, and Sir A. O. Molesworth, stating transactions between the Respondent and Matthew Wood, and deeds and instruments whereby an interest in mines, called Great and Little Crinnis, Campdown and Appletree, vested in the Respondent for terms of years, and a judgment in the court of Common Pleas entered up against the Respondent for the sum of £20,000 were assigned to Matthew Wood, by way of security for the payment to him of monies due and to become due to him from the Respondent; and stating also, contracts entered into by Matthew Wood for the purchase of 20-64th shares, and by the Appellant of 4-64th shares in the mines; and further stating an indenture bearing date the 16th of December 1814, made between the Respondent of the one part and Matthew Wood of the other part, reciting an agreement between the parties thereto as to the taking and adjusting of the accounts relative to the mines, by which indenture the 20-64th shares in the mines were assigned by the respondent to Matthew Wood; and further stating an indenture of the same date, made between the Respondent of the one part and the Appellant of the other part, to the same purport and effect, *mutatis mutandis*, as the first mentioned indenture, whereby the 4-64th shares in the mines were assigned by the Respondent to the Appellant.

The bill further stated that Matthew Wood executed a power of attorney to Benjamin Wood, authorizing him to take possession of the mines, as the agent and for the benefit of Matthew Wood; and that in pursuance of the power, Benjamin Wood, in March 1815, entered into possession of [598] the mines, as the agent of Matthew Wood, and had ever since been and then was in possession, and had ever since worked, and then worked the mines. The bill further stated, that the respondent from time to time, after the month of November 1812, transmitted to Matthew Wood blank bills of exchange, upon stamps, sufficient to warrant the drawing of £50,000 at least, that the same were all signed by the Respondent, either in the character of acceptor or drawer; that Matthew Wood had (as the Respondent believed) filled up the blank bills, and negotiated or disposed of several of them, in some way, for his own use; and that since the month of March 1815, when Benjamin Wood took possession of the mines, Matthew Wood had carried on the business under the firm of the Crinnis Mine Company, and had issued bills of exchange in the name of the Crinnis Mine Company.

The bill further stated, that Matthew Wood had caused the complainant's effects to be seized in execution for the sum of £8948 11s. 4d. and that such execution was taken out on the judgment for £20,000. The bill charged, that in a certain account made out by Matthew Wood, of the dealings between him and the Respondent, there

were divers errors and improper charges, and in particular that the Respondent was therein debited with the sum of £9170, though in fact the same was money paid by Matthew Wood for purchases on his own account; and further charged, that Sir A. O. Molesworth, the then sheriff of the county of Cornwall, intended forthwith to proceed to a sale of the Respondent's effects seized in execution.

[599] The bill prayed that an account might be taken of the several dealings and transactions in the bill mentioned; and that the balance due thereon from Matthew Wood to the Respondent might be ascertained and paid, he being ready to pay what, if any thing, might be found due from him upon taking the account; and that either the Appellant and Matthew Wood might be declared to be partners with the Respondent in the mines, and that an account might be taken of all the profits of the mines received by the Appellant and Matthew Wood, or either of them, etc. and that the Respondent might have credit in taking the account for his share of the profits, and for what was due and unpaid for the Appellant's and Matthew Wood's shares in the mines, and for the blank bills of exchange, and that proper directions might be given for the payment of the bills drawn in the name of the Crinnis Mine Company, or such of them as were outstanding; or in case the court should be of opinion that the Appellant and Matthew Wood were not partners with the Respondent in the mines, then that a like account might be taken of the profits thereof received by, or by the order, or for the use of the Appellant and Matthew Wood, or either of them; and that the Respondent might have credit given to him in taking the account for all those profits and for the blank bills of exchange, and for all the bills issued by Matthew Wood, in the name of the Crinnis Mine Company, or might be indemnified against the bills; and that the Appellant and Matthew Wood might, upon being paid what, (if any thing,) was due to them, deliver up possession of the mines, and the [600] stock therein, to the Respondent; and that the Appellant and Matthew Wood respectively might in the mean time be restrained by injunction from issuing or negotiating any bills or notes in the name of the Crinnis Mine Company, or any of the blank bills of exchange, and from using the name of the Crinnis Mine Company in any manner; and that Matthew Wood might also be restrained by injunction from proceeding in the execution, and from all other proceedings at law under the judgment; and that Sir A. O. Molesworth might, in like manner, be restrained from selling the Respondent's effects, or from otherwise proceeding in the execution.*

[601] The Appellant put in upon oath the following plea:—

"This defendant, etc. saith, That since the said bill of complaint was exhibited,

* The bill was unusually long, but contained no other allegations material to be stated for the purpose of making the plea and the judgment upon the appeal intelligible. On account of the observations made by the Lord Chancellor in moving the judgment (*Post*, 606, *et seq.*) a short statement of the proceedings which occurred between the filing of the bill and the plea is here introduced by way of note.

On the 19th of July 1816, the statements of the bill being supported by affidavits, an injunction to restrain proceedings under the execution was applied for, *ex parte*, and granted.

A joint and several answer had been prepared for the Appellant and M. Wood. In the month of November 1817, M. Wood alone swore to the answer, with an understanding (as stated by affidavit) that P. W. Wood should not be required to answer until certain proceedings then pending in an ejectment, which related to the mines, should be determined.

On the 29th of January 1818, the sheriff applied for a receiver of the effects, which had been levied under the execution. An order was accordingly made with the consent of all parties, and the appointment was afterwards completed with the usual recognizances.

No further step was taken in the cause until the month of July 1819, when the plaintiff issued an attachment returnable immediately against P. W. Wood for want of an answer. Notice of a motion having been given to set aside this attachment, affidavits of what had taken place in the intermediate time were filed by both parties.

An affidavit was filed by the Respondent, as explanatory of the case, and a joint and several affidavit by the Appellant and two other persons, in which the agreement

the said com-[602]-plainant and M. Wood, and this defendant being mutually desirous of determining all proceedings under the said bill, Benjamin Wood, as agent for the said M. Wood and of this defendant, as also in and on his own individual capacity and behalf, and the said complainant did for that purpose, amongst others, on or about the 27th day of May 1818, make and enter into and duly sign an agreement in writing, which was and is in the words and figures following (that is to say:) We, the undersigned, hereby mutually agree to the following effect: viz. 'That Wheal Regent forms a part of Campdown Set, and is therefore included in the sale to M. and P. Wood, and also in the mortgage securities to M. Wood, but as she has made no profit up to this time, the accounts respecting the same shall not be taken one way or the other, but from this date.' 'The mine accounts during the possession of J. Rowe, and also during the possession of M. Wood, to be settled as per deed dated on or about December 1814, between the undersigned, if possible, if not, by two indifferent persons, one to be named by each of the undersigned. All the ship-timber now undisposed of to be taken at a valuation of [603] two indifferent persons, and if they do not agree, then to call in a third, and the same to be charged to the mine account.' 'M. Wood to give J. Rowe 1, 2, 3, 4 and 5 years, by equal instalments, for the payment of the balance due upon making up the accounts, which is agreed to be done without delay, between M. Wood, P. Wood and J. Rowe; but whatever J. Rowe may deliver in stores to the mine, including the before-mentioned ship-timber, as well as his proportion of the profits, to go towards the next instalment coming due, but M. Wood to be paid as much sooner as the profits may amount to.' 'J. Rowe agrees to the charge of £1000 per year to the mines for B. Wood's services.' 'M. Wood to remain in full possession of the mortgage property as he is at present, but J. Rowe to have the control of the working part of the mine; B. Wood to receive and pay every thing, and to purchase and manage all the stores.' 'The injunction to be immediately dissolved, and the execution withdrawn, and all proceedings in law and equity to cease between J. Rowe and M. and P. Wood,' (thereby meaning the complainant and M. Wood, and this defendant.) 'When J. Rowe has paid the balance of the account due to M. Wood, on making up all accounts between him and M. and P. Wood, the

was set forth: it then proceeded to state, that in pursuance and furtherance of the agreement, the Respondent and Benjamin Wood, acting on behalf of M. Wood and the Appellant, had investigated accounts; and that on the 6th of March 1819, a farther agreement was made between the parties, in which the account between the Respondent and M. Wood and the Appellant was set forth according to the result of the investigation. At the end of this statement of account appears the following reservation:—"The above account is correct, subject to the following respective claims and charges: the same to be agreed on between the undersigned, if possible, if not, to be referred in two months from this date." Then follow several claims for credit, etc. among which is a claim on the part of M. Wood and the Appellant to be credited for the profits on 24 64th shares, in Wheal Regent, from the 27th of May 1818. The memorandum concludes thus:—

It is agreed between the undersigned, that particulars of all accounts of every description shall be forthwith furnished mutually for the settlement of the above claims and charges.

It is agreed to refer the valuation of the ship-timber to, etc.

It is also agreed to refer the claim for stock, and rent of Dartmoor brewery, on, etc. to, etc., they to call in a third person if they do not agree.

(Signed) Josh. Rowe,

B. Wood, for Matthew Wood.

The Crinnis Mine, 6th March 1819.

The Respondent claimed credit for the balance of purchase-money on the shares sold to M. Wood and the appellant, and for profit on the residue of the shares.

On the 31st of July 1819, the Lord Chancellor, upon the ground that the attachment had issued without a full communication with the defendants as to the steps intended to be taken in the cause, ordered it to be set aside, without costs, and without prejudice to any future proceedings.—See 1 J. and W. p. 322.

securities to be re-assigned.' 'Should any difference arise hereafter between J. Rowe and M. and P. Wood, the same to be left to two indifferent persons, one chosen by each party, and if they cannot agree, a third to be called in.' 'Should any deeds be required to carry the above [604] arrangement into effect, the same to be prepared by Mr. Joseph Edwards, as adviser between the parties.'

"J. Rowe to assign to B. Wood all his property and debts, for the benefit of his common creditors, they agreeing not to proceed against him in law or equity for 5 years, from the 1st of June next.' 'All payments and receipts to be made by B. Wood, and what purchases may be required for carrying on any of the works of the said J. Rowe, to be made by the said B. Wood; but the management of the said works to remain under the control of the said J. Rowe, B. Wood making such dividends within the 5 years as he may be enabled to from the monies in his hands.' 'J. Rowe not to draw for more than £1000 per year from his estate, for his maintenance.' 'B. Wood to charge 5 per cent. on all the monies he receives for his trouble, and also to charge what other actual expenses he may pay or incur; but the 5 per cent. to include all other commissions.' Dated this 27th day of May 1818. 'B. Wood, for self, M. and P. Wood—J. Rowe.'

"And this defendant doth aver, That the said B. Wood, at and before the time of the signature of the said agreement by him and the said complainant, was duly authorized and empowered to enter into and sign such agreement, as the agent for and on behalf of this defendant and the said Matthew Wood.

"And this defendant doth also aver, that by the proceedings in equity, which it is by the agreement stipulated should cease between the [605] complainant and M. Wood and this defendant, were meant and intended the proceedings in this present suit; and that at the time when the agreement was entered into and signed, there was not, nor were there any other suit or proceedings in equity, between the complainant and M. Wood and this defendant, or either of them, than this present suit and the proceedings therein.

"And this defendant doth also aver, that the agreement hath not been waived or determined, but is now subsisting and in full force; and this defendant doth therefore plead the matters aforesaid, in bar to the said complainant's bill of complaint, and the relief and discovery thereby sought; and he humbly hopes to be hence dismissed with his reasonable costs in this behalf sustained."

The plea was argued before the Vice Chancellor, on the 10th of November 1819, and allowed.

The respondent thereupon presented his petition of appeal against the order allowing the plea to the Lord Chancellor.

The appeal was heard in April 1820, when the Lord Chancellor reversed the order of the Vice Chancellor, and overruled the plea.

Against this order of the Lord Chancellor the appeal to parliament was presented.

For the Appellants: Mr. Heald, Mr. Sugden, and Mr. Sidebottom.

For the Respondent: The Attorney General, and Mr. Horne.

[606] The Lord Chancellor (after some prefatory observations, and stating the effect of the pleadings and proceedings):

There are two ways in which this question must be considered. In the first place, I am not quite prepared to say that the affidavits filed in the cause might not be judicially noticed by the Court, nor do I say they could, nor do I mean to state that they had not a considerable influence on my mind.* The first question is, whether they ought or ought not to be looked at as a matter of record, to enable us to determine upon the validity of this plea? Considering the affidavits as matter of record, suppose that on Monday the attachment had been disposed of, and on Tuesday this plea had come before me, if I could not have judicially taken notice of the affidavits, I should have had entirely to forget them, which would have been a difficult operation. A-

* One of the facts averred by affidavit was, that the Respondent had been fraudulently induced by the Appellant and M. Wood to sign the agreement. This was denied by the affidavits of the opposite parties. The same fact was alleged by the petition of appeal from the judgment of the V. C. to the Lord Chancellor.

matters of record they might be looked to. Considering the nature of this agreement, and looking at the averments, the Court was authorized to say argumentatively, and supposing such facts had taken place which the affidavits say did take place, and if the facts had taken place before the agreement, could those facts form a part of this plea; and if necessary to form a part of the plea, how could it be supported not noticing those facts? In these circumstances I think it would have been perfectly correct to look at the affidavits in a [607] judicial point of view. When the case came before me I was puzzled to know how to deal with it. I observed that it was the first time within my experience that such an executory contract had been pleaded. It was asked, did you ever hear of a Court allowing such a plea? and the answer was, did you ever hear of such a plea being overruled? On which my observation was, that I never heard of any such plea being allowed, or, on the other hand, of any such plea being overruled. I have considered with great attention the observations made on the subject of supplemental bills, according to the view which the Court below (the Vice Chancellor) took of the case: Where it was said this agreement applies to the whole suit, for by one of the terms of the agreement the Court is bound to dismiss the bill, and if any thing has been done to deprive the defendant of the benefit of that plea, it must be made available by a supplemental bill.

The important view of the case, taken by one of your lordships (Lord Redesdale), that it is a plea of one where the suit is against several, and where the interests of several are affected, did not wholly escape me. This view of the case presented itself to my mind: Supposing this agreement has not been acted upon in such a way that Rowe could compel the performance of it against Matthew Wood, then Philip Western Wood pleads this plea; and supposing land should have fallen in value, would there have been any thing to hinder Matthew Wood from saying, I am not bound to remain the purchaser of these shares in this mine; I will not join in the plea; I have no desire to enforce the agreement against Rowe; I will not be the purchaser of these shares in the character [608] which the agreement would fix upon me. The grounds upon which I proceeded were these: In the first place this being an executory contract merely under the signature of the party, (I say nothing of a release under seal), I could not bring my mind to think that such an executory contract in a court of equity could be a bar to the whole of this suit: in the next place, if I had been bound to give my opinion upon it, I should have thought, from the contents of this agreement, all taken together, that a court of equity would have found it so difficult to execute that it would not have been executed. Whatever might be the law on the one side or on the other, looking at the date of this agreement, and the time when the plea was pleaded, I was of opinion that the plea was defective in matter altogether; and that it was defective in averment. It was asked by the counsel for the Appellant, Suppose it had been pleaded immediately after it was signed, would it not have been a good plea? Why, to be sure, pleading it then, the performance of the conditions of the agreement could not have been averred. At that moment it must have been averred, that under those circumstances, (which averment this plea wants,) they could not have been performed.

I forbear to enter into many other considerations connected with this plea. I do not press into the aid of the disallowance of this plea any of those facts which appeared in the subsequent affidavits. It appeared upon those affidavits, that all the matters of the bill, even important matters, were not covered by the two agreements. Under the first agreement, Rowe could not have the relief which he prays. By the agreement with Matthew Wood, he may take [609] into account not only the purchase money which Matthew is to pay for his shares, but also the consideration which Philip Wood is to pay. Under the first agreement that equity could not be enforced. That provision, although it is subsequent to the first agreement, I do not look at as a circumstance affecting its validity; but nobody can deny, on the other hand, that such an agreement, if it is not acted upon, but is merely a contract to be fulfilled, would require that there should be some averment to account why it has not been fulfilled, if it was not meant finally to act upon it.

Lord Redesdale (after stating the pleadings and proceedings):

With respect to the agreement, which is the foundation of the plea, it is, between Joshua Rowe, Benjamin Wood, Matthew Wood and Philip Western Wood, one entire agreement, which is to have its effect, if at all, according to the obligations which the several parties undertake by that agreement. "We the undersigned, hereby mutually agree to the following effect: that Wheal Regent forms a part of Campdown Set, and

is therefore included in the sale to Matthew and Philip Wood, and also in the mortgage securities to Matthew Wood; but as she has made no profit up to this time, the accounts respecting the same shall not be taken one way or the other from this date: "this is a part of the agreement which concerns Philip and Matthew Wood.

"The mine accounts, during the possession of Joshua Rowe, and also during the possession of Matthew Wood, to be settled as per deed dated on [610] or about December 1814, between the undersigned, if possible, if not, by two indifferent persons, one to be named by each of the undersigned: "that is the deed on which, as I apprehend, it was contended at the bar, as was alleged by Rowe in his bill, that the Woods are to be considered as partners: one part of the prayer of the bill is, that if they are to be considered as partners, then that the account may be taken in one way; but if they are not to be considered as partners, then that the account may be taken in another.

It is material, in any way of construing this deed, to observe, that the agreement does not at all determine what is the effect of it; whether they are to be considered as partners or not; if the disputed account is not settled by that deed, which it is to do if possible, it is to be adjusted by two independent persons, "one to be named by each of the undersigned." Now, though Benjamin Wood is one of the undersigned, Philip and Matthew Wood are the persons intended.

"All the ship-timber now undisposed of to be taken at a valuation of two indifferent persons, and if they do not agree, then to call in a third, and the same to be charged to the mine-account. "Matthew Wood to give Joshua Rowe, one, two, three, four, and five years, by equal instalments, for the payment of the balance due upon making up the account, which is agreed to be done, without delay, between the said Matthew Wood, Philip Wood and Joshua Rowe." This provision is of extreme importance with respect to the effect of the agreement, and whether it can or cannot be made a matter of plea, as pleaded to this bill, because this being [611] a separate stipulation on the part of Matthew Wood, is a part of the consideration of the whole agreement, and if that stipulation on the part of Matthew Wood is not performed, the consideration of the agreement itself cannot be fulfilled.

"But whatever Joshua Rowe may deliver in stores to the mines, including the before-mentioned ship-timber, as well as his proportion of the profits, to go towards the next instalment coming due, but Matthew Wood to be paid as much sooner as the profits may amount to: " (this provision also relates to Matthew Wood) " Joshua Rowe agrees to the charge of £1000 per year out of the mines for Benjamin Wood's services: " (here is a provision for Benjamin's services) " Matthew Wood to remain in the full possession of the mortgage property, as he is at present, but Joshua Rowe to have the conduct of the working part of the mine: " That is a stipulation between Joshua Rowe and Matthew Wood—a stipulation which, with respect to Mr. Philip Western Wood, has no effect, except as he was to submit that the possession should be in Matthew Wood, and the management of the mine should be to a certain extent in Rowe, that is as to the working part. " Benjamin Wood to receive and pay every thing, and to purchase and manage all the stores: " That is a stipulation in which Matthew Wood is concerned, as well as Philip, and in which Benjamin Wood is also concerned.

Then comes this stipulation, which is the ground of the plea: "The injunction to be immediately dissolved, and the execution withdrawn, and all [612] proceedings in law and equity to cease between Joshua Rowe, and Matthew and Philip Wood." Upon this part of the agreement I shall only briefly observe, in the first place, that the execution could only be withdrawn by Matthew Wood, for Philip Wood had no execution or proceedings at law. They were proceedings on the part of Matthew Wood; and it is a little material also to observe, that there is an averment that there were no other proceedings in equity, except the suit instituted by Rowe; but there is nothing said respecting the proceedings at law.

"When Joshua Rowe has paid the balance of the accounts due to Matthew Wood, on making up all accounts between him and Matthew and Philip Wood, the securities to be re-assigned. Should any difference arise hereafter between Joshua Rowe and Matthew and Philip Wood, the same to be left to two indifferent persons, one chosen by each party, and if they cannot agree, a third to be called in: " That is indefinitely prospective, extending to any thing which might arise in dispute, and to any period of time during which those mines should be in operation.

"Should any deeds be required to carry the above arrangement into effect, the

same to be prepared by Mr. Joseph Edwards, as adviser between the parties; Joshua Rowe to assign to Benjamin Wood all his property and debts for the benefit of his common creditors, they agreeing not to proceed against him in law or equity, for five years from the 1st of June next:" That, I presume, is a stipulation which Matthew Wood and Philip Wood provided, with a view to putting the whole property of Rowe, [613] who was concerned with them as to these mines, into such a situation that his creditors might be repaid in the course of time, so as to prevent any embarrassment arising to the mines from any debts due by Rowe.

"All payments and receipts to be made by Benjamin Wood, and what purchases may be required for carrying on any of the works of the said Joshua Rowe, to be made by Benjamin Wood, but the management of the works to remain under the conduct of Joshua Rowe, Benjamin Wood making such dividends within the five years as he may be enabled to from the monies in his hands:" That is an engagement with all the three parties who contract here—all concerned in one way or other, and for the performance of which all were interested.

"Joshua Rowe not to draw for more than £1000 per year from his estate for his maintenance; Benjamin Wood to charge five per cent. on all the monies he receives for his trouble, and also to charge what other actual expenses he may pay or incur; but the five per cent. to include all other commissions:" That is a stipulation for the benefit of Benjamin Wood, and a stipulation also in which Matthew Wood and Philip Wood, and Rowe, were interested.

This instrument, which is dated on the 27th of May 1818, is signed by Benjamin Wood for himself, and Matthew and Philip Wood, and by Joshua Rowe. The plea, stating the agreement verbatim, avers, that Benjamin Wood was duly authorized and empowered to enter into and sign such agree-[614]-ment as agent for and on behalf of the defendant, and Matthew Wood; and it is also averred, that by the proceedings in equity, which it is by the agreement stipulated should cease between the complainant, and Matthew Wood, and the defendant, were meant and intended the proceedings in the present suit; and that, at the time when the agreement was entered into and signed, there were not any other suits or proceedings in equity between the said complainant and Matthew Wood, and the defendant, or either of them, than this present suit and the proceedings therein. Then it avers also, that the agreement has not been waived or determined, but is now subsisting and in full force; and the defendant pleads the matters aforesaid in bar to the bill of complaint, and the relief and discovery thereby sought.

This plea is in effect a plea of one part of the agreement; that part which provides that all proceedings in equity should cease between Joshua Rowe, and Matthew and Philip Wood, in bar of the whole bill. It is therefore a plea, the object of which is to prevent any further proceedings in the particular suit; yet that was a suit which was not merely against Philip Wood, but a suit in which Matthew Wood was also a party. In deciding upon this plea and the effect of it, I must consider first what is the object of a plea to a bill in equity. The object of a plea to a bill in equity I take to be this, to reduce the subject of litigation to a single point, and to avoid that expense which would be incurred by entering into all the subject-matter of the dispute. This plea does not effect that purpose; for this, which is made the sub-[615]-ject of plea, is an agreement which embraces several subjects of the suit, and provides for them in a different way from what they could be provided for under a decree in the cause which had been instituted. If, therefore, the court is to proceed upon this plea as a mode by which it is to do justice between the parties, how is it to act? Is it to stay all proceedings against Philip Wood? that will not execute the agreement; it will execute that one part of the agreement which provides that the proceedings instituted in equity shall cease, but it will not execute the other part of the agreement; and I apprehend it is impossible to hold, that any person can have a right to demand that one part of an agreement shall be executed, leaving the other part unexecuted; which consideration alone demonstrates that this agreement could not be a good plea to this suit.

But what is the nature of this plea? Without entering into the question, whether the averments are or are not sufficient, except that it is manifest from what has been stated, that the averments are not sufficient, because they do not inform the court that Benjamin Wood and Matthew Wood are ready to carry into execution this agreement, without which the agreement cannot be performed. If such a decree cannot

be made, the plea does not enable the court to do justice between the parties, and therefore I conceive it cannot be a bar to this suit as it is pleaded. Independently of this objection, can it be contended that an agreement which binds three persons can be offered by one of those persons in bar of a suit which involves other persons? The court upon the hearing of the plea would have that party before it on [616] part of the case, and other parties at the hearing upon another part of the case. It would be impossible for a court to act upon the agreement under these circumstances, unless it had also the means at the same time to compel the other two parties to perform that agreement, which it cannot do unless a bill is filed for the purpose.

It has been said this is a dilemma which Rowe, the Respondent in the bill, has brought upon himself by executing this agreement; I say it is a dilemma which the Appellant also has brought upon himself by executing this agreement; both of them have brought themselves equally into that situation. When the Respondent does not insist upon the execution of the agreement, and the Appellant does insist upon it, it lies upon the Appellant to take the steps necessary to have the agreement performed, and not upon the Respondent. That I conceive is also an answer to the plea, and shuts it out from being allowed as a good plea to this bill.

But there is another objection which appears to me important, and which of itself is an answer to this plea, and that is, that it is an executory agreement; it is a ground of action, and I never yet heard that one cause of action could be pleaded in bar against another cause of action. Whether P. Wood has or has not a right to carry this agreement into execution must depend upon a variety of circumstances which cannot be in the contemplation of the court upon the hearing of this plea. In the first place the court would not have all the parties before it, and in the next place it would not have the point in issue as between Rowe and Philip Wood and [617] Matthew Wood, and consequently it would be impossible for the court to act upon it in any way whatever.

It is said, why is this difficulty to be thrown upon Philip Wood since he is ready to perform the agreement? if so, he must file a bill in equity to compel the performance of it; the agreement gives him no other remedy. It gives him a right to file a bill for a specific performance, but no other right whatever: it is only that species of right which it confers, how then can that as a plea be a bar to the bill? It has been compared to a release; I apprehend it is a totally different thing. Taking it as in the nature of a release, it is only an agreement (as pleaded) for a release of all demands between Philip Wood and Rowe, and that could not be pleaded in bar to the whole relief. It might be pleaded in bar as to any account sought to be taken by this bill, so as to make Philip Wood responsible to Rowe, but it would not be a bar to the whole suit. The suit must proceed with respect to Matthew Wood; and as far as he might have a demand against Philip Wood, though derived from Rowe, the court must decree against all the parties: and the only effect of that decree would be, with regard to the result of the account, if any thing should appear to be due from Philip Wood to Rowe, Rowe could not have any remedy upon that if it should be so decreed. Therefore, if it had been a release, it could not be pleaded in bar; if it had been a release of all demands whatever, it could not be a bar to this bill, because it could not affect the rights between Rowe and Matthew Wood, and the rights of Matthew Wood as against Philip Wood.

[618] Under these circumstances, it appears to me that this is a case, not only in which this plea with the averments is not a good plea, because the averments are not sufficient; but that no amendment could make it a good plea, because it is not a proper subject of plea: it is a mere right of action which Philip Wood insists he has against the respondent Rowe, and that right of action can only be made available by that mode of proceeding by which a right of action can be made available, that is, by producing it in the proper course of suit. It cannot be a bar to another suit which has been instituted by the party against whom Philip Wood insists he has this right of action. Upon these grounds the order disallowing this plea ought to be affirmed.

The Attorney-General: We trust your Lordships will allow the Respondent his costs of this appeal.

The Lord Chancellor: We cannot allow the costs, because there have been opposite judgments.

The order for over-ruling the plea affirmed.

[619]

SCOTLAND.

JAMES DUKE OF ROXBURGHE.—*Appellant*; JOHN WAUCHOPE, Writer to the Signet, sole accepting Trustee and Executor of the deceased JOHN DUKE OF ROXBURGHE; and the Reverend Archdeacon CHARLES BAILLIE HAMILTON, second Son of the late Honourable GEORGE BAILLIE of Mellerstain; Sir WILLIAM SCOTT of Ancrum, Baronet, Son and Heir of the late Sir JOHN SCOTT of Ancrum, Baronet; and Sir HENRY HAY MACDOUGAL of Mackerston, Baronet, the Residuary Legatees appointed by the said Duke,—*Respondents* [25th May 1820].

[See *Strathmore v. Strathmore's Trustees*, 1831, 5 Wils. and Shaw, 170.]

LANDS, etc. being limited to heirs of entail by simple destination, a deed was executed in *liege poustie* in favour of the heirs general of the disponent after his death without issue, with a power to revoke or alter that disposition on death-bed; and a declaration, that so far as it shall remain unrevoked, and not altered by a writing under the hand of the disponent, it shall have the effect of a delivered evident, though, etc. By another deed, executed thirteen years after the first, all the lands, etc. together with the personal estate of the disponent, are vested in trustees in trust, to be sold, and the produce to be applied in payment of debts owing at his death, and legacies, etc. granted or to be granted, etc. (The objects of trust being different from those provided in the former deed) and the trustees are directed to convey, etc. the residue of the whole fund in favour of such persons, etc. as the disponent had directed or should direct by any writing executed, or to be executed, etc. On death-bed the disponent executes a deed of appointment, directing the trustees to convert the whole estate into money; and after giving cer-[620]-tain legacies he bequeaths the residue to his heirs M. and E. for life, with remainder to other persons therein named; held, that this was not a revocation of the first deed so as to give to the heirs of entail a title to challenge the last deed *ex capite lecti*; although the disponees for life, under the second deed, being the heirs general of the disponent, had reduced the death-bed deed on that ground, and thereby, under the doctrine of approbate and reprobate, had forfeited the life-interest given to them by the second deed.

Where lands by an instrument in the nature of a will are disposed in trust to sell and pay certain legacies, and as to the residue for such persons as the disponent shall by writing appoint; and afterwards by deed made on death-bed he disposes of the residue, the law of death-bed applies to the case, and the disposition is reducible on that ground, so far as it relates to lands.

Lands (entailed by simple destination) being given by testamentary disposition to the sisters and heirs of the disponent, under obligation as to part of those lands, that they should be conveyed by his sisters to the heirs of tailzie, entitled by strict statutory entail to the principal mansion, etc. where the lands subject to the obligation are situated, on condition that a certain sum shall be paid by a certain day by those heirs to the sisters; by a subsequent testamentary disposition, consisting of two deeds, the latter being made on death-bed, the lands of the disponent, including those in question, are vested in trustees upon trust to sell and pay the interest of the produce to the sisters of the disponent for life, etc. who, as general heirs of the disponent, reduced the latter instrument so far as it regarded lands destined to heirs of line, as made on death-bed; held, that the heirs of entail have no title or interest to reduce the same instrument on the same ground as to the entailed lands; nor to call for a conveyance on payment of the sum specified in the condition; 1. because their interest is excluded by the *liege-poustie* deed, and is not restored, transferred to, or vested in them, because the disponees in that deed have forfeited or rejected their right under it; 2. because they must

claim as disponees or legatees under that deed, and in such character they are barred from challenging the death-bed deed; 3. because in the events which [621] had happened they could not fulfil the conditions on which alone the benefit of the disposition could be claimed; 4. because they are not entitled to avail themselves of the right of redemption according to the condition, and under the obligation imposed on the disponees in the first deed, inasmuch as that obligation does not extend to the trustees who take under the death-bed deed.

John Duke of Roxburghe, in 1790, executed a deed by which he disposed to himself, and the heirs whomsoever of his body, whom failing, to Lady Essex Ker, and Lady Mary Ker, his sisters-german, etc. and the heirs whomsoever of their bodies, etc. and failing both his said sisters and the heirs of their bodies, then to his heir of tailzie, having right for the time to his earldom and estate of Roxburghe, etc. whom failing, to his own heirs and assignees whomsoever, all his unfettered estates, comprising lands destined to heirs of line, and lands descendible to heirs of tailzie, by simple destination, etc. except certain lands in the parish of Kelso, as to which it was provided and declared in manner following, "that the said Lady Essex and Lady Mary Ker, and their foresaids, shall be obliged to *dispose* and *convey* to the heirs of entail, having right for the time to my said tailzied lands and estate of Roxburghe, and to the heirs of tailzie and provision, succeeding to them in my said tailzied estate, in terms of the rights and investitures thereof; but also with and under the conditions, provisions, restrictions, limitations, and clauses irritant and resolute, contained in the said rights thereof; all and whatever lands and heritages within the [622] parish of Kelso, presently belonging, or which may belong to me at my death, and not subject and liable to the limitations and restrictions in the entail of the Roxburghe estates; but with this provision always, that such heir of entail shall, at either of the two first terms of Martinmas, which shall be next after my death, make payment to my said sisters, and their foresaids, of the sum of £3000 sterling, or such other sum as I shall appoint; and shall also discharge them of all claims whatsoever, which they may have against my representatives, for the price of teinds sold by me, the exchange of lands, or on any other cause or pretence whatsoever; declaring, that if my unentailed lands and estate in the parish of Kelso, shall not be redeemed in manner foresaid, by my heir of entail, at either of the two first terms of Martinmas, next after my death, the same shall, from thenceforth, remain with and belong to my said sisters and their foresaids, heritably and irredeemably in all time coming."

All former dispositions and settlements of his said lands, estate, and effects, are then expressly revoked, and the deed concludes with the following clause: "And as I reserve full power and liberty to myself, at any time in my life, and even on death-bed, to revoke or alter these presents, in whole or in part, and to sell, burden, or otherwise dispose of the whole estate, heritable and moveable, hereby disposed, or any part thereof, so I dispense with the delivery of these presents, and declare that the same, in so far as not revoked or altered by a writing under my hand, shall have [623] the effect of a delivered evident, though found in my own repositories, or in the custody of any other undelivered at the time of my death."

On the 5th of November 1803, Duke John executed a new settlement in the form of a trust disposition and nomination of executors. By this deed, he vested the whole of his unfettered lands, together with all his personality, in the Respondent, Mr. Wauchope, and other trustees, upon trust, to sell the whole or any part of his real estate, etc. at their discretion, and apply the produce in payment of debts, legacies, etc. given or to be given, etc. The final trust is thus expressed: "The whole residue, remainder, and surplus of my said estate and effects, shall be conveyed and made over, or applied and employed by my said trustees or trustee acting for the time, to and in favour of such person or persons, or for such uses and purposes as I have directed, or shall direct, by any deed, missive, memorandum, or other writing, executed, or to be executed by me for that effect, at any time of my life, and even upon death-bed."

Of the same date, he executed a memorandum relative to the said trust deed and settlement, whereby he desired it to be understood by his trustees, in case he should

he prevented from executing such a deed of appointment as he had alluded to, that it was his wish and intention that the disposition and settlement of 1790 should stand good as far as regarded his sisters the Ladies Ker.

On the 19th of March 1804, Duke John, when upon death-bed, executed a deed of appointment or instructions to his trustees. By this deed he directs them to sell his real and personal estates, and to [624] apply the produce in payment of certain legacies: and after investing the residue, to pay the interest to his sisters the Ladies Essex and Mary Ker, and the survivor; and after the death of the survivor, he directed that the residue should be paid, in certain specified proportions, to the Respondent the Reverend Charles Baillie Hamilton, Sir John Scott, the father of the Respondent, Sir William Scott, and to the other Respondent, Sir Henry Hay Macdougall.

The arrangements made by this deed, as well as by the trust disposition, were in many respects materially different from those of the settlement which had been made in 1790, but neither of them contained any express revocation of that settlement.

Duke John dying without issue, the disposition as to the unentailed lands was reduced by judgment of the Court of Session at the instance of the Ladies Ker, in their character of heirs of line to the disposer.

Duke John was succeeded in the entail by Duke William, who did not challenge these settlements.

Duke William was succeeded by the Appellant, James Duke of Roxburghe, who brought an action of reduction and declarator to set aside these settlements. The summons recites the title of the pursuer as heir of entail, and the before-mentioned deeds, and concludes, 1st, that it ought to be found and declared that "John Duke of Roxburghe did, by the execution of the deed of the 19th of March 1804, effectually revoke and recal the foresaid deed or instrument executed by him in *liege poustie*, on the 14th day of October 1790, as well as the foresaid writing or memorandum of [625] date the 5th of November 1803, purporting to be a direction to the trustees named in the trust-deed of the same date, in so far as said deed or instrument of 14th October 1790, and memorandum of 5th November 1803, or either of them, was or were prejudicial, or intended to be prejudicial, to the heirs of the entailed estate of Roxburghe, or to their claims to any lands or rights destined to them by prior rights and investitures thereof, and to the pursuer in particular." 2d, That the deed, of the 19th of March 1804, be set aside, "because the said deed, instrument or writing, was by the said Duke made and signed at a time when he was upon death-bed, labouring under the disease of which he died a few hours after, and when, by the common and statute law of this realm, he was incapable of making any deed to the prejudice of the pursuer, as heir of the investitures of the said lands." 3d, That at least, and in every event, and although it should not be found and declared, and although decret should not be pronounced in manner above mentioned, yet the said death-bed deed of the 19th of March 1804 ought and should be cassed, reduced, annulled, decerned, and declared in manner, and for the causes and reasons foresaid, to be and to have been void and null, so far as concerns the lands situated in the parish of Kelso, which belonged to the said John Duke of Roxburghe, whether destined to his heirs of entail or not, and to which, in virtue of the said *liege poustie* deed of 1790, the pursuer and other heirs of entail had a right, and were entitled to succeed, upon payment of £3000, and fulfilling [626] the other conditions of the deed in manner particularly before mentioned."

In this action, the Ladies Essex and M. Ker, the Respondent Wauchope, the only trustee who accepted and acted in the trusts of the deeds of 1803 and 1804, and the Respondents the residuary legatees were called as defenders. No appearance was made for the Ladies E. and M. Ker: but the Respondents having put in defences, and the case having been discussed before Lord Alloway, Ordinary, the following interlocutor was pronounced:—

"The Lord Ordinary having considered the mutual memorials for the parties, and the whole process, finds, that John Duke of Roxburghe, when in *liege poustie*, conveyed his whole unentailed subjects of every description to Lady Essex and Lady Mary Ker, his sisters, and their heirs in fee-simple; but with a destination, upon the failure of his sisters and their heirs, to his heirs of entail, and with a

power to revoke and alter that deed, even on death-bed; finds, that the heirs of entail, in so far as they were the heirs of investiture of any parts of these lands, were completely excluded by that *liege-poultie* deed, in favour of his sisters; finds, that Duke John afterwards executed in 1803 a conveyance of his whole heritable subjects, not limited by the entails, to John Wauchope and James Dundas, as trustees for the purposes therein mentioned; finds, that upon the 19th March 1804, John Duke of Roxburghe, when upon death-bed, executed a deed of instructions, directing the trustees to distribute [627] his whole heritable and moveable property, by paying certain legacies, and dividing the residue of his fortune among certain residuary legatees; finds, that the right of challenging upon the head of death-bed, is only competent to the next heir of investiture having an interest, and who, in virtue of the death-bed deed being set aside, would succeed to the lands and heritages therein contained; finds, that if the death-bed deed in question were set aside, the deed 1790, which is not expressly revoked by the death-bed deed, must exclude the succession of the heirs of entail; and that the pursuer, James Duke of Roxburghe has no interest, as the heir of investiture, to insist upon the reduction of the death-bed deed 1804; and therefore assoilzies the defenders from the general conclusions of the reduction: And with regard to the particular conclusions, as to that part of the lands situated in the parish of Kelso, the investiture of which formerly stood to the heirs of entail, but which were again conveyed by the deed 1790 to the Duke's sisters, and which deed contains an obligation upon his sisters to convey these lands to the heir of entail, for the time being, upon his discharging them of all claims whatsoever against them, as the Duke's representatives, and making payment to them of £3000 sterling, at either of the two first terms of Martinmas, next after his death; finds, that the right to these subjects was actually conveyed to his sisters; and that therefore the right and interest of the pursuer as heir of investiture, to challenge the death-bed deed in 1804, was expressly excluded by the deed [628] in favour of Ladies Mary and Essex Ker in 1790; finds also, that the pursuer has no right to challenge the deed in question *ex capite lecti*, as to these lands, and assoilzies the defenders, and decerns."

A representation was given in by the Appellant against this judgment: upon advising which with answers, the following interlocutor was pronounced: "The Lord Ordinary having considered this representation, and the answers thereto, together with the whole process, refuses the representation, and adheres to the interlocutor complained of, in so far as relates to the general findings; but with regard to the alternative conclusion, as to the lands in the parish of Kelso, appoints the cause to be enrolled, and parties to be heard further upon this point; and particularly desires that the interlocutors in the process, which formerly depended before Lord Balgray, be produced in process; and that the pursuer shall also particularly condescend upon these lands in the parish of Kelso, as to which the investitures formerly stood to heirs of entail."

The Appellant represented against this judgment. The Lord Ordinary appointed the representation to be answered, and ordained a condescendence to be lodged on the special point, respecting the lands in the parish of Kelso. Thereafter, on advising these papers, the following interlocutor was pronounced: "The Lord Ordinary having considered this representation, and the whole process, after having heard parties, refuses the representation, and adheres to the interlocutors complained of;" and of the same date he pronounced this other interlocutor, as to the lands lying in the parish of Kelso: "The Lord Ordinary having again resumed consideration of this process, with regard to the lands lying in the parish of Kelso, in respect that the former investiture of these lands, in so far as it stood in favour of the heir of entail, was altered by the deed 1790, executed by John Duke of Roxburghe, in *liege poultie*; and that the representor cannot claim any benefit from that deed without being subjected to all the conditions contained in it, as a dispositive or legatee, in which character he was barred from challenging the death-bed deed in question; and as he cannot now fulfil the conditions on which alone he could claim the benefit of that deed, refuses this representation, and adheres to the interlocutors complained of."

The Appellant petitioned the Court of the first division against these interlocutors, but the Lords "adhered to the interlocutor reclaimed against, in so far as it finds

that the pursuer is barred by the deed of 1790 from challenging the death-bed deed of 1804, and that he has no right to challenge that deed *ex capite lecti*, as to any lands to which he would have had right as heir *alioqui successurus*; and further find, that the pursuer, the Duke of Roxburghe, is not entitled to avail himself of the right of redemption of the Kelso lands contained in the deed of 1790, inasmuch as the obligation therein contained is not imposed on the defenders by the death-bed deed, under which they take these lands."

[630] Another petition was presented to the same division, but the Court adhered to the interlocutor.

From these several interlocutors the Appeal to Parliament was presented.

For the Appellants, Mr. C. Warren and Mr. Wetherell:

The first question is, whether an implied revocation is sufficient to destroy a deed executed in *lege pouta*? By principle of law a subsequent deed, which is inconsistent with a prior deed, effects a revocation; so in the same instrument the last provision, and in different instruments the last in date, is operative and destroys the former. The deed of 1804 is explanatory and directory, and taken with that of 1803 they give the subject-matter to new disponees, and thereby declare that the dispositions of the deed of 1790 are altered. In the English law, which stands on the same principle, where the donee of a power alters the uses before limited, it is a revocation in law. So where a testator makes a later will inconsistent with an earlier will, it is an implied revocation (*Powell on Devises*, vol. 2, p. 132). According to these principles the deed of 1790 is revoked by the deed on death-bed, which is void for every other purpose but that of revocation. So by the law of England, and in principle, a subsequent will or instrument which is void for informality, or ineffectual on account of the incapacity of the devisee or donee, effects an implied revocation; as a devise to A. and afterwards to the poor of the parish, or to a corporation, or a papist; the second devise is void, and the first revoked.

[631] It is said to be inconsistent to suppose the deed invalid as made on death-bed, and yet to use it as a valid deed for the purpose of revocation; but it is used as showing the intention to revoke, and is efficient for no other purpose. Thus where a devise was made to B. and afterwards the deviser by deed poll granted the lands to his wife, that grant was held void. But although nothing passed by the deed, it was held to be a revocation (*Beard v. Beard*, 3 Atk. p. 72). So it is in the case of a feoffment without livery, and a bargain and sale not enrolled.*

An implied revocation is as powerful in law as an express revocation. By the law of Rome and of England as to personalty, a will is revoked by a second will inconsistent with it. The law stands on the principle of presumed intention, and is equally applicable to land. The authorities on this point, from the civil law, which is the fountain of the law of Scotland, are decisive.†

The failure or non-existence of the heir named in the last testament does not annul it as a will, and restore the former will.‡ If, indeed, no heir is [632] named (L. 11, ff. h. t.), or an impossible heir (L. 16, ff. h. t.), or the latter will is void in law upon the face of it (L. 16, sec. 1, ff. *De vulg. et pup. subst.*), it has not the effect of revocation, because it is no will; but whenever it may have an operation which is disappointed, the effect is not merely to give a preferable right to the devisee under the second will, in failure of which the right of the devisee under the first will revives, but to destroy that right altogether.

So Voet (Vol. 2, p. 288, lib. 28, tit. 3, s. 5) states the law to be, that although there must be a possibility of inheritance under the second will to make it effectual as

* 1 Roll. Abr. 615, Vin. Dev. (P.) pl. 6, 3 Atk. 803. So an incipient act not perfected, as the making a tenant to the praecipe towards suffering a recovery without further proceeding, revokes a will. See *Harwood v. Oglander*, 6 Ves. 199; and formerly the grant of a reversion without attornment had the same effect.—See Wentw. Off. Ex. 22.

† Heineccius ad. Inst. sec. DLXXXIII. ad. Pandect. vol. 2, p. 11, sec. 30; (L. 1, l. 2, ff. sec. 2, sec. 7. Inst. h. t. l. 27, *C. de Test.*)—(L. 4, ff. *De Adim. Leg.*)—(L. 6, sec. 2, ff. *De Jure. Codicill.* sec. 2, Inst. L. 16, ff. h. t.)—L. 27, *C. de Testam.*)—(L. 1, sec. 6, ff. *De bon. poss. sec. tab.*)—(L. ult. ff. h. t.)

‡ Heineccius, *qu. sup.* note to s. 30, L. 1, ff. h. t.

a revocation, it is not necessary that the inheritance should vest. The former testament will be equally revoked, although the latter will is rejected by the heir named in it, or because he dies before the testator, or the condition of the gift fails (Inst. quib. mod. infirm. test. 16, ff. h. t.). From which it follows, that a testament once revoked by a second testament remains void, although the later will is afterwards rescinded by law; and this is equally true where the second will is revoked by a subsequent event, as by the birth of a posthumous child.*

These instances are precisely similar to the case of revocation by the event of death within the time limited by law. The deed is valid when made, but [633] becomes invalid by a subsequent event. A disposition of heritage, intended to be in operation during the life of the disposer, and revocable until his death, is in the nature of a will, and regulated by the same principle of law.

It is supposed that the rules of the civil law are inapplicable, because the case relates to death-bed; but the true point in question has nothing to do with the law of death-bed, which is peculiar to Scotland; but to the effect of a later deed or will as to revoking a former deed or will, and this question of revocation is not peculiar to the law of Scotland, but is a point of general law and of the civil law, as the foundation of the law of Scotland.

By that law a second testament annuls the first, and makes it ineffectual (Ersk. Inst. B. 3, tit. 9, s. 5). It is a revocation, and not a conditional substitution. So with respect to a legacy given to a different person by a posterior will (Stair, Inst. B. 3, tit. 8, s. 3), the right cannot revive in the first legatee by the event of the death of the second. Bankton (B. 3, tit. 8, s. 53) on the subject of implied revocations, says, "voluntary alienation of the thing bequeathed, or willingly uplifting a bond, and not employing, will infer revocation. But it is otherwise if the alienation was necessary, or the debtor forced the payment, and the money was re-employed on a moveable security. In this the testator will be presumed only to have been exercising lawful acts of administration, but not to have intended to prejudice or recall the legacy. A transfer of the legacy from one to another, etc. will infer a virtual re-[634]vocation." So Erskine (B. 3, t. 9, s. 6) says as to legacies, special and general, "they may be revoked by posterior derogatory deeds, or general dispositions."

The deed in question contained an express power of revocation, but *mortis causa* deeds are revocable in their nature; and whether they relate to real or moveable property, in this respect is immaterial; for the question turns upon the intention of the testator or disposer, to be inferred from his acts.

But the case is supposed to be concluded by authority, and the Respondents admitting that it may be difficult, on principle and by reason, to support the law as they represent it to be, contend that it is settled by decision, and not now disputable. To support this position they cite the cases of *Irring v. Irring* (Nov. 1738, Kilk. Voce Death-bed, p. 115); *Finlay v. Birkenhead* (Fac. Coll. July 29, 1779); *Alexander Telfer* †; and *Ronan v. Alexander* (22d Nov. 1775, D. P.)

But the cases are not applicable to the question; for in the first it was barely decided, that a death-bed-deed renewing a previous disposition in favour of the same donee, as the previous *lige poutre* deed did not operate as a revocation. No question was raised, as in this case, whether an implied was not equal to an express revocation; and whether such revocation was not effected by a subsequent deed altering the disposition of a preceding deed. In *Finlay v. Birkenhead* the revocation was express, and therefore not applicable to a question of implied revocation. The case of *Alexander Telfer* is not reported, but [635] according to the account given by the Respondents, it was similar to the case of *Irring*; the death-bed deed being a

* L. 12, sec. 1, ff. de honor. possess. contra tab. or where the testator destroys the latter will with a view to make the former valid, as being the last will in existence. Heinec. ad Pandect. Pars. v, sec. 32. But in this doctrine the civil law appears to differ from the law of England where the latter will has not expressly recalled the former. See *Goodright v. Glaister*, 1 Burr. 2512 Peck, 240, 44. As. 4 pl. 36. M. 44, Ed. 3, 33, Doug. 40. *Burtenshaw v. Gilbert*, Cowp. 49.

† Not reported. July 11, 1806. See the report of *Crawford v. Goutts*, in the note at the end of this case.

renewal of the disposition in favour of the same party, as in the *liege poustie* deed, it was held not to be a revocation either express or implied.

As to *Rowan v. Alexander*, it is a single case, decided upon a difference of opinion: it is contrary to principle, and has not been followed in practice. The Respondents suppose it has been confirmed in the case of *Coutts (Craufurd v. Coutts)*, D. P. 1799: see the note at the end of this case, but the fact is otherwise. It was a case of express revocation, and Lord Loughborough in moving judgment, alluding to the case of *Rowan v. Alexander*, said, he did not agree with the Court of Session in the distinction made by them in that case between express and implied revocation. According to the opinion of Lord Loughborough, expressed in the case of *Coutts*, a second disposition, inconsistent with the first, operates *per se* as a revocation. Being of this opinion, he could not have thought *Rowan v. Alexander* a correct decision. In the same case of *Coutts*, Lord Eldon said "he concurred with Lord Rosslyn that it would have been impossible for him on appeal, to have acceded to the judgment of the Court of Session, in the reversion of the decision of the Lord Ordinary in *Rowan v. Alexander*." The authority of the case is impeached by these judicial observations; it has been followed by no similar judgment, and is not supported by the practice of the courts or of conveyancers. When the case of *Craufurd v. Coutts* again came before the House in [636] 1806, the decision in *Rowan v. Alexander* was again disapproved by Lord Eldon: but he said, if titles rested upon the authority of the case, it ought not to be disturbed. So that the date of the decision (1775) seems the only difficulty impeding reversal and the only ground for supporting it.

If the words "I revoke," had been used by the disposer, the revocation is admitted, although the deed is reduced on the head of death-bed. But is there any peculiar virtue in these words, surpassing the effect of an act of revocation done in pursuance of a preconceived intention? A power to revoke being previously reserved, a new disposition is made, giving the lands to new disponees. How a revocation can be more effectually made it is difficult to conceive. The act itself is conclusive to show the intention of the disposer: and in addition to this, the memorandum signed after the execution of the first deed of trust shows that the deed of 1790 was considered by the Duke as revoked. For on no other supposition could it be necessary to provide, as he does, by the memorandum, that the deed of 1790 should remain effective, if he should make no appointment under the powers of the trust-deed.

In that memorandum the power is expressly recited, the future exercise of the power is contemplated, and upon the supposition that the general deed of trust operates as a revocation, a provision is made to counteract that effect. The deed in *liege poustie* is therefore by implication revoked, and does not interfere with the right and title of the Appellant to reduce the deed made on death-bed, which, though void in law, may be used to show the intent [637] to revoke. These propositions are borne out by authority (*Moore v. Moore*, Phill. Rep. 412: and cases there cited).

2. The deed in question cannot interfere with the right of the Appellant, because it became ineffectual by the rejection of the disponees in that deed. The right of the heir to reduce a deed on death-bed cannot be taken away by a deed in *liege poustie*, unless a valid right is thereby constituted in some third person, and made effective by acceptance. A deed merely disinheriting the heir, or made in blank to be filled up in *lecto*, is inoperative. The former case is self-evident: the latter is decided by the case of *Pennycook* (Fount. Jan. 18. 1687. See *Brudenell v. Boughton*, 2 Atk. 270): although it appeared in evidence that the testator, being in *liege poustie*, had declared that he intended to fill the blank with the name which was inserted in *lecto*. So, in a case where the name of the donee had been inserted in *liege poustie*, but in a blank left at the time the domicile was afterwards added on death-bed, the disposition was held incomplete and ineffectual to exclude the heir from challenging the deed on death-bed (*Buchanan*, 1683. *Harcarse, Lectus Egritudinis*, p. 182). So deeds executed in *liege poustie* in favour of the heir, with a power reserved to revoke and redispone on death-bed, do not exclude the title of the heir to reduce: because no effective right is established in a third person, and the power reserved is a fraud upon the law: it is the assertion of a faculty and judgment to dispose on death-bed, which the law denies. If such reser-[638]-vations were permitted the law

would be futile, for every heir might contrive his own law, to enable him to dispose on death-bed (*Hepburn v. Hepburn*, 25 Feb. 1663, Stair. *Davidson v. Davidson*, 17 Nov. 1687, Fountainhall). It can make no difference whether the cause of this inefficiency is original or supervenient. A disposition is equally ineffectual whether to an actual Jew, or a person who becomes a Jew; to a person actually attainted, or who becomes attainted, before the death of the donor. So a gift to an alien, or any person incapable of taking the estate, is void; and it is immaterial whether the gift with a power of revocation be to a person originally incapable, or afterwards becoming so; or to a person capable, but having such right in opposition to the deed; or where the gift is subject to such conditions, that a rejection of the gift is the sure consequence. A *liege poustie* disposition, subject to legal objection, does not destroy the interest of the heir to reduce the deed on death-bed. In what respect can the case of legal objection, which prevents the existence of an interest to bar the title to the heir, be distinguished from the rejection of an interest by which it is equally annulled?

3. If the deed of 1790 is not revoked, the appellant may reduce the death-bed deed for the purpose of claiming the lands of Kelso. It is objected that by the former deed he is barred from challenging the latter. That might be so, if the disposition were made to a stranger; but the ancestor cannot, by this contrivance, take away the right of an heir *alioqui successurus*, to challenge the deed on death-bed.

The Ladies Ker, to whom the lands of Kelso [639] were given, as trustees, with a beneficial condition, have rejected the gift, and their rejection is recorded by the judgment. The lands, therefore, devolve to the persons for whose benefit they were given, free from the condition, and as if the disposition to the Ladies Ker had never existed; or supposing that, under these circumstances, the lands are not disposed of, the Appellant claims them as heir of tailzie. It is said he cannot appropriate and reprobate, but as heir of tailzie he seeks only to reprobate. If it is to be considered as a gift to the heir, on the rejection by the conditional disponees, taking under the *liege poustie* deed as heir, or by paramount title, he may reduce the deed on death-bed. Considering that deed as a conveyance to the Ladies Ker, it is to them as trustees for the Appellant, as heir of entail. So it is put by the Respondents themselves, in their pleadings in the court below. In their condescendence they broadly argue, that it is in substance a disposition in favour of the heirs of entail; and so it was held by the two successive judgments of the Lord Ordinary (Balgray), who pronounces the deed of 1790 to be a settlement in favour of the heirs of entail. Whether the conditions of the conveyance are to be fulfilled, and in favour of whom, are different questions, which may be discussed afterwards in a different proceeding.

The objections as to the Kelso lands, that the condition is not imposed on the disponees in the death-bed deed, and that it contains no disposition in favour of the heirs, must be admitted as facts; but the question of law returns, whether the heir is not entitled to reduce the death-bed deed? A gift [640] by *liege poustie* to an heir, or a trustee for the heir, or to him through the medium of a stranger, upon any condition, does not destroy his right to challenge a death-bed deed. If a gift to any other person, on condition to convey to the heir, with a power of revocation, defeats the right of the heir, the law of death-bed is futile, as being open to the plainest evasion. As to the objection, that the conditions imposed in the conveyance exclude him, and particularly, that the estate is to be conveyed subject to the terms of the entail of Roxburghe: what is to prevent his fulfilling the conditions, if necessary, and taking the estate as heir *quasi* beneficial disponee? A right in the heir to redeem lands, or a right to lands subject to a burden, may be less in quantity or degree, but in quality is the same as an absolute right, and equally protected in favour of the heir by the law of death-bed. The death-bed deed is equally to his prejudice, whether he is to take as heir or disponee, and whether it be directly, or through the intervention of the Ladies Ker, or the Respondents, as their substitutes. In the case of a wadset the redeemable right is vested in the wadsetter; but the ancestor cannot dispose the lands on death-bed to the prejudice of the heir; nor is he excluded from redemption, because he cannot be served as heir, but must take by reconveyance.

It is objected, that as to the Kelso lands, the Appellant in his summons founded on his right, under the disposition of 1790; but he founded mainly on his right as heir of investiture, a right which appears on the face of that deed, and in the fact

were as contended, the rules of Scotch [641] pleading do not exclude a party founding up in a deed in his summons, from abandoning that ground in court, and claiming as heir. The disposition of lands subject to redemption, it is contended, makes the heir a disponent, and that the right of redemption is personal to the heir, which right he cannot exercise without acknowledging the validity of the deed under which he takes. But the disposition only qualifies the right of the heir, still leaving to him that character: the right of redemption is real in the heir, as by the exercise of that right he is reinstated in his inheritance. The objection, that the condition was to be performed after the Duke's decease, within a time which is past, and that it cannot now be performed, is too technical and too inequitable to be maintained. The question has been under litigation ever since the Duke's death, and no payment could be made till the death-bed deed was reduced.

For the Respondents:—The Attorney-General and Mr. Clerk (since raised to the Bench of the Court of Session, under the title of Lord Eldin).

The lands which are the subject of controversy were settled by simple destination, without fetters, upon the heirs of entail of the Roxburghe family. These lands were given by the deed of 1790, a deed *inter vivos* to the Ladies Ker, upon conditions: one of which is, the power reserved to revoke and alter. That power existed without reservation: but the clause dispensing with delivery is considered necessary where the author intends to keep the deed in [642] his repository; and, according to the general opinion, a deed is ineffectual without such clause, if not delivered. The deed of 1790 remained in force and unaltered until the execution of the deed of 1803, whereby a new disposition is made of the estate, so far as it is thereby vested in trustees. The beneficial interest might not ultimately have been affected by that deed. It is by the deed of 1804, operating upon the trusts of the deed of 1803, that the estate is destined to the Respondents, the beneficial devisees. The question arising out of this state of facts is one purely of Scotch law.

Arguments drawn by analogy from the law of England are dangerous to be applied in deciding on questions of the law of Scotland. By the law of Scotland, a person possessed of an hereditary right, without fetters, has power to dispose in *liege poustie*: he may reserve a power of revocation on death-bed. It is admitted that by the same law a person cannot on death-bed dispose of heritable property to the prejudice of his heir.

The Duke of Roxburghe had complete dominion over the property in question, of which he made a disposition by the deed of 1790. If this had been the only instrument executed by him, it is not disputed by the Appellant that it would have been a good disposition. By that deed he reserved a power to revoke on death-bed: by the deed of 1803 he gives the whole residue of his estate and effects, consisting of realty and personalty, in trust for such persons and uses as he *had directed* or should direct by any deed thereafter to be executed.

It has been argued at the bar that this deed alone [643] operated as a revocation of the deed of 1790. It was not so argued in the court below: but that the deeds of 1803 and 1804 together so operated. If no death-bed disposition had been made, it is clear that the Ladies Ker would have been entitled under the residuary clause in the first of those deeds. For the deed of 1803 expressly refers to that of 1790: and it seems to be admitted in the proceedings below by the Appellant, that the deed of 1790 remained in operation, so far as it was not altered by that of 1803, until the execution of the deed of 1804. And such appears to be the right construction from a passage in the speech of the Lord Chancellor, in the case of * *Ker v. Wauchope*. It was lawful to revoke by a *liege poustie* deed, although not by a death-bed deed. The language of the deed of 1804 becomes important in considering whether it is or is not a revocation of the deed of 1803. The deed of 1804 is a deed of appointment or instruction to his trustees already named in the deed of 1803. By the deed of 1804 he gives to those trustees the power to sell the real and personal estates already vested in them by the former deed, and to apply the produce in payment of legacies, and upon the other trusts specified in that deed. So far is this from an intention to revoke the deed of 1803, that it is founded upon it, and the

* Ante, Vol. I. p. 1. The passage is not reported. It probably occurred incidentally in stating the facts of the case.

authority is derived from it. It is on this ground that the two deeds together are said to be a revocation of the deed of 1790.

To reduce a death-bed disposition, it must be to the prejudice of the heir, and no one else can question it. The law of death-bed was made in favour of the heir (Regiam Majest. Stair. Erskine's Princ. of the Law of Scotland).

If there has been a *liege poustie* disposition to a stranger, the heir at law cannot question the death-bed disposition: although on death-bed a disposition in favour of the heir may so far be made as to revoke a *liege poustie* disposition made against him (see *Craufurd v. Coutts*. Post).

A party may by a *liege poustie* deed reserve a power to alter on death-bed. The arguments on the other side would show, that a death-bed disposition operates as a revocation of the *liege poustie* deed. *Rowan v. Alexander* is not the only, nor even the first case on the subject. It was both preceded and followed by others decided on the same principles. In *Ker v. Ker* (Stair, p. 174. 199. Dict. of Decis. 3250), a deed made partly in favour of a grandchild, the son of the second son of the disponent, was delivered by him *sub silentio* to a stranger. The disponent afterwards, on death-bed, required the depositary to redeliver the deed, and having obtained possession of it, delivered it to a notary, to whom he also gave two blank papers, with his signature, desiring him to fill up the one with a disposition to his second son, the other, with a disposition to the only daughter of his eldest son, who was dead. Upon these facts it was held, that the first delivery was conditional, and that the recalling was effectual, although made on death-bed: seeing thereby the heir had no prejudice, since, if the death-bed deed were reduced, the former *liege* [645] *poustie* deed was set up. The disponent in the first deed could not challenge it, because that deed was made revocable * on death-bed, which is lawful as against all persons but the heir.

In *Craufurd v. Coutts* there was an interval during which the right of the heir at law revested in him. But where there is a virtual revocation there is no such revestment (*Ker v. Ker*, 9. s.). In *McKean v. Russell*, where a creditor having taken a bond payable to himself, if living, and after his decease to persons therein named as substitutes, with a power reserved to him at any time of his life to receive and discharge the same, without consent of the substitutes, exercised the power on death-bed by disposing the bond to persons not being either the substitutes or his heirs at law; this disposition being questioned, in an action of reduction upon the head of death-bed, it was argued for the heir, that the death-bed deed annulled the substitution, and revested his right; and although by the same act the subject was disposed to strangers, the alienation was ineffectual as against him, being done on death-bed. But these reasons of reduction were repelled by the court (Dict. of Decis. Death-bed, p. 3277).

As to *Rowan v. Alexander*, it is said the property was but small, and the question not much discussed in the court below. The case was fully argued both there and in this house. The *liege poustie* deed in that case was most materially altered [646] by the death-bed disposition. It is in almost every circumstance similar to the present case.

It is admitted that by a death-bed disposition the *liege poustie* deed may be burdened; what is that but a revocation *pro tanto*? *Rowan v. Alexander* was decided in 1775. Many estates are held upon the law as settled by that case.

It was followed by the case of *Donaldson*.† On [647] advising the petition in

* By implication under the circumstances of the delivery.

† *Donaldson v. McKenzie*, 20th July 1776. The case is not reported. The following is a short outline of the facts, pleadings and judgment:—John Donaldson, book seller in London, adjudged certain subjects in the neighbourhood of Edinburgh as belonging to Alexander Thompson. In that process, Mrs. McKenzie of Rebe, the daughter of James Thompson, by a second marriage, appeared, and insisted that the subjects sought to be adjudged belonged to her; and to prove this to be the case, she produced, 1st, A mutual disposition (1768) between her father and mother, departing to themselves, and to Mrs. McKenzie and her heirs, their whole heritable and moveable estate. 2dly, A holograph deed, dated 13th Sept. 1769, by which James Thompson conveyed to her the subjects in question. 3dly, A trust disposition to James Thompson, with consent of his spouse, conveying his whole estate to her.

Donaldson's case, it was refused without answer, on the ground that the death-bed disposition was not to the prejudice of the heir.

The case of *Craufurd v. Coutts* was decided on the ground that an *express* revocation vested the right in the heir, and then the death-bed deed was to the prejudice of the heir. The Lord Chancellor in that case held (see note at the end of the Case), that at the time of the death-bed disposition there was no effectual *liege poustie* deed in existence.

[648] In the court below, Lord Gillies, in the discussion of the present case, said, as to the case of *Rowan v. Alexander*, "That even if wrong it ought to be upheld;" and he conceived "that there was a great difference between implied and express revocation." The term, "implied revocation," cannot properly be applied to this case: according to the law of England it always proceeds upon the supposition, that the grantor has power to grant. There is no case in which it has been held that a deed executed by a person having no power can be a revocation. By the law of Scotland, upon a deed *inter vivos*, such as the *liege poustie* deed in this case, a power being reserved to alter on death-bed, it could only be altered by express exercise of the power; and the execution of a subsequent deed, which is destroyed by legal challenge, was never in that law held to be such an exercise of the power. That implied revocations have the same effect in law as express revocations, is a doctrine contradicted by authorities in the law of Scotland, showing that parties whose interest it was to contend for that doctrine, and who must have succeeded if it had been well founded, never thought of resorting to it as an argument in support of their claims.* The distinction between express and implied revocations is established by the cases of *Rowan v. Alexander* and *Craufurd v. Coutts*.† On that point the Judges of [649] the Court of Session, who delivered their opinions in this case, were unanimous.

There is no such head in the dictionary as implied revocation, and the term itself is foreign to the law of Scotland. The cases of *presumed* revocation are totally different: as where a legacy is given, and the subject of the gift is afterwards disposed of

for certain purposes therein expressed. This trust disposition was executed *in lecto*, and Mr. Donaldson insisted that the trust deed should be reduced upon that ground, in as far as it was prejudicial to Alexander Thompson, the heir of his father. As to the holograph deed, Mrs. McKenzie could not prove its date: and of course it was held to have been executed *in lecto*. And lastly, with regard to the mutual disposition of 1768, Mr. Donaldson insisted that it was revoked by the trust disposition.

Lord Monboddo, Ordinary, repelled this plea of Mr. Donaldson, who reclaimed to the court: putting his cause upon the following points:—"That both in law and in equity he is entitled, as creditor to the heir apparent, to insist, 1mo, That the mutual disposition and settlement founded on is effectually revoked by the trust disposition: and 2do, That he is entitled to reduce the said trust disposition *ex capite lecti*, without giving effect to the former deed: or in other words, to use the trust disposition to cut down the former settlement, and thereafter to reduce the same disposition as executed on death-bed."

In support of the last of these propositions, Mr. Donaldson founded, at great length, upon the case of *Cunningham v. Whiteford Falconer*, 10th June 1718, insisting that it was a well-founded decision: but, on moving his petition, the court was of opinion that the case of Cunningham was erroneously decided. Lord President Dundas and Lord Corrington said, that they knew the history of that cause very well: that before it came to be heard at the bar of the House of Lords, the parties understood that Lord Hardwicke, then Chancellor, thought that the interlocutor of the Court of Session was ill-founded: in consequence of which understanding the matter was compromised by payment of a large sum of money. When counsel were called to the bar the cause was not argued: but it was stated that the matter was made up, and that both parties concurred in wishing the decree to be affirmed. Upon which Lord Hardwicke observed from the woolsack, that the Respondent had done wisely in not risking a judgment, and thus the interlocutor was affirmed.

* See Kilkerran, p. 151, *Finlay v. Birkmyre*, 29th July 1779. Case of Telfer, Jan. 14, 1806.

† See also the opinion of Bankton, upon a case stated by him, B. 3. tit. 4. s. 49.

otherwise; or where a specific legacy is followed by a general disposition of all the funds, including that legacy: there it is rather a question of preferable disposition than of implied or even presumed revocation. If by law the disposer has the power on death-bed to substitute a new object of his bounty in the place of the *liege poustie* disponent, how is that end to be effected? According to the argument of the Appellant, on the doctrine of implied revocation, the attempt to make a new disposition operates to displace the right of all the disponents, and gives the benefit to a party excluded by the author. Such a doctrine, if admitted, could only have the effect to prevent any disposition after a deed in *liege poustie*.

It is to be observed, that the deed of 1790 conveyed no right to the disponent at the time of its execution. It was an undelivered deed, kept in the repositories of the author, and containing an express reservation of power to revoke. The effect of such a deed is suspended, both as to the heir and the disponent, until the death of the author. In a testamentary instrument, the event of death operates as a delivery. If it be revoked, the right of the heir revives, or rather remains unaffected. But how is the power of revocation to be exercised? Erskine (B. 3. tit. 8. s. 98) [650] says, "Where it is *actually* revoked the heir may pursue reduction of any *subsequent* deed made on death-bed to his prejudice." By *actual* revocation can he mean *implied*, or any thing less than *express* revocation? The deed to be reduced must be subsequent to the revocation, according to the doctrine expressed in that passage, which excludes the notion of a revocation in favour of the heir by a deed which is intended to operate in favour of another object of the author's bounty. That in such case there should be an implied revocation is a contradiction in terms.

If the analogy of English law is to prevail, the question is decided by the case of *Goodright v. Glazier* (Burr. p. 2542), which is law, notwithstanding the case of *Moore v. Moore* (*qua supra*). A second will being cancelled sets up the first.

As to the cases from Rolle's Abridgment, they are on the ground that an alteration in the estate has taken place, which alters the seisin: so that, technically, the party has not the same estate. That rule of law depends on the words of the statute of wills.

The case in Cowper * was decided on the ground of express revocation, by one of the modes prescribed, and having operation according to the [651] words of the statute of frauds. If the second will is to be reduced on the ground of incapacity in the testator, it cannot be looked at for any purpose whatever, and then the first instrument remains in operation. It comes under the principle of decision in *Goodright v. Glazier*.

In the cases of *Pennycook v. Thomson*, *Hepburn v. Hepburn*, and *Davidson v. Davidson*, there was no previous deed in *liege poustie* to exclude the heir. In the first the deed was signed blank, and filled up on death-bed with the name of the disponent.

If the gift were to a person incapable of taking, the case might be different: and if, even to a dying person, according to the extreme case put by the Appellant, a question might arise, whether such deed were not null and void, as fraudulent and fictitious? Cases of fraud are decided upon the peculiar ground of fraud.

If there have been no cases on implied revocation since the decision in Rowan and Alexander, it must be on the ground that the law is considered as settled. Here is no express revocation as in *Craufurd v. Coutts*, but on the contrary, a reference to the previous deed, which is evidence that the interest of the heir is cut off: and if revoked in any sense, can only be to the effect of transferring the estate and right to the new disponent. If implications are to prevail, there is, with other implications, an implied assignation to the *liege poustie* deed, to make the gift to the new disponent effectual.

It has been argued that the Ladies Ker having repudiated the deed of 1790, the title of the heir at [652] law vests: but there must be something to repudiate. They

* *Burtenshaw v. Gilbert*, p. 49.—In this case there were two parts of the first will, one of which being in the possession of the testator was cancelled, the other, being a duplicate, in the possession of a depository of the testator, was found uncanceled in the room where the testator died. The opinion of the court was, that both parts were cancelled by the cancellation of one.

had not an absolute, but only a qualified and conditional right, subject to the power to alter on death-bed, which power was exercised by the testator; and neither they nor the Appellant as disponees can question the death-bed disposition. They could only repudiate for themselves, not for other parties interested: as to them it is *res inter alios acta*. According to the state of law supposed in this argument, the death-bed disponee and the *liege-pouster* disponee may, by collusion, exclude the heir; or the heir, and the *liege-pouster* disponee may, by a similar operation, exclude the death-bed disponee; and the effect of the author's bounty will depend upon the contrivance of the parties: but no such attempt has ever been heard of in the law. There is no ground for this doctrine of repudiation. The estate does not vest during the life of the disposer, and it requires no acceptance at his death, but vests immediately upon that event. In the Bargany case the party repudiated by an instrument duly executed. There must be, together with the repudiation, an investment of the right in another: which in heritable rights, can only be effected according to the known forms of law. The deed executed on death-bed constituted a right preferable to the right contemplated by the deed of 1790: that deed became accessory to the deed on death-bed, by the will and intention of the author, and the heir has no interest in the disposition. According to English law, if an estate is given to A., with a condition to pay a sum of money to B., A. may repudiate, but he cannot disappoint the legatee.

[653] By the deed of 1790, the Kelso lands are given to the Ladies Ker to convey to the heirs of entail, on payment of a certain sum on a given day. This confers no right upon the heir in his representative character. It is a privilege affecting the lands, whether entailed or unentailed. As heir of entail he could have no claim to unentailed lands: and, with respect to lands entailed by simple destination, he was excluded by the deed on death-bed. It is argued, that by the operation of that deed he is remitted to the right under the deed of 1790. But in what character is he to maintain that right? not as heir, but as disponee. The legacy of a right to purchase the lands was displaced by a subsequent disposition. By the deed of 1790, the heirs of entail were put out of the investiture of the lands. Suppose the disposition had been in favour of heirs of line, could the heirs of entail have raised a claim? To support such claim the heir must be a person who is deprived of the estate by the death-bed disposition. But in this case he was deprived by the previous deed of 1790. The claim must be supported on the ground that by the will they have a right as heirs of entail: but it is no right to the lands; it is a mere personal obligation on the Ladies Ker, the disponees. The offer was to be made within the time limited by the deed, which has not been done, and it is now too late.

The Lord Chancellor (in the course and at the conclusion of the argument):

Testamentary deeds executed in *liege-pouster* [654] usually contain a power to revoke. It is argued that a revocation of the deed revokes the power, which is part of it. But unless the power is expressly revoked, no court can impute to the author of a deed the absurdity, that he means to revoke a power which he professes to exercise.

On the points as to the repudiation and the Kelso estates, the judges of the Court of Session having differed, it is necessary that those questions should be accurately considered. As to the question of implied revocation; if we are to act on the maxim of *stare decisis*, the judgment cannot be disturbed. The deed in *liege-pouster* reserves a power of revocation; by making another disposition under the authority of the power, it must be supposed that the disposer intended to do something effectual; and it cannot be implied that by the exercise of the power he meant to revoke it.

25 May 1820.—The Lord Chancellor: Having looked carefully into this case, I can see no sufficient reason for saying that this judgment should be altered. It appears to me, upon the best consideration I can give to the case, that upon all the points controverted at the bar the Respondent is right.

Judgment affirmed.

[655] WILLIAM MOODIE, an infant, the representative of Mrs. ELIZABETH CRAUFURD, otherwise HOWIESON, Widow, deceased, by the Reverend JAMES MOODIE, his father, and WILLIAM BEVERIDGE, Trustee of the said Mrs. E. CRAUFURD,—*Appellants*: THOMAS COUTTS, Esquire, Banker in London, —*Respondent* [11th July 1799, and 6th August 1803, and 14th March 1806].

By REVIVOR,

[Considered in *Gordon v. Clyne* 1839, 6 Cl. and F. 552, 560.]

COLONEL CRAUFURD, being possessed of the estates of Craufurdland and Monkland, in the county of Ayr, and of certain superiorities in the county of Renfrew, all of which he held in fee simple in the year 1771, executed a disposition of the estates of Craufurdland and Monkland in the following terms: "In favour of myself in liferent, and to the heirs male lawfully to be begotten of my body; whom failing, to Sir Hugh Craufurd of Jordanhill, baronet, and the heirs male lawfully begotten, or to be begotten of his body; which failing, to the heirs male lawfully begotten of the now deceased William Craufurd, merchant in Glasgow, my cousin; which failing, to the heirs male lawfully begotten of the also deceased John Craufurd, late surgeon in Glasgow, his brother; whom all failing, to my own nearest heirs and assignees whatsoever in fee, heritably, and irredeemably, all and whole, etc.

"Providing and declaring, as it is hereby expressly provided and declared, that notwithstanding the right of fee and property of the lands above disposed is hereby conceived and taken in favour of the heirs male of my own body; whom failing, to the heirs male of the several other persons before mentioned, substituted to them, and that heritably and irredeemably; yet, nevertheless I do hereby reserve to myself full power and liberty at any time of my life, *et etiam in articulo mortis*, to alter, innovate, annul, and make void these presents, either in whole or in part, and to infringe upon, or totally change the foresaid series of heirs, and course [656] and order of succession above devised; as also to wadset, contract debts, and grant heritable bonds or other securities upon the lands and others above disposed, as I shall think proper, and burden and affect the same to what extent I may see necessary; and sicklike to sell, alienate, and dispose the haill foresaid lands or any part thereof, and in general to do every deed and exercise every act of property that any unlimited liar by law can do; and that without the advice or consent of the heirs male of my own body, if any there shall hereafter be, or of the other heirs male substituted to them in the order above mentioned, to be asked or obtained for that purpose; as also notwithstanding any charter or infeftment that may have followed hereupon."

This deed, which was executed by Colonel Craufurd in *liege pousitie*, was not delivered to the disponees, or any person for them, but remained in the repositories of the disposer.

On the 13th of February 1793, Colonel Craufurd executed a deed by which he conveyed the estate of Craufurdland to the Respondent: "For the love, favour, and affection I have and bear to Thomas Coutts, Esq. banker in London, and to the end that all disputes and differences which might arise upon my death touching the succession to my estate and means, may be obviated and prevented," etc. After conveying the lands and estates of Craufurdland, and after providing for the payment of Colonel Craufurd's debts, funeral expenses, and legacies, the deed declares that the Respondent and his heirs, succeeding in the estate of Craufurdland, shall assume and bear the surname and arms of Craufurd of Craufurdland.

The deed also contains a clause in the following words: "And I hereby revoke and recall all former dispositions, assignations, or other deeds of a testamentary nature formerly made and granted by me, to whatever person or persons preceeding the date hereof; and particularly a deed granted by me in the year 1771, settling my estate upon Sir Hugh Craufurd of Jordanhill, baronet, and his heirs; and I declare the same to be void and null, so far as these deeds are conceived in favour of the persons to whom they are granted, but to be valid and sufficient to the extent of the powers [657] therein reserved to me to revoke, alter, or innovate the same, to the effect only of making these presents effectual in favour of the said Thomas Coutts and his forefathers."

This deed also conveys to the Respondent the superiorities in the county of Renfrew, which were not conveyed to Sir Hugh Craufurd by the former disposition in the year 1771.

Colonel Craufurd died on the 19th February 1793.

Of the same date with the disposition of the lands of Craufurdland in the Respondent's favour, Colonel Craufurd executed a separate deed, by which, without communication with the Respondent, he conveyed to him the lands of Monkland, in consideration of a sum (not paid) of £5000 sterling, as the price thereof. As soon as Colonel Craufurd had executed these deeds, he wrote to the Respondent and desired him to send his bond for £5000, as the price of Monkland; and the Respondent accordingly, on the 18th of February 1793, executed a bond for that sum in favour of Colonel Craufurd, as the price of these lands, and sent it to his agent Mr. James Dundas, writer to the signet, to be exchanged for the disposition of Monkland. Colonel Craufurd died before that bond arrived in Scotland.

On the 17th May 1793, the Respondent was duly infeft in the lands of Craufurdland and of Monkland.

Afterwards Mrs. Howieson, who was the aunt and heir at law of Colonel Craufurd, (with William Beveridge, writer to the signet, her trustee) brought an action of reduction before the Court of Session in Scotland, for reducing and setting aside the disposition in 1771, in favour of Sir Hugh Craufurd, and the two deeds executed in 1793, conveying the lands of Craufurdland and Monkland to the Respondent.

The process of reduction came before Lord Stonefield, as Lord Ordinary, who, after hearing parties, took the cause to report: and on advising informations, the Court of Session (June 12, 1795) pronounced the following interlocutor: "Upon the report of the Lord President, in absence of Lord Stonefield, and having advised the informations for the parties, petition for the pursuers, and additional information for them, the Lords sustain the reasons of reduction in so far as they respect the superiority of the [658] lands in the county of Renfrew, contained in the charter, 12th February 1725, from the then Prince of Wales, as Prince and Steward of Scotland, and reduce, decern, and declare accordingly: repel the reasons of reduction, in so far as they respect the lands of Craufurdland, and others, contained in the disposition by the late Colonel Craufurd to the defender Thomas Coutts, of date 13th February 1793: assolvie the defender, and decern: Find that the alleged sale of Monkland, set forth in the other deed of the same date, 1793, was an unfinished transaction: and remit to the Lord Ordinary to hear parties procurators further thereon, and to do as he shall see just: remit also to his Lordship, to hear parties procurators upon the claim competent to the pursuers under the disposition and tailzie 1719, and to do therein as he shall see cause."

The disposition, so far as concerned the superiorities in Renfrewshire, was reduced, because these were not contained in the deed 1771: and the Respondent acquiesced in this part of the judgment.

The pursuers complained of this interlocutor, by a reclaiming petition, in so far as it sustained the conveyance of the lands of Craufurdland in favour of the Respondent, and prayed the court "to reduce, decern, and declare in terms of the libel: and, secondly, to find that neither Sir Hugh Craufurd, nor any of the persons called by the deed 1771, have any right to the lands in question, but that the same belong to the petitioner as the just and lawful heir therein."

The Respondent put in his answer, and the court pronounced (Nov. 17, 1795) the following interlocutor: "The Lords having advised this petition, and the additional petition, with the answers thereto, they adhere to the interlocutor reclaimed against, and refuse the desire of these petitions."

Mrs. Howieson, and her trustee, appealed from the interlocutors of 12th June and 17th November 1795, in so far as they repelled the reasons of reduction respecting the disposition of the lands of Craufurdland. This appeal was heard at the bar of the House of Lords: and on the 11th of July, 1799, Judgment was pronounced: "Whereby it was ordered by the Lords Spiritual and Temporal in Parliament assembled, that the [659] cause be remitted back to the Court of Session in Scotland, and that the said court do rehear the parties upon the interlocutors complained of on the said appeal."

In consequence of this remit, parties were heard in presence of the Court of Session, and memorials were afterwards ordered, upon advising which, this inter-

locutor was pronounced (Feb. 3, 1801): "The Lords having resumed consideration of this cause, and in obedience to a remit from the Most Honourable the House of Lords, having again heard counsel for the parties upon the interlocutors complained of in the appeal to that Most Honourable House, and having advised the mutual memorials for the parties, they adhere to these interlocutors, assoilzie the defender from the reduction, in so far as concerns the lands of Craufurdlan, and decern."

Mrs. Howieson and her trustee also brought their appeal against this interlocutor, and the two former interlocutors pronounced in this cause, contained in the former appeal; and Mrs. Howieson having died, the appeal was revived in the name of the now Appellant, the infant, her grandson and representative.

On the 11th of July 1799, some time after the argument upon the first hearing in the House of Peers, Lord Rosslyn moved the judgment in the following terms:

The Lord Chancellor: The hearing at the bar upon this cause was had some time ago, and I have now to state the result of the opinion I have formed upon it. The more I have considered this case the more I have felt the difficulty and importance of it. I had the advantage of trying my own opinion by communications with persons conversant in the law of Scotland, who were present at the hearing, with a noble and learned Lord (Lord Thurlow), who perused the printed cases, and with a Judge of the Court of Session, who was not raised to the Bench when the judgment now appealed from was pronounced. I had verbal communication also with other persons, and I was favoured with the result of the opinions they had formed.

These opinions were not uniform. If they had all gone in one course I should have deemed that the safe mode [660] for you to have followed in determining this cause, though it had differed from my own sentiments. It is proper to state, that the learned Lord I alluded to concurs with me; and that our opinion is, that the judgment in the present case is contrary to law. At the same time he feels, as I myself do, much difficulty in a question purely of Scots law upon such opinions as we can form, to state it as advisable to reverse the judgment of the Court of Session.

I shall mention in a few words the nature of the present question, to show the importance of it, the grounds upon which the decision proceeded, and the nature of my doubts with regard to it; and I shall then submit what I conceive is proper to be done in the present case.

The facts in the cause are short. Colonel Craufurd possessed an estate, which he destined by deed, several years ago, to Sir Hugh Craufurd, who was not his heir. This deed remained in Colonel Craufurd's hands undelivered; but if he had died without executing any other deed, no doubt the estate would have gone to Sir Hugh. He reserved a power, however, to alter the deed, in whole or in part, *et etiam in articulo mortis*.

This reservation referred to a point in the ancient law of Scotland, which I have always looked up to as of great excellence; and I have read cases where it was treated with great respect by Lord Hardwicke. By that law no deed is valid against the heir if executed on death-bed, that is, if the grantor be attacked with the sickness of which he dies, and does not survive a certain number of days. In the argument stated in the printed cases it was held out that this was a personal privilege in favour of the heir at law, a regulation for his benefit alone. But in my opinion this comes far short of the excellence of the regulations; it is also highly favourable to the dying man, that his last moments should not be disquieted. It was, perhaps, at first intended to put a stop to the granting legacies to the church, and to charities, which prevailed so much in those days; it now prevents the mischiefs that might arise from deeds obtained by besieging a person when near his death.

The heir has a right to set aside all deeds executed contrary to this regulation. It appears in the present case, that Colonel Craufurd entertained a purpose that Sir Hugh Craufurd, in whose favour he had made the [661] former deed, should not succeed to his estate; and that he also had the intention, when in a declining state of health, to leave it to a very respectable gentleman, an old and intimate friend, perhaps his relation. By him it was neither asked nor expected; and when I mention, that this was Mr. Coutts, the respondent in the present appeal, I need not add, that he could be supposed to want it but little. Without communication with Mr. Coutts, he revoked the disposition in favour of Sir Hugh, and by same deed conveyed one of his estates to the former.

A singular transaction took place with regard to another estate, which he meant to give to Mr. Coutts by means of a fictitious sale for £4000 or £5000. He writes that gentleman a letter, mentioning that he had sold him the estate, and would give him a receipt for the price, but payment was still to be supposed; and he desired Mr. Coutts to send him a bond for the money. This transaction makes no part of the present appeal.

After Colonel Craufurd's death, the appellant, his heir at law, claimed his estates, if no person could show a better right to them. For this purpose she brought an action before the Court of Session for setting aside the disposition to Mr. Coutts as void, being granted on death-bed; and contending, that the pretended sale of the other estate was invalid, being a mere fiction. She called Mr. Coutts and Sir Hugh Craufurd as parties; but the latter was entirely out of the case: the only title he could make was through the deed which had been revoked. He however founded upon this, that it was the intention of the deceased that he should take the estate if it did not go to Mr. Coutts. But the deed in his favour was revoked in the most marked manner, and all intention as to him was clearly gone. When the question was agitated with regard to the estate which was the subject of the fictitious sale, Sir Hugh having stated his argument that if his deed was not revoked that estate must belong to him, the Court found that the heir was entitled to it, the deed to Sir Hugh being expressly revoked.

That determination was posterior to the decision which forms the subject of the present appeal in the other part of the cause, and Sir Hugh's argument, in some degree, arose out of that decision. The Court then held the ground of giving the estate to Mr. Coutts by some [662] confused mode of reasoning, to be of this nature: "It is true, an heir at law has a right to set aside deeds executed on death-bed; but what right have you in the present case? Sir Hugh must take in preference to you, though his deed was revoked; it was a revocation only to the purpose of validating the deed in Mr. Coutts's favour. Sir Hugh is a bar to you; but as the intention of the deceased was not in his favour, therefore Mr. Coutts's right is against him."

The Court then added a good deal of reasoning upon the decisions which had been pronounced. In one of these, about twenty-five years ago, there occurred a case (*Rowan v. Alexander*, 22 November, 1775) where a person possessed of two estates, A. and B., by one deed conveyed both estates to certain disponees; and by a second deed executed on death-bed he conveyed the estate B. to certain other persons. Lord Auchinleck, a respectable Judge, before whom this matter was first argued, held, that the heir at law was entitled to the estate B., and that the death-bed deed, though ineffectual as a conveyance, was sufficient as an *implied revocation* of the former deed with regard to that estate; and he supported the first deed as to the other estate. This judgment was altered by the Court upon an appeal to them; and it was determined that the death-bed deed was effectual, on the ground that the heir was cut off by the first deed, of which there was no express, but merely an implied, revocation, by the subsequent disposition of the estate B. on death-bed; and that if the death-bed deed was not to subsist, the prior deed would be effectual. The Court of Session here made a distinction between an express revocation and an implied one, which I confess I do not feel. If a person makes a disposition of his estate, and locks it up in his repositories, and at the distance of ten years makes another disposition of the same estate, I should be of opinion that the former deed was revoked, and that the posterior one must take effect.

Another distinction was taken in the present case, namely, that though Colonel Craufurd being in death-bed could not execute a valid disposition of his estate, yet he could still execute the reserved power to alter contained in his former deed, and which he had charged on Sir Hugh Craufurd the volunteer. My objection to this is, [663] that such a resignation cannot be allowed. A man may reserve a power to charge his disponee, whose sole right being founded on the disposition, he cannot object to any part of it. But what is the nature of the reservation made by Colonel Craufurd? it is a reservation of a power to do on death-bed what the law says he shall not do in that situation. He might reserve a power to alter his former disposition at any time of his life, which was a reservation against the disponee, but he could not reserve a power against the heir at law to do a deed which was contrary to law.

I may illustrate this by mentioning an instance where Lord Hardwicke determined a similar question upon a similar point of law (*Hearle v. Greenbank*, 3 Atk. 695). A person conveyed her estate to her daughter, an infant, with power to dispose of the same during her minority, or to devise it by will for certain purposes. The daughter was a grown infant, and under coverture. After the mother's death, the infant's husband got her to grant a conveyance to his creditors, which was a different purpose from those pointed out by the mother. The daughter afterwards devised her estate by will, and died before her age of twenty-one years. It was contended in this case, that though the daughter was an infant, yet what she did in execution of the power granted by her mother must be held valid. Lord Hardwicke appears to have been at first caught with this argument, but he was clear that the powers mentioned in the mother's conveyance were contrary to law; and though an infant of twenty years had a greater capacity of mind than one of tender years, yet by law they were under the same disabilities. The same mode of reasoning applies to the case now before us.

It appears that the judgment of the Court below must have proceeded in a fallacy. The deed in favour of Mr. Coutts being executed on death-bed was a nullity; the deed in favour of Sir Hugh was also a nullity, because it was revoked, both expressly and by implication. But the Court, in some singular way, by splicing these two nullities together, which taken singly were of no effect, formed a deed carrying off the estate from the heir, though against a positive law.

[664] The respondent founded part of his argument upon what is termed in Scots law the maxim of Approbate and Reprobate: Says Mr. Coutts, "If you approve the revocation of the deed to Sir Hugh, contained in the posterior deed in my favour, then you cannot reprobate the other clause of that deed." But this is false reasoning. The Court cannot say to the heir at law, Under what deed do you claim? It is enough for her to say, God and nature have made me heir at law; show me by what deed my right is cut off. The title of an heir at law is always complete, inasmuch that a conveyance or devise to such heir in fee is held null, and of no avail. The law of England in such a case says, the heir is in by *descent*, and not by *purchase*.

Having stated so much of the argument in the present case, I must now mention the doubts that have occurred to me upon the subject. I cannot concur in the judgment which has been pronounced; and if I had been sitting as sole Judge in a court of law, bound to act according to the dictates of my conscience, I must have determined against the judgment of the Court below. But the case is different here: when I am to state what I conceive is fit to be done, I cannot arrogantly direct that my opinion should be held better than that of the Court of Session, and on a point of Scots law of great importance to the public, assert that they have been mistaken.

A matter, which I have yet to mention, appears to have biassed the Court considerably. Within these last twenty-five or thirty years an attempt has been made to remedy an inconvenience in conveyancing, which was a good deal felt. In Scotland every security on real estate is itself real. Persons in this country having money to lend are informed that the titles to estates in Scotland are clear, and that interest is there well paid; but they are staggered when they learn that they cannot dispose of such securities by will. A desire at first prevailed to have this matter settled by Act of Parliament, but it was not effected. The present Lord President of the Session, and the late Lord Justice Clerk, who was eminent for his knowledge in conveyancing, thought they could do away this difficulty, and still make a good security by creating, and so reserving, a power to devise by will. I am apprehensive that the decision in this case [665] would involve questions relative to the securities so vested in trustees, and therefore I feel the more delicacy with regard to it where the consequences might be so widely extended, and so disagreeable.

I have considered this point along with the noble and learned Lord already alluded to, and we agree in opinion that it should be regulated by an Act of Parliament declaring that money secured on real estates should still be considered, and be devisable, as money, though descendable to the heir at law, as in mortgages in fee in this country.

Upon the whole, my opinion is that the case should be remitted to the Court of Session, with a direction to them to reconsider their judgment. I think a future consideration of it may open and enlarge the views of the Court; for upon a part of the cause subsequent to that now appealed from, they preferred the heir at law, and

they must then have entertained an idea of the case which was not consistent with their former decision.

Ordered accordingly.

After the remit and judgment in the court below, and the argument upon the further hearing in the House of Peers, Lord Eldon, at the end of the session of 1803, delivered the following opinion:—

The Lord Chancellor: This is a cause which has undergone more consideration than almost any which I remember in this place. I had hoped I should have found it in my power before the end of the present session of Parliament to have made a distinct proposition to you, either for affirming or reversing the interlocutors pronounced in this cause, but I have not yet been able to form an opinion to which I can give the character of judgment.

I have thought upon the cause with much anxiety again and again, but am not yet in possession of some facts, the knowledge of which would enable me the better to form my own opinion. I am aware, also, that some others of your Lordships (all now absent) whose sentiments are much attended to on such subjects, are not of one opinion in this case. One (Lord Rosslyn) of the noble and learned [666] persons to whom I allude formerly considered this case very minutely, and I understand adheres to his former opinion, maintaining it on the same grounds; another (Lord Alvanley) who attended the pleadings in this cause, though now necessarily absent, has inclined, I believe, to think that the present case is, in substance, though not in mode and form, no more than other cases of exception out of the law of death-bed; and a third (Lord Thurlow), who from indisposition has not been present at your deliberations during the present session, but who, whether absent or present, never fails to attend to what relates to judgments to be pronounced by this house, entertains, as well as myself, considerable doubt, whether, in a case of this sort, mode and form is not of the highest importance.

At one time I thought that it might be advisable to remit this cause to the Court of Session for further consideration, not recollecting the great consideration it had originally received in that court, and after it came here how much it was considered by the noble and learned lord then upon the woolsack. From the very mature discussion too that it has received since, and the great expense incurred by the parties, it does occur to me that future deliberation may be sufficiently employed, and necessary information may be otherwise obtained upon the points I am to allude to before the next session of Parliament. I have doubted the propriety of remitting also, because it is utterly impossible to do justice to the merit which I conceive belongs to the Court of Session for the learned and painful discussion given to this case, and the mode in which they have discharged their duty with regard to it.

This cause arises out of the settlement of a Colonel Craufurd. He was seised of two estates in Scotland, Craufurdland and Monkland. In 1771, he executed a settlement, conveying both these to himself in life-rent, and to Sir Hew Craufurd and others, in fee. That deed contained a clause dispensing with the delivery, and he reserved power to alter it at any time of his life *et etiam in articulo mortis*. The adoption of such a clause has been explained to arise out of what is termed in Scotland *the law of death-bed*. To avoid what were supposed to be inconveniences flowing from that law, it had been consider-[667]-ed as law, that if a former deed had been executed in due time, a person might execute another even in lecto, which in given circumstances would be effectual. By connecting the latter with the former the disposition was considered to have been made at the date of the former, and so not to be challenged as not made in due time; but in most cases at least the former has been a deed valid, effectual, and subsisting in operation, at the death of the grantor.

About twenty-two years after making the first settlement, Colonel Craufurd in 1793 executed a new settlement of his estate of Craufurdland. It will be noticed that this contains a procuratory of resignation, a precept of seisin, and other clauses necessary for making up the feudal title in the person of the donee, Mr. Coutts. This deed also contained certain superiorities in Renfrewshire, which were not contained in the deed of 1771. The estate of Monkland was not given by this deed to Mr. Coutts. If it required a joint operation, therefore, of these deeds of 1771 and 1793 to make a valid disposition, it is plain that as to the superiorities, and the estate of Monkland, there was no effectual conveyance.

The deed of 1793 contains the following clause, on which the question turns: [here his Lordship read the clause of revocation.]

Of the same date the Colonel executed a conveyance of his estate of Monkland by way of bargain and sale; but this was a fictitious transaction. The reason of his choosing this mode of making a settlement of that estate has not been distinctly explained. The disposition of 1771 was not then lying by him, and he did not recollect, perhaps, that Monkland also was included in that deed. He wrote a letter to Mr. Coutts to send him a bond for £5000 as the price of this estate, which, it is said, was accordingly executed; but it is not necessary at present to make any further statement on this point.

The heir at law then brought her action to set aside these deeds. It has been correctly explained to us, that the word *heir* is understood in Scotland in a different sense from what it is in this country. In Scotland an heir may be the person pointed out by the destination of former settlements of an estate. In this country the heir takes purely by descent; and the person taking by a destination is considered as a purchaser; as a person not [668] taking in the quality of heir. Mrs. Howieson was the person destined to the succession by the settlement of the estates prior to 1771, she contended that the deed of 1771 was made a nullity by the deed of 1793, and that the deed of 1793 also was a nullity, being executed upon death-bed; and that you would not, (in the phrase of the noble and learned Lord who formerly in this house considered this case,) by splicing two nullities together, make a valid conveyance of the estate to Mr. Coutts.

In this action, Mrs. Howieson called Sir Robert Craufurd, as well as Mr. Coutts, as defenders. [Here his Lordship read the conclusions of her summons, Mr. Coutts's defences, and the interlocutors, 12th June 1795, and 17th November 1795.]

After the question of death-bed had thus been decided, Sir Robert Craufurd appeared, and stated, that the deed of 1771 was not absolutely revoked; and that if Mr. Coutts did not take the estate of Monkland under the fictitious sale, that he was entitled to it. Upon this point the Court pronounced an interlocutor adverse to Sir Robert's claim, declaring, that the settlement executed by Colonel Craufurd in 1771 was effectually revoked by the clause of revocation contained in the deed of 1793. It is fair, however, to observe, that the principle of that declaration cannot be stated more broadly, than that the deed of 1793 had no other effect than the effect of revoking as to the estate of Monkland. The decision, as to that estate, does not amount to a declaration of the Court that they ought to have come to the same decision as to the estate of Craufurdland, because the two estates were in different circumstances. Sir Robert Craufurd appealed against this judgment, but his appeal was dismissed for want of prosecution.

Mrs. Howieson also brought her appeal against the judgment as to the Craufurdland estate. When the cause came to a hearing in this house, very great attention was paid to it. I hold in my hand a note of what fell from the noble and learned Lord then on the Woolsack, when the cause was sent back to the Court of Session, from which I shall read some extracts. [Here his Lordship read great part of the notes of Lord Rosslyn's speech as before stated.]

I have also the notes of the opinions formed by the Judges of the Court of Session, as they have been handed [669] to us, and of what passed in consequence of your remit. I should be wanting in due respect to that Court if I did not state it as my opinion that it is impossible to have discharged a duty more carefully, more anxiously, and more sedulously, than the Court have discharged theirs in this case. They differ considerably in opinion; but it has been the opinion of the majority that the former judgment was right. From these notes I cannot, however, accurately and precisely collect their respective opinions upon some (as they appear to me) important points.

The cause came again here by appeal, and has since been most ably argued by advocates from Scotland: the cases, whether similar or analogous, have been fully sifted, and the law of death-bed, and its effect on the public convenience, fully examined.

As to the law of death-bed, I never thought it necessary very anxiously to discuss its operation as convenient or inconvenient: it is enough that it forms undoubtedly part of the law of Scotland. It seems to have been relaxed from the rigour of the general doctrine concerning it in several decided cases; as in some cases the

law of England, with regard to devises by will, has been relaxed. Though it be positively laid down that a mere deed on death-bed shall not disappoint the heir, yet if a former deed has been granted in *liege poustie*, the grantor may by a death-bed deed burden the grantee of the former deed, so as to leave nothing valuable remaining of the title to the beneficial interest in the estate given to such former grantee: the former deed, however, remains in that case valid as a title-deed to the estate, however burdened by the latter deed.

Analogous decisions have been pronounced in this country on the statute regulating the forms of attesting wills of land. By that statute three witnesses are necessary to attest a devise of real estate: yet it has been held, that if a testator devises his lands by a will so attested, subject to the payment of debts and legacies, he might afterwards by any writing, with or without witnesses, and even by any parol transaction forming a contract of debt, charge, in legacies and debts, the devisee to the full value of the estate: though he could not so dispose of so much of the land itself as was of half a crown value to any creditor or legatee. Here, however, the estate [670] remains in the devisee under the attested will, however burthened by what is not attested. Where a devise is duly made to trustees by sale of real estate to pay certain sums to given persons, and the residue to A. B., I apprehend that a subsequent devise of this surplus or residuary interest, attested by two witnesses only, would not be good. So much have we thought form matter of substance, that in this country, when it has been desired by parties that the Courts should apply the decided cases by analogy to others, the Courts have refused to say, that because you may in one mode effectually do what you intend to do, therefore, if you intend the same thing in effect, you may execute your intention in any other new mode of accomplishing it. The knowledge of this, as an English lawyer, may have, perhaps, caused a great difficulty in my mind in the present case.

I come therefore now to mention a doubt upon this cause, which I have not yet been able to get rid of. In most of the cases which have been cited, the first deed, the *liege poustie* deed, has remained an effective operative instrument at the death of the grantor. I don't mean as leaving a title to any thing beneficial in the grantee of the *liege poustie* deed, but as continuing at the death of the grantor an interest in the grantee of the *liege poustie* deed, on which the grantee of the death-bed deed must found his right, and to which he must knit and attach it.

If one makes a *liege poustie* deed in favour of one of your Lordships, and afterwards by a second deed on death-bed burdens the grantee thereof with some charge, the heir *alioqui successurus* would be by the first deed effectually cut out; and the grantee under the first deed is clearly bound to fulfil the directions of the second deed, for he cannot avail himself of the law of death-bed. So if the grantee in the first deed is ordered to convey to a person named in the death-bed deed. In both these cases the heir *alioqui successurus* is cut out by a *liege poustie* deed available at the grantor's death. In the one case the *liege poustie* deed gives the title to the estate though burdened: in the other also, though to be conveyed: in both, it is a subsisting operative instrument at the death of the grantor, cutting out the heir's title.

It is said, if you may disappoint your heir in this way, why not also by the mode used in the present case? if by giving a title to an estate burdened to its taker, or to [671] be wholly conveyed away, why not by a death-bed deed give the estate itself, a *liege poustie* deed having been once executed? My difficulty is to admit that a person can do what he has the power of doing by all the different modes in which he pleases to do it. The principle of the former cases appears to go only to this, that the grantee of the first deed would take if the death-bed deed was not effectual, and that the heir *alioqui successurus* had nothing to complain of in such a case, and the grantee of the first deed could not make any complaint. Now, though it is true that the present decision puts Mr. Coutts's case on the same footing, yet I do not find either in the notes of the Judges, or in the arguments of counsel at the bar, what is precisely the effect of the deed of 1771 in contemplation of law at the grantor's death. If a title to any estate is at the grantor's death left in the grantee of that deed, the case falls under one consideration: but if that deed at the death of the grantor was absolutely revoked, it is in effect the same case as if the *liege poustie* deed had been a disposition to the heir *alioqui successurus*, or as if it had never existed. When the interest under the death-bed deed knits and attaches itself to an estate to be claimed under the former, there is a *liege poustie* deed disposing of the title: but if

there is no such estate to which that interest can attach, there is nothing but a mere death-bed deed.

To explain myself further: I have frequently put a question to my own mind of this nature, perhaps suggested by ignorance—Suppose the deed of 1793 had contained neither procuratory nor precept, it might still have furnished a good ground of action to get the property in due form; but who would have been defender in that case? Would the heir at law, or Sir Robert Craufurd? If Sir Robert Craufurd had no title to any estate remaining in him, then no action would lie against him. If the action was to be brought against the heir, must it not be admitted that the heir had some how got back the estate? This question has not been answered at the bar. The answer to it I must endeavour to collect; and I want to know whether the deed of 1771 be a necessary operative instrument in Mr. Coutts's title, as he must make it; or if he might without prejudice throw it in the fire; in one word, I wish correctly and precisely to know its effect, and whether the grantee of that deed is considered [672] as entitled in law to any estate or interest in the property in order thereout to make good Mr. Coutts's title.

It was said that the deed of 1771 was not fully revoked, but only revoked *quoad certum effectum*; and that this was more a question of intention than of power: I doubt whether it is not a question of intention and power. I entertain no doubt of Colonel Craufurd's power to have given the estate to Mr. Coutts, nor of his intention to give it to him; but the law frequently gives the power of effectuating the intention only in one mode, and you can do what you intend in no other. If by saying that this is only a revocation *ad hunc effectum*, you mean that the deed is not revoked; but that Craufurd's title to the estate is burthened with a duty to convey or denude for the benefit of Coutts, and must be taken to continue for the purpose of so effectuating Coutts's title: then the deed is not wholly revoked; but if it is wholly revoked, it seems difficult to argue that because, if a *liege poustie* deed remains effectual at the death of the grantor, a death-bed deed shall defeat the heir, therefore, also, the heir shall be defeated merely because a *liege poustie* deed had been executed, but which did not remain in effect at the death of the grantor.

If Mr. Coutts had declined to take this estate, I wish to learn who would in that case have been entitled to it; would Sir Robert Craufurd take it in such a case? The judgment admits that the intention was exercised in a way to take the beneficial interest from Sir Robert Craufurd; if it be not given to Mr. Coutts, how should the heir proceed to make good his title? must he contend with Sir Robert Craufurd or Mr. Coutts? Could it be argued, if Mr. Coutts had not taken, that the intent to revoke was only *ad hunc effectum*, viz. to give to Mr. Coutts, and therefore if he would not take, Sir Robert should?

I may mistake this matter very much, but I have not been able to find any case where the law of death-bed did not take effect in favour of the heir, if the *liege poustie* remained at the grantor's death, without any effect as an instrument through which the title must be made, and the notes to which I allude, as well as the argument at the bar, contains an assertion that Mr. Coutts must make up his title under the deed of 1771 without explaining how, and the contrary assertion also, that he need take no notice whatever of it. As to these points [673] I wish for further satisfaction. If he need take no notice of that deed, I doubt whether authority has gone the length of this judgment. If he must take notice of it, in what way he is to do so has not been explained. I admit that it was Colonel Craufurd's intention to have revoked only *ad hunc effectum*, but I question if the purpose of the revocation be sufficient to sanction a new mode of conveyancing, if it be such; for I do not presume at present to say whether or not the meaning of the words used is understood to be such as puts the judgment on this ground, and this only, that because there was once, though not at the grantor's death, a *liege poustie* deed, therefore the death-bed deed is good.

I could put many cases from the law of this country illustrative of the difficulties I entertain. Suppose I were to make a will in this country, devising my real property to a certain person, and were afterwards to execute another will, revoking my former will that I might make the other, and then devising my real property to one not capable of taking, the revocation would be perfectly good, but the devise being ineffectual, the heir at law would come in, though the intent of my act was to

confirm the exclusion of him. Here is a fallacy, therefore, in the argument as to the effect of a revocation made *ad certum effectum*; if the revocation be complete, and an entire revocation is not a right mode of proceeding *ad hunc effectum*, the revocation will be good, and the disposition will be good for nothing.

If I were to intend to revoke a will already formally made in this country, meaning at the same time to execute another in due form, and had such will prepared and ready for execution, but was arrested by the hand of death before completing it, we hold in that case that the former will is not revoked, because the revocation is not complete, and the devisee under the former will would take. Neither of these cases so put from our law would support by analogy the present judgment. In the former case, the heir is let in; in the latter, the first devisee; this judgment excludes both the heir and Sir Robert Craufurd.

I may state unreservedly upon this part of the case, that I am not much impressed with the consideration of it as being an evasion of the law, or not such. There seems no doubt but that, in the circumstances of the case, it [674] was completely in the power of Colonel Craufurd to have disappointed the law; * and I consider the question as a question whether he can do it in this mode: Whether he can do it without having a *liege poustie* deed in actual effect at his death? The suggestion so often made, that the heir was already cut out by the *liege poustie* deed, appears to me to assume all that is in dispute, for the heir cannot be said to be cut out till the death of the grantor, and therefore it may be said, that if at that time there is no effectual *liege poustie* deed, there was never any *liege poustie* deed that affected his titles.

Another doubt with me is, whether this case has been decided by the court below, on the point of approbate and reprobate, or not. I see in the notes of the individual Judges opinions that some of them have laid great stress upon this doctrine, though others thought differently of it; but the judgment of the Court as to that point I cannot collect. If the judgment were put on that alone I should entertain great doubt of it. It seems very nearly to resemble the doctrine of election in this country, though I am aware of the difference between what is understood by the word *heir* in Scotland, and what we understand by that term. The heir has been stated to be whom God and nature have made such: I should say that the heir in England is a person succeeding by the mere operation and provision of the law.

In our doctrine of election we hold, that if any person takes benefit under any instrument he must submit to the instrument altogether; but if I give a legacy in money to my heir at law, without any express condition annexed to the legacy, and give by the same will part of my real estate to another, and this without the attestation of three witnesses, the heir is entitled to take the legacy; and at the same time to say, this is no good devise as to the land, and accordingly, in such a case, the heir would take the estate. So in the case of a devise against the Statutes of Mortmain, he would take against [675] such a devise, though he claimed under the same will, for these are not cases of election.

If the English doctrines are to rule, this is nothing like a case of election. The heir here does not take the estate or benefit under the instrument, but under the law. If a testator in this country was required to make his will of land 60 days before death, it would be quite competent for the heir to say, This is a death-bed deed; I take the benefit of the law, and I take the land under the benefit of the law. And he might also take personal benefits under the will. There may, however, be a considerable difference, attending to the distinction of character between an heir in England and Scotland; and it is impossible not to see that some cases have been decided in Scotland, which very nearly support the doctrine of approbate and reprobate, as applied in this case.

A person in this country cannot, by a will of land made and attested in a

* The right of the heir stands upon decision. The decision which first gave the land to the eldest son, rather than to all the sons or children, and the decision which prevents a man from disinheriting his heir in his last sickness, within sixty days of his death, are no more law than the decision that he may do so, if he has previously executed a deed in *liege poustie*, which is unrevoked at the time of his death.

regular form, reserve a power of making a future devise of the land which should be attested by less than three witnesses. And the courts of this country, though they have admitted subsequent bequests, otherwise attested of the whole value of the land, do not admit them as to a particle of the land itself; and the bequests of the value of the land must be supported by, and must knit and attach themselves to, an instrument remaining at the death of the testator, effectual to give title to the land itself against the heir at law. The title to the land, to convey the benefit of the land to those claiming under the unattested bequests, must remain at that time in some person claiming under a testamentary instrument duly attested to pass an estate in the land. Upon principles which, because they are very familiar to my mind, perhaps affect it so much in the present case, I doubt whether the death-bed deed, can be supported, unless it can be founded upon some claim to the estate, available against the heir, created by, and continued available until, and at the death of the grantor, by the deed of 1771, to which the title under the deed of 1793 may knit and attach itself, as a burthen by a death-bed deed attaches itself to an estate created by a *liege poustie* deed.

If it were my duty to decide the present case this day, I should feel it a very irksome task to pronounce that the judgment was right or wrong. I believe that my [676] noble and learned friend, who has long paid so much attention to cases from Scotland, entertains considerable doubt of the judgment, if an estate of some kind or other be not remaining in Sir Robert Craufurd; if the *liege poustie* deed in making up the titles is to be regarded as an absolute nullity. It would be altogether indecent to decide the cause at present, in the absence of all the noble and learned lords, if I was more able than I am to state a judgment upon the case. But knowing the delay that has already taken place, and the anxiety that the parties must feel where such property is at stake, I should not have held myself excusable, had I not detailed to you at some length the whole circumstances operating upon my mind when I purpose that judgment should be postponed.

Cause adjourned accordingly.

(March 1806) The Lord Chancellor (Eldon): This is a cause which has already occupied a great deal of attention from the Court of Session and from you. It originates in the settlements executed by Colonel John Walkinshaw Craufurd, the representative of an ancient and respectable family. He was seised and possessed of two estates, Craufurdland and Monkland, in the county of Ayr. In 1771 he executed a deed of settlement to keep up the representation of his family of his estates of Craufurdland and Monkland to himself in life, and the heirs of his body in fee, whom failing, to Sir Hugh Craufurd, and the heirs male of his body, whom failing, to a certain other series of heirs.

This deed contained a power to revoke at any time of his life in *liege poustie*, or *in articulo mortis*. It remained in the repositories of the grantor undelivered at his death.

This instrument appears to be evidence of a purpose on the part of Colonel Craufurd to defeat the heir *aliique successoris* from 1771 down to 1793. At the same time it is fair to observe that this case will fall to be decided as if the deed of 1771 was executed only 61 days before the death of the testator.

When, as is admitted on all hands, Colonel Craufurd was on death-bed, he executed a new settlement in Feb. 1793, of the estate of Craufurdland, in favour of Mr. Coutts, his heirs and assigns, containing a procuratory [677] of resignation, a precept of seisin, and other usual clauses, (the same as in the former deed for vesting the estate feudally in the dispositive,) we shall have to consider whether this deed be one altogether substantive, or if it be to be taken in connection with the former deed.

This deed, besides the estate of Craufurdland, conveyed certain superiorities which were not contained in the deed of 1771. These were clearly gone by the law of death-bed.

With regard to the estate of Monkland, this deed did not attempt to convey it to Mr. Coutts. I call your attention to this at present, as I shall afterwards have occasion to refer to it more particularly when considering the principle of the interlocutor as to Monkland.

[His Lordship here read verbatim the disposition of Craufurdland to Mr. Coutts.

as far as the clause of revocation.] You will observe that this was a deed under conditions, reservations, and declarations, under which Mr. Coutts might have declined to take the estate. Hitherto it has every appearance of a substantive and independent disposition. [He here read the clause of revocation.] This clause, in revoking the former settlement executed by Colonel Craufurd, of course revoked also the procuratories and precepts contained in the former deeds.

The day after the date of this deed Colonel Craufurd wrote a letter to his agent, directing him after his death to open his repositories at Craufurdland. When this was done, the deed of 1771 was found lying there. He had not cancelled this former settlement; if cancelled at all, it is so by the deed of 1793.

Colonel Craufurd died soon after; but before his death, and of the same date with the deed of 1793, he executed a conveyance of Monkland, bearing on the face of it the receipt of £5000, said to be paid by Mr. Coutts as the price thereof. At the same time he wrote a letter to Mr. Coutts to send him his bond for that sum. If that bond was sent, it did not reach Colonel Craufurd in time, for he died six days after the date of the deed.

I must here remark the difference of the situation of the two estates of Craufurdland and Monkland. The heir *aliique successurus*, by the judgment of the Court below, got this last estate. In their interlocutor of the 31st of Jan. 1798, the Court found that the deed of 1771 was effectually revoked by the clause of revocation con-[678]-tained in the deed of 1793, in consequence of which the estate of Monkland was adjudged to the heir. It was contended, that the principle of the decision as to the estate of Monkland was directly contrary to that in regard to the estate of Craufurdland.

The deed of 1793 conceived in favour of Mr. Coutts embraced the estate of Craufurdland, and the superiorities only, and did not affect the estate of Monkland, except in the clause of revocation. The clause of revocation revoked the deed of 1771, as well with regard to Craufurdland as to Monkland, but it also disposed Craufurdland to Mr. Coutts, and not Monkland.

The attempt to dispose of Monkland for a price was not fully completed, because not acceded to by Mr. Coutts in Colonel Craufurd's lifetime; as to Monkland, it was also clear that he meant the heir not to succeed, but the purpose of selling was only an inchoate purpose.

The decision as to the estate of Craufurdland is upon this ground, that, as to it, the revocation of the deed of 1771 was not an absolute, but a qualified, revocation to support the deed of 1793; whereas the revocation as to the estate of Monkland, of which the new conveyance was set aside, *restored the right of the heir aliique successurus*.

The difficulty upon this interlocutor is, that it lays down as a general principle that the deed of 1771 was effectually revoked by the deed of 1793, and does not express that it was only revoked as to Monkland, and not as to Craufurdland, which was the meaning of the court.

The principle so generally laid down in this interlocutor was pressed against Mr. Coutts, but farther than it would go. There may be a finding in an interlocutor in too general terms, and still the conclusion be a sound one. In considering this case, it is very material to take into view, whether the decision as to the estate of Monkland be consistent with that as to the estate of Craufurdland, but it is too much to say that the decision as to Monkland is one directly contrary to that with regard to Craufurdland.

After Colonel Craufurd's death, Mrs. Howieson his aunt (not as we understand the term, but the heir *aliique successurus*, as termed in Scotland) taking under former destinations in her favour, claimed these estates. In [679] prosecution of her claims she executed a trust-bond, as usual in such cases, on which an adjudication was obtained, and afterwards an action of reduction was brought against Sir Hugh Craufurd and Mr. Coutts. [His Lordship here read the conclusions of the summons of reduction, noticing the more especial ground on the law of death-bed. He next read the interlocutor of the 9th of June 1795, sustaining the reasons of reduction as to the superiorities which were not in the deed of 1771, and repelling them as to the estate of Craufurdland, and the interlocutor of the 17th Nov. 1795, adhering thereto.]

After the Court had thus decided as to the estate of Craufurdlund, Sir Hugh Craufurd conceiving that the deed of 1771, if not revoked, gave him the estate of Monkland, put in his claim to that estate, but after a discussion upon that point, the Court, by their interlocutor of the 31st January 1798, to which I have already alluded, found that the deed of 1771 in regard to Monkland was effectually revoked by the deed of 1793.

Then came the first appeal here, which was heard and remitted back to the Court of Session: Lord Loughborough was then upon the woolsack, and another noble and learned Lord concurred with him in the opinion which he had formed. These two great and eminent persons were not content to discuss this question as one depending merely on the construction of the instruments which I have stated, but conceiving that there was in the principle of the judgment something vicious in regard to the law of death-bed, they were still anxious not to decide it, fearing that their own view of the case might bring into danger a system of securities as to trust-bonds, then of some standing in Scotland. The substance of the opinion delivered by Lord Loughborough in that case was as follows:—

[Here his Lordship read the same, of 16th Oct. 1800, commenting upon it as he proceeded.]

On the case of *Rowan v. Alexander*, quoted by the noble and learned Lord, I have no scruple to add the authority of my opinion to his; and if that case had come before me in a court of appeal in 1775, when it was pronounced, it would have been impossible for me to have given my assent to the judgment of the court in that case, reversing the judgment of the Lord Ordinary. I see [680] the Lord Justice Clerk Miller says, in that case, as a ground of his opinion, in which the majority of the court concurred, that as the grantor might have burdened his estate to the full amount of its value, he might therefore give it to the disponent under the death-bed deed. But I by no means coincide with the doctrine, that because you may do a thing in one mode, therefore you may do it in any mode.

It is perfectly settled in this country, that in a will devising land, which must be executed in the presence of three witnesses, you cannot reserve a power to devise any part of it by a will executed in the presence of two witnesses only. We may devise land by will to be charged with legacies, or to trustees, to pay such sums of money as the testator may direct; and such legacies may be granted, or directions given, in any writing executed before two witnesses, or without witnesses. Where the land is already vested, even the witnesses to the will may take as legatees to the whole value of the land, but not one particle of the land can be devised by our law but by a will in the presence of three witnesses. But the distinction goes a great deal farther; though the whole value of the land may be given in legacies, yet after giving legacies to a certain amount the surplus cannot be given away in this manner. The surplus is held to be land, and is not thus to be disposed of. These cases strongly prove the distinction between a power of giving by a certain mode, and giving by any mode.

Though I have said thus much of the case of *Rowan* and *Alexander*, it is, in my opinion, a very different thing to say what might have been done with regard to it in 1775, and what ought now to be done at this day. It would not be on any dry reasoning that I should disturb the authority of this case as applying to another occurring in 1793 if they coincided.

In the present case, I think that the reasons of the Judge in the Court below altogether amount to this, that it was the testator's purpose to bestow the estates on Mr. Coutts by the last deed; and that he did not do so if he did not keep alive the former deed; they held that the deed of 1793 only revoked the former deed to the end of giving effect of the later one.

If it be asked what he did not mean to revoke, I understand it to be supposed that he did not mean to revoke [681] that which gave a right to the disponent in the deed of 1771, to adjudge from the heir at law if the disponent in the second deed should refuse to take. If Mr. Coutts should be unwilling to take under the deed of 1793, is there a right under the deed of 1771 to adjudge the *hereditas* against the heir? If such a right could not exist under the deed of 1771, under what pretence does *any* deed exist to bar the right of the heir?

Whatever I might have been disposed to decide in such a case as that of *Rowan*

and *Alexander* in 1775, I should be one of the last men in the world, in 1806, to disturb that decided ease, in so far as it applies to a case of implied revocation.

It appears from what was said by Lord Loughborough that those noble Lords who coincided in opinion with him were inclined to consider this as a case of fraud on the law of death-bed. My view of it is different: that this is not a case of fraud, and that the Appellant's case cannot be made out upon that ground.

[His Lordship here briefly stated the case of *Hearle* and *Greenbank* (Atk. p. 695) mentioned in the note of Lord Loughborough's speech.]

That Noble Lord concluded with saying, that he was afraid a reversal of the judgment of the Court then under consideration, might trench upon the system established with regard to those trust-bonds to which I have alluded; and therefore he thought it better to send it back to be re-considered. He added, that Lord Thurlow and he were of opinion that it might be proper to prevent all question upon these trust-bonds by an Act of Parliament declaratory of the law. It appears to me that this case may be decided without touching any of these trust-bonds.

The cause was accordingly remitted to the Court of Session, where it underwent the most painful and minute re-consideration. I think I never saw a more honourable specimen of judicial ability than occurred in the discussion of this case when they formed the opinion on which this second appeal arises.

They re-considered this case in all the points of view in which it had been taken up in regard to the alleged fraud upon the face of death-bed; the whole principles of that law, and the particular facts and circumstances of the case. They at length narrowed the case very much from what had formerly been discussed, and put it upon what [682] I think its true merits, the effect of the second deed upon the first through the clause of revocation.

They agree that if the deed of 1771 was cancelled, or wholly revoked by executing another instrument; if the right of the heir was let in *pro brevissimo intervallo*, that the deed on death-bed would operate nothing.

A narrow majority of the Court held, that under the deed of 1793 the deed of 1771 was not revoked absolutely, but under a qualification, and they therefore held, that if the death-bed deed of 1793 was challenged by the heir (for a death-bed deed is not in any view a nullity, but only liable to effectual challenge by the heir) the donee under it might found on the prior deed in 1771, and insist, with effect, that the heir had no interest to challenge the later deed, that if it was set aside Sir Robert Craufurd would have (as we should say in this country) a right to the estate; or, as they would say in Scotland, would have a personal right of action to obtain the estate. The true question in this case, therefore, is, whether or not, in a reduction brought by the heir of the death-bed deed of 1793, her claims could be repelled by any thing the donee under it could urge upon the deed of 1771, as at the death of the grantor.

If he could so repel the claim of the heir, he must prevail in this action; if he could not, then the present appeal would be well founded.

This question will still necessarily lead me into a discussion of some length, and I wish to reserve this till Tuesday, when I shall state my final opinion upon this case. If I be in error thereon, then I must say that it is conformable to the first views I have formed of the case, and that, with all the light since thrown upon it my opinion has never varied with regard to it.

Lord Eldon (12th March 1806), [after reverting to the opinion delivered in part by him as above]: The questions in this cause were anxiously discussed, and considered both before and after it was remitted to the Court below, by noble Lords, some of whom are now no more. One of these noble Lords (Rosslyn,) entertained but one unqualified opinion upon the subject throughout. He held that the settlement of 1793 was a fraud upon the law of death-bed, and that that deed was an unqualified revocation of the deed executed in 1771. His Lordship, [683] therefore, observed in strong, although not in legally accurate, language, that it was impossible to splice two nullities in order to make one effectual deed of disposition. This expression was not technically correct, inasmuch as the term nullity could not be applied with strict precision to the death-bed deed, because it was *primâ facie* a good deed, and was alone reducible by the heir, who was *aliâquâ successurus*. But his Lordship's meaning was this, that the first deed *being revoked was an absolute nullity*, and if

the death-bed deed *could not knit itself upon the first*, it was a nullity likewise in the popular sense of the word, as it could convey nothing. Such were the sentiments of the noble Lord, which coincided with those of several Judges in the Court below, and were supported there by very strong arguments.

Another noble Lord (Lord Alvanley), who is also now no more, seemed to regard the question in another view. So far as I could collect his sentiments he did not consider the death-bed deed as an invasion of the law of death-bed, nor the *liege-poustie* deed as altogether revoked by it; but his Lordship seemed to be of opinion that the first deed was to be considered as in existence to a certain effect, and he thought we should look at the effect of the two instruments taken together, and construe them so as that a disposition, which the disponent had a clear power to make, might be supported, and that the manner in which he did so was to be regarded as matter of form, and not of substance.

But to this last sentiment I never can agree. I entirely concurred with the other noble Lord whom I have mentioned, that matter of form in conveyancing is matter of substance; and that it is not sufficient that a person should have power and an intention to dispose of his property, but that in order to render it effectual he must execute it *habili modo*, or in other words, he must execute it in the form and with the solemnities prescribed by law for conveying such property.

The case of *Rowan and Alexander*, which I shall have occasion to remark upon more particularly hereafter, was more relied upon in the argument than I think it can well be. It was relied on in that case, and has been argued here, that the party might have given the value of the estate by a death-bed deed, and why therefore not give [684] the substance or land itself. But this is not so by the law of Scotland any more than it is by the law of England. By the law of England, a will executed before three witnesses is necessary to convey land, and if land is so conveyed, it may be afterwards charged by a will which is not so executed. But it by no means follows, that because the total value of the estate could be conveyed in the way of a charge, although not attested, that therefore the land itself could be so conveyed. You know very well that even the surplus money arising from the sale of land cannot pass without a will attested by three witnesses, because a Court of Equity considers that as land.

It has been also said, that if a person means to revoke an instrument with reference to a particular purpose, if that purpose is not effected the original instrument is not revoked.

This proposition is to a certain extent true, but it is to be understood with various limitations and distinctions. It is true, that if a party sits down, meaning to revoke a disposition of his property, and by the same act, or as it is called *unico contextu*, to make a new one, if he makes the revocation, but dies before he has completed his new disposition, he shall not be held to have revoked his former disposition, because his revoking it was but part of his purpose, and his act was incomplete. But if he completed his purpose by a new disposition, the first is revoked however inadequate such new disposition may be to convey his property. Thus, if having made a will of land, I afterwards make another in which I revoke it, and give my land to a monk, or an alien, the revocation is good although the devise is void, because the purpose was complete so far as it was in my power to complete it. In the present case, the purpose of the party to dispose his land anew was complete, which decides the case with reference to this argument.

A good deal has been said on the doctrine of Approbate and Reprobate, and that it barred the heir from claiming in this case. I have made a good deal of inquiry into the grounds of the decision, to see if it went upon that ground, and if so how it could be maintained upon it.

I think that this is not a case where the doctrine of Approbate and Reprobate will apply. The heir does not [685] claim under the death-bed deed. The heir says, "your deed does not give you a title unless you can show me a deed executed in *liege poustie*, existing at the death of the grantor: if there be no such deed, the deed executed on death-bed is gone."

In various cases, which I need not at present specially mention, the death-bed deed has been held to be good. The law of death-bed has been so far altered, that a person may by certain modes give away his estate by a deed on death-bed. Upon this point,

as well as upon the practice which has prevailed with regard to trust-bonds, we cannot shake the cases without great danger to private property. In our own law we have also instances of a similar kind, in the practice with regard to the barring of estates-tail, and the making of conveyances to enable a person to give legacies without regard to the statute of frauds.

If by inveterate usage and practice you find mens titles standing in a certain way, you will support them to the extent of the usage; but it is a very different thing to say that you should carry the law beyond the usage.

It is admitted that if a valid *liege-poustie* deed existed at the death of the grantor, the death-bed deed would also be good. It is to be observed, however, that this *liege-poustie* deed must be in favour of a stranger, and not in favour of the heir *alioqui successurus*. A deed in his favour would be held to be an evasion of the law, and not effectual. This is obvious on principle—the stranger disponee is bound to hold good any power reserved against him; if such power be duly executed he cannot complain. This seems also to have been admitted by all the judges, except those who decided against Mr. Coutts, on the ground of its being an evasion of the law.

It is clear that Colonel Craufurd meant to give the estate to Mr. Coutts. His power of doing so is also clear. In treating this matter, I deem it better to go upon the dry points of law than to consider whether it was more fit in Colonel Craufurd to prefer the nearest branch of an ancient family, or to give his estate to that deserving gentleman Mr. Coutts. The intention and power of the testator are both admitted.

The only question is, Has he executed that intention by effectual means? It is admitted on all hands, that Colonel Craufurd might have charged the estate vested [686] in the grantee of the *liege-poustie* deed to its full value in favour of Mr. Coutts, or he might have directed him to convey that estate to Mr. Coutts. The testator in doing so acts in affirmance of the estate vested by the *liege-poustie* deed, for the person to take by the death-bed deed could not call upon the disponee under the former deed to denude, unless the estate was vested in him. The author of the death-bed deed, in such a case, so far from revoking, asserts the validity of the *liege-poustie* deed.

Such cases are not authorities for the present decision, unless you could say Sir Robert Craufurd had some estate under the deed of 1771, of which he could denude himself in Mr. Coutts's favour, or which Mr. Coutts could have adjudged. But it is impossible to say that he had such estate of which he could denude himself, or which could be adjudged, if it can be made out on the construction of the death-bed deed that such estate did not remain in him.

You know that in Scotland the maxim of *mortuus seisis vivum* does not obtain as it does in this country: a proceeding in that country to take up *hereditas jacens* is rather against the estate than the person; the right can be made effectual directly upon the estate, if constituted by a deed containing procuratory and precept by an adjudication in implement. I say this to prevent any misunderstanding of the language which I use.

Another case was put; it was stated, that the testator might have rendered the death-bed deed valid by a clause in it that he meant the deed of 1771 to subsist, if the death-bed deed was found to be ineffectual. I do not mean to deny this. He would then have said, if my death-bed deed is not good, or if the disponee under it would not, or could not, take from popery or other cause, then the disponee under the deed of 1771 might have said to the heir *alioqui successurus*, "the estate is mine:" and he might have proceeded to connect himself with it by his procuratory and precept, or if none had been contained in his deed, by adjudication. In that case this would be the express meaning of the testator: I keep alive the former deed to all those purposes to enable the disponee, in the death-bed deed, to say to the heir that he has no interest to impugn the death-bed deed.

When I considered the cases of implied revocation, [687] (and I have never considered any question more deeply than the present,) I am free to say that I never could have assented to affirm the case of Rowan and Alexander if brought before me by appeal at the time when it was pronounced. Lord Rosslyn stated, when this cause was first here, that he could not give his assent to that case. But there is a manifest difference between what might have been fit and proper to be done when

that case was recent, and what may be so at this day. No man can say that many titles may not rest on the principle of that case of Rowan and Alexander; and were we to touch that case, we might shake securities, in the validity of which there had been great confidence for many years. I allude to the trust-bonds which had been devised and approved of by the most eminent persons upon the Bench in Scotland.

In that case of *Rowan and Alexander* a false principle was laid down on the Bench, that because the testator could effectually have given the value of his estate in money, therefore the disposition of the estate was valid. It was said in that case, that there was no express revocation, but it is difficult to perceive what could be a more express revocation than giving the estate wholly to another.

That case must now be held to stand upon this principle, that the testator did not mean the former deed to be revoked unless the second deed was found to be good; and expressing nothing as to a revocation of the former deed, must be held to have meant in effect that both should stand to accomplish the purpose he wanted of giving the estate to the donee in the last deed. This would apply also to the case of the donee under the second deed being unwilling to take or incapable of taking.

But the same principle will not apply to a case of express revocation. This is the first instance where this principle has been so applied. It is unnecessary to enter into the cases of *Birkmyre*, etc. which are different from the present, in the revocations being by different instruments.

In the present case, as appears to me, there are only two questions: 1st, Is the disposition of 1771 revoked [688] entirely? 2dly, Is it revoked *ad hunc effectum*, or *ad omnes effectus quoad*, this species of question.

The case of express revocation proves, (and the decision in this case, with regard to the estate of Monkland, is the strongest of them all) that if the heir is let in *pro brevissimo intervallo*, the intention or power of the grantor signifies nothing, though he had half a dozen ways of giving away his estate upon death-bed. It signifies nothing if this is not done *habili modo*. The cases of the destruction of the *liege-poustie* deed, though cancelled only to execute another deed, or a revocation by indorsement, when a new deed was the next moment executed, clearly show this, that what may be done validly in one mode cannot be so in any mode.

In the case of Monkland the Court seems to have had considerable difficulty with their own decision; more, indeed, than I feel with regard to it. The disposition of Monkland was by a different deed from that of Craufurdlan. The former disposition of Monkland was revoked, that Colonel Craufurd might dispose of it by a sale; and on the same day he executed a disposition to Mr. Counts by such mode of sale, but before completing this purpose Colonel Craufurd died. We see here strongly that the power to give away in certain modes, and the intention, are nothing. The Court, in their judgment declared, that it was the testator's purpose to give to Mr. Counts, but they found (in terms too general to reconcile that decision with the decision with regard to Craufurdlan) that the deed of 1793 had revoked the deed of 1771, and therefore they give the estate to the heir.

It is clear in this country, where an estate can only be devised by a will executed in the presence of three witnesses, that in such a will a person cannot reserve power to make a valid devise of his estate by will before fewer witnesses. All the doctrines connected with this rule of law were much canvassed in the case of *Habourgham v. Vincent*. A person in this country cannot by the medium of a will or deed reserve to himself powers contrary to law.

In Scotland no man could make a valid *liege-poustie* deed in this form: "Know all men by these presents that I do hereby reserve a power to dispose of my estate [689] at any time of my life, *et etiam in articulo mortis*." The *liege-poustie* deed must be some actual deed of disposition existing at the death of the grantor.

Put the case, that Mr. Counts had repudiated the disposition in his favour contained in the deed of 1793; could the heir, under the deed of 1771, have made use of his procuratory and precept to attach himself to the *hereditas jacens*; or if there had been none such, could he have used an adjudication in implement against the estate? This question depends upon the fact whether the deed of 1771 was revoked by the deed of 1793, or not. If the testator left the deed of 1771 a subsisting deed, the donee under the deathbed deed might make use of that deed to protect himself against the heir at law. In order to find that this case can be ruled by the decision in

Rowan and Alexander you must find the direct contrary of what the testator has expressed in the present case.

The deed of 1771 was a deed standing by itself, containing a procuratory and precept, and all the usual clauses of style. Let us see what the testator does or says with regard to this deed: Does he say that the deed of 1771 shall stand if the deed of 1793 is found not to be good? Does he substitute Mr. Coutts in the room of the donee under the deed of 1771? He does no such thing. The dispositive part of the deed of 1771, the procuratory and precept, are all revoked, and the deed of 1793 is made a complete disposition, standing solely by itself, containing a new procuratory and precept, and other usual clauses. It also contains the clause upon which the whole question turns. [Here his Lordship read the clause of revocation.]

The question of construction, as to what the testator has said, arises upon this. He says, I don't intend that the donee in the deed of 1771 shall take; nor that the deed of 1771 shall be *kept alive*, and that the donee therein shall denude in favour of Mr. Coutts; but I do expressly revoke that deed, so far as conceived, in favour of the persons to whom it is granted; and I keep it alive only with regard to the powers to alter, innovate, and revoke therein contained; thereby reducing the deed to nothing but one containing a power to alter and revoke.

I never in this case could bring my mind to any other opinion, than that the deed of 1793 reduced the deed of 1771 to a conveyance in favour of the heir *alioqui successurus*, because if the intermediate disposition was destroyed, the right of the heir to claim the estate was again set up. Any other opinion goes to make the deed of 1793 good by itself, which is illegal and impossible.

I put another question to myself, which I hope will free me from any charge of mistaking the law. I cannot conceive what the deed of 1793 would do, whether it contained an express or an implied revocation of the former deed, unless I were able to say, that if Mr. Coutts could not or would not take, some right to take up the *hereditas jacens* under the deed of 1771 would still remain. Now such right could not remain under the deed of 1771, because the revocation goes to every thing but what is therein excepted. How could a personal right of action be made out in the donee under the deed of 1771, as the deed of 1793 absolutely revokes that deed, as far as it contained any disposition?

The case turns entirely on the true construction of this part of the instrument; it destroys all right granted under the former deed without which the reserved powers to alter were vain.

In the opinion which I have formed I have the misfortune to differ from many persons in the Court of Session, of whom I am bound to say, that if I have been of any use in the matters of Scotch law I owe it to them; but I have also the satisfaction to agree with many others in that court, and with some who heard the case argued in this house.

I repeat, that this is a question of construction only, and that all apprehension must be gone of touching any title to estates, or any other decided case; the present case turning upon this point, and neither upon any general or special construction of the law. I shall defer giving in the judgment which I mean to move in this case till to-morrow, contenting myself at present with stating this conclusion, that the heir *alioqui successurus* has both a title and an interest in this case.

Ven. 14 Mar. 1806. The Lords, etc. find, that in this case, the question, whether the heir hath a title and interest to challenge the deed of 1793, as made on death-bed, depends upon the particular nature and effect of the several deeds executed by the late Colonel Craufurd, and especially on the nature and effect of the deed of 1793, regard being had to the particular terms of that deed, as [691] expressing the same to be a revocation and recalling of all former dispositions; and find, that the deed of 1771, though executed in *liege poustie*, ought not to be considered as being at the death of Colonel Craufurd, such a subsisting valid instrument or disposition executed in *liege poustie*, as that thereby the interest of the heir to challenge the deed of 1793, as to the lands by the same deed disposed to the defender Thomas Coutts, should be deemed to be barred, inasmuch as the latter deed contains in terms the most express revocation of all former dispositions, assignments, or other deeds of a testamentary nature, formerly made and granted to whatever person or persons preceding the

date thereof, and particularly of the deed granted in the year 1771, and contains the most express declaration in terms, that such deeds are to be void and null so far as they are conceived in favour of the persons to whom they are granted : and also find, that although the deed of 1793 contains a declaration that the former deeds should be valid, and sufficient to the extent of the powers therein reserved, to revoke, alter or innovate the same to the effect only of making the deed of 1793 effectual in favour of the said Thomas Coutts, such declaration ought not to be taken as the ground of an implication rendering such former deeds valid or effectual beyond the extent in which they are in express terms declared so to be, or to be made the ground of a construction whereby such former deeds should be held to be valid, or sufficient in any respect in which they are, by the same deed, in express terms, declared to be null and void ; and find, that although such declaration was made in the deed of 1793, asserting the validity of the former deeds to the extent of such powers, all the dispositions in the former deeds having been revoked in express terms, there did not, according to the true effect of all the deeds taken together at the death of Colonel Craufurd, under any parts of the former dispositions so expressly revoked, and so expressly declared to be null and void, exist in any persons named in such former deeds any personal or other right in the lands by the deed of 1793 disposed to the defender, secure against the challenge of the heir, *ex capite lecti*, on which the disponent *in lecto*, under the deed of 1793, could be entitled to found as his defence against the reduction of the deed made *in lecto* : and find also, that as the deeds in this case are conceived as to the terms thereof, the disponees under the deed of 1793 cannot be considered as having title or right under the former dispositions, as if they had been named therein, or otherwise under the effect thereof : and find, likewise, that the heir is not excluded in this case from challenging the deed of 1793, *ex capite lecti*, and at the same time founding thereon, as revoking the former dispositions. And it is therefore ordered and adjudged, That the Interlocutors complained of, so far as they are inconsistent with the findings and declarations aforesaid be and the same are hereby Reversed : and it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be meet, regard being had thereunto.

[692] Mrs. ANNE MAJENDIE and her Husband the Bishop of BANGOR. *Appellants* ; W. T. CARRUTHERS and his Guardians, — *Respondents* [5th June 1820].

[See 1 Dow, 392.]

UNDER a marriage-contract executed in 1735, lands subject to the limitations of an entail, made in 1708, are resigned by the husband, being heir in possession, and destined upon new infeftment to the husband, "and the heirs-male of the marriage, which failing, to the heirs-male of the body of the husband in any future marriage; which failing, to the *heirs female* of the said spouses, and the heirs-male to be procreated of their bodies, the eldest daughter or heir-female, and the heirs-male descending of her, always excluding the rest, and proceeding without division." To fulfil the obligations of this contract, the husband made up titles, and was infeft in 1736. A daughter was the only issue of the marriage. This daughter being married, by a contract, in which her husband joined, and which was carried into effect under a decree-arbitral in 1759, accepted from her father a sum of money "in full satisfaction of all right of succession which they have, or in any event may have, to the lands subject to the marriage contract, and of the provisions to children of the marriage in any portion, etc. whatever, which the daughter or her husband might claim on the decease of the father, and they accordingly quit claim, and discharge the father from all demands, and renounce and overgive to him, his heirs and assignees, all right, claim of succession, or other right which the daughter and her husband have, or in any event may have, under the provisions of the marriage contract." In the same year, 1759, a disposition was executed by the father in favour of

himself and the heirs-male of his body, whom failing, to his brother, etc. The daughter died in 1768, leaving a son, J. R. The father died in 1774. In 1806 J. R. was served heir to his mother, and brought an action to reduce the disposition of 1759, and all subsequent conveyances of the [693] lands subject to the marriage-contract of 1759. J. R. dying in 1811, the Appellant, Mrs. Majendie, became pursuer in the action, as the sister of J. R. and heir of provision, under the destinations of the marriage contract: held, 1st, that she was heir-female within the meaning of the terms of the destination; 2d, that the entail of 1708 was barred, both by positive and negative prescription; 3d, that the daughter had power to contract with the father, and renounce and discharge the right under the marriage contract as a *jus crediti* vested in her: the effect of which discharge is to bar the right of all other heirs of the marriage.

The question in this case arose upon a marriage contract executed in 1735, by which lands (subject to an entail made in 1708,) were settled "upon F. C. the husband, and the heirs-male of his marriage with M. M., whom failing, the heirs-male of F. C. in any subsequent marriage, which failing, the *heirs-female* to be procreated betwixt the said spouses, and the heirs-male to be procreated of their bodies, the eldest daughter or heir-female, and the heirs-male descending of her, always excluding the rest, and succeeding without division." R. a daughter and only child of the marriage being under coverture, with the concurrence of her husband, and by agreement with her father F. C. in consideration of £650 to be paid by him, renounced her estate, right and claim under the marriage settlement.

This agreement was carried into effect by decree-arbitral, discharge and renunciation, in 1759, and the lands were settled by new dispositions made by the father on a new series of heirs. R. died before her father, leaving a son and two daughters. In 1806 the [694] son served himself heir of provision under the marriage settlement, and brought an action in the Court of Session to set aside the dispositions by which his claim was affected, and the principal question in the cause was upon the validity of the discharge and renunciation. The Court of Session, after various interlocutors, by a final judgment delivered in 1812, affirmed the validity of the transaction, holding the renunciation good against the son of R. Under these circumstances the cause came before the House in 1816, and after much argument and doubt on the principal question, expressed by the Lord Chancellor, was remitted to the division of the Court of Session, from which it came, with directions that they should call for the opinions of the judges of the other division on the points of law arising in the case.*

A petition having been presented by the Appellants to the Court of Session, (First Division,) to apply this judgment, an interlocutor was pronounced on the 10th July 1816, appointing the case to be stated in mutual memorials.

In the memorial which was thereupon presented for the Respondent, an objection occurred to the title of the Appellant, Mrs. Majendie, which was to the following effect:

By the marriage contract 1735, the estate is provided, "to Francis Carruthers and the heirs-male of the marriage with Margaret Maxwell, whom failing, the heirs-male of Francis in [695] any subsequent marriage, which failing, the *heirs-female* to be procreated betwixt the said spouses and the *heirs-male* to be procreated of their bodies." Under this destination Mr. John Routledge was properly served heir of provision, as being the *heir-male* of the body of Mrs. Elizabeth Routledge, the only daughter or heir-female of the marriage of Francis Carruthers and Margaret Maxwell. But the present Appellant, Mrs. Majendie, who is in a different situation, has served herself heir of provision to her brother John, taking it for granted that she is called as the next heir of this contract.

The destination is to the "heirs-female to be procreate betwixt the said spouses and the heirs-male to be procreated of their bodies, the eldest daughter or heir-

* The opinion of the Lord Chancellor at that time seemed to be adverse to the judgment of the court below on the principal question. MSS. May and June 1816, and see Dow's Rep. vol. 1, p. 392.

female, and the *heirs-male descending* of her, always excluding the rest, and succeeding without division; *which all failing, the said Francis Carruthers, his heirs and assignees whatsoever.*" The heir-female procreated of the spouses was Elizabeth Routledge; and John Routledge, her son, served himself heir of provision as the heir-male of her body. But the present Appellant is *not* an heir-male of the body of Mrs. Routledge; and there is here no provision to the *heirs-female of her body*. It was submitted, that, according to the sound construction of the terms of the destination of the contract, the destination after the immediate heir-female of the marriage, and the *heirs-male* of her body, is "to the heirs and assignees whatsoever of Francis Carruthers." Under this last clause, the Appel-[696]lant could have no title to challenge the settlement 1759.

On the 15th of January 1817, the Court of Session, (First Division,) pronounced the following interlocutor:

"The Lords having heard and considered the mutual memorials for the parties, and whole cause, appoint supplementary memorials to be lodged on the point of Mrs. Majendie's title to pursue the present action, whether in the character of heir of provision under the marriage-contract of Francis Carruthers of Dormont, or as heir of provision served to her brother John Routledge; appoint the memorials to be seen and interchanged."

These additional memorials having been advised, the Lords of the First Division ordered a hearing in presence upon the objection to the title. After the discussion of this question the following interlocutor was pronounced: "The Lords having advised the supplementary memorials, and having heard parties procurators in their own presence upon the point of Mrs. Majendie's title, they sustain Mrs. Majendie's title to pursue the present action, as heir of provision under the marriage contract of Francis Carruthers of Dormont, and decern: but find no expenses due to either party."

This incidental point having been thus disposed of, the First Division of the Court of Session pronounced the following interlocutor, in order to obtain the opinions of the Second Division and Permanent Ordinaries, in terms of the judgment of the House of Peers, on the questions stated in that interlocutor.

[697] "The Lords having resumed consideration of, and advised the mutual memorials for the parties and whole cause, before answer, and in obedience to the remit from the House of Lords, order these memorials, etc. to be transmitted to the Judges of the Second Division and Permanent Ordinaries, with a request that they will peruse and consider the same, and thereafter give their opinions in writing, either collectively or individually, on the following questions in law arising therefrom:

"1^{mo}. Was the pursuer's mother, Mrs. Routledge, vested in the *jus crediti* under the marriage-contract 1735, so as to give her power to discharge the obligation thereby incumbent on her father, either on receiving full and specific implement, or on such terms of compromise as her father and she settled, or as arbiters might decern?

"2^{do}. Whether the decree-arbitral was meant to regulate the succession of the estate, or was confined to the money provision?

"3^{to}. Did Mrs. Routledge, by her discharge and renunciation in 1759, following on the relative agreement, submission, and decrees-arbitral, effectually discharge her *jus crediti* under the marriage-contract 1735, so as to bar the claim of her son John, who, by her predeceasing her father, became the heir of the marriage-contract at his death, and, but for that discharge and renunciation by his mother, would have taken the estate under the marriage-contract?

"4^{to}. Was the entail, in the former marriage-contract in 1708, effectual to secure the estate to the heirs-male of that marriage; and was it a [698] valid and subsisting entail, binding on Francis Carruthers in 1735?

"5^{to}. Supposing it to have been binding, is it cut off by prescription?"

The case having been considered by the Judges of the Second Division and the permanent Ordinaries, the following opinions were returned:

"In reference to the interlocutor of the First Division of the Court of 25th February last, applying a remit from the House of Lords, we have considered the printed pleadings on both sides, and report our opinion on the questions of law to which our attention is directed.

" Answer to question 1st.—We are of opinion that, in consequence of previous decisions, the pursuer's mother, Mrs. Routledge, must be held as vested in the *jus crediti* under the marriage-contract 1735, so as to give her power to discharge the obligation thereby incumbent on her father, either on receiving full and specific implement, or on such terms of compromise as her father and she might settle, or as arbiters might decree.

" Answer to question 2d.—We are of opinion, that the decree-arbitral was meant to regulate, and that its terms must be held to apply to the succession to the landed estate of Dormont, as well as the pecuniary provision to which Mrs. Routledge might eventually have been entitled.

" Answer to query 3d.—We think that Mrs. Routledge, by her discharge and renunciation in 1759, did effectually discharge her *jus crediti* under the marriage-contract in 1735, so as to bar the claim of her son.

[699] " Answer to query 4th.—We are of opinion, that the entail in the marriage-contract of 1708 was from the beginning ineffectual, in so far as it relates to the lands of Winterhopehead; but that as to the lands of Dormont and others proceeding from the husband, it was in 1735, and in consequence of the titles afterwards completed by Francis Carruthers, effectual in terms of the act 1695, chap. 24.

" Answer to question 5th.—But it appears to us, that all obligation under the marriage-contract 1708 is now cut off by prescription.

(signed) " D. Boyle, Wm. Robertson, David Douglas, Ad. Gillies, D. Monypenny."

" To query 1st.—Whatever might have been the effect of a conveyance by the pursuer's grandfather of the whole estate, settled by the contract of marriage entered into by him in 1735 in favour of the pursuer's mother, Mrs. Routledge, and especially if she had survived her father; we are of opinion that, as no conveyance was granted to her, and she did not survive her father, she had no power to discharge the obligation in the said contract any farther than concerned herself and the heirs who represented her.

" Query 2d.—We think that the decreet-arbitral was meant to apply to the estate as well as to the sum of £1000 stipulated in the marriage-contract, so far as regarded the interests of those who [700] were parties to the submission. But that it cannot in just or sound construction be held to extend to heirs of the marriage, who were not themselves, and do not represent those who were parties to the submission.

" Query 3d.—We are of opinion, that Mrs. Routledge, by the discharge alluded to in this query, did not effectually discharge the *jus crediti* under the marriage-contract 1735, so as to bar the claim of her son John.

" Queries 4th and 5th.—We agree with our brethren that the destination of succession in the marriage-contract 1735, was not rendered ineffectual by the entail in the contract of marriage 1708; and further, that this latter is now cut off both by the negative and positive prescriptions.

(signed) " William Miller, Wm. Macleod Bannatyne, Ro. Craigie,
D. Cathcart, J. Wolfe Murray."

The case then came to be advised by the First Division of the Court; and a majority of the division having declared their opinion to be in favour of the Respondent, it was proposed that the former interlocutor should be adhered to in general terms. But the counsel for the Respondent having observed that an interlocutor in such terms would in point of form decide the question of prescription in his favour, which was contrary to the opinion expressed by the Judges, and that he wished for an opportunity of bringing that question [701] more particularly under the consideration of the Court, as he was afraid that his argument upon it might have been misunderstood by their Lordships, especially as it had been very much misunderstood and misrepresented by the Appellant; and, besides, it had been held of such inferior importance that no specific judgment had hitherto been given upon it. For these reasons he prayed the Court, if the opinion of their Lordships remained against him on the point of prescription, to insert a finding to that effect in the interlocutor to be pronounced, in order that he might have an opportunity to reclaim against that finding, and, in his reclaiming petition, to state the merits of the question of prescription as unmingled with the other points in the cause. It appeared to the Court that this was a reasonable proposition; and their Lordships not having changed their opinion on the question of prescription, the following interlocutor was pronounced:—" The Lords having advised the memorials, and

additional memorials, for the parties, and having also advised with the Lords of the Second Division of the Court, and with the Permanent Lords Ordinary of both divisions of the Court, and having reconsidered the whole cause in terms of the remit from the House of Lords,—They adhere to their former interlocutor of date 12th May 1812, and decern in terms of the said interlocutor in the two several processes therein mentioned: And further, in the process of declarator of irritancy and of reduction, brought at the instance of William Thomas Carruthers, and founded on the contract of marriage and settlement of tailzie of 10th August 1708, the Lords [702] find, that all claim at the instance of the pursuer of the said process upon said contract of marriage and settlement of tailzie, is cut off by prescription both positive and negative; and therefore sustain the defences in the said process, assolvie from the conclusions of the same, and decern.”

This interlocutor was submitted to review in a reclaiming petition by the Respondent, in so far as it found that all claim at the instance of the Respondent upon the tailzie 1708 was cut off by prescription.

Answers having been ordered and given in to this petition, and one counsel on each side having been heard at length upon this point of prescription, the Lords of the First Division pronounced the following interlocutor: “The Lords having resumed consideration of this petition, and advised the same, with the answers thereto, and having also heard the counsel for the parties thereon, they refuse the prayer of the said petition, and adhere to their former interlocutor therein reclaimed against.”

Mrs. Majendie entered an appeal from the interlocutor of 25th May 1819, sustaining the defences for the Respondent, founded on the discharge and renunciation in 1759.

The Respondent entered a cross-appeal against the interlocutors of the 3d of Feb. 1818, from part of the interlocutor of 25th May 1819, and from that of 16th December 1819: in which the objection to the title and the point of prescription were decided against the Respondent.

[703] The case was argued in the House of Lords at very great length, by The Attorney-General and Mr. Brougham, for the Appellant.

Mr. Clerk and Mr. Hope, for the Respondent.

By the petitions of appeal three questions were raised, 1st, Whether Mrs. Majendie, being a daughter of a daughter of the marriage, was an heir-female within the meaning of the provisions of the marriage contract: it being contended by the cross appeal, that daughters only of the marriage were intended as heirs-female, which appeared from the provision for the heirs-male of such heirs-female! Upon this question the following authorities were cited:—

On the cross-appeal,

Pro:—*Creditors of Redhouse v. Glass*, 15th June 1743; Home's Decis. *Ewing v. Miller* 1st July 1747. *Dalziel v. Dalziel*, 30th May 1809.

Con.—*Erskine's Inst. B. 3, tit. 8, s. 18.* *Ker v. Ker*, Fac. Coll. 13 Nov. 1810.

The second and principal question was, Whether Mrs. Routledge, being heir of provision expectant, and predeceasing her father without having received implement of the contract, could for all future contingent heirs, as well as for herself, renounce the right of provision under the settlement, and by agreement with her father discharge his obligation! Whether she had a *jus crediti*, or merely a *spes successionis*? Whether in fact she did, by the terms of the agreement, etc. renounce for herself personally, or also for the other heirs of provision! On [704] the former branch of this question (the right to renounce) were cited,

Pro:—*Case of Aikmans*, 20th Dec. 1550, Balfour, p. 222, 223. *Craig*, l. 2, d. 14, sec. 10, 11, 22; Stewart on the obligation of Marriage Contracts; *Stair*, B. 2 tit. 5, sec. 41; *Ersk.* B. 3, tit. 8, sec. 38, 39, 41. *Cunningham v. Cunningham*, Jan. 17th, 1804. *Cunningham v. Stewart Hathorn*, Dec. 20th, 1810. *Case of Bairns of Young*, 7th July 1632, *Durie*, p. 2. *Hay v. Earl of Tuccobuloh*, *Stair*, July 24, 1676. *Panton v. Irvine*, March 1681. *Cairns v. Cairns*, Jan. 34th 1705. *Ballinghall v. Henderson*, 1759; *Ersk.* B. 3, tit. 8, sec. 87, 92, in fine. *Mood v. Stewart of Burch*, Jan. 17th, 1728; * affirmed by the House of Lords, Feb. 6th 1729.

* No where reported, but the circumstances appear stated in the printed case delivered in to the House of Lords upon the appeal: from which, and from recitals statements and arguments in other cases, it was contended by the Appellant that the heir of provision predeceased the father in that case.

cited in *Edgar v. Maxwell*, July 6th, 1736; Kilk. p. 148, and affirmed in D. P. on appeal, May 31st, 1742. *Rankine v. Rankine*, Feb. 17th, 1736; Home's Dec. No. 17; Elchies' Dec. vol. 2. tit. Mutual Contract. *Trail v. Trail*, Jan. 7th, 1737. *Creditors of William Scott v. Blair*, Elchies' Dec. tit. Seisin and Confirmation, No. 5. July 30th, 1736. *Moncrieff v. Moncrieff*, 8th Dec. 1759. *Sinclair v. Sinclair*, Nov. 27th, 1768; affirmed in D. P.: Kaim's Sel. Dec. *Fotheringham v. Fotheringham*, June 20th, 1797. *Allardice v. Smart*, Feb. 16th, July 14th, 1720; affirmed in D. P. 21st Feb. 1721. *Stewart Thricepland v. Sinclair*, affirmed in D. P. Feb. [705] 13th, 1770. *Cowan v. Young*, Feb. 9, 1769; Gosfird. *Wauchope v. Wauchope*, Feb. 6, 1683. *Cunninghame v. Cunningham*, July 9, 1776. *Sinclair and Moodie v. Sinclair*, July 29, 1768. *Lawson v. Lawson*, Feb. 6, 1777. *Henderson v. Henderson*, July 26, 1782. *Lamond v. Lamond*, July 30, 1776. *Boyd v. Boyd*, Jan. 6, 1670.

Contra:—*Lynn v. Creditors of Easter Ogle*, Jan. 1724; Kaim's First Collection. *Case of Hamilton*, 21st of Feb. 1690. *Case of Preston*, 15th July 1691. *Creditors of McKenzie against his Children*, 2d Feb. 1792; Voet. lib. 5, tit. 2, sec. 3; Bank. vol. 2, p. 338; Ersk. B. 3, tit. 8, sec. 38. *Hay v. Lord Tweeddale*, Stair's Decisions, July 31, 1676. *Panton v. Irvine*, Harcarse, March 1684. *Cairns v. Cairns*, Harcarse, 31st Jan. 1705. *Case of Cunningham*, Jan. 17, 1804. *Anderson v. the Heirs of Shields*, Kilkerran, Nov. 16, 1747. *Christie v. Dunn and others*, Fac. Coll. Jan. 21, 1806; Bankton. vol. 1, tit. 5, sec. 10; Ersk. B. 3, tit. 8, sec. 39, p. 603. *Inglis v. Hamilton*, Dict. vol. 1, p. 220, Dec. 4, 1734. *Bayne v. Sir John Belsches*, Feb. 16, 1793. *Atkyn's Rep.* vol. 2, 160; 1 Wilson, 229. *Machonochie v. Greenlees*, 12th Jan. 1780. *Cunningham v. Hathorn*, 20th Dec. 1810. *Lord Wemyss v. his Father's Trustees*, 28th Feb. 1815. *Case of Powrie*, (*Fotheringham v. Fotheringham*), as to the question of fact, whether the son predeceased or survived the father in the case of *Stewart of Burgh*. *Harvie v. Craig*, Buchanan, 12th Dec. 1811, containing the opinion and statement of Lord Meadowbank as to ease of Elsie'shiels.

[706] The third question was, Whether the settlement of 1708 was cut off by positive or negative prescription, and to what title the possession was to be ascribed? On these points were cited,

For the Appellant in the original appeal:—*Porterfield v. Porterfield*, Dec. 6, 1771. *Case of Welsh Maxwell*, June 21, 1808. *Balfour v. Lumsden*, 13th June 1811. Fac. Col. Edgar, Jan. 17, 1721. *Case of Muirhead*, Lord Kaim's, 11 Feb. 1724. *Earl of Dundonald v. Marquis of Clydesdale*, Kaim's First Col. Jan. 21, 1726. *McDougal v. McDougal*, Clerk Home, 10th July 1739; June 25, 1785, Menzies; Cod. de Loc. et Conduct. L. 4, tit. 65. L. 25. *Harris v. Anderson*, Spott. voce Possession. *Cunningham v. Cook*, Spott. voce Removing; Stair, 177; Bankton vol. 1, p. 514; and Ersk. 176. Dict. voce Mutual Contract, p. 598, *et seq.* and 7th Feb. 1777, Carnegie.

For the Respondent:—*Carmichael v. Carmichael*, 5th Nov. 1810. *Case of Welsh Maxwell*. *Balfour v. Lumsden*. *Smith and Bogle v. Gray*, Kilkerran, p. 424. Ersk. Inst. B. 2, tit. 1, sec. 50.

After an elaborate argument on the 25th, 26th, and 31st of May, and on the 1st and 5th of June, the judgment of the Court of Session was affirmed on all the points. Judgment affirmed.

[707]

SCOTLAND.

COURT OF SESSION.

The GOVERNORS of HERIOT'S HOSPITAL,—*Appellants*: J. C. ROSS.—

Respondent [24th July 1820].

When a vassal sub-feus his possession for its full adequate value at the time, it is only a year's sub-feu duty, and not a year's rent upon the value improved by buildings, which he is bound to pay to his superior, as a composition for an entry to a singular successor.

The Respondent held under the Appellants a piece of ground in Edinburgh, at the yearly feu-duty of three bolls of wheat and three bolls of barley: The composition payable to the Appellants as superiors on the entry of a singular successor was not

taxed. The Respondent, upon his entry in 1804, paid a composition of £30 sterling, which was the nominal value of the land. In 1807 the Respondent sub-féued the land to builders, who covered the ground with houses. The duty reserved upon the sub-féus was about £120 per annum, and the gross rental of the houses built and building was stated to amount to £3000 per annum. The feu-dispositions to the sub-vassals stipulated for a duplicando of the sub-feu duty on the entry of every heir and singular successor, and prohibited sub-inféudation. In the year , the Respondent being desirous to sell his interest in the feus, applied to the Appellants to assess the composition upon the [708] entry of a purchaser. The Respondent proposed to pay £120, the amount of one year's sub-feu duty. The Appellants refused to accept less than one year's full value of the land, as improved and increased by the buildings. The Respondent thereupon brought an action against the Appellants, seeking a declaration that purchasers were entitled to demand an entry from the Appellants, as superiors, on payment of £120 in full of the composition exigible by the superior upon the entry of the singular successor; and that the Appellants and their successors, as superiors, should be decreed to enter purchasers and singular successors of the Respondent, as vassals, accordingly on payment of £120, or the amount of sub-feu duties for one year, in full of non-entry duties, casualties of superiority, and other claims for entry of singular successors.

The Appellants contended in their pleadings in defence, that they were entitled to a full year's value at the time when the entry was to be given.

The Lord Ordinary and the court, upon a reclaiming petition, after condescendences and a hearing, delivered judgment for the Respondent. Upon a further reclaiming petition, praying the court to alter the interlocutor pronounced, so far as to find that the Appellants were entitled for the entry of an adjudger or purchaser to one year's sub-feu duty, and one year's average value of the whole profits derived by the pursuer and his successors from his sub-feus, by casualties or in any way whatever, the court by an interlocutor, pronounced on the 6th of June 1815, adhered to their former judgment.*

[709] From these several interlocutors the appeal was presented.

For the Appellants:—The Lord Advocate, Mr. Warren, (and Mr. J. Miller.)

For the Respondents:—Sir S. Romilly and Mr. Moncrieff.

The authorities cited were: For the Appellants, *Aitchison v. Hopkirk*, Fac. Coll. 14 Feb. 1775; *Jordanhill v. Craufurd*, 13 Feb. 1752; Kilkerran, 395, and Lord Elchic's *roce* Tack, No. 48. *Alison v. Ritchie*, 3 Feb. 1730; Dict. vol. 2, p. 119; Bankton, B. 2, tit. 9, s. 6; Erskine, B. 2, tit. 6, s. 27. *Cowan v. Lord Elphinstone*, 20 March 1636; Stair, B. 3, tit. 2, s. 24 and 27; Ersk. B. 2, tit. 11, s. 24. *Erskine v. Earl of Home*, 17 July 1630, Durie. *Brandon Baird*, contra, 18 July 1633, Gibson; Ersk. B. 2, tit. 5, s. 7 and 12. *Catheart v. Tait*, 15 Feb. 1782, Fac. Coll.; Kames's Stat. Law, *roce* Feu. *Almond v. Hope*, 9 March 1639, Durie. *Gray v. Allan and Taylor*, 1840.

For the Respondents: *Heriot's Hospital v. Ferguson*, July 30, 1773, Fac. Coll. vol. 5, No. 83; Elchic's Decis. *roce* Feu; Craig, 2, 20, 32; Stair, 3, 2, 27; Bankton, 3, 10, 19; Ersk. 2, 12, 24. *Ramsay v. Earl of Rothes*, March 23, 1622; Durie. *Pater-son v. Murray*, 30 March 1637, Durie; Stair, 2, 1, 66. *Monkton v. Yester*, 15 Feb. 1634, Durie. *Cowan* [710] *v. Lord Elphinstone*, 26 March 1636, Durie; Spottis-woode's Practicks, p. 56. *Almond v. Hope*, 9 March 1639, Durie. Stair, 2, 1, 32; ib. 4, 45. Bankton 2, 1, 66.

The case stood over for judgment from the time of the argument in 1818 until the end of the Session 1820, when the Lord Chancellor, in moving the judgment, observed, that it was a question of great importance and difficulty; that he had bestowed upon it, at various times since the argument, much and repeated attention, but he could not venture to advise the House to disturb the judgment.

The result of his deliberation was, that the majority of the judges below had decided the case properly.

Judgment affirmed.

24th July 1820

* See the Report in the Fac. Coll. vol. p.

REPORTS of CASES heard in the House of Lords upon Appeals and Writs of Error, and decided during the Session 1821. By RICHARD BLIGH, Barrister-at-Law. Vol. III.

ENGLAND.

(COURT OF CHANCERY, 1 Meriv. 436.)

SAMUEL WHALLEY, CHARLES HARRISON and ELIZABETH his wife, and CATHERINE GEORGIANA WHALLEY,—*Appellants*; JOHN WHALLEY and DANIEL WHALLEY,—*Respondents* [7th Feby. 1821].

[*Mews' Dig.* vii. 221, 294; ix. 308; xii. 902. Cited in *Gibbs v. Guild*, 1881, 8 Ch.D. 296, at p. 394; and see notes to *Huguenin v. Buscley*, 1807, 14 Ves. 273, in 1 Wh. and T. L.C. 7th Ed. 247.]

The purchase of a reversion, by a Nephew from an Uncle of very advanced age, for a price grossly inadequate, the deed of conveyance in the operative part, but not in the recitals, expressing that the grant was made partly in consideration of love and affection, not impeached on the ground of fraud under the circumstances.

A reversion, valued at £6000 and upwards, in consideration of annuities secured to be paid on the lives of two very old persons, and valued at less than £400, is conveyed by a deed executed by an Uncle, aged 80, in favour of a Nephew, who was so described in the deed. There was no recital that blood formed a part of the consideration; but in the operative part of the deed [2] the grant is expressed to be made in consideration "of love and affection," as well as the annuities.

The grantor had previously made a valid will, devising the reversion to his Nephew, the grantee; and after the execution of the will, and before the grant, had sold part of the reversion, and received the price. The attorney (a stranger to both parties) who drew the will upon his own suggestion, but by the instructions of the Uncle, and the deed upon the instruction of both parties, was dead.

The deed was executed in 1773: the grantor died in 1774, leaving an heir, who died in 1791, not having impeached the deed. In 1794 the heir of the heir filed a bill to set aside the deed, on the ground of fraud, which bill was dismissed for want of prosecution.

In 1812 the devisees of that heir filed a new bill for the same purpose.

Held,—That the description of the party as a relation was equivalent to a recital: that the making the will was evidence of the truth of the consideration of love and affection; that the absence of recital did not afford sufficient ground to presume fraud, which being denied by the answer, and not proved in the cause, no issue ought to be directed, as the court of equity had before it sufficient evidence to decide the case; and on these grounds, and under these circumstances, that the conveyance was rightly held valid, and the bill properly

dismissed; but no costs having been given in the Court below upon the decree of dismissal, that no costs ought to be given on affirming the decree upon the appeal.

The cause of action within the meaning of the statute of Limitations arises when the party has the right to apply to a court of equity: As where a reversion, alleged to have been fraudulently purchased, descends in equity to the heir by the death of the ancestor. *Semb.* that the time of limitation begins to run from the time when the fraud is discovered, either in the lifetime of the ancestor, or upon the descent.

In the year 1772 certain freehold and copyhold lands (subject to a life-interest, vested in the widow of J. Eyre,) descended to Samuel Whalley, who was then eighty years of age.

[3] In September 1772, a notice to let being affixed on premises, part of the estates in question, Daniel Whalley, the nephew of Samuel, called on Mr. Garth, a respectable solicitor, who had acted for Mr. Eyre, the former owner, and had the management of the estates for the widow, but with whom Daniel was before unacquainted, to treat with him, as the agent of the widow, for renting the premises. Mr. Garth, in the course of this treaty, having stated that the premises could only be let upon the contingency of the widow's life interest, as he had been unable to discover the heir of J. Eyre, Daniel informed him that his uncle Samuel was the heir; and having afterwards brought his uncle to the office of Mr. Garth, he was informed of his right, and advised to dispose of the reversion by a will being drawn up in the office upon the suggestion of Mr. Garth, and Samuel Whalley being asked to whom he would devise the reversion, answered, to his nephew Daniel, whereupon the will was accordingly filled up, and executed on the 25th of September 1772.

After the date of the will, part of the lands were sold by agreement between the tenant for life and Samuel the reversioner, and Samuel received his share of the price. In 1772 an agreement took place between Samuel and Daniel for the sale and purchase of the residue of the reversion, by which it was agreed that Daniel should secure to Samuel an annuity of £80 to be paid to Samuel during his life, and an annuity of £20 to be paid to Martha Linwood for her life, commencing from the death of Daniel Whalley; and that Daniel should convey the reversion to Samuel. The annuities were after-[4]-wards, upon the suggestion of Daniel Whalley, increased to £100 and £30 respectively, and thereupon deeds of lease and release were prepared in the office of Mr. Garth. The deeds were dated in December 1772, and executed in January 1773. The release, describing Daniel as the son of Samuel's brother, recited the contract for sale, the consideration of the annuities, and the security given for payment of them; and witnessed, that in consideration of the annuities so secured, and *in consideration of the* natural love and affection which Samuel then bore to Daniel Whalley, he granted, etc. the freehold, and covenanted to surrender the copyhold estates, subject to the life-interest.

The reversion of the copyhold lands was surrendered to the use of Daniel Whalley according to the covenant.

Samuel Whalley died in 1771, leaving Peter Whalley his heir-at-law and customary heir, who died in 1791, having devised his freehold and copyhold lands to the Appellants, who at that time were infants, but afterwards, and as stated in the bill, lately obtained administration of his personal estate as next of kin, he having died intestate as to his personal estate. Martha Linwood died in 1775. Rebecca Eyre, the tenant for life, died in 1782: from which time Daniel Whalley held possession of the lands under the conveyance until 1811, when he died. In 1791 a bill was filed in the Exchequer by the Appellant Samuel Whalley, as the customary and right heir of Samuel and Peter Whalley, to set aside the conveyance; which bill was dismissed for want of prosecution. In 1812 a bill was filed in [5] Chancery by the Appellants against Daniel Whalley, impeaching the sale and conveyance on the grounds of fraud, and gross inadequacy of price, stating the facts before mentioned and praying an account of the rents and profits of the lands, and of waste done or permitted, from the death of Rebecca Eyre, the tenant for life, to the death of Peter Whalley, and a like account from that time, and a conveyance of the lands, etc.

This bill was afterwards amended, but not in any respect material to be noticed

The answer to the original and amended bill denied fraud; relied upon the consideration of love and affection, as expressed in the deed; and insisted upon the Statute of Limitations as a bar to the claim.

It appeared in evidence, by production of the bill of costs, upon the hearing in the Court below, and upon the appeal, that Daniel Whalley paid Garth for preparing the deed of conveyance, and the bonds to secure the annuities. By items of charge in the same bill, it appeared that Garth had managed the lands in question as steward or solicitor. It further appeared that the freehold lands, in 1773, according to a surveyor's valuation, were worth about £2025, and the copyhold about £4200. The defendant, by his answers, admitted that the reversion might at that time be worth £3000. It further appeared, by the valuation of an actuary, that the annuities were worth £389 14s. There was no direct proof of fraud.

The cause was heard at the Rolls, before Grant, M.R. who made a decree (*Meriv. supra*), dismissing the bill [6] without costs. This decree being signed by the Lord Chancellor, and enrolled, was now brought by appeal before the House of Lords.

For the Appellants, Mr. Wetherell and Mr. Wakefield.

On the part of the Appellants it was argued, that under the circumstances of the case the length of time since the right accrued was no bar * to the suit; that the conveyance ought to be set aside on account of the inadequacy of price, and the suspicious circumstances of the transaction †; that the consideration of love and affection inserted in the operative part of the deed was fraudulent, and the absence of recital on that subject was proof of the fraud, and ought to control the operation of the deed ‡; that an issue to try the validity of the deed ought, at all events, to be directed (*Filmer v. Gott*, 4 B.P.C. 230).

For the Respondents, Mr. Hart and Mr. Buck.

If this were a case of mere bargain, being the sale of a reversion, the transaction if it had been impeached in due time, might have been assailable on the ground of inadequacy of price. But in this case there was a mixture of considerations, price and [7] blood. No Court can apportion what belongs to each. With what justice to the Respondent could an issue now be directed after a lapse of forty years, when the witnesses are dead who could have explained the transaction. There is no evidence of fraud; and the answer denies it. There is therefore no ground for an issue. In *Filmer v. Gott* the issue was directed upon a clear presumption of fraud, and the jury found that love and affection formed no part of the consideration. The grantor in this case died in 1774, and his heir must then have been apprised of the fact that he was disinherited by the will.

The Lord Chancellor: Is the will of Peter proved?

For the Respondents: It was not thought material; because if the Appellants could not claim as devisees of Peter, one of them claimed as his heir-at-law.

Lord Chancellor: It is material in this view, if the claim is by the heir-at-law; he, in 1794, filed a bill to set aside the conveyance, and suffered that bill to be dismissed for want of prosecution.

For the Respondents: From 1782, when the tenant for life died, to 1794, when Peter Whalley died, no claim was made by him. Long delay, where no legal disability exists, is fatal to the claims of a suitor in a court of equity. Mr. Garth, the [8] only person acquainted with the particulars of the transaction, died in 1792. How are the Respondents now to produce evidence to show absence of fraud, (if such evidence ought to be required,) but by the transaction itself? Part of the property was sold by the grantor; that is a proof of free-agency. He left abundant assets, which shows that he was not in a state of necessity; and that he was not in a state of imbecility is proved by the surrender of the copyhold.

This is not a case of direct trust, in which it may be admitted, as a general proposition, that length of time is no bar; this is a case where a party is to be declared a trustee upon the effect of evidence and constructive inference from the acts of the

* *Morse v. Royal*, 12 Ves. 374; *Pickering v. Lord Stamford*, 2 Ves. jun. 280.

† *Gowland v. De Faria*, 17 Ves. 20; *Peacock v. Evans*, 16 Ves. 512; see also *Bowes v. Heaps*, 3 V. and B. 117; *Roche v. O'Brien*, 1 Ba. and Be. 330; *Blennerhasset v. Day*, 2 Ba. and Be. 101; *Dunbar v. Tredennick*, ib. 310.

‡ *Oliver v. Daniell*, Rolls, 16th May 1814: 1 Meriv. 500. See p. 729.

parties. In such cases courts of equity, by their own rules, give great effect to length of time. The statute has given the measure, and furnished the rule in equity, not merely in difficult cases, like the present, but even in cases where fraud is manifest.* Mrs. Eyre, the tenant for life, died in 1782; the reversion then fell into possession. There is no proof that Peter Whalley was then abroad; the cause of action then arose, and the time of limitation began to run from that hour; an ejectment could not have been brought after 1802, and the bill was not filed till 1812. The recitals are not a necessary part of the deed: they may be used to explain the intention of [9] the parties, if it is doubtful in the operative part, but they have no distinct operation.†

If fraud is to be implied from the absence of recital as to love and affection forming part of the consideration, it would be easy for persons intending fraud to have provided against such inference, by inserting a recital to that effect.

Lord Redesdale: It is recited that Daniel, the grantee, is the son of John, the brother of the grantor.

Mr. Wetherell, in reply: The time had not elapsed, according to the rule: it began to run only when the reversion fell in.

Lord Chancellor: The cause of action arose when the party had a right to apply to a court of equity to set aside the deed. Peter had that right immediately after the death of Samuel.

Reply: Where the subject of fraud is a reversion, the time has been reckoned from the falling into possession. Peter Whalley died abroad; and from the frame of the bill in 1791, it appears that nothing was known of the fraud. As to the respectability of the solicitor employed, the same argument might have prevailed in *Purell v. Macnamara* (11 Ves. 91), and *Hudson v. Beauchamp* (see note at end of this case). In those cases the deeds were prepared in respectable offices.

[10] Lord Redesdale: You forget that Garth had the means of knowledge, which might not be the case in those offices. Garth let the estates, and must have known the value. The agreement for the leases of the house and farm shows his knowledge.

Lord Chancellor: He had the management of the farm. As to the annuities, the answer represents that £80 was required by Samuel the grantor, and that £100 was proposed by Daniel the grantee of the reversion.

Reply: The neutrality of the solicitor, in not interfering to prevent an unfair transaction raises no presumption of fairness.

Lord Redesdale: You are to make out that the words "love and affection" were fraudulently introduced into the deed.

Lord Chancellor: *Filmer v. Gott* ought to have been decided without an issue. In that case there was not only no evidence that love and affection formed part of the consideration, but the contrary.

Lord Redesdale: I observe that there is no charge in Garth's bills for taking instructions.

Lord Chancellor: What has become of *Hudson v. Beauchamp*?

Reply: It is still in the Ecclesiastical Court.

That testimony has perished is an accident which ought not to affect the right of a claimant.

[11] The Lord Chancellor: The question in this case is, whether a deed, executed in December 1772, is to be considered fraudulent, upon a suit instituted in 1812.

There are two points: 1. On length of time. 2. On the nature of the transaction. But if, from the nature of the transaction, the deed is not to be considered as fraudulent, it is unnecessary to discuss the question of length of time.

It appears that J. Eyre, who was entitled to the reversion in fee of the estate in dispute, died in 1772; Rebecca Eyre, who was tenant for life, died in 1782.

It also appears that in the transactions forming the subject of this suit, Mr. Garth, a very respectable man, was employed as the attorney; but undoubtedly his

* *Bonny v. Redgard*, 1 Cox, 119; *Andrews v. Wiggley*, 1 B. C. C. 121; *Frounsen v. Townsend*, 1 B. C. C. 550; *Gregory v. Gregory*, Cooper, 201; *Hornden v. Jones*, 2 S. and L. 607, where the authorities on this head are collected and discussed.

† Bath and Montague's case, 3 Cases in Ch. 101. *Oliver v. Daniel* is misreported, 1 Meriv. 500. It is corrected in the *addenda*, p. 729.

respectability cannot be used as evidence of the fairness of the transaction. There are attorneys and conveyancers who do not think it their duty to decide what parties ought to do, but attend only to their instructions, and carry them into execution. That remark may apply to the cases of *Purcell v. Macnamara*, and *Hudson v. Beauchamp*, where highly respectable solicitors were employed in the transactions which formed the subjects of those causes: yet the Court thought, from the relation of the parties, the nature of the conveyances, and other suspicious circumstances, furnishing a presumption of fraud, that investigation was necessary. I can recollect the time when counsel, being consulted, thought it a part of their duty to point out the propriety or impropriety of the transaction submitted to their consideration. But in this case it will be more satisfactory to consider the [12] nature of the advice given by Mr. Garth, as bearing upon the transaction, than the respectability of his character.

It appears that Samuel Whalley was ignorant that the reversion had descended to him, until he was informed of the fact, in consequence of the application made by Daniel Whalley to Mr. Garth. The reversion was expectant upon a life-estate, vested in a person aged fifty-four, and S. Whalley was then eighty-three years of age. The estate, therefore, was not likely to be productive to him, unless it should be immediately converted into money.

Samuel Whalley died in 1774, leaving Peter Whalley his heir at law, who died abroad in 1791. But it does not appear by the answer, or by proof, whether, in the interval between his ancestor's death and his own, he resided abroad or in England permanently or occasionally.

Peter Whalley devised all his real and copyhold estates to the Appellants.

In the year 1794 a bill was filed in the Exchequer, by the Appellant S. Whalley, praying that this deed might be set aside as fraudulent.

The cause of action arose at the moment when the deed was executed, or as soon after as the parties interested were apprised of the facts. Suppose that Samuel Whalley was not aware of the fraud alleged, and died in such ignorance; whether Peter, his heir, was or was not informed of the state of things does not appear by evidence; but at least Peter knew that he was the heir of Samuel, and he must have known the connexion of Samuel with John Eyre.

[13] In this case my judgment will not proceed upon the doctrine cited, as to express or constructive trusts, or the distinction between them; nor shall I rely upon the lapse of time.

Those doctrines deserve serious consideration when cases arise which require it. In all cases, delay of suit, where parties are cognizant of their rights, and under no legal disability, must affect a tardy claim, as importing a conscious acquiescence in what they have supposed to be an adverse right.

In the case of *Filmer v. Gott*, the transaction purported to be a sale of the property, and upon the recital of the deed it appeared to be simply a sale: but in the operative part of the deed, love and affection was expressed as part of the consideration, and in fact there was blood enough to support that consideration. But in that case the grantor filed the bill to set aside the conveyance. There was no question as to length of time. It was contended, on the part of the Defendant, that the deed imported a consideration of blood, as well as money, and *primâ facie* it was so; but the House of Lords (superfluously perhaps) sent the cause to be tried upon the question, whether love and affection formed any part of the consideration. It was considered, even in that case, that unless there was presumption, or proof, to destroy the effect of a consideration expressed in the deed and to prove that there was nothing but pecuniary payment, though otherwise asserted in the deed, the Court was not at liberty to refuse to give effect to that which was expressed; but in fact, in *Filmer v. Gott* the issue was unnecessary. It was manifest that the Defen-[14]-dant considered himself a mere purchaser, and until the bill was filed he never thought of the consideration of love and affection. The grantor was in a state of partial incapacity, never intending to give any thing from love and affection; nor was it so considered by either party.

In questions of this kind it is necessary to look to the difference of facts and circumstances.

In this case it appears, that upon the death of John Eyre, from whom the reversion descended, it was unknown to Garth, who managed the property, who was entitled to the reversion as heir at law.

The information is obtained accidentally from Daniel Whalley, that his uncle Samuel is the heir; and he, upon being introduced to Garth fairly, as represented by the answer, devises the property to his nephew. The personal property is distributed under the administration of Peter, the Appellant's father, among the next of kin, and at that time no complaint is made of the deed. Upon the answer, unimpeached by other proof, the Defendant is entitled to credit; at least the Plaintiff must prevail by admissions in the answer, or proof in the cause, that the deed was obtained by fraud, or that the consideration expressed in it of love and affection was not founded in fact. But the answer represents that Samuel Whalley, the grantor, lived on terms of great intimacy and affection with Daniel his nephew, the grantee, and that he was offended with and averse to Peter, the Appellant's father, and his family; and those representations are not falsified by proof to the contrary.

With respect to the transaction in obtaining the will, it is to be watched with jealousy; but it appears, from the statement of the conversation between Garth and Samuel Whalley, that the reversion was willingly devised to Daniel. Garth attested the will; and if the testator had died the day after the execution, the validity of the will could not have been affected by the interposition of Garth; and in that view the will gives countenance to the subsequent deed.

In *Filmer v. Gott* the aunt had devised her estate to near relations, and had no intention to sell or give it to the nephew.

Here, at the date of the will, the old man had the intention to give the property to his nephew. The mode of selling for annuities was not impolitic for a man of eighty-one expecting a reversion subject to a life of fifty-four; and he had in fact joined with the tenant for life in selling a part of the property. He could not, therefore, be ignorant of his right and power to sell, nor entirely so of the value.

The deed *primâ facie* is a grant, not only for a money-consideration, but for love and affection.

It is open to proof, that love and affection formed no part of the consideration; upon such proof it would be considered as a mere money bargain. It is urged, that the want of recital affords presumptive proof; but the deed in the description of the parties shows the relationship.

In *Filmer v. Gott*, if I had heard the case in the Court below, I should have decided without directing an issue, upon the ground that the answer did not set up the consideration of blood.

In this case the Defendant, by answer, insists that the grant was made upon the consideration of love as well as money; and the oath of the Defendant must prevail in the absence of proof to the contrary. The witnesses who could explain the transaction are dead; and it would be unjust to the grantee to submit the case now to a jury, at the risk of deciding against the judicial presumptions arising from the expressions of the instrument, the oath of the Defendant in his answer, and the absence of other evidence to affect the answer.

Lord Redesdale: It would be attended with infinite mischief if courts of equity were to hesitate in deciding questions, when sufficient evidence is before them. In such cases they are more competent than a jury. Issues are usually, (or ought only to be,) directed in those cases where evidence is wanting; and it is only in those, because the mode of examination is more effectual at common law, that issues are directed in equity. Here, according to the answer, the attorney was employed by both parties; and in such cases it is at least gross negligence of duty in the attorney not to see that the transaction is fair.

To suppose that Garth, without instructions, inserted the consideration of love and affection, is to impute to him gross misconduct. The transaction cannot be impeached without charging him with fraud. He knew the value of the reversion, and that the annuities were not a compensation; and if he considered the transaction as a mere bargain of sale and purchase, when he inserted the words importing consideration beyond money, he acted fraudulently.

The objection arising from length of time is important in this as in other cases. It is the policy [17] of the statute to prevent the discussion of questions upon title when evidence has perished. In this case Garth, if living, could have decided the question.

If he had deposed that he inserted the words to give colour to the deed, that would

have been a ground to rescind it; if he confirmed the representations made in the answer of the Defendant, the deed must have been supported. Those representations must now be presumed true, because the Appellants, by their delay, have deprived the Respondents of the evidence of Garth.

Under such circumstances length of time, if it had been less, would have been a sufficient ground for rejecting this application to Equity. Courts of Equity have always followed the statute of limitations; they are bound to act according to the spirit of that statute; and even in cases where it is not too late to maintain an ejectment, courts of equity have refused to interfere, because evidence has been lost.

The lapse of time is fatal to the claim of the Appellants. The parties having a claim were bound to proceed while the evidence of Garth was to be had, unless his death had happened very soon after the transaction.

Samuel Whalley, the grantor, had a right to impeach the deed, if fraudulent. The cause of action then existed; and thirty-nine years having since elapsed it would be grossly unjust now to rescind the deed, unless there were some evidence of fraud upon the face of the instrument.

The only ground stated by the Appellant is the [18] absence of recital as to the consideration of love and affection; but the grantee is described as the son of John, the brother of the grantor, and that is equivalent to such a recital. There is no internal evidence of fraud, and the will proves decisively that such a consideration in part existed; what ground is there to impeach the will? There is, therefore, positive evidence of the existence of the consideration, and nothing to rebut it.

As no costs were given below, that is a circumstance always regarded in the decision of appeals; and therefore no costs ought to be given here in this case.

Decree affirmed 7th February 1821.

Reg. Lib. 1819. A. 1745.

HUDSON v. BEAUCHAMP.

[Mews' Dig. vii. 221, 294. See notes to *Whalley v. Whalley*, *sup.* p. 506.]

The bill in this case was filed by Humphrey Hudson, as sole next of kin of Anne Hudson, whose maiden name was Beauchamp, stating, that he had procured letters of administration to her effects; that she, when living, was possessed of large property in the public funds; that she was of very advanced age, and in a state of imbecility and decrepitude; that Messrs. Ransom and Morland were her bankers, and had the entire management of her property; and that the defendant, Robert Farthing Beauchamp, (no relative,) but a stranger to Anne Hudson, who had lately assumed the name of Beauchamp, being a clerk in that banking-house, and having thereby become acquainted with the extent of her property, and her inability to manage or dispose of it, had, under pretence of being in love with her, and deluding her with a promise of marriage, obtained an improper influence over her weak [19] mind; had taken her away from her residence at Twickenham, and secluded her from intercourse with her relatives, friends and acquaintance; had treated her as a child, and exercised an uncontrolled dominion over her imperfect faculties; that shortly after her removal from Twickenham, the defendant, by undue means, upon his own suggestion, and by direct instigation, prevailed on Anne Hudson to transfer all her stock in the public funds into the joint names of herself and the defendant, to execute a deed of gift to him of all her estate and effects, and, moreover, to make a will bequeathing all her personalty, except two small legacies, to the defendant; that the plaintiff had commenced proceedings in the Ecclesiastical Court against the defendant to recall the probate of the will; upon these allegations the bill prayed, that the deed might be delivered up to be cancelled, and an injunction to restrain the defendant from transferring the stock or receiving the dividends.

To this Bill a demurrer was in the first instance put in, upon the ground, that the plaintiff had, by his own shewing, proved the title to be in the defendant, who,

as he stated in his bill, had obtained probate of the will. This demurrer was afterwards abandoned.

On the 20th of July 1820, upon a motion before the Lord Chancellor, supported by affidavits, stating the facts before mentioned, and various instances of imbecility on the part of Anne Hudson, and of influence and coercion on the part of the defendant, an injunction was granted according to the prayer of the bill, until answer or further order.

In delivering his opinion upon the motion, the Lord Chancellor considered the accumulation of the will upon the deed of gift as a badge of fraud. He seemed to doubt the validity of instruments, obtained under the circumstances appearing in the affidavits, and dwelt particularly on the impropriety of the transfer of the stock into the [20] joint names, which deprived Ann Hudson of the power to deal with it.*

The suit instituted in the Ecclesiastical Court was pending till 1823, when a sentence † was pronounced by Sir J. Nichol in favour of the will. In Michaelmas Term 1823, on the application of the defendant, stating that the answer had been put in denying all the plaintiff's equity, the injunction was dissolved.

One of the points made by the answer to rebut the charge of fraud was, that the instruments were prepared in the office of respectable solicitors.

[21]

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

Sir JOHN GORDON SINCLAIR, of Murkle, bart. *-Appellant*; WILLIAM MANSON, *-Respondent* [21st Feb. 1821].

[3 Scots R. R. 615. See *Jollie v. Graham*, 1827, 6 Shaw 236, S. C., reported as *Graham v. Jolly*, 1831, 5 *Wilson and Shaw*, 280.]

A TENANT, by the terms of his lease, was bound to uphold and maintain the houses

* For the account above given of what passed on the hearing of the motion, the editor is indebted to Sir George Hampson and Mr. Wilbraham, who were opposed to each other as counsel in the cause.

† [In delivering judgment, Sir J. Nichol made the following general observations.]

The case set up in argument was a case of fraudulent circumvention, practised on an impaired capacity. This is a case which certainly may exist. It is a mixed case, consisting of two ingredients, namely, weakened capacity and fraudulent circumvention; and the quantity and degree of each of these ingredients must therefore be examined into. If the degree of capacity is important, if very much reduced, slighter evidence of fraud and deception would be sufficient; whereas if the capacity was quite perfect, or nearly perfect, more clear proof of fraudulent circumvention would be required. Faculties so impaired as to be liable to imposition, is a proposition extremely loose and indefinite. No person, much passed the very prime of life, has not suffered in some degree a deterioration in respect of some of the faculties, and no capacity, even the most perfect, is completely safe against the practice of extreme cunning and artifice. Upon the question of capacity or incapacity, the Court relies but little in opinion, it looks for facts and conduct, in order to ascertain the boundary between testamentary capacity, and the absolute want of capacity, but any opinion that a person is liable to be imposed on by artful and designing persons, is of all species of evidence the most unsatisfactory that can be resorted to. Hence it becomes necessary for the Court to examine, with some degree of caution and carefulness, the conduct of the deceased. First, the degree of capacity or incapacity to which she was reduced, and then to see what evidence there is of fraudulent circumvention being practised upon her. The learned judge then entered into a minute statement and discussion of the facts, after which he pronounced the judgment above mentioned.

let in sufficient tenantable condition, during the lease, and to leave them so at his removal, subject to a special provision, that the timber in the sub-tenants houses should be valued at the commencement, and at the expiration of the tack; and that the out-going tenant should pay, or receive from the proprietor or in-coming tenant, the difference in value at those respective times.

The lease contained a further provision, that if the tenant should build an *additional* steading during the lease, the value thereof, at the expiration of the lease, to be ascertained by arbiters, at that time, should be allowed to him. Holding under this lease, the tenant pulled down the old buildings, and built a *new* steading.

It was decided on appeal, reversing in part the judgment of the Court below, that he was not authorized to pull down the old buildings without rebuilding or substituting others in their place, that the knowledge of such unauthorized acts without interference on the part of the landlord, did not conclude him on the principle of acquiescence, which is not applicable to such a case; but that the tenant is entitled to the value of so much of the new steading as ought to be considered as an additional steading, and not a substitution for the old buildings, subject to the provision in the lease, as to the timber in the sub-tenants houses. It was held also, that the tenant was entitled to be allowed for so much of the new buildings as consistently with the former finding he was entitled to have an allowance for, according to a valuation to be fixed at the time of removal, and not according to actual expenditure.

[22] In the year 1785, the Respondent's father, obtained from the grandfather of the Appellant, a lease of the farm of Borrowstone, for the term of twenty-one years.

At the commencement of the lease, the buildings on the farm consisted of a servant's dwelling, a stable, a byre, two barns, a kiln, an oxen-house, and cot-houses, inhabited by sub-tenants.

The lease contained the following clause:—

"The tenants shall keep, uphold, and maintain the *whole* houses thereby set in *sufficient tenantable condition*, during this tack, and *leave them so at their removal*, with this provision and declaration, that the timber in the several sub-tenants houses shall now be appraised and valued, at the sight of two neutral men, one to be chosen by each party; and the like appraisement and valuation shall be made at the issue of this tack; and that the out-going tenant shall pay to or receive from the proprietor, or in-coming tenant, according to the *difference* of those valuations to be made by neutral men as aforesaid."

A clause was also inserted in the lease, by which, in contemplation of improvement, it was provided, "That in case, during the currency of this lease, the said John Manson, or his foresaids, shall build an additional steading (*i.e.* a farm-house and offices) on said lands, etc. at their own expense, *they shall have allowance of the value of such steading, etc. at the issue of this tack, from the said Sir John Sinclair, or his foresaids, according to a valuation to be put thereon at the term of removal, by two neutral men as arbiters.* [23] one to be chosen by each party, whom the parties shall be obliged to name, and whose determination shall be final."

The Respondent's father died in 1786, by which event this lease devolved upon the Respondent. Shortly after he came into possession, the Respondent pulled down the old buildings and erected on the land a new farm house, with offices.

These buildings were completed, without objection on the part of the landlord, two years after the commencement of the lease, and were occupied by the Respondent during the term.

At Whitsuntide, 1806, the Respondent quitted the premises on the expiration of his lease; and the land, together with these buildings, was let to another tenant, at a rent of £400.

Before quitting possession, the Respondent applied to the agent of the Appellant, who had succeeded to his grand-father's estate, and was then a minor, for the appointment of a person of skill, to concur with one to be named by the Respondent, to survey these buildings, and to make up a report of their value. These applications

having been disregarded, the Respondent, on the 23d June 1806, made a notarial requisition by a written instrument, to the Appellant's manager, protesting, that in the event of failure within a time specified, judicial measures would be resorted to for such an appointment, and that the proprietor would be liable in the penalty stipulated in the lease, for this contravention.

No attention having been paid to this requisition by those who had the management of the Appel-[24]-lant's affairs, the Respondent presented a petition to the Judge Ordinary, the sheriff of Caithness, 'craving him to grant warrant to some fit person whom he should appoint, to concur with George Burn, architect, in the valuation of the houses and enclosures erected by the petitioner on the lands of Borrowstone and Lybster, during the currency of the before-mentioned lease, as the same stand at the present period, and to ordain them to report the same to him; and after the said valuation has been carried into effect, to ordain the proprietor's agent to relieve the petitioner, after payment and satisfaction has been made to him of the value of the said erections, in terms of the tack of the possession of the foresaid houses, and of all further risk or concern in the same.'

Upon this application the sheriff pronounced the following deliverance:—
"The sheriff-substitute having considered the within petition, together with the original lease therewith produced, grants warrant for serving a copy thereof, and of this interlocutor, upon Sir John Gordon Sinclair of Murkle, Bart., and his tutors or curators, and appoints them to concur with the petitioner in the choice of a proper person or persons, to estimate and value the house and enclosures mentioned in the petition; and that within fourteen days after such service, with certification to them, if they fail, that a person or persons will be appointed by the Court to inspect, estimate, and value the said houses and enclosures."

This petition and deliverance were served edict-[25]-ally on the defender, and his tutors and curators, who appeared, and opposed the petition. After some discussion, in which the Appellant contended that his obligation went no farther than the original cost of the buildings, valued at the time of removal, the sheriff-substitute granted warrant to a mason and a slater to inspect and value the masonry and slate-work, and to a wright and a house-carpenter to value the timber-work of the houses, and report. In consequence of this warrant the inspectors gave in a report, from which it appeared, that the value of the mason-work of the buildings, etc. was £355 2 11
and of the carpenter-work 403 2 6½

Total £758 5 5½

and the valuers deponed, in presence of the sheriff, that "the foresaid statement contains a just and true estimate of the several buildings therein mentioned, according to the usual rates of charging for such workmanship and materials in this county, and according to the best of their skill and judgment in those matters."

The Respondent made a requisition upon the Appellant's curators for payment of this sum, with interest from the term of Whitsunday 1806; and payment having been refused, he raised an action before the Court of Session, concluding for the above sum, "together with £100, being the penalty stipulated by the lease for the contravention of any of its provisions, which the Appellant had incurred by refusing to name a person to inspect these buildings, and thus occasioning delay in the inspection, [26]-tion, during which the buildings were deteriorated, and also for the expense of the proceedings before the sheriff, in ascertaining the value of these houses, together with the expenses of process."

Against this action defences were lodged for the Appellant and curators, objecting, *1mo*, That the amount of alleged repairs, etc. thus claimed exceed ten years rents of the farm: *2do*, That there is an action on the same ground, at the instance of the pursuer, depending before the sheriff of Caithness: *3to*, That the pursuer owes arrears of the stipulated rents, which were left in his hands to compensate any just claims for repairs of buildings.

The case came before Lord Succoth, Ordinary, who sustained the defence of *lis alibi pendens*, by pronouncing the following interlocutor: "Having heard parties procurators on the libel and defences, in respect the sums now pursued for are the subject-matter of certain proceedings between the same parties, still in dependence before the Sheriff of Caithness, dismiss this action," etc.

Against this judgment the Respondent represented that the proceedings before the Sheriff were not of the nature of an action for payment of this claim, but were merely preparatory, with the view of ascertaining the amount of the claim under the authority of the Judge Ordinary, as the Appellant had refused to concur in the mode pointed out in the lease; that the petition to the Sheriff accordingly contained no conclusion for payment, so that there was no *lis alibi pendens*, nor any means in that action of awarding to the Respondent the estimated value of these houses; but the Respondent after-[27]-wards brought an advocacy, *ob contingentiam*, of the process before the Sheriff, which was conjoined with the ordinary action in the Court of Session.

Lord Succoth accordingly (12 May 1825) recalled his interlocutor of the 15th February 1811, and appointed the case to be stated in memorials, upon considering which he pronounced the following interlocutor:—"Having considered the mutual memorials for the parties, and whole process, Finds, that it appears from the proof adduced before the sheriff of Caithness, that the steading upon the farm of Borrowstone, belonging to the defender, was both incomplete and in bad repair at the commencement of the lease granted in the year 1785, to the pursuer's father; and that although the proofs were not satisfactory, the stipulations in the lease, upon which the present question depends, afford real evidence that this was the case: Finds, That, by an express clause in said lease, it was provided, that in case the tenant should build any additional steading on the said lands, he should have allowance of the value of the said steading at the issue of this tack: Finds, That no restriction is put upon the tenant, by this clause, as to the nature or extent of the steading which he might build upon the farm; and that it did not impose an obligation on the tenant to communicate the plans of the intended buildings to the landlord, or to give him formal intimation before commencing them: Finds, That the pursuer's father did erect a new steading, consisting of a slated dwelling-[28]-house, and farm-offices, which must have taken considerable time to erect; and that no complaint was made at the time by the landlord or his factor that they were too large and not suitable to the farm, nor any objection made until the pursuer came to demand the value of the same at the expiry of the lease: Finds, That even, after the cause came into this Court, the objection stated by way of defence was not that they were too large for the farm, but that the expense exceeded ten years rents, (which does not seem to be true in point of fact): Finds, That although by a clause in the lease the tenant was bound to keep the whole houses upon the farm in sufficient tenantable condition, yet that, according to a fair and rational construction of this clause, he was not bound to maintain old houses after he had built new ones sufficient for the farm; and, therefore, that the argument in defence, founded upon a supposed breach of covenant in this respect, on the part of the pursuer, is not well founded: Finds, That as the interest of the money laid out in building the new steading would be at least equal to the sum which it would have cost the tenant to keep the old steading in repair, the defender is not entitled to insist for any deduction on account of the pursuer having been saved the expense of keeping the old houses in repair. Therefore, as the reports and valuations which were made by tradesmen appointed by the sheriff are not objected to, and appear to have been made after a minute examination of the premises, finds the defender [29] liable in the sum of £758 5s. 5¼d., being the amount of the valuations of the houses, with interest from the expiry of the lease, viz. Whitsunday 1806; and finds the defender liable in the expense of the litigation since the interlocutor of 3d January 1813, conjoining the advocacy with the process previously depending in this Court. Lastly, as the claim for penalty and damages arising from the delay which took place in valuing the new steading, and which is said to have been owing to the opposition given by the defender, and also the amount of the ameliorations upon the houses occupied by the subtenants, are not sufficiently stated in the memorials, ordains parties to be heard at the bar upon these points; and also upon the expenses incurred in the Sheriff Court."

To this interlocutor the Lord Ordinary adhered, by refusing two representations; upon which the Appellant presented a petition to the First Division of the Court of Session, praying their Lordships "to alter the interlocutor complained of, and to assolvie the petitioner from the present action, and find him entitled to expenses." In this petition, the Appellant rested his case, 1st, Upon the interpretation of the

clause in the lease regarding the expense of these buildings. 2dly, Upon the proof adduced in the proceedings before the Sheriff, by which he alleged it was made out, that the Respondent had failed to implement the obligations incumbent upon him with regard to the old houses on the farm, which he was bound to keep in a sufficient tenable condition. 3dly, Upon the allegation that the buildings which the Respondent had erected were [30] upon an extravagant scale, and altogether unsuitable to such a farm.

This petition was appointed to be answered; and, thereafter (11 Nov. 1816), the First Division of the Court of Session, "having resumed consideration of this petition, and advised the same, with the answers thereto, refuse the desire of the petition, and adhere to the interlocutor reclaimed against: And, in the mean time, decern against the petitioner for the sum of £700 Sterling, which sum they ordain to be paid to the Respondent, on or before the term of Candlemas next; and, if not then paid, decern also for the expense of extract, and allow the interim-decree to be then extracted."

The Respondent having also brought under the review of the First Division, that part of the interlocutor of Lord Succoth, which found him liable in the expenses of process, prior to the 3d January 1813, their Lordships "so far alter the interlocutor reclaimed against, as to find neither party entitled to any expenses which were incurred prior " to that date.

The Appellant presented a second petition, upon nearly the same grounds as those which were set forth in the former petition, against the judgment of the Lord Ordinary, which reclaiming petition was unanimously refused by the First Division, without answers on the part of the Respondent.

The above interlocutors being thus final in the Court of Session, the Appellant presented his appeal to the House of Lords.

[31] For the Appellants, The Attorney-General, and Mr W. Adam.

The determinations of the Lord Ordinary and the Court against the Appellant proceeded upon a misinterpretation or misconception of the real nature of the agreement between the predecessors of the parties, contained in the lease, founded on by the tenant in support of his claim. The Court of Session held that the bargain was, that the tenant should have it in his power to build a separate and entirely new suit of farm-offices, under the name of an additional steading, on the lands let, without reference to the accommodation which was previously on the farm: whereas the tenant was expressly bound to maintain and uphold the old existing steading, and even to leave it at his removal in sufficient tenable condition, and therefore any new buildings which the tenant was to be entitled to demand compensation for from the landlord, were merely such as were necessary or proper additional buildings, over and above the other houses, which were to be at all events upheld. The case of *Ducat* (3 Bl. p. 33) cited for the Respondent, is not applicable in its circumstances, and the authority of that case may be doubted.

The judgments under review are erroneous, in so far as they gave effect to a plea of the Respondent, founded on the alleged state of the houses in 1785, as appearing from a proof taken in the Sheriff's Court at an early stage of the present litigation. This evidence, it was said, showed the old houses to be [32] so ruinous and worthless as to lead to a presumption that the parties had it in contemplation to allow the erection of an entire new suite of buildings. But parol proof is inadmissible to explain the lease; and the reasoning is not only irrelevant, and contrary to the express provisions of the lease, but proceeds on a view of the proof altogether inaccurate.

According to the judgments of the Court of Session the Appellant's claim to the value of the steading (or similar buildings), which the tenant was bound to uphold, was disallowed; but as the new buildings were erected partly with the materials of the old, the Appellant, by the decision against him for the full value of the whole new steading, has been obliged to pay a price for his own property.

The decree against the Appellant is untenable, as the additional buildings were unsuitable to the farm, as possessed by the Respondent and his predecessor.

The Respondent pleaded, that the Appellant was bound to pay the estimated value of the buildings in this case, because he or his predecessors and then factor acquiesced in the erection. This is also one of the grounds adopted by the Lord Ordinary and the Court, but is utterly unfounded both in fact and in law.

The plea of the tenant in this case, being unsanctioned by the special terms of the lease, has no other foundation in law or equity against the Appellant.

Even as to any part of the buildings which may be properly termed "additional buildings," the valuation, at present rates, is such as the tenant is not entitled to demand.

[33] Upon these grounds, if the tenant was found entitled to the value of any buildings at all, it ought to have been limited to such as had been fair and *bona fide* "additions" to the former steading on the farm; and even these ought to have been valued, not at the price of labour and materials in 1807, but at the actual rate of outlay when the buildings were erected.

For the Respondents, Mr. J. P. Grant, and Mr. H. Stephen.

The lease, in terms of which the Respondent possessed his farm, expressly bears, That in case the tenant should build "any additional steading on the said lands," he should have "allowance of the value of such steading, at the issue of this tack, from the said Sir John Sinclair, and his foresaids, according to a valuation to be put thereon, at the term of removing, by two neutral men as arbiters, one to be chosen by each party, whom the parties shall be obliged to name, and whose determination shall be final."

In the case of *Ducat against the Countess of Aboyne* (Fac. Coll. 14 May 1803), the plea of the landlord was much stronger than in the present case. For in that case, the claim of the tenant for the expense of erecting a new dwelling-house was sustained, although the lease did not contain any express clause authorizing a new house to be built; and although the proprietor, before the house was begun, distinctly signified [34] to the tenant that he was determined not to make any allowance for such an expenditure. The lease contained a clause binding the tenant to leave the houses on the farm, which he was to take under inventory, in a sufficient and habitable condition at his removal, and "if the said houses shall be then found to have been ameliorated, the said Charles Ducat shall have allowance therefor from the said Countess of Aboyne." After the lease had subsisted some years, Ducat, instead of ameliorating the old house pulled it down, and built an entire new one; and before commencing this building, a protest was taken, that the proprietor should not be liable in the expense. Ducat, notwithstanding, went on with the work, and at the expiry of the lease brought an action for the difference between the estimated value of the new house which had been erected, and the old houses upon the farm, and in this action he prevailed, although the proprietor pleaded that the clause in the lease applied only to meliorations on the houses existing on the farm at the commencement of the lease; and although the tenant had been distinctly informed before he made this outlay, that no allowance would be made for it at the expiry of the lease.

The appellant having refused, though required by a notary-public, to name a person to concur on his part in the valuation of the farm, the Respondent had no other means of ascertaining the amount of his claim than by an application to the Sheriff of the district, to name neutral persons of skill, to inspect and value the farm-steading, who gave in a report upon oath that the buildings which had [35] been erected by the Respondent, were worth the sum for which decree has been given.

There being no limitation in the lease as to the amount of the sum to be expended in these farm-houses, and the Appellant's predecessor having made no objection at the time to the nature or extent of the accommodation, the Appellant is not entitled, at the end of the lease, to derive the whole benefit of buildings erected at the Respondent's expense, without making a fair allowance for their value.

After erecting a complete and substantial farm-steading sufficient for all the purposes of the farm, the Respondent could not reasonably be considered as being any longer under the obligation of keeping up the old houses, which were thus rendered unnecessary.

Even if the Respondent had been still under the obligation of keeping up the old houses, after he built a new farm-steading, the Appellant has not shown either that the Respondent allowed those old houses to fall into any other disrepair than what was necessarily occasioned by lapse of time, or that he ever required the Respondent to keep up those houses.

Any supposed deficiency in the implement of such an obligation can never afford a legal defence against a clear and liquid claim upon the Appellant for the estimated value of these houses.

The buildings erected by the Respondent, the value of which was not equal to two years rent obtained for this farm at the expiry of the lease, did not contain any superfluous accommodation, or any [36] thing more in this respect than is usually allowed to a tenant paying a rent of £400 per annum.

The Appellant, as proprietor of the estate, derived an advantage from these buildings equivalent to the sum he has been decreed to pay, and he is not entitled to this benefit at the expense of the Respondent.

[In the course of the argument the following observations were made.]

The Lord Chancellor: The principle of acquiescence is undoubted. But if I covenanted with my tenant, and he with me, that he should keep the buildings in repair, and he pleases, instead of repairing, to rebuild, can it be said, (unless there are special circumstances in the contract,) that because I stand by and permit him to rebuild I must pay for the alteration? Is there any case to such effect?

Lord Redesdale: The decision in Ducat's case did not go so far as this. For there the judgment was only for the difference between the value of the new and the old buildings, so far as the substitution of the one for the other was an amelioration. In ordinary cases, not governed by any special contract, if a tenant pulls down and rebuilds he is entitled to no allowance. In Ducat's case, under the circumstances of the contract, it was held, that the tenant was entitled to the value of amelioration. That was a strong decision; but does it warrant the judgment in this case? If he had made an addition, that was to be the subject of allowance [37] according to the contract. But has he done so? If he has acted, not under the contract, but according to his own discretion, he must bear the legal consequences. If it is a mere substitution, he is entitled to no allowance. To the value of additions he is entitled under the contract, but not for mere substitution, according to the judgment of the interlocutor. What is substitution, and what addition may be the subject of inquiry.

The Lord Chancellor, after stating the lease and obligations, proceeded to make the following observations:—Among the provisions of this lease, it is material to observe the respective times when the valuations are to be made, with respect to the timbers of the sub-tenants houses, and the additional standing. The timber is to be valued at the commencement and the issue of the tack, and if the tenant builds an *additional* standing, he is to have the value of *such* standing at the issue of the tack, according to a valuation then to be made.

It might be difficult to collect the meaning, or to put a satisfactory construction upon these clauses of obligation, taken singly; but looking at them altogether they tend to explain each other. What precisely was intended by the parties, in the provision for building an additional standing, is not, perhaps, with certainty to be ascertained. But instead of the addition contemplated or expressed, new edifices have been erected. Upon this state of things the question arises how the valuation is to be made between landlord and tenant in a case apparently not [38] anticipated*. The interlocutor of the Lord Ordinary, affirmed by the Court of Session, finds the Appellant liable in the whole amount of the valuation of the new buildings; but the obligations of the lease require that the old buildings should be kept and left in repair, subject to certain valuations of timber, and the tenant is at liberty to build an additional standing, not to pull down the old one and replace it by new buildings. Under these circumstances it is impossible at the end of the tack to allow the tenant the whole value of the new standing. He cannot claim more than he would have been entitled to demand if the obligations had been observed as to keeping the old buildings in repair and making the addition of the new standing. The allowance by the Court of Session of the whole value of the new standing is too much.

Under the circumstances of this case it will be proper for the House to embody some special findings in their order,† and remit the case to the Court below for reconsideration.

Lord Redesdale: According to the covenants in this case, the tenant was bound to repair the old tenements, and he was authorized by the contract to add new buildings, but he was not authorized to pull down and rebuild. Having done so, when the new

* Here the Lord Chancellor recapitulated the interlocutor of the Lord Ordinary, stated *ante* p. 26.

† The Lord Chancellor here read the proposed minutes.

buildings were substituted for the old ones, all [39] the covenants applicable to the old became obligatory as to the new buildings. That part of the clauses of obligation, which relates to the valuation of the timber of the sub-tenants houses, seems to explain what is otherwise difficult of construction.

The timbers before the commencement of the lease were probably in a state of decay, and it was foreseen that it would be necessary to substitute new timbers: it was therefore provided, that in case of such substitution the value of the timber at the entry should be estimated and compared with the value at the expiration of the lease, and that landlord or tenant should pay or receive the difference, according to the result of such valuation. This provision shows that the tenant was to have allowance only for ameliorations. The landlord is not to be deprived of the old buildings, and to pay the full value of the new ones without compensation for the repairs which the tenant was bound to make.

Die Mercurii, 21st February 1821.

The Lords, etc. find, That according to the terms of the lease the tenant was bound to keep, uphold and maintain the whole houses set in sufficient tenantable condition during the tack, and to leave them so at his removal, subject to the particular provision respecting the timber on the sub-tenants houses: and that the tenant was not authorized by any provision in the lease to pull down the old buildings without rebuilding the same, or substituting other buildings instead thereof: but inasmuch as the tenant was authorized by the terms of the lease to build an additional steading, and has built an entire new steading, and pulled down the old buildings, he is entitled to the value of so much of such new steading as ought to be considered as an additional steading, and not a substitu-[40]-tion for the old buildings: subject nevertheless to the particular provision in the lease touching the timber in the sub-tenants houses: Further find, that according to the terms of the lease the Respondent is entitled to be allowed for so much of such new buildings as, consistently with the former finding, he is entitled to have an allowance for, according to a valuation to be put thereon at the time of removal, and not according to the actual expenditure in making such new buildings: And it is ordered, that, with these findings, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with such findings.

[41]

SCOTLAND.

FROM THE COURT OF TEINDS.

Sir HENRY HAY MAKDOUGALL, of Makerston, in the County of Roxburgh, baronet.—*Appellant*: The Reverend DAVID HOGARTH, Minister of the Parish of Makerston,—*Respondent* [23d Feby. 1821].

[1 Shaw, App. 5.]

A DECREE having been made under the Authority of the High Commission Court in 1635, valuing the teinds of various lands therein described, and now belonging to the Appellant, an extract of that decree had been produced by the ancestor of the Appellant, in a process of augmentation of the minister's stipend in the year 1720: when it appeared, or was assumed, without objection on the part of the Heritor, that the word ascertaining the number of chalders at which the teinds of his lands were valued, had been obliterated by a fold in the paper, (or possibly left in blank:) and in that process consequently the lands were held as unvalued. Upon a similar process, in 1799, it was found by the Court that the valuation of the lands in question, in the decree of 1635, is not legible, and that, although the decree appears to have been intended as a valuation of the whole parish, and the lands belonging to the Appellant are set forth in the decree, the valuation annexed to them is *totally obliterated*. The same course was pursued, and with a similar result, in a process for augmentation in 1805. In 1814, upon a new process for augmentation, the Appellant as heritor having by his first defence admitted that the word appeared to be obliterated, afterwards produced evidence to show that the

word supposed to be effaced was either *ten* or *twa*, and that no other word could have occupied the vacant space; and reports to that effect were made by men of skill and experience, in decyphering ancient and decayed instruments, to whom the inquiry was referred.

The original decree had perished among the records of the Teind Court, consumed by fire in the reign of Queen [42] Anne. The extract had remained in the possession of the Appellant and his ancestors.

Held, that the extract not being an original instrument in the possession of the law, but of the party claiming a right under it, whose duty it was to have supplied the defect under the provisions of the statute of Anne (1707), as to the records of the Teind Court destroyed by fire, conjectural evidence could not be admitted to supply the word supposed to be effaced.

Whether under the provision of the Scotch statute 1707, for "making up the tenor of decreets, whereof the extracts are amissing and the registers lost in the fire," the Lords of Session were empowered to receive evidence and supply the defects of an extract not missing, but imperfect and unavailable, on account of the obliteration of material words.—*Quære*.

Whether a defect by loss, erasure, or obliteration, in an instrument of gift or contract, if the proceeding to supply the loss, etc. were instituted recently after the accident, or the discovery of the defective state of the instrument, and where the party is not estopped by his own admission, and by former adjudications.—*Quære, semb. affirm.*

Where the substance of a question has been adjudged by former decisions, upon the admission or acquiescence of the party, costs are given upon the affirmance of a subsequent judgment on appeal.

The question in this Appeal arose out of a process raised by the Respondent for an augmentation of his stipend, as minister of Makerston. The following are the material facts upon which the decision turns:

The proprietor of an estate now held by the Appellant obtained by process before the Court of High Commission for the surrender of teinds in Scotland, a valuation of the teinds of his lands by a decree dated the 15th July 1635.

Of this decree an extract * was obtained by the proprietor of the land, from whom it was transmitted [43] to the Appellant. In this extract the numeral, ascertaining the number of chalders at which the lands were valued, had been effaced by the folding of the paper, or (possibly) had been from some cause originally left in blank. The extract, as produced in the process in the Court below, which is the subject of the present Appeal, appeared as follows:—

"They find and declare the just worth and yeirlie availl of the lands underwritten, pertening to the persones above and efter nominat, heritable, lyand within the said parochin of M'Kerston, to be in personage teind, the quantities of victuell underwritten of the qualities efter spect., ilk one of the saids heritors as follows: To witt, the landis, town, and maynis of M'Kairstoun, etc. with their pendicles and pertinentis pertening heritable to Sir W. McDougall, to be worth in personage teind chalderis victual, tua part cheritet heir, and thrid pairt heiper ait meill, all of the old mett and measour of Jedburgh. The lands of Stodrig, and four husband landis in M'Kerston, etc. to be worth in personage teind tua chalderis half chalder victual, tua pairt cheritet heir, and thrid pairt heiper ait meill of the said auld mett and measour of Jedburgh. The thrie husband landis of M'Kerston, pertening heritable to W. McDougall to be worth in personage teind nyne bollis victuell, tua part cheritet heir, and thrid pairt heiper ait meill of the said auld mett and measour of Jedburgh; and the saidis Lordis decernis and ordainis the quantities of victuell, above written, of the qualities above spect., to stand, continue, and endure, and to be repute and haldin, in all [44] tyme coming, the just worth and yeirlie availl of the landis above mentionat, in personage teind, *communibus annis*, becaus the said persewar compierand be the said John Dunlop, advocat, his prior, product the said

* The original record of the decree perished in the fire, by which the registers of the Teind Courts were burnt in 1707.

rental of the personage teindis of the landis above written : and the saides Robert, Erle of Roxburgh, titular, Sir W. McDougall, etc. compeirand personallie, and be thair pror. as said is, consentit and agreit to the said rental producit, and wer content to be halden as confest thairupon : Thairfore, the saidis Lordis fand, and declarit, decernit, and ordainit, in manner foresaid : and, also, the saidis commissioneris findis and declairis, that the landis of Charterhouse pertening to, etc. extending three husband landis lyand, etc. ar worth, and may pay yeirlie of constant rent in personage teind, the number of aucht bollis victuell, tua pairt cheritet bier, and thrid pairt heipit ait meill of the said auld met and measour of Jedburgh : and the saidis Lord decernis and ordainis the samyne to stand and continew, and to be repute and halden the just worth and yeirly avail of the saidis landis in personage teind, *communibus annis*, in all tyme coming."

In the year 1720 a process of modification and locality of the stipend of the parish of Makerston was brought before the Lords of Council and Session, as commissioners for plantation of kirks, and valuation of teinds, in the course of which it became necessary to make up a state of the teinds of the parish, in order to show the extent of the fund liable in payment of stipend to the minister. The different heritors were accordingly required to produce the rights which they had to the teinds of their [45] respective lands. Upon this occasion, as appears from the records of the Teind Court, Henry MacDougall, of Makerston, the ancestor of the Appellant, produced, in presence of the said Lords, ane "decree of valuation, obtained before the said lords and others of the commission, for surrenders and teinds, upon the 15th day of July, 1635 years : whereby they found the just worth and constantly yearly avail of the lands under-written, pertaining to the persons after mentioned, lying within the said parish of Makerston, to be in personage tiend the quantities of victuals under-written, of the qualities after specified, viz. *the lands, town, and mains of Makerston, Lintonlaw, Murdean, Nethermains, Manorhill, with their pendicles and pertinents pertaining, to Sir William MacDougall, of Makerston, knight, to be worth of parsonage tiends, ——— chalders victual, two part cheritet bear, and third part heipit oatmeal*, all of the old mett and measour of Jedburgh," etc. The decree then proceeds to specify the lands of Stodrig, and four husband lands in Makerston, which are valued at two chalders, eight bolls : the three husband lands of Makerston, which are valued at nine bolls, and the lands of Charterhouse, which are valued at eight bolls.

In making up a scheme of the teinds of the parish on this process, the lands of Stodrig and others, where the decree of valuation was legible, were valued at the quantities of grain there specified : but in regard to the first parcel of lands mentioned in the decree, viz. the lands of mains of Makerston, etc. where the number of chalders of grain [46] corresponding to the teinds, had either originally been left blank, or had been accidentally obliterated, the teinds were held to be unvalued, and the stipend modified to the minister of the parish was allocated accordingly.

The stipend continued to be paid in terms of the decree of modification and locality of 1720, down to the year 1799, when the predecessor of the Respondent raised a new process of augmentation * and locality. Upon this occasion a rental was made

* According to the present forms, a process of augmentation is conducted thus :—The process is brought by the minister, as pursuer, against the proprietors of lands, the *titular* or lay impropiator of the teinds, and all others having right to teinds within the parish. The minister produces a rental of the parish, which is made up generally of the rents actually paid at the time. The first step to the process is to adjust that rental agreeably to the rights of parties. Those proprietors who have decrees of valuation of their teinds produce those decrees, or refer to them, if upon record : and they are rentalled agreeably to such valuations. Those having no decrees of valuation are rentalled agreeably to the *rents actually* paid at the commencement of the process, one fifth part of which is taken as the teind. After the rental is adjusted the minister exhibits the amount of the fund out of which augmentation may be made, and craves the Court to grant him a suitable addition to his stipend out of that fund, or to grant him the whole fund, when it is inconsiderable.

A decree of valuation made by the competent Court is conclusive as to the value of teinds. The person having right to such a decree has a right to have the stipend

up in the usual way, which was approved of [47] by the Court; and in enumerating the lands belonging to the Appellant, it is stated that by decree of valuation, dated July 16, 1635, the lands after specified "were valued as under." The rental then specifies the lands of Stodrig, and four husband lands of Makerston, which are valued at two chalders, eight bolls; the three husband lands of Makerston, which are valued at nine bolls; and the lands of Charterhouse, which are valued at eight bolls. It then proceeds thus, "*These are all the lands of which the valuation in the decree above mentioned is legible.*" The decree, however, seems to have been intended as a valuation of the whole parish, and it specifies, besides the above three articles, the lands, town, and mains of Makerston, Luntoulaw, Muirdean, Nethermains, and Manorhill, pertaining to Sir William MacDougal, of Makerston, knight; *but the valuation annexed to these lands in the decree is totally obliterated.*" The rental then enumerates the different farms belonging to the Appellant, including as well those of which the valuations are especially mentioned in the decree, as those of which the valuation was illegible or omitted; and after the enumeration concludes thus,—"*Of all the lands, the decree of valuation is effectual only quoad Stodrig, seven husband lands of Makerston, and Charterhouse.*" Upon this rental the heritors were held as confessed. It was approved of by the Lord Eskgrove, ordinary, and afterwards by the Court; and upon the proven rental the decree of augmentation was pronounced upon the 5th of June 1799.

The Respondent's predecessor instituted a second process of augmentation in 1805, which was ultimately dismissed, upon the ground of there not having been any such change of circumstances within so short an interval as to authorize a second augmentation; but the cause was prepared for decision in the usual way. A scheme of the rental was made up in common form; and in this scheme, (upon which the heritors, and among others the Appellant, Sir Henry Bay Macdougal, were held as confessed, and which was afterwards approved of by the Court,) the same statement is given as to the illegibility of the decree of valuation 1635, except in so far as regards the lands specially enumerated. The rental was accordingly made up in the same terms as the previous rental of 1799.

In the year 1811 the Respondent raised a process of augmentation and locality, in which the Court held the heritors as confessed upon the rental produced by the Respondent, and remitted to Lord Reston, Ordinary, to prepare the cause.

The Appellant, who is proprietor of the whole parish, with the exception of a small farm belonging to the Duke of Roxburgh, gave in objections to the rental exhibited by the Respondent, in which, after specifying the valuation of the three different parcels of land, which are contained in the decree 1635, he observes, "these are all the lands of which the valuation in the above decree is legible. The decree, however, was in fact a valuation of the whole parish, as it specifies, besides the above three articles, the lands, town, and mains of Makerston, Luntoulaw, Muirdean, Nethermains, and Manorhill, pertaining to Sir William Macdougal, of Makerston, knight, *but the valuation annexed to these lands is totally obliterated.*"

[49] The Respondent lodged answers to these objections, which it is not necessary to state, as the Appellant, in his replies, abandoned the grounds of objection to the rental which he originally brought forward, and insisted that this decree (extract) must be held as a good and effectual decree of valuation of the teinds of the lands called Mains of Makerston, &c. as at *ten chalders*, two thirds beer, and one third part oatmeal.

The Respondent maintained that this part of the decree was altogether illegible, that the amount of valued teind might be taken just as well at any other supposed quantity as at *ten chalders*; and that it was impossible to supply this omission or obliteration in the decree.

The decree (extract) was produced to the Lord Ordinary at the bar. It appeared that there had been a fold in the document, which was written upon a single sheet, and a hole had been worn through the paper at the place where the word expressing the number should have occurred. The Lord Ordinary made a remit to Mr. John Dillon, writer in Edinburgh, and to Mr. James Miller, one of the teind clerks, who payable by him restricted to the amount of his valued teind—for this purpose he may at any time make a surrender to the minister of his valued teind, after which the minister can demand no more than the amount thereof.

were accustomed to examine old writings, "to examine the decree, and to depone as to their opinion of the disputed word therein."

In consequence of this remit, Messrs. Dillon and Miller made a report on oath upon the 1st of June 1815, in the following terms, as expressed by Mr. Dillon, and concurred in by Mr. Miller: "That he has, along with the said Mr. James Miller, read over and examined the decret of valuation of [50] teinds, shown to him, and marked as relative hereto; and particularly that part thereof which specifies the valuation of the town and mains of Makerston, Luntounlaw, Muirdean, Nether Mains, Manorhill, with their pendicles and pertinents: that the word which expresses the number of chalders payable out of these lands has become illegible, owing to a small part of the paper on which it was written being wasted away, occasioned, as appears to the Deponent, by the fold: That part of the first letter of the said number of chalders is visible: and, from comparison with the other parts of the decret, the deponent conceives that letter has been a capital T, as what remains of it, being the top stroke, agrees with the like stroke of other capital T's occurring on the same decret: That the space which the remainder of the word has occupied could not well contain more than two letters, and it is most probable the word was either twa or ten: but in the present state of the paper the deponent cannot take upon himself to say, from any thing that now appears on the face of the paper, which of these two words was originally written: but upon measuring with a pair of compasses, the space occupied by the word twa, in the third line below the word in question, it appears to be of the precise same extent as that word: That there is a chance that the application of infusion of galls may make some parts of the word more apparent, which the dimness of the ink, and bad colour of the paper, may at present conceal: but the success of the application is doubtful, because the substance of the paper [51] is gone where the most part of the word was written, and all that can possibly be made appear is only a small part of the letters, which may have reached that part of the paper which remains, and of which the deponent thinks some trace remains, but at present cannot be certain. And further depones, that having, in presence of the commissioner, applied infusion of galls to the word in question, nothing appears that enables him to say, with greater certainty than he has above deposed to, what that word originally was. And being interrogated, depones, that he does not think the word in question was either three or threttie, because he can observe no trace of the appearance of the down stroke of the letter *h*, which letter, throughout the whole Decreet, at least when it is medial, is almost constantly written with a down stroke coming below the line: That the only instance in said paper where an *h* appears without the down stroke, is when the words begins with *th*, in which case, the letters *th* are made in a sort of capitals, taking up a considerable space, and, by measurement with compasses, the space so taken up for these two letters alone would be more than the room left for it in the writing in question. Interrogated if it be his opinion that said word could be a contraction for *twenty*, depones, that he does not think it probable; for this reason, that it is not common in decreets of valuation of teinds to contract the numbers; and more especially, that, in the writing in question, which is written in a fair and uniform hand, there are throughout not a single contraction of a number, and therefore [52] it is not likely that the doubtful word would be the only exception. And on again examining the Decreet, the deponent does not find in it any word contracted besides *M* in Mackairston."

The Lord Ordinary afterwards took the case to Report, and appointed the parties to state their respective pleas in memorials. These memorials were accordingly submitted to the judge, who, upon the motion of the Appellant, allowed an additional report to be made by Messrs. Miller and Dillon: and also a report by Thomas Thomson, Esq. advocate, as to the state of this writing. The additional report by Messrs. Miller and Dillon was made on the 13th of February 1816, in the following terms: "We have again carefully examined the decree of valuation in question: and it appears that the solution of galls has had a further operation, more than it had when we formerly examined it, in so far as the colour of the ink, where it was applied, is now deeper: and, particularly, we can now discern what appears to be the remains of a stroke, which probably constituted part of the last letter of the word which occupied the place where the paper is worn away: and we are of opinion, after again carefully perusing the Decreet, and examining the forms of the letters in it,

that the last letter of the word was more probably an *n* than any other we can conceive to have stood there; we are also of opinion that the first letter (which we suppose to have been a capital *T*) could not be an *F*, as we observe the form of the *F* is quite different from that of the *T*, wherever it occurs." Mr. Thomson reported, "I have examined the extract [53] of a decree of valuation of the teinds of that parish, dated July 15, 1635, produced in that process, and more particularly that part of the writing which is partly worn away, and which has been the subject of dispute between the parties; and I am of opinion that the word in question could not have consisted of more than three letters; that the first of these letters evidently enough has been a capital *T*; that the next letter is entirely obliterated, or rather, the paper on which it has been written is entirely worn away; that the last letter is very nearly in the same state, but that there does appear a small portion of it, which I am inclined to think from its form is more likely to have been the last limb of the letter *n* than of the letter *a*, or any other letter that can be supposed to have ended in *y* numerical word that could have stood in this place; and, *without presuming to state it as any thing more than a probability*, I am of opinion that the word is more likely to have been *ten* than *two* or *two*, the only two numerical words which I can conceive it possible to have stood in this part of the writing."

Upon these reports the Lord Ordinary made *avizandum* with the cause to the court.

The memorials were afterwards considered by the Court, with the aid of these additional reports, when the following interlocutor was pronounced: "The Lords having advised the memorials for the parties, and the minute for the pursuer, they sustain the objections made for the pursuer to the decree of valuation produced and founded on by the defender, [54] Sir H. H. MacDougall of Makerston, and remit to the Lord Ordinary to prepare a scheme of the rental accordingly, and to report."

Against this interlocutor the Appellant presented a reclaiming petition, in which he insisted, that the reports which had been obtained from the persons who had been appointed to examine this old writing afforded sufficient evidence that the obliterated word was either *two* or *ten*; that he was willing to take the numeral which was more favourable for the Respondent, and to hold the teinds of the lands in question as having been valued at *ten* chalders; and he therefore maintained that the decree should be so interpreted.

The Respondent having put in an answer, the Court, upon advising the petition and answer, adhered to their former interlocutor.

Against these judgments the appeal was presented.

For the Appellant, The Attorney General, and Mr. Wetherell.

Although part of the word in the extract of the decree has been obliterated, enough remains to afford conclusive evidence, that the word must have been *ten* or *two*. According to the reports of experienced men no other word could have been in the space worn away. The Appellant ought not to be deprived of his right by unavoidable accident, if the loss of more certain evidence can be supplied by probable conjecture.

In the analogous case of wills the Roman law [55] permitted such a defect to be supplied by any means whereby the will of the testator might be ascertained (Auct. Lib. 28, tit. 1, s. 2). In such cases, where instruments were lost or destroyed, recourse might be had to parol testimony (Mathæus de Probationibus, c. 3, s. 134).

The law of Scotland is the same as to instruments of gift or contract which have been lost, destroyed or effaced. In all which cases the Court allows the tenor to be proved.*

Here the proof is supplied by probable conjecture. According to the report of the inspectors no word could have occupied the obliterated space but *ten* or *two*, and the Appellant is willing to concede to the Respondent the insertion of the word most for his advantage. By inspecting the valuation of the lands in the parish, as it appears in the cess-books, it is ascertained that the proportion of value assignable to the Lands of Makerston, as compared with the other lands in the parish, and their proportion of teinds remaining legible in the decree, gives exactly *ten* chalders as the amount of

* *Earl of March v. Montgomery*, 19 July 1743, a personal bond; *Van v. Sinclair*, 26 July 1771, a heritable bond; *Inglis v. Hay*, 26 June 1712, *Cunningham v. Greenleaves*, 9 June 1671, marriage contracts.

Makerston. So that the conjecture of the reporters is fortified, if not rendered certain, by this calculation.

In former proceedings on this same question it has been taken for granted, that the word is illegible; but there has been no decision to that effect, nor any admission sufficient to exclude the Appellant [56] from now showing that the word is legible. The presumption arising from the experiments and examination, detailed in the reports, is sufficient to infer that certainty or strong probability, to which the text-writers refer (Ersk. B. 4, tit. 2, s. 34).

For the Respondent, Mr. Brougham, and Mr. W. Adam.

The burthen of proof lies upon the Appellant. It is for him to produce a perfect document to ascertain the value of his teinds. The defect of this indispensable word cannot be supplied by conjectural evidence.

The referees commence their report by admitting that the word is illegible. The question is thereby concluded. They cannot make it legible by any *hypothesis*, or any chain of *hypotheses*. The ground of their conjecture from fragments of lines and measuring of spaces is fanciful. The instrument has been in the possession of the heritors, and who knows how and when the marks now forming the basis of this conjecture came, or were put upon the paper. As to spaces, the writers of manuscript vary materially in their writing. Mr. Thomson, whose opinion is the clearest, will not presume to state it as more than a probability. If the horizontal line which furnishes the ground for the *hypothesis* was not discoverable in 1720, in 1799, or in 1805, the probability is, that it has grown upon the paper since one of those dates.

[57] As to the argument drawn from the comparison of the teinds with the cess, and the real rent, it is entirely against the Appellant. In the comparison of the cess he selects the lands of Charter House, which happen to answer his purpose. If he had tried a comparison with the other lands comprised in the decree, he would have found, that the result was adverse to his conjecture. So it appears also upon a comparison of the real rents with the teinds, which gives twenty or thirty chalders as the probable valuation of the teinds.

There is no precedent for supplying such a defect in a record or instrument by conjectural evidence. It is an accidental loss which must fall on the party who claims under it: * *Bayley v. Garford*.

The Lord Chancellor: The question upon this appeal is, whether the blank in the decree ought to have been considered as filled up with the word "*ten*:" Whether, upon inspection, or upon the result of the evidence produced in the cause, the Court of Teinds should have found that the instrument was perfect, and acted upon it as demonstrating the number of chalders of victual, which originally stood in the decree.

The instrument now produced is not the original record. It is an extract which comes out of the [58] possession of the party, who now insists that it ought to have the effect of a complete record. He therefore, or those under whom he claims, were bound to preserve the document in such a state as to manifest the right with reasonable certainty. The act which was passed in Scotland in 1707, for the valuation of teinds, reciting the loss of the registers of the Court of Teinds by fire, provides, "that *authentic* extracts from these records may be brought in;" (the authenticity of this extract is not disputed, the question turns upon the contents,) "and being presented to the Lords, be recorded in a particular register, and that the said extracts so brought in be kept by the Lord Clerk Register, etc. and be held as valid and authentic, as the principal warrants themselves, if the same were yet extant; and the Lord Register, and his deputies, are ordained to give a new extract, *gratis*, to every person that shall give in an old extract, etc.; and extracts from these new records shall make the like faith in judgment, and out-with the same as the extracts from the old registers of the commission were wont to do before they were burnt."

If indeed the extract here in question was as defective at the date of this statute, as it now appears to be, the giving a new extract copied from the old one would not have assisted the claim. But then a material question might have arisen, whether the

* March, 125, 2 Show. 29, S.C. Three were bound in a bond, jointly and severally: the seals of two were eaten by rats. As March reports the case, the Court were *inclined* that the bond was void against all. Shower cites it as *adjudged* that the bond was void.

Court were not authorized to inquire what were the contents of the original register; for, by the following clause of the act they were "empowered, upon such evidence, and as they should see cause, to [59] make up the tenor of such Deereets in manner above mentioned, whereof extracts are amissing, and the registers lost in the said fire." If this clause is to be considered, as providing only for the case of extracts from the burnt registers, which had been lost, it would be inapplicable to the case in discussion. But if such a construction may be put upon the words of the clause, as to authorize the Court to make up the tenor of the decree, where a word is missing or obliterated, then an application might have been made to the Court of Teinds, under this act of Parliament. It appears that in the process in 1720, this extract was produced, and considered to be unintelligible as to the lands in question.

The same thing has happened in two subsequent proceedings; and it is now to be considered, whether the proofs, in support of the instrument produced, furnish such a degree of certainty as to authorize a reversal of the judgment.

You cannot apply to the case of a document in the custody of a party the same principle of decision, as if the question related to a record in the keeping of the law. Considering, moreover, what has taken place with respect to this extract since the year 1720, it would be too hazardous to decide, upon the evidence now produced, that the obliterated word in the extract was "Ten;" and as the Court of Teinds has repeatedly held this extract to be unintelligible, the judgment ought to be affirmed with costs.

Lord Redesdale: The evidence produced in the cause is evidence to prove that some teinds of the [60] parish were valued, but is no proof as to the teinds in question. The valuation of those teinds might have been left in blank in the original decree: there is nothing to prove the contrary. In that case the decree had no operation as to these teinds. The act 1707 provided a remedy for the loss of the records of valuation; and it was the duty of all persons, who had an interest in preserving the records, to proceed without delay to establish their rights.

The persons, who in 1707 were entitled to the lands of the Appellant, ought to have brought their extract into the Court of Teinds, to have it recorded as evidence of their rights, if it was then perfect; or if any part of the extract was effaced by accident, to have supplied the defect by evidence. Such evidence then probably might have been adduced. Now it is difficult, if not impossible, to produce, and dangerous to admit, such evidence. If the right ever existed, it has been lost by the negligence of those who failed to claim it. A century has elapsed since the claim ought to have been presented; and this neglect furnishes a strong ground to presume, that they were incapable in 1707 of supplying the defect. The proceeding in 1720 called upon the party to supply the defect. Instead of doing so, it seems by acquiescence to be admitted, that the defect was incapable of being supplied. Can we at this distance of time supply the word by conjecture? The evidence which has lately been produced might equally have been offered to the Court in 1720. As the parties interested omitted to do so, we must presume that the defect [61] could not be supplied, which, in effect, they have admitted then, and in subsequent proceedings.

Die Veneris, 23 Feb. 1821.

Ordered, and adjudged, That the said petition and appeal be and the same is hereby dismissed this House; and that the interlocutor therein complained of be affirmed, with £200 costs.

[62]

IRELAND

FROM THE COURT OF EXCHEQUER.

Sir ROBERT LYNCH BLOSSE, bart. and FRANCIS LYNCH BLOSSE, his eldest Son, an Infant, by the said Sir ROBERT LYNCH BLOSSE, his Father, next Friend and Guardian. *Appellants*: The Right Hon. JOHN LORD CLANMORRIS and GEORGE RICHARDS, Esq., *Respondents*. 26th Feb. 1821.]

[*Mews' Dig.* iv. 1135; vii. 45; xiii. 1870; xiv. 1157. Cited (arg.) on point as to doubtful title in *Howarth and Others v. Smith*, 1833, 6 Sim. 161 at p. 166, and see *Elliott v. Pott* 1821, 3 Bl. at pp. 114, 115.]

LANDS being settled by H. upon the sons of R. successively in tail male, with divers

remainders over, and the ultimate reversion to H. and his heirs. H. is attainted of high treason, and afterwards B. the issue in tail, being in possession under the limitations of the settlement, suffers a recovery. Whether it is effectual to bar the reversion vested in the Crown by the attainder.—*Quære*.

A TITLE, depending upon a recovery suffered by a Tenant in tail of lands, the reversion of which had vested in the Crown by attainder of the reversioner, is not such a Title as a purchaser is bound to accept.

A purchaser brought into Court upon a doubtful title ought to be discharged with costs.

Sir Henry Lynch, baronet, being seised in his demesne as of fee, of divers lands in the barony of Carra, in the county of Mayo, in Ireland, in the year 1684, granted and released the said lands to the [63] use of the first and other sons of Robert Lynch, severally and successively in tail male, with divers remainders over, with the ultimate limitation to the right heirs of Sir Henry Lynch.

After the date of this deed Sir Henry Lynch was attainted of high treason.

In the year 1779 Sir Henry Lynch Blossse became seised of the lands under the limitations of the deed, as tenant in tail male; and in Michaelmas Term 1779 suffered a common recovery of the lands to the use of himself in fee.

By his will, bearing date the 18th day of February 1788, Sir Henry Lynch Blossse gave certain legacies and annuities, to be raised by sale or mortgage of his lands in Ireland; and, subject thereto, he gave all his real estates in Ireland to the use of his nephew, the Appellant Sir Robert Lynch Blossse, for life, with divers remainders over.

Sir Henry Lynch Blossse died in February 1788, leaving the Appellant, Sir Robert Lynch Blossse, a minor.

During the minority of Sir Robert Lynch Blossse several of the incumbrances affecting the lands were paid off by his guardian, out of the savings of the estates; and Sir Robert Lynch Blossse himself, after he came of age, paid off more of the incumbrances with his own money. The securities were assigned to the Respondent George Richards, in trust for the Appellant Sir Robert Lynch Blossse.

In 1811 the Appellant, Sir Robert Lynch Blossse filed a bill in the Court of Chancery in Ireland, in the name of George Richards, against himself, and the Appellant, Francis Lynch Blossse, [64] his eldest son and others, praying an account of the debts and legacies of Sir Henry Lynch Blossse, and that the same might be paid, or in default thereof, that a sale might be had of a competent part of the estates, for payment of the debts and legacies, pursuant to the trusts of the will.

In consequence of proceedings under the decree made in the cause, Brabazon Browne, in trust for the Respondent, John Lord Clanmorris, became the purchaser of several denominations of the lands. On the 17th of November 1815, by an order made in the cause, it was referred to the Master to inquire and report, whether a good title could be made out to the purchaser, and whether any and what act was necessary for that purpose.

On the 7th of December 1815 the Master reported that a good title in fee-simple could be made to the lands; and that the only acts necessary were to procure a certain judgment affecting the lands for £60,000, to be assigned to a trustee to protect Lord Clanmorris and the other purchasers. An objection was taken to this report on the part of the Respondent, Lord Clanmorris, upon the ground that, after the settlement made by the indentures, bearing date the 16th and 17th days of July, 1684, Sir Henry Lynch was attainted of high treason, whereby and by virtue of the several statutes in force in Great Britain and Ireland, the reversion in fee-simple, limited by the settlement to the right heirs of Sir Henry Lynch, became forfeited to and vested in the Crown, and could not have been effectually barred or destroyed by the common recovery suffered by Sir Henry Lynch [65] Blossse, and that therefore the said title was defective.

On the 3d of February 1816 an application was made to the Master of the Rolls, *to set aside the report*,* which was ordered, on the grounds of objection before stated.

The Appellants acquiesced in the last-mentioned order, and on the 10th of February, 1816, by an order made, on the application of the Appellants, it was referred

* See the observation of Lord Redesdale, p. 71.

to the Master in the cause, to inquire and report whether any and what acts were necessary to be done to make out a good and sufficient title; the Appellant, Sir Robert Lynch Blossse, undertaking to procure such report within a week; and if any acts were necessary to be done, it was further ordered that the said Master should report within what period of time the same ought to be completed, if reasonable diligence should be used, the solicitor for the Respondent undertaking to attend before the Master on the first summons.

In pursuance of this order the Master made his report on the 19th day of February, 1816, that a good and sufficient title could be made out to the Respondent, *in case* the commissioners for executing the office of Lord High Treasurer of Ireland, by and with the consent of the chief governor of Ireland, should conceive themselves warranted to grant the reversion in fee of the said lands under and by virtue of the powers vested in them by the Act of the forty-sixth of George the Third, chap. 123;* [66] and if that could not be obtained, that a good title to the said lands could be made out to the Respondent, by means of a private Act of Parliament, to be obtained by the Appellants; and the Master further reported, that such grant or private Act of Parliament might be procured with reasonable diligence in the course of the then session of Parliament; and he further reported, that the Appellants, procuring a certain judgment for £60,000, to be assigned to a trustee to protect the said purchase, would secure the purchaser against any outstanding judgments that might remain unsatisfied.

This report was confirmed, and afterwards the Appellants appealed from the order of the 3d day of February, 1816, to the Lord Chancellor, who, by an order dated the 12th day of March 1816, refused the Appellants application, and affirmed the order.

The Appeal to the House of Lords was against the orders of the 3d of February, and the 12th of March 1816.

Against the order confirming the report of the 19th of February, 1816, there was no appeal.

For the Appellants, Mr. Wetherell, Mr. Shadwell (and Mr. Blake.)

The question in this case is, whether a reversion, after an estate-tail vesting in the Crown by attainder of the reversioner, can be barred by a common recovery suffered by the issue in tail when in possession. The Crown can only take the reversion subject to all its original properties and incidents. The King can take no more than the party by forfeiture lost.

[67] The reversion, while it belonged to the original reversioner before the attainder, was subject to the right of the tenant in tail, to be destroyed by a recovery.

Lord Redesdale: Is there any Irish statute similar to the English statute 34 Hen. 8, saving the rights of the Crown?

For the Appellants: There is not.† That statute has been held by construction to apply only to estates-tail created by the Crown (Co. Litt. 372, b.). The principle of that construction applies equally to remainders and reversions not flowing out of the Crown. A reversion vesting in the Crown by grant, subject to a condition, may be barred by the recovery of the tenant of a particular estate. Where the estate vests in the Crown by forfeiture, the same principle applies.§

* An Act to amend several Acts for the Sale of (Crown Rents, etc., and) certain Lands forfeited and undisposed of in Ireland.

† See Mr. Butler's note (323) to Co. Litt. 372, b.

‡ Chomley's case, Rep. 2, 52, and Moor, 342. In Coke's Rep. the case is put thus in one of the points resolved.

"A man makes a gift in tail, the remainder in fee; he in remainder grants his remainder to another for life; the remainder to the queen in fee, upon condition, *ut supra*, tenant in tail suffers a common recovery; if this recovery shall bar the estate of tenant for life in remainder, and the condition also, is the question. And it was resolved, that the recovery doth bar, not only the estate-tail, but also the estate for life, although the remainder of the fee was in the queen; *par. t. 1. c. 1. f. the stat. of 34 H. 8, c. 26*, because the estate-tail was not of the queen's estate, etc. fo. 52. "And by operation of law, the estate for life being defeated, the remainder to the Queen, which depends upon it, shall be defeated also," fo. 53.

§ See *Nicholles v. Nicholles*, Plowden, 481, 486; and *Walsingham's Case*, Id. 552, 3.

[68] Lord Redesdale: Have you considered the effect of the statute *de donis*,* as to reversions in the Crown: how far the principles on which the Courts have permitted parties to suffer recoveries of estates-tail, and reversions upon them, affect the Crown? It must be argued, on authority: there is no intelligible principle.†

For the Appellant: The effect of the statute *de donis* ought to be the same as to the King and private persons. Can it be contended that a reversion vesting in the King by the felony of the reversioner, or upon a conveyance by the most remote remainder-man, would deprive the tenant in tail of his right to bar the reversion by a recovery?

How does a recovery operate? By enlarging the estate-tail into a fee. If therefore the recovery bar the estate-tail, it ought to bar the remainders over, and reversions also, of which the fee-simple is composed. A recovery puts the estate-tail under the statute, in the same situation as the alienation by the donee in tail after issue born put the gift in [69] tail before the statute *de donis*. The decision in the great case upon the validity and effect of recoveries, rests expressly upon this principle, that "he who claims by another cannot be in a better estate of right than he through whom he claims."‡

For the Respondents, the Attorney General and Mr. Horne.

It is fully established, that a remainder or reversion vested in the Crown, and expectant on an estate-tail, cannot be barred by a common recovery suffered by the tenant in tail.§ If that point were doubtful, yet, according to the rules of a Court of Equity, a purchaser is not compelled to accept a title subject to a serious doubt as to its validity.

The Lord Chancellor, after stating the facts and [70] proceedings in the case, observed, that there was no appeal against the order confirming the last report: which might create a difficulty as to further proceedings, if the judgment upon the other orders should be reversed.

The question was, whether a reversion vested in the Crown by forfeiture, and not by original grant, could be barred by a recovery: whether the doctrine of law upon that point could be stated to be so clearly against the Crown that a purchaser

* 13 Ed. 1. In *Magdalen College, Case*, 11 Rep. 72, etc. it is resolved, that the stat. *de donis* binds the King, although he is not named, because it is a remedial statute. By parity of reason, the statute of fines, 4 and 5 Hen. 7, c. 24, binds the King where the estate-tail is not of his gift, etc. But whether the *practice* of his courts, as to recoveries, which has in effect repealed the statute as to gifts by a subject, can affect the King's right to a reversion vested in him by grant, *bonâ fide*, or by operation of law, *quære*. In *Pelham's Case*, 1 Rep. 16, citing 18 Ed. 3, 28. b; 25 Ed. 3, 48. a, it is holden, that a recovery by assent, without title, shall not divest a remainder or reversion out of the King, because, etc. it is but a conveyance. See *Walsingham's Case*, Plowd. 553, a. b. Nor a recovery by tenant in tail, *Pigott*, 86.

† See the observations of Sir W. Lee, C. J. in giving judgment in *Martin v. Strachan*, 1 Wils. 73.

‡ *Hunt v. Gately*, Moor. 154. See also *Pigott*, 85, where he says, it is *verata questio* how far at common law a remainder vested in the King was divested by recovery and discontinuance.

In *Wiseman's Case*, 2 Rep. 15, which was a conveyance in remainder to the Crown, expressed to be for the purpose of creating a perpetuity, the fourth of the resolutions upon which the judgment in favour of the recovery is founded, is that "by such secret limitations of the remainder to the Queen, purchasers are deceived, and the tenant in tail in possession deprived of the power which the law giveth him to cut off the remainder, etc." See the fifth resolution.

See also *Nevill's Case*, 7 Rep. 121; *Mary Portington's Case*, 10 Rep. 35; *Lord Chesterfield's Case*, Hardres, 409, *Pigott*, 88; *Martin v. Strachan*, 1 Wilson, 73.

§ *Shepherd's Touchstone*, 42, (Preston's edition); *Lord Nottingham's MSS.*, Hargrave and Butler, Co. Litt. note (323) to Co. Litt. 372, b; *Brooke's Abr. Assur.* pl. 6; *Taille*, pl. 41; 2 *Rolle's Ab. Com. Rec. (A)*: *Lutwych*, 848, 9; *Vin. Abr. Com. Rec. (r)*: *Com. Dig. Estates, B.* 31; see also the stat. 26 Hen. 8, c. 53; 13 Hen. 8, c. 20; 34 and 35 Hen. 8, c. 20; 27 Eliz. c. 1; 11 Wm. 3, c. 2; 1 Anne, stat. 2, c. 21; 46 Geo. 3, c. 123.

ought to be compelled to take an estate with such a title. That the law as to estates-tail, under the stat. 34th Hen. VIII, was clear and settled: but not so with respect to such a reversion as now was in question. That he could not advise the House, sitting as a court of equity in appeal, to hold a purchaser to the contract in a case, where it could not be stated as a matter free from doubt, whether the reversion had been barred by the recovery; and as the purchaser had been brought into Court upon a doubtful title, he ought to be discharged with costs.

Lord Redesdale: That a reversion vested in the Crown, but not reserved upon a gift by the Crown, may be barred by a recovery, there is no authority but in one loose report,* which is contradicted by [71] every other case. The case in Rolfe's Abridgment (394, l. 2) is decisive on the point. Pigott,† in one passage, treats it as a disputable point at common law. Cruise‡ seems to understand the law on this subject, as it is laid down in Rolfe, and refers to the practice of divesting the reversion of the Crown by act of parliament, to enable the tenant in tail to make an effectual recovery. The practice is important as evidence of the state of the law. General opinion is certainly against the title. In this case it is not necessary to come to any precise decision on the point. It is sufficient, on the question now before the House, if the law be doubtful. A purchaser has a right to require a marketable title: and this title, it must be admitted, rests on a point of law which at least is doubtful. This being so, the purchaser who has been obliged to keep his money in readiness, and deprived of the opportunity of vesting it in another purchase, has been hardly used, and is entitled to his costs. The proceeding in the Court below, of setting aside the report is extraordinary practice.

26th Feb. 1821. It appearing to the Lords that the title offered to the Respondent, Lord Clannorris, at the date of the Report of the 7th December 1815, was not such a title as a purchaser was bound to accept under the circumstances stated, etc.: It is therefore ordered and adjudged, that the said petition and appeal be dismissed, and that the said orders therein complained of, be affirmed with £250 costs.

[72]

SCOTLAND.

COURT OF SESSION, SECOND DIVISION.

JOHN DINGWALL,—*Appellant*; The Reverend GEORGE GARDINER,

Respondent [2d March 1821].

[3 Scots R.R. 623. See *Gardiner v. Dingwall*, 1823, 2 Shaw, 409; *Dingwall v. Gardiner*, 1825, 4 ib. 216. Considered in *Elgin (Magistrates of) v. Gathorne*, 1841, 4 Dunlop, 25, at pp. 31, 32, 31.]

The Scotch statute of the 1st Parl. of Charles II. sess. 3, c. 21, provides that where competent manse are not already built, the heritors, etc. shall build competent manse to their ministers, the expenses thereof not exceeding one thousand pounds (£83 6s. 8d. sterling), and not being beneath five hundred marks; and where competent manse are already built, ordains that the heritors shall relieve the minister of all charges for repairs, declaring that the manse, being once built and repaired, etc. by the heritors, they shall be up-holden by the incumbent ministers during their possession, or by the heritors out of the stipend in time of vacancy.

* *Querc.* The *Nota* in Hardres, 409; and see *Murry v. Eyton and Price*, 2 Shaw, 104; and S. C. T. Rayn. 338; Pollexfen, 491; Tho. Jones, 237; Skinner, 95. In this latter Case the question was, whether the estate-tail was barred by a fine. According to the note in Hardres, it was adjudged in the C. P., upon advice with all the other Judges and Barons, that after a conveyance and regrant, a reversion in the Crown might be barred by tenant in tail of the gift of the Crown or the issue; and the case is cited in Pigott, 90. On this point, see the *dict.* of Street, Baron, *arg. pro*, 2 Shower, 109, *ad finem*, and Sir Tho. Jones, 254, *contra*.

† Recov. 85, see the passage *ante*, p. 69, note. ‡ Recov.

Up to the year 1760 the sum allowed for building manse, upon litigation in the Courts Ecclesiastical and of Session, had not exceeded the amount specified in the statutes, except in cases where the heritors consented. But from the year 1760, it had been the practice in both courts, without the consent of the heritors, to grant much larger sums.

In 1814, the Respondent applied to the Presbytery to ordain the heritors to *build* a new manse, which was decreed accordingly, upon an estimate of the Respondent, amounting to £1214. The question being brought before the Court of Session, £1000 sterling was finally decreed for *building a new manse*. The question upon the construction of the act, whether expense of building was not limited to one thousand pounds Scots, had been adverted to, but not insisted upon, by the Appellant in his pleas before the Presbytery or the Lord Ordinary, but only before the Court of Session in the last stage of the proceedings. The point raised, discussed in the former stages of the cause, was, whether £1214 or £700, or any intermediate sum, should be allowed.

Held, that the case fell within the clause of the statute which relates to the repairing of manse, and not within [73] the clause as to the building of manse; and with this finding the judgment below was affirmed.

Whether a custom, beginning in 1760, can abrogate or control a Scotch Act of Parliament, *quære?*

The defender, by his pleadings in the first instance, having taken issue upon the sum necessary to build a *competent* manse, and not having then insisted upon the limitation of the statute (*sensu*.) had waved the objection arising out of the statute; but having finally, in a reclaiming petition, insisted upon that objection, which the Court referred to the Lord Ordinary as a point not before argued, and the pursuer not having objected or appealed against the interlocutor, by which this reference was made, the right to insist upon the objection was restored.

By the Scotch act of the first parliament of Car. II. 3d sess. c. 21, it is recited and provided as follows: "And because, notwithstanding of divers acts of parliament made before, diverse ministers are not yet sufficiently provided with manse and glebes, and others do not get their manse free at their entry, therefore our Sovereign Lord, with advice foresaid, statutes and ordains, That *where competent manse are not already built*, the heritors of the parish, at the sight of the bishop of the diocese, or such ministers as he shall appoint, with two or three of the most knowing and discreet men of the parish, build competent manse to their ministers, the expenses thereof not exceeding one thousand pounds, and not being beneath five hundred merks: and *where competent manse are already built*, ordains the heritors of the parish to relieve the minister and his executors of all costs, charges and expenses for repairing the *foresaid* manse: Declaring hereby, that the manse [74] *being once built and repaired*, and the building and repairing satisfied and paid by the heritors in manner foresaid, the *said manse* shall thereafter be upholden by the incumbent ministers during their possession, and by the heritors in time of vacancy, *out of the readiest of the vacant stipend*."

In the year 1814 the Respondent, who is minister of the parish of Aberdour in Aberdeenshire, made an application to the Presbytery of Deer, within which the parish lies, setting forth that his manse was in a ruinous condition, and praying that it might be inspected, and that the heritors of the parish might be ordained to build a new one; and at the same time he produced a plan of the proposed house and offices, with an estimate of the expense, amounting to £1200.

The Appellant, who is proprietor of the greater part of the parish, objected to the plan as extravagant, stating, that *although the presbytery could not legally subject the heritors to the payment of any sum beyond what was mentioned in the act of parliament*, yet, considering how inadequate that sum was in the present times, he was willing to forego the plea, and would consent to a sum being assessed equal to what had been expended in erecting manse in some neighbouring parishes of much greater extent than Aberdour; and he produced a plan of what he considered a sufficient manse, with an estimate of the expense, amounting to between £700 and £800.

The Respondent rejected this proposal: and after an inspection and report by a mason and a carpenter, [75] to whom the matter had been referred, the Presbytery gave their decree against the heritors for £1214 11s. 10d. sterling.

The Appellant complained of the decree to the Court of Session by bill of suspension, which was passed; and the matter came to be discussed before the Lord Pitmilley as Ordinary.

On the 16th of February the Lord Ordinary made avizandum to himself, etc.; and on the 24th lodged a note in process, by which he states, that "having considered the plans in process, there is no question about repairing or adding to a manse already built. It seems admitted that a new manse and offices must be erected, and the point to be determined is, whether the plan produced by the minister should be adopted, etc."

On the 1st March 1815, the Lord Ordinary pronounced this interlocutor: "Having heard parties procurators, before answer, remits to Mr. Laing, architect, to inspect the plans, specifications, and estimates produced, to consider the objections to each which have been stated in the extracted decree of the Presbytery, and to report."

Mr. Laing accordingly made a report on the merits of the several plans, in which he stated, that the sums allowed by the Presbytery exceeded any he had ever heard of being allowed for building a manse and offices.

The Lord Ordinary made avizandum to himself with the report, and thereafter pronounced the following interlocutor:

"The Lord Ordinary having considered the report of Mr. Laing, and heard Mr. Laing along with [76] the counsel of the parties thereon, of new remits to Mr. Laing with instructions to adopt either of the plans in process, or to make such alterations as he shall think proper; or, if preferable, to make a new plan: *the expense of whichever plan to be adopted not to exceed £1000 sterling, exclusive of the old materials.*"

Against this interlocutor the Appellant having offered a representation, it was refused by the Lord Ordinary.

In all the discussions before the presbytery and the Lord Ordinary, the question turned upon the amount of the sum to be expended in the erection of the manse, etc., the Appellant admitting that it was reasonable, and had been the practice, *with the consent* of the heritors, to exceed the sum specified in the statute as the maximum to be expended in erecting a manse, and consenting to allow £800 for the purpose; but at the same time referring generally to the objection arising under the words of the statute.

Against the final interlocutor of the Lord Ordinary the Appellant presented his petition to the whole Court, reclaiming against the interlocutor, and praying even to suspend the letters *simpliciter*, and to find that the expense of the manse and offices, so far as leviable from the heritors, could not exceed £1000 Scots; or at any rate to remit to the Lord Ordinary to find, that the sum to be expended should not exceed £750, *granted of consent* of the heritors.

On hearing this petition the Court remitted to the Lord Ordinary to hear parties thereupon, in [77] respect that the plea stated in the prayer thereof, that the expense of the manse and offices leviable from the heritors should not exceed £1000 Scots, had not been discussed before the Lord Ordinary.

The Respondent having given in to the Lord Ordinary an answer, the following interlocutor was pronounced:

"The Lord Ordinary having considered this petition, with the answers thereto, and whole process, finds, that by the act 1663, c. 21, the heritors of parishes are ordered to build competent manses for their ministers, and that this express provision of the statute, under the authority of which alone new manses can be built, could not in the present day be complied with if the expense of the building were to be limited to the sums of money mentioned in the act of parliament, which, with a view to the expense of building at the date of the act, was fixed at £1000 Scots, as the maximum, and five hundred marks as the minimum: Finds, that the clause in the statute which provides that where manses are already built, the heritors shall relieve the minister of the expense of repairing them, does not limit the amount, and that these repairs therefore must frequently in the present day exceed the ex-

pense of building a new manse as fixed in the act, although it must evidently have been the intention and understanding of the act that the expense of repairing an old manse should be much less than the expense of building a new one, and that it should be for the interest of the heritors to repair rather than to build, while the reverse would be the case if the [78] construction put upon the statute by the petitioners were adopted: Finds, that the usage to this effect is not only uniform and long established, but was sanctioned by the Court in the case referred to by the Respondent of the minister of Inverury (see note at end of case), after the point was litigated by one of the heritors: Refuses the desire of the petition, and adheres to the interlocutor reclaimed against."

Against this interlocutor the Appellant presented a reclaiming petition to the whole Court, which was refused. And a second petition against the former interlocutor, praying an alteration, and that the Court would suspend the letters *simpliciter*, and find that the sum mentioned in the statute could not be legally exceeded, was also refused.

For the Appellant, Mr. C. Warren, and Mr. J. P. Grant.

On the part of the Appellant, it was contended, that the act 1663 was a temporary measure: that the act was not applicable to the case of rebuilding when the manse *once* built has become ruinous, or to a second repair at the expense of the heritors.

That although the institutional writers on the law of Scotland construed this statute as a subsisting and perpetual law, authorizing the presbyteries, in place of the bishop, to take cognizance of the state of manses, and to subject the heritors in the expense of repairing or rebuilding under the control of the Court of Session; yet every writer who touches on the subject is agreed that the power of the Presbytery is restrained to the sum mentioned in [79] the statute (£1000 Scots) as the maximum for building*.

That the inadequacy of the sum which the statute allows might afford a ground for application to the legislature for enlarging it, but could afford no reason for the church courts usurping a power of assessing the subject at their discretion.

When a sum was limited, beyond which the heritors could not be assessed, for building a new manse, and at the same time they were subjected to the expense of repairs without an express limitation, the reasonable interpretation of the statute is, that the cost of repairs could not go beyond the cost of building. If, immediately after the passing of the act, the Presbytery or the Bishop had decreed the heritors to pay a sum beyond the £1000 for repairing an old manse, while necessarily confessing that they were limited to that sum for building one entirely new, it seems impossible that the courts of law could have given their sanction to such a decree: and Lord Stair accordingly considers the limitation to apply equally to repairs and building.

The Appellant is not called upon to show that the statute is consistent. He admits that there ought to be a new law on the subject, to correspond with the present state of society.

The legislature, when limiting the expense of the original building, could not mean that the expense of repairing or rebuilding should be unlimited.

The Appellant denies that any practice can justify [80] the disregarding a clear act of parliament in such a case as the present. If the heritors were under an obligation to provide competent or suitable manses by the common law, or independent of the act 1663, it might be argued that that act had become obsolete, or had been departed from, and that therefore the common-law obligation might be resorted to. But the common law is here out of the question, there being no such obligation but by force of the statute. If that statute is obsolete, there is no authority to assess the heritors in any sum whatever.

It is true that Presbyteries have taken upon them to exceed the sum limited by the act of parliament, and that the Court of Session has lent its sanction to their doing so, it being felt that the sum mentioned in the statute had been extremely inadequate: but those interested were considered as tacitly consenting, till very

* See Stair's Institute, b. 2, tit. 6, sec. 19. Mackenzie, b. 1, tit. 5, sec. 12. Bankton, b. 2, tit. 8, sec. 121. Erskine, b. 2, tit. 10, sec. 55, 56.

lately, that it has been done avowedly and against their will. The industry of the Respondent or his counsel has discovered one solitary case, occurring in the year 1760, which the interlocutor alludes to, where one of the heritors did plead the act of parliament unreasonably, the sum decreed for being extremely moderate; and the Court appear somehow or other to have got over the plea: but this case, so far from being considered as consistent with law, or as settling the law, has never been reported or mentioned as an authority by any writer. In the second edition of Erskine's Institutes, published *several years after this decision*, no notice is taken of it; but, on the contrary, the rule of the statute 1663 is laid down broadly, as the law by which Presbyteries are bound to proceed.

[81] The judgment in the present case seems inconsistent in principle with that given by the Court in the case of the minister of Dunbar (15 May 1811). The statute on which the present question arises also enacts, that the minister besides his glebe shall have pasture land for a horse and two cows; and if there be no pasture land in the parish as distinguished from arable, there shall be paid to the minister in lieu of it the sum of £20 Scots. In the parish of Dunbar there was found to be no pasture land in the sense of the statute; and the minister arguing, as in the present case, that the sum specified in the act was totally inadequate, and instancing that the Court had in practice disregarded the limitation with regard to manse, prayed that they would do the same, by awarding compensation in money in lieu of pasture, computing what would be sufficient, according to the modern rate, to maintain the cattle specified in the act: but the Court, holding themselves bound to follow the direction of the statute, declared that they had no power to go beyond its strict letter.

For the Respondents, The Attorney General and Mr. H. Stephen.

On behalf of the Respondents the argument was to the following effect:

At the Reformation the clergy were deprived of a part only of their revenues; and, therefore, at first a certain part only of the burden of building churches was imposed upon laymen. By the act of Privy Council 1563, it was provided that *two parts* of the [82] expense thereof be made by the parishioners, and a *third part* by the *parson*, who then was not a stipendiary minister, such as all the clergy of Scotland now are, but a parson in the proper sense of word, viz. a beneficiary having a right to the tithes of his parish.

With regard to manse, by an act of Parliament (1563, c. 72.) it was provided that ministers serving at kirks should have "the principal manse of the parson or vicar;" or, if the manse and glebe was set in feu or in tack, it was enacted that "*ane reasonable and sufficient house be bigged to them, beside the kirk.*"

After episcopacy was restored in the reign of James VI., it was thought just that the old law should be revived, throwing the burden of repairing and upholding manse upon the beneficed clergy; and accordingly the act 1612, c. 8, was passed, which speaks of "archbishops, bishops, and others, ecclesiastical persons;" but it is plain from the purposes of the act, as well as from the period when it was framed, that beneficed persons only were meant; and hence it is denominated in the rubrick, "An act anent repairing of *bishops* manse."

On this footing the law stood till the abolition of episcopacy in the reign of Charles I. By the act 1641, c. 30, (afterwards rescinded,) it was provided that the stipends of ministers should be modified out of bishops' tithes, as well as out of other tithes. By another act passed about the same period, patronage was abolished; and, in lieu of this right taken from patrons, all the unappropriated tithes were bestowed upon them. In this way the whole clergy of [83] Scotland became stipendiaries; and having become stipendiaries, it was thought just that the burden of building and repairing manse should be thrown entirely upon heritors. This was specially provided by the rescinded acts 1644, c. 31, and 1649, c. 45; and the enactment in the latter statute was, after the Restoration, revived almost verbatim by the act 1662, c. 21.

The Appellant has argued that the question at issue is not whether the burden of manse should be again transferred to the clergy, but to what extent it shall be imposed upon a particular class of the laity; and has maintained that it was by the titulars or lords of erection, and not by the heritors at large, that the spoils of the church were acquired. That the heritors at large did not obtain the whole spoils of

the church is very true; but in acquiring the privilege of valuing and purchasing their tithes, heritors certainly shared in a very important part of those spoils. But the point at issue must be regulated by the statutes, according to the interpretation which has been put upon them by long usage, and by express decisions.

The limitation of the statute 1663 was only meant to apply to those parishes which had no manse built at the date of the statute, and which were to be immediately built. The sum was fixed upon as the maximum in those cases, because at that period a good manse might have been built for the sum of £1000 Scots.

In that part of the enactment which devolves upon heritors the burden of repairing manses there is no limitation of any sum. Heritors are required to [84] relieve ministers "of all costs, charges and expenses for repairing of the foresaid manses: " Under the authority of this part of the statute, the courts in Scotland have a power of ordering a manse to be repaired to an indefinite extent; and can it be supposed that the legislature could mean that more than £1000 Scots might be given for repairing a manse, and yet that no more than this sum should be allowed where it was necessary wholly to rebuild it? Even speaking of manses which were to be rebuilt, the legislature says that they shall be "*competent* manses," that is, they should be *suitable* to the respective benefices: whereby it virtually enacted that the sum to be allowed must vary with the expense of the building; and it follows that as soon as the supposed sum became inadequate, from a rise in the materials for building, or a fall in the value of money, the courts who had jurisdiction in this matter were entitled to increase the estimated value according to such a change of circumstances.

In interpreting acts of Parliament, all writers on the law of Scotland agree that a certain latitude is given to judges (Ersk. Inst. b. 1. tit. 1. s. 52, 53. Inst. 1. 17, 18, 24, 28).

This being a remedial statute must receive a liberal interpretation. The words founded upon by the Appellant are evidently contrary to the spirit of the enactment, and even to the words used in the very same statute, which immediately precede those which have been quoted. Supposing the words used conveyed a doubtful meaning, that construction must [85] be adopted which accords best with the real object of the legislature.

But this strict construction of the act is contrary to the practice both of the church judicatories and of the courts of law, and the express judgments of the Court of Session.

So long as a *competent* manse could be built for £1000 Scots, this sum was not exceeded. For nearly a century after the date of the act 1663, there was little diminution in the value of money, or rise in the price of materials employed in building manses. This appears from the price of grain remaining stationary till about the middle of the last century, £100 Scots the chaldier being the conversion price of grain at the date of the act 1663; and this was not merely the Court conversion, but seems to have been much about the real price during the first half of last century.

From the date of the act 1663, downward, to about 1750, it appears that £1000 Scots continued to be the sum usually allowed by the Court for building a manse; and, until that period, competent manses could generally be built for that sum, partly in consequence of the low price of labour and materials, and partly from the very humble buildings which were then allowed to the clergy: for not only were these very small, both in the number and in the dimensions of the rooms, but the walls were frequently built with clay instead of lime. About the year 1750, the expense of building appears to have risen; and as other ranks of people began to live in better houses, it was natural that the clergy [86] should look also for some melioration in their habitations. At first, however, it appears the Court did not venture to exceed the £1000 Scots, unless there was a consent of the heritors: but in the year 1760, the power of the Court to exceed that sum was fully discussed, and terminated in a judgment in favour of the minister.

The question occurred in the case of the minister of Inverury (see note at end of case). This decision was probably the origin of the practice which has prevailed so long both in the ecclesiastical judicatories, and in the Court of Session in Scotland, of awarding to clergymen such sum as would give them competent manses, without regard to the pecuniary *maximum* mentioned in the act 1663.

It is a maxim of law universally acknowledged, that "as one statute may

be explained by another, it may also be explained by the uniform practice of the community, for which reason custom is said to be *the surest interpreter of law*" (Ersk. b. 1, tit. 1, s. 45.)

It is an express rule of Scotch law, that a statute may be entirely deviated from and lose its power by custom. This is laid down by Lord Stair (B. 1, tit. 1, s. 16. Inst. l. 37, de Legib.). "In the next place our statutes, or our acts of Parliament, which in this are inferior to our ancient law, that *they are liable to disuse* which never encroaches on the other. *In this we differ from the English, whose statutes of Parliament, [87] of whatever antiquity, remain ever in force till they be repealed, which occasions to them many sad debates (public and private) upon old forgotten statutes.*"

The same doctrine is laid down by Lord Bankton (B. 1, tit. 1, s. 60). He says, our municipal law "further consists of our statutes or acts of Parliament; to those, no doubt, former laws or ancient customs must yield, but with this limitation, that laws here, before the Union, relating to private rights, are not to be altered by the British Parliament, but for the evident utility of the subjects within Scotland. *Many of our old statutes have run in disuse, a contrary usage for a long course of time acquiesced to by the law-givers, being a tacit abrogation of them; and this is expressly declared to be the law with us by our old statute.*"

In like manner Erskine (B. 1, tit. 1, s. 45) states, that "as a posterior statute may repeal or derogate from a prior, so a posterior custom may repeal or derogate from a prior statute, even though that prior statute should contain a clause forbidding all usages that might tend to weaken it, for the contrary immemorial custom sufficiently presumes the will of the community to alter the law in all its clauses, and particularly in that which was intended to secure it against alteration; and this presumed will of the people operates as strongly as their express declaration."

Although, therefore, the Appellant could make [88] out that the act of Parliament was once imperative with respect to the sum to be allowed for building manse, yet the Respondent, in virtue of these authorities, would be entitled to argue that this part of the act has lost its force by contrary usage.

Supposing the words of the statute to be doubtful, they have received an interpretation by express decisions and long-continued practice. *The Duke of Hamilton v. Scott*.*

As to the acts respecting bail in criminal matters, to which the act in question has been assimilated, [89] there is a wide difference between the cases. The act of 1701 gave no power to magistrates to exact "competent" bail; but *fixes precise sums*, which no authority short of that of the legislature could exceed. Criminal statutes must in all cases be strictly interpreted. The act 1701, with respect to bail, has not been deviated from in relation to the sum specified, either by the decisions of the Court or by a contrary practice.

In the cases before the House of Lords, respecting second augmentations of

* The question there was, whether a minister, whose manse had been once repaired, was entitled to demand farther repairs from the heritors? The heritors founded upon a clause in the same act of Parliament, 1663, c. 21, in support of their argument, that after a manse had been once repaired, the burden of upholding it should fall upon the incumbent. The minister (Mr. Scott) pleaded, that although this argument received some countenance from the words of the act of Parliament, yet it was quite contrary to the spirit of the enactment, and that a different construction had been put upon the statute for a long period. It was said by the Lord Chancellor, in moving the judgment, that he "agreed that the legislature meant, by the act of 1663, that when the manse should have been once built or repaired, the burden of upholding them should rest on the ministers. But it had not been so construed; and when a different construction had been for so long a time put upon it, and acted upon, especially considering the effect of desuetude, as connected with the Scotch acts, they were not now to go back nearly two centuries to give it a new construction. *The statute, as it had been construed, was now to be taken as the law.*" Accordingly the judgment of the Court of Session finding Mr. Scott entitled to a certain sum, for additional repairs to his manse and offices, was affirmed D. P. July 13, 1813.

ministers stipends, the argument of the heritors was founded upon the special words of the decreets arbitral of Charles I. and of the relative acts of Parliament; and the answer made on the part of the clergy was, that supposing the argument to be well-founded, it was overturned by the invariable practice of the Court in granting first augmentations after the Union: and that if the Court had power to augment a stipend once which had been modified during the time of Charles I. it had power to augment more than once. It was upon this ground principally that the judgments by the House of Lords were founded (see the cases of Kirkden, Tingwall, and Preston-kirk, D. P.). The rule of the Court of Session in refusing to grant second augmentations was objected to as a recent practice, which could not be put in competition with the prior inveterate usage. The issue of these cases, therefore, so far from being favourable to the argument of the Appellant, is directly the reverse; for the judgments were founded entirely upon the force of usage to explain express laws of a doubtful nature, or [90] rather to explain laws which were generally thought to be unfavourable *in the very words*.

In the case of Dunbar the question was, whether a minister was entitled to ask more than £20 Scots, (the sum fixed by the act 1663,) in lieu of a grass-glebe where land could not be given. The claim of the minister rested upon very different grounds from those on which the present claim stands: 1st, The act of Parliament does not provide, as it does with respect to manse, that ministers shall in all cases have "competent" grass glebes; 2d. The practice of the Court with respect to grass-glebes was precisely the opposite way from what it had been in relation to manse, for from the date in 1663 down to 1811, the date of the Dunbar case, the Court had not in any one case given more than £20 Scots in lieu of a grass-glebe.

The objection now pleaded by the Appellant was discussed in the House of Lords, and repelled in a case decided in the year 1786.*

* This was a case respecting the manse of the parish of Lethindy. The old manse had been ruinous, and a new one became necessary. The Presbytery pronounced a judgment, whereby they decreed that the heritors should build a new manse, and approved of a plan and an estimate of the expense, amounting to £210 sterling. One of the heritors, Mr. Mercer, of Lethindy, who was proprietor of nearly three fourths of the lands in the parish, carried the cause to the Court of Session, and pleaded that a manse might be built sufficient for the parish for a smaller sum; but did not maintain the argument, that no more than £1000 Scots could be allowed. The Lord Ordinary approved of the plan which had been adopted by the Presbytery; but after some proceedings both before the Lord Ordinary and the Court, an inquiry was ordered to be made as to whether this plan could not be executed for a smaller sum. Thereafter he found that it might be executed for £195 10s. sterling, which was about £15 less than the sum allowed by the Presbytery.

Mr. Mercer then carried the cause by appeal to the House of Lords, and he maintained four "reasons" of appeal, the first of which is stated thus in his appeal case: "Because by the act of Parliament above recited, passed in 1663, it is enacted, that the heritors shall provide and build manses for the ministers, and that the expense thereof shall not exceed £1000 Scots, and not beneath 500 marks; and that this is a positive statute which must be binding in all cases, and over which the Court of Session neither have nor ought to have any discretionary power whatsoever, either to exceed the *maximum*, or to go below the *minimum*; but in the present case, the Court of Session have decreed a sum for rebuilding this manse, greatly more than double the *maximum* allowed by law, three fourths of which falls upon the Appellant in respect of his property within the parish; and therefore he has a right to object, and does contend, *that the sum to be allowed for the purpose ought not to exceed one thousand pounds Scots, the maximum allowed by the statute above mentioned.*"

To this reason of appeal the following answer is made in the appeal case for the minister:—"This plea made its appearance for the first time in the appeal; it was not stated in the Presbytery, or in the Court of Session, and consequently is inadmissible here. It will not be believed that such a bar to the proceedings would have been omitted, had not the Appellant and his counsel been satisfied of its being groundless. It is well and long established, that the act 1663, in circumscribing

[91] The Lord Chancellor: This is a question of great importance to the heritors and clergy of Scot-[92]land; and it will be unfortunate if the main question in the cause cannot be decided upon this appeal.

The principle upon which the act of parliament is to be construed is the first question of difficulty. Looking at the admissions in the bill of suspension, it might have been difficult to contend that this point made upon the construction of the act had not been waived. But the Respondent seems to have restored the right to make that defence, by not objecting to the interlocutor of the Court of the 12th June 1815, which remitted the cause to the Lord Ordinary on that point. So it seems that question is still open. Whether all the findings of the Lord Ordinary can be adopted in case of affirmance, it is difficult to say. It will be necessary to look with care at the statute, to determine what ought to be the construction as applied to circumstances.

The Lord Chancellor: As we find it to be necessary to alter some of the declarations of the interlocutor of the Court of Session, the proposal of the minutes of judgment in this case must be postponed. The interlocutor states several propositions of law not necessary to be decided in this [93] case. Experience confirms the truth of that which is apparent in theory, that it is inconvenient and dangerous to incorporate in judgment doctrines of law which are not called for by the circumstances of the case. It will be proposed, on moving the judgment, to narrow the finding of the interlocutor; but to sustain the judgment in effect, with some observations on the question of costs.*

March 2, 1821. The Lords, etc. find, That this case ought to be considered as falling within the meaning of that clause in the statute 1663, c. 21, which relates to the repairing of manse, and not within the clause which relates to the building of manse, where manse had not been then already built: And it is ordered and adjudged, that with this finding, the said interlocutors of the 11th March 1815, and the 11th May 1815, and so much of the interlocutor of the 10th January 1816, as refuses the desire of the petition of the Appellant, and adheres to the interlocutor reclaimed against, be affirmed: And it is further ordered and adjudged, That the said several other interlocutors be affirmed, with £100 costs.

[94] The following account of the case of Laverury, mentioned in the text, p. 86, is taken from the records of the Kirk session of that parish, where the proceedings are preserved:—

The Presbytery of the bounds having given a decree to the minister for a new manse in the usual form, letters of horning were raised upon this decree, and a charge was given to the heritors. Of this charge, one of the heritors, Mr. Leith, of Black-hall, presented a bill of suspension. His reasons of suspension were, 1st, That the manse was appointed to be built upon some grounds belonging to the Earl of Kintore, which was possessed under a strict entail: 2d, That the manse, according to the plan approved of by the Presbytery, was too large in point of dimensions, and would exceed the sum of £1000 Scots, which was the *maximum* allowed by the act 1663. The reasons for suspension came to be discussed before Lord Coalston,

the expense to £83 6s. 8d. sterling, *respected only manse then immediately to be built in parishes where there had been none before*: so it says. The sum mentioned must have been reckoned sufficient in those days; but the legislature could not be so absurd as to suppose that it would be sufficient in all future times. And accordingly, in the next clause in the statute respecting reparation of manse then already built, when they should come to need repair, no restraint or limitation is imposed.

The case having been heard in the House of Lords, a judgment was pronounced, ordering and adjudging, "that the appeal be dismissed, and the interlocutor complained of affirmed with £100 costs." D. P. 1786.

Quare whether this judgment did not proceed on the ground that the Appellant, by his mode of pleading in the court below, had waived the objection arising out of the words of the statute. But see the case of Laverury *post*, the note at the end of the case.

* On the subject of the effect of desuetude and practice, as applied to acts of parliament in Scotland, see the observations of Eldon, Ch., in the *D. of Hamilton v. Scott*, 13 July 1813, MSS. and 1 Dow, 403.

Ordinary, and the heritor then "judicially offered at the bar to pay his proportion of £1000 Scots, *which is the maximum directed by the law for building a manse*; and agreed that the chargers might dispose of that in such a manner as they thought proper, and this besides the materials of the old manse; *but further he apprehended, under the circumstances in which the case stood, he could not in equity, nor in law, be desired to go.*"

This offer, judicially made, "was refused by Mr. Simpson (the minister) and the Presbytery, who contended, *that the rule laid down in the act of parliament was not a reasonable one*; that the expense of building *had much increased since that time*; that the minister was entitled to *have a sufficient manse built to him* without any regard to the statute; and that the plan approved of by the Presbytery was a reasonable plan."

Lord Coalston pronounced an interlocutor, turning the decree of the Presbytery into a libel, and "granting probation to both parties for ascertaining whether the repairing the old manse would be done at a lesser expense than building a new one, and for proving that Lord Kintore's estate was under a strict entail." Thereafter the minister produced "an estimate of the expense which, [95] he said, was necessary for building the new manse, which had been approved of by the Presbytery, *amounting to £123 6s. 2d. sterling, besides the materials of the old manse*, and the benefit of all carriages from the parish, except the drawing of stones." The cause was then taken to report by Lord Coalston; and the appointment to report was renewed at a subsequent calling, in consequence of a *viva voce* debate of the minutes.

On the part of the minister it was stated, that one of the points of debate was, "whether or not a manse should be built according to one or other of the plans produced, *whether the expense exceed £1000 Scots or not.*" In answer to a proposal on the part of Mr. Leith, that a consent should be obtained from the whole heritors to exceed the sum mentioned in the statute, it was stated on the part of the minister, that "the charger *does not think that* (*viz.* the heritor's consent) absolutely necessary, and must rest it upon what is already in process." "Montgomery (for the heritor) answered, that he always was, and still is, willing to pay his proportion of £1000 Scots; but he contends, *that, at no rate, can he be subjected to any more.*" The cause having been reported, the following interlocutor was pronounced: "The Lord Ordinary having considered the memorials for the parties, and plans, and other writs produced, and *having advised with the Lords thereanent*, finds that the suspender, and the other heritors of the parish of Inverury, are *obliged to build a competent manse*; and in respect the suspender objects to the plan of the manse approved of by the Presbytery as improper, ordains him betwixt and the 11th instant, to give in another plan of a manse, such as he judges proper and competent for the minister of this parish."

In consequence of this interlocutor, the heritor procured a new plan and estimate of a manse, according to which the building would only cost £898 14s. Scots. According to this plan the front of this house was only to be fourteen feet; the side walls to be only sixteen feet high, and two feet four inches thick in the first story, and two feet in the second story; the chimney-heads to be carried three feet above the roof; the walls were to be built with clay instead of lime, and the floor of the dining-room was to be of earth instead of wood. To this plan the minister gave in objections, complaining of the small dimensions of the house; of the outer walls not being to be built with lime; of the want of a wooden floor for the dining-room, etc. [96] Thereafter the court pronounced this interlocutor: "On report of Lord Coalston, the Lords find, that the heritors of Inverury must build a manse and offices for the charger, according to the plan given in for the suspender, with the following variations and additions: *1mo.* That the manse is to be thirty-six feet long, and eighteen feet wide within the walls: *2do.* That the side-walls are to be twenty feet high above ground, and the gables of a proportional height: *3tio.* That the walls of the first story above the ground are to be two feet seven inches thick, and the walls of the second story two feet four inches thick: *4to.* That the chimney-heads are to be four feet above the roof: *5to.* That the floor of the dining-room is to be laid with deals: *6to.* That the partitions are to be made with brick, and standards, etc. of wood, all proper distances: and that the whole of the walls are to be built with stone and lime; and the walls on the inside as well as the partitions

and roofs of the first and second stories, are to be sufficiently plastered; 7mo. That the barn, stable and byre are to be eleven feet wide within walls, and the walls to be eight feet high, and wholly built with stone and lime. And in respect of the offer made by the charger of transporting the stones of the old manse at his own expense, find, that the manse and office-houses are to be built upon that part of the glebe which is described in the charger's memorial; allow and authorize the charger to call a meeting of the heritors and magistrates of Inverury, to meet at the church of Inverury upon the first Tuesday in September next, and ordain the magistrates and heritors then and there to stent themselves and the burgh of Inverury *with such sum of money as may be necessary for executing the plan as above mentioned*; and find expenses due to the charger, which they modify to £4 sterling, and decern therefore, and for the expense of the decree to follow thereon, as the same shall be ascertained at extracting."

The heritor immediately gave in a reclaiming petition, in which he stated, in explicit terms, that "the alterations made upon the plan by the interlocutor will make the expense (if the work is to be sufficiently done) *amount to more than double the sum in the act of parliament*." In this petition the cause was again argued by the heritor, on the general ground that the court had no power to exceed the sum of £1000 Scots, allowed by the act of parliament. In one part of the petition the clause in the act of [97] parliament is quoted; and it is stated that the "words are so express that they leave no room for comment; and, under the authority of them, the petitioner maintains that he, as an heritor of this parish of Inverury, cannot be decerned to build a manse at a greater expense." In former cases, it is stated, where a large sum was allowed, "a consent of the *majority* of the heritors" was always obtained; and that in the present case there was not only no evidence that such consent was obtained, "but it evidently appears *that such consent has been refused*."

Besides this general argument, which is enlarged upon in other parts of the petition, it was stated that, according to the plan, as approved of by the Court, the manse would be made better than any of the other manses in the neighbourhood; and the heritor particularly objected to building the offices with stone and lime. The petition concludes with a prayer, applicable to the various pleas maintained in the petition; and, so far as respected the general point, the heritor craved that it should be found, "that the petitioner, as a heritor of the parish, cannot be decerned to build a manse *at an expense above £1000 Scots*, being the maximum *allowed* in the statute 1663."

Upon advising the petition, the Court pronounced the following interlocutor: "The Lords having heard this petition, and parties procurators thereon, they find the offices are to be built with stone and clay, and harled (plastered) with lime; and, *with that variation, adhere to their former interlocutor as to the other points*, and refuse the desire of the petition."

The effect of this judgment was, to allow a sum of about £2000 Scots for building the manse, etc.

[98]

SCOTLAND.

COURT OF SESSION.

ROBERT ANGUS, JAMES TODD, WILLIAM CURRIE, JAMES BARCLAY, sen. JAMES BARCLAY, jun., JOHN ALLAN, JOHN FLEMING, HENRY ARNOTT, ROBERT WALKER, and WILLIAM STEWART, *Appellants* DUNCAN MONTGOMERY, DAVID WISHART, JOHN MONTGOMERY and JOHN GULLAND, *Respondents* (2d March 1821).

[7 Geo. II. c. 16, s. 7, and 16 Geo. II. c. 11, were repealed by the Stat. Law Rev. Act 1867.]

In a summary complaint under the act of 16 Geo. II. c. 11, s. 24, respecting a wrong alleged to have been done upon the election of magistrates and councillors of a Scotch burgh, by the express provisions of the act it is necessary that all the magistrates and councillors should be parties in the proceeding

below, and, as Appellants or as Respondents, upon appeal to the House of Lords; as, upon a similar proceeding before the act, by action of declaratur, all persons interested must be parties. Where the whole body are not before the House no judgment can be given. Cases which have been decided contrary to this doctrine (*semb.*) are of doubtful authority.

Whether a special objection should be taken, at the election, and a vote, put upon the objection as a necessary preliminary to found the complaint under the act.—*Quære.*

The 7 Geo. II. c. 16, s. 7, does not expressly require such notice to, and summons of, magistrates and councillors as the 16 Geo II. c. 11, s. 24; but the latter act being passed to explain and amend the former (*semb.*) they may be considered in many respects as one act.

The proceeding under the act 16 Geo. II. m st be within two months after the election or wrong done. Whether this can apply to a case of continuance upon the roll, upon an election many years before, without actual re-election.—*Quære.*

[99] In the case of a party, not a magistrate or councillor, but having a vote, where the election is for life, and the party has demitted his office, being struck off the Roll, (*semb.*) there is no authority under the act to summon, and *à fortiori* no authority to hear and decide the case on summary application.

Whether this provision of the act is not confined to summary complaints under the act, and whether there is authority to extend the provisions to actions of declaratur not under the act.—*Quære.*

Upon a summary complaint under the 16 Geo. II. c. 11, s. 24, the Court of Session have no power to award *costs in part*, the act directing that they shall allow to the party who prevails *full costs of suit*.

According to the set or constitution of the burgh of Inverkeithing the council consists of fifteen persons at least, viz. the provost, two bailies, the dean of guild, and treasurer, and ten or more inhabitant burgesses.

The number of the ordinary councillors is indefinite, they must be at least ten. There is no annual election of councillors, as in most burghs; when those of the old council who are desirous to resign have demitted their offices, the magistrates and old council choose new councillors in the room of those who have resigned.

The *set* further provides, with regard to the election of magistrates and office-bearers on the 29th September yearly, in the following terms: "First, they elect the provost, then leets five of the council, and chooses two out of them for the ensuing year; next leets three, and chooses the dean of guild; and last two, and chooses the treasurer."

[100] It has been the practice of the burgh to follow the order here prescribed.

According to custom of the burgh, although there has been no re-election of councillors, those who are duly qualified continue in office during life.

At a meeting of the council on the 29th Sept. 1811, the minutes bear, that the following persons were present, viz. General A. Campbell, provost; W. Turnbull and Alex. Montgomery, bailies; J. Todd, dean of guild; Malcolm Brown, treasurer; Duncan Montgomery, W. Currie, J. Henderson, J. Adamson, Hugh Dawson, Will. Fulton, W. Lillie, D. Wishart, W. Ridley, Andrew Kirk, J. Barclay sen., J. Barclay jun., R. Angus, W. Bouthron, J. Gulland; and deacons J. Dove, D. Wishart, G. Grindlay, and R. Gowie.

At this meeting, after the ordinary forms of procedure were gone through, the council proceeded to the election of magistrates for the ensuing year; and, by a majority of twenty to four, re-elected Mr. Alexander Montgomery second bailie.

The following persons were also allowed to remain upon the roll of councillors:—Duncan Montgomery, John Gulland, William Fulton, David Wishart, Capt. John Montgomery, and John Muckersie.

A summary petition was presented to the Court of Session by the Appellants, in Nov. 1812, complaining of the proceedings at the then last Michaelmas election of magistrates and councillors of the Burgh; and praying the Court to find and declare,

"*Primo*, That the election of Alexander Montgomery, as bailie, was void and null, and also, that Alex. Montgomery had no right to continue [101] upon the roll

of councillors of that burgh upon the 29th of September last, or to sit, act, or vote in that capacity, and ought to be struck out of the list of councillors.—*Secundo*, That Duncan Montgomery was also disqualified from acting as a councillor of the burgh, or continuing on the roll of councillors, and that he ought to be struck off the same. *Tertio*, That John Gulland, William Fulton, and David Wishart, were disqualified from being councillors of the burgh, and that they had no right to sit, act, or vote upon the 29th of September last, and ought to be struck off the roll of councillors.—*Quarto*, To find that Captain John Montgomery, a pretended councillor, is not qualified to sit, act, or vote in that capacity, and that he ought to be struck off the roll of councillors of the burgh.—*Quinto*, That John Muckersie, a pretended councillor, is not qualified to sit, act, or vote in that capacity, and that he ought to be struck off the roll of councillors of the burgh.—*And lastly*, To find the complainers entitled to full costs of suit; and find, decern, and declare accordingly."

This petition was founded on the 16 Geo. II. c. 11, s. 24, which provides, "That it shall and may be lawful to and for any constituent member, at any meeting for election of magistrates or councillors, or of any meetings previous to that for the election of magistrates and councillors respectively, who shall apprehend any wrong to have been done by the majority of such meeting, to apply to the Court of Session by a summary complaint, for rectifying such abuse; or for making void the whole election [102] made by the majority; or for declaring and ascertaining the election made by the minority, so as such complaint be presented to the Court of Session within two calendar months after the annual election of the magistrates and councillors; and the Court shall thereupon grant a warrant for summoning the magistrates and councillors elected by the majority, upon thirty days notice, and shall hear and determine the complaint summarily, without abiding the course of any roll; and shall allow to the party who shall prevail their full costs of suit."

Answers were given in to this petition and complaint on the part of Gen. A. Campbell, provost; W. Turnbull, and A. Montgomery, bailies; And. Kirk, dean of guild; and Malcolm Brown, treasurer; D. Montgomery, W. Bouthron, W. Fulton, J. Henderson, J. Adamson, D. Wishart, W. Lillie, J. Montgomery, J. Muckersie, H. Dawson, J. Gulland, and Major-General D. Ballingall, councillors; and J. Dove, deacon of the incorporation of bakers; and G. Grindlay, deacon of the incorporation of weavers; all of the said burgh, at Michaelmas 1812;—and replies were given in by the Appellants; on advising which papers, the Court appointed the Appellants "to lodge, print, and box, within eight days, a condescendence, in terms of the Act of Sederunt, of the facts and circumstances which they aver, and offer to prove in support of their several objections to the several councillors and others objected to."

In their condescendence, the Appellants averred that the parties to whom they objected were disqualified by non-residence.

[103] To this condescendence answers were given in for the respondents, and the other parties then defenders.

A proof was allowed to the parties; and after some further procedure, pending which A. Montgomery, one of the original defenders, died; and General Campbell petitioned the Court to allow his name to be withdrawn from the list of Respondents to the complaint, on the ground of his having, on the 17th December 1814, addressed a letter to the provost, magistrates and council of the burgh of Inverkeithing, in which he resigned then, and for ever, any right he might have to the office of councillor in the said burgh: the proof was reported.

Having heard counsel on the import of the evidence, the Court ordered memorials, on considering which, they pronounced the following interlocutor:

"The Lords having advised the petition and complaint of R. Angus, J. Todd, and others, with the answers thereto, replies and duplies, depositions of witnesses adduced, and writs produced, and memorials for both parties; they find that the said complaint is competent against such of the Respondents as were continued on the roll of councillors of the burgh of Inverkeithing at Michaelmas 1812, in so far as they, or any of them, were by law disqualified from being so continued: Find, that by the set and constitution of the said burgh, the councillors thereof must be inhabitant burgesses, and, therefore, sustain the objections of non-inhabitancy made by the complainers against the continuance of the following persons on the said roll at Martinmas 1812, viz. J. Muckersie, J. Gulland, D. [104] Wishart, W.

Fulton, and Capt. J. Montgomery: Find, that the said persons, and each of them, were disqualified from being so continued, or from acting as councillors of the said burgh, and grant warrant to, and ordain the clerk of the said burgh to expunge their names from the said roll, and decern accordingly. Repel the whole objections to the continuance of D. Montgomery and Alex. Montgomery on the said roll of councillors at Michaelmas 1812; and also repel the whole objections to the election of Alexander Montgomery as a bailie of the burgh at Michaelmas 1812; and assoilzie them, and each of them, from the conclusions of the said complaint, and decern; but find none of the parties on either side entitled to expenses of process."

Against this interlocutor the Appellants presented a petition, praying the Court "to alter the interlocutor complained of, so far as regards Duncan and Alex. Montgomery; and to decern in terms of the petitioners complaint, and to find them entitled to expenses."

This petition was refused.

The Respondents also petitioned against the interlocutor, and prayed the Court "to alter the interlocutor complained of, to dismiss the complaint, and find the petitioners entitled to expenses; at least, to repel the objections to the qualifications of Capt. J. Montgomery, D. Wishart, and J. Gulland."

This Petition being answered by the Appellants, the Court pronounced the following interlocutor:

[105] "The Lords having resumed consideration of this petition, with the additional petition, answers thereto, and whole cause, they alter the interlocutor reclaimed against, and find the complaint incompetent, in as far as the same concludes against Capt. J. Montgomery, D. Wishart, and J. Gulland, in respect there was no special objection stated against them at the Michaelmas election 1812, no vote put upon such special objection, and consequently no wrong done by the magistrates at that election: therefore dismiss the said complaint, assoilzie the said Capt. J. Montgomery, D. Wishart, and J. Gulland, from the conclusions of the said complaint, and decern: Find the complainers liable in expenses, in as far as respects those incurred in discussing the point of competency: allow an account to be given in, and remit to the auditor to tax the same upon the principle above expressed, and to report."

A petition against this interlocutor on the part of the Appellants was refused; and the appeal was presented from these interlocutors.

For the Appellants: The Respondents having in the pleadings below joined issue on the question of residence, have thereby waived the objection to the competency. It is not an objection which nullifies the proceedings, or which the Court is bound to notice. The defenders having proceeded on the question of residence, it must be taken for granted that the special objection, if necessary, was taken at the election. As to the argument upon which the judgment below proceeds, it is [106] a fallacy. It has been decided* that persons not present at the election may complain of wrongs done by those who were present. If so, a specific objection to be made at the election cannot be necessary. In many cases† persons present, and not objecting, and even concurring in the proceedings at an election, have afterwards raised a complaint under the statute without objection. As to the argument that no wrong was done at that election, because the parties had been elected for life at former elections, the re-election or continuance of those persons as councillors is a wrong within the statutes, and the continuance is equivalent to a new election. If objection were necessary, the general protest made against illegal votes was sufficient. There was in fact an election of magistrates, and Wishart and Gulland, two of the persons against whom the complaint is made, did vote. The fallacy seems to have grown out of the misapplication of the statutory enactments in the case of freeholders of a county (16 Geo. II. c. 11. s. 1 to 21). But as to them, the statute has not said generally if *any wrong be done* it shall be competent to complain. The statute refers to the four cases of a claim rejected, an enrolment made, a continuance on the roll where there ought to have been a removal, and a removal where there ought to have been a continuance. It points out the mode of proceeding [107] in each of these cases. But there is no such provi-

* Wight, on Elect. 340, 341, citing the case of St. Andrew's, Kilk. p. 107.

† *Andrew v. Provost of Linlithgow*, Jan. 24, 1775, Dict. 1885; *Marshall v. Carr*, Dec. 4, 1782, Id. 1887; *Tenant v. Johnston*, Feb. 23, 1785, Id. 1888; *Harrower v. Meiklejohn*, 5th Dec. 1812. Not reported.

sion in the case of burgh elections (16 Geo. II. c. 11, s. 22 and seq.). In one case as to a freeholder (*Dempster v. Lyall*, March 3, 1791. Dict. 8868), where he had altered his status by parting with his freehold qualification, the complaint against the continuance of a person on the roll was found competent, although no special objection had been made at the meeting.*

For the Respondents: The conclusion of the petition and complaint, so far as it complains of the continuance of Alexander Montgomery and the other persons mentioned on the roll as councillors, and prays that they may be struck off the roll, is incompetent.

This is a summary proceeding under the statute not according to the ordinary course of the Court.

[108] The proceeding intended by the Legislature is not one for determining a question of right. In such a case the party must be left to his remedy by the common course of the law, viz. to his action of declarator (*Anderson*, 7th Feb. 1749, Dict. 1812; *Dunbar*, 7th Jan. 1757; Dict. 1855).

The complaint admits that the parties were on the roll of councillors previous to the election complained of; and it admits, that by the set or custom of the burgh the councillors *continue during life, without re-election*. But it affirms, that if they cease to be inhabitants *it is competent to object to them, and to apply to the Court to have them struck off*; and it concludes accordingly, by praying the Court, upon the merits of the case, *to find and declare as in a declaratory action*.

A meeting which adopts a practice sanctioned by long usage have not committed a wrong for which an immediate remedy is necessary, and which, if they attempt to defend, they must be *vi statuti* liable in costs. The whole frame of the statute shows that it had in contemplation those acts of injustice, or of culpable mistake, which were plain, and which tended to produce immediate injury to the individual complainers, or to the community; a description which cannot apply to the *boni fide* continuance of an usage which has long subsisted.

There is no re-election, or act of continuance of the old councillors on the roll. No such act is necessary by the constitution of the borough. The wrong therefore complained of was at the election of Michaelmas 1812, and the statutes require the summary proceeding to be within two months.

[109] For the Appellants, The Attorney-General, and Mr. W. Adam.

For the Respondents, Mr. C. Warren, and Mr. J. P. Grant.

[In the course of the argument the following observations were made by the Lord Chancellor and Lord Redesdale.]

The discretion which the Court below has exercised on the subject of costs is not given by the act (16th Geo. II.), which provides that full costs of suit shall be given.

The 7th Geo. II. c. 16, s. 7, does not name and limit the parties to be summoned on the complaint given by that act. But the 16th Geo. II. c. 11, s. 21, requires that the magistrates and councillors elected by the majority should be summoned upon a warrant issued by the Court. It requires, therefore, expressly, that all of them should be parties. How the decisions are to be reconciled with the provisions of the act it is difficult to see. Suppose a man had been struck off the roll who had a vote, not being a magistrate or councillor, how could he be summoned under the act? Or where the election is for life, and the party has demitted his office, if he is struck off the roll, it

* Whether actual residence is essential, and whether councillors elected for life were removable upon ceasing to reside, were questions not much discussed upon the hearing of the appeal, which was decided upon a preliminary question of form. On the heads of annual election and residence, see the following authorities *pro*: *Leges Burgorum*, c. 77; stat. 1469, c. 30; stat. 1487, c. 108; Wright, pp. 333, 344; Bankton, v. 2, b. 1, tit. 19, par. 8; case of the Mayor of Inverkeithing, Elchies Decs. Burgh Royal, No. 22; Falconer, vol. 1, p. 60; *Holburn v. Haldane*, D. P., July 14, 1761; Kames, Dec. *roce* Citation; *Dalrymple v. Stoddart*, 7th Aug. 1778; *Lamb v. Hall*, citing *Millar v. Nicholson*, 29 July 1789; *Cochrane v. Henderson*, 6th Feb. 1807 *Conc*. The case of Dumfries, *dict.* of Dec. v. Burgh Royal, p. 1810. That necessity of residence applies only to office-bearers, not to councillors; *Anderson*, 17 Feb. 1749, *Dunbar*, 7 Jan. 1757; *Id.* p. 1812; *Munro v. Forbes*, 19 July 1784; D. P. 3 May 1785, and the Records of the Borough.

may be doubted, notwithstanding the decisions, whether the Court has jurisdiction to summon the party, much less to hear and decide the case. In these acts giving summary jurisdiction, the power must not be extended beyond the cases for which express provision is made. Where are the words of the act which give jurisdiction to strike off the Roll? [110] especially if the disqualification of non-inhabitaney may be purged by subsequent residence. That is a very important question. The 16th Geo. II. being an act to explain and amend the 7th Geo. II., they may be considered in many respects as one act. In the proceeding by action of declaratur before the act all persons interested were made parties. But as the act directs who are to be parties, that direction is conclusive. It has been argued that the proceedings being penal in their nature, cease as to Alexander Montgomery by his death. But it may be doubtful, under the requisition of the statute, whether it is not necessary to revive against the representatives in case of death; although in a case where no costs are given it might be difficult to assign any cause for the revivor.

According to the act, in these cases of summary complaint, the proceeding must be commenced two months after the election. How can that provision be applied to the case of an election which took place twenty years before? The act speaks of a wrong done by the majority. In this case, so far as concerns the act of continuing the councillors on the Roll, it must be considered unanimous; for it does not appear that there was any separation or dissent expressed. How can a party complain of a wrong, to which, by implication, he was accessory?

With respect to actions brought before the passing of the acts of Geo. II., it was not necessary that they should be brought within two months. Where is the authority for limiting that time in such actions since the statutes, which apply only to summary complaints? In the case* cited by Wight, who [111] is generally an accurate writer, it does not appear that in the House of Lords there was any question or decision as to the limitation of two months on such actions. It was an action of reduction at common law. The decision is in general terms, no special ground being stated.

In this case many of the councillors are not parties to the appeal. If they had been made parties, and the petition had prayed that they might answer, judgment would have been given against them by default if they had not appeared upon the usual summons. We can do nothing against them in their absence, if you have not, by your proceeding in the appeal, given them the opportunity of appearing. We can only give judgment against those who are before the House individually, or against the whole body who are not before the House.

The Lord Chancellor: I have looked anxiously into the statute and the authorities, and considering the circumstances of this case, I can only advise the House to affirm the judgment, taking care distinctly to express in the terms of the order, the grounds on which it is made.

2 March 1821. The Lords find, that in the circumstances of this case an application by summary complaint to the Court of Session of Scotland could not be sustained, with respect to the Respondents, now before this House. It is therefore ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of, so far as they relate to the Respondents now before this House, be affirmed.

[112]

IRELAND.

COURT OF CHANCERY.

JANE HIGGINS,—*Appellant*; LAURENCE Earl of ROSSE,—*Respondent*
[9th March 1821].

[Mews' Dig. viii. 822; x. 1636. As to building leases, see Settled Land Act 1882, ss. 8, 9. As to defective execution, see Farwell on *Powers*, 2nd Ed. pp. 356, 359.]

By a deed executed in 1708 lands were vested in A. for life, remainder to B. for life, remainder to the issue of B. in tail, remainder to the heirs male of A.

* *Young v. Johnston*, Wight, 339, in C. of Sess. Jan. 1766, in D. P. 1767.

remainder to the right heirs of A. with power to A. and B. successively to grant leases for lives of any part of the lands in settlement, renewable for ever, without fine to be taken for any such *first* lease; such lease not to be of more lands than six plantation acres, at the best rent, with covenants to be in such leases for building, etc."

In 1726 A. grants to P. (under whom the Appellant claims) three leases, the two first being of houses and gardens, together with six plantation acres to each; the third lease being of a house, garden, and three acres; and all three leases being for three lives, with a covenant for renewal on application within six months after the failure of each life, on paying £4, and in case of neglect to forfeit the right of renewal.

In 1730 a new settlement is made, by which the lands are limited to A. for life, remainder to C. the son of B. (deceased) for life, remainder to the issue of C. remainder to several brothers of C. for life, in succession, and their issue in tail, in strict settlement; remainder to the right heirs of C. with power to A. to grant leases for three lives, renewable for ever, of any house and garden in the town of B. with ten acres of land, etc., and a similar power to C. and his brothers in succession, to lease any *plot* for a house and garden, with ten acres, etc.

In 1735 the third of the leases granted in 1726 was renewed by A. according to the covenant. After the date of this renewal, fines of the lands were levied by C. being in possession upon the death of A. In 1751 a recovery was suffered to such uses as C. and W. his son, should appoint, and in default of appointment to C. for life, remainder to W. and his heirs.

[113] By articles in 1754, and an act of parliament in 1758, the lands were limited to C. for life, remainder to W. for life, remainder to the issue of W. in tail, remainder to the right heirs of C. The act of parliament in pursuance of the articles vested a power in C. and W. severally in succession, to grant leases for three lives renewable for ever, of *any plot* for a house and garden in, etc., and any quantity of land not exceeding ten acres.

In 1779, by deed and recovery, the lands were limited, in default of appointment, to W. for life, remainder to L. (the Respondent in the appeal) in fee.

In 1786, W. the tenant for life named in the preceding settlement, renewed all the leases by deeds purporting to be executed in pursuance of the covenant for renewal, reciting the original leases of 1726; and that the leases had been frequently renewed; and containing covenants for renewal as in the original leases.

Further renewals to the same effect, and in the same form, were executed by W. in 1790.

W. died in 1791, when the fee vested in the Respondent. It did not appear, by direct proof, or otherwise, than by the recitals in the deeds of 1786, that any renewal had been made between 1735 and 1786. The rents reserved upon the leases were from time to time, and up to 1807, paid to and received by the owners of the lands for the time being, *including the Respondent*. In 1807 two of the *cestuy que vies* being dead, application was made to the Respondent for renewal, and upon refusal a bill was filed in Chancery to compel a specific performance of the covenant to grant renewals. The Bill was dismissed without costs, and on appeal the judgment was affirmed, on the ground (*scnb.*) that the leases were not warranted by the power.

Where a lease not warranted by a power is granted by a tenant for life, containing a covenant for perpetual renewal, the reversioner, by accepting for many years after he comes into possession the rent reserved upon the lease, does not confirm it so far as to make the covenant for renewal binding upon him.

By marriage settlement bearing date the 15th of Oct. 1708, and made between Sir W. Parsons and [114] William his son, and M. Parsons, of the first part; and certain trustees of the second, third, and fourth parts; the manor, etc. of Parsons town were conveyed to the trustees of the second part, and their heirs, to the use of Sir W. for life; rem. to trustees to preserve, etc.; rem. to *Will. Parsons for life*, remainder to preserve, etc.; rem. to the issue of that or any future marriage of Will in tail male; rem. to the heirs male of Sir W. with *remainder to his right heirs*.

The deed contained a *general* leasing power to Sir W., and to Will. Parsons to lease, etc., for any term not exceeding twenty-one years, or three lives.

There was also a power to Sir W. Parsons during his life, and after his death for Will. Parsons, during his life, to make leases for lives renewable for ever, without fine, present, or income, to be taken for any *such first lease* of any part of Parsonstown, and the other lands contiguous thereto, (the mansion-house, etc. excepted,) such lease not to contain or be of or for more lands than six plantation acres, at the best improved rent, with *covenants* to be in such lease or leases *for building* and improvements, and the fine to be taken for such lease or leases to be renewed not to exceed half a year's rent, reserved on the lands so to be leased.

There was issue of the marriage, Laurence, the eldest son; Will. the father died in the lifetime of Sir W. the grandfather.

By lease bearing date the 11th of Feb. 1726, made between Sir W. Parsons, of the one part, and N. Pritchett, of the other part, Sir W. Parsons, in consideration of the rents and covenants, etc. demised to Nicholas the house wherein Philip Langton then dwelt, [115] situate in Parsonstown, together with six acres of land, plantation measure, to hold all and singular the said demised premises, with the appurtenances, to N. Pritchett, his heirs and assigns, for the lives of the three persons therein named, and the survivors of them, and during the life and lives of such other person and persons as should for ever be added during the demise, at the yearly rent of £8 sterling, with clauses of distress and re-entry in case of non-payment.

The lease contained a covenant by Sir William Parsons for perpetual renewal, by adding new lives on payment of a small fine, such life to be renewed within six months after the falling of each life.

By another lease, bearing the same date, and made between the same parties, Sir William Parsons granted and demised to Nicholas Pritchett the house and garden wherein R. Gillespie of Parsonstown, saddler, dwelt, together with six acres of land, plantation measure, in Lough Guir, then or late in possession of Philip Langton, To hold for the three lives mentioned in the first lease, at the yearly rent of £4. This lease contained a covenant of renewal, upon payment of £2 as renewal fine, and clauses similar to those in the first lease.

By a third lease, bearing the same date, and made between the same parties, Sir William Parsons granted and demised to Nicholas Pritchett the house and garden in the Race Lane, near the town of Parsonstown, together with three acres of land, plantation measure, adjoining to the said house and garden, in possession of Philip Langton. To hold [116] for the same three lives as mentioned in the first and second leases, at the yearly rent of £2 sterling. This lease contained the covenant for renewal, and clauses similar to those in the two former leases. These leases do not appear to have been registered.

By a deed of settlement, bearing date the 1th of September 1730, made between Sir William Parsons and Laurence Parsons, his grandson and heir-apparent, of the first part; certain trustees of the second, third and fourth parts; and William Sprigge, and Mary Sprigge, his eldest daughter, of the fifth part, reciting certain articles of the 23d and 24th April 1683, and the settlement of 15th October 1708, and also reciting that a marriage was then shortly to be solemnized between Laurence Parsons and Mary Sprigge, Sir William and Laurence Parsons granted and conveyed the manor of Parsonstown, etc. to the trustees of the second part, and their heirs, upon trust, as to part of the lands to the use of Laurence for life, and as to the remainder (subject to a jointure) to the use of Sir William for life; remainder to Laurence Parsons for life; remainder to trustees to preserve, etc.; remainder to the first and every other son of the marriage in tail male; remainder in like manner to the first and every other son of Laurence by any after-taken wife in tail male; remainder to William Parsons, brother of Laurence, for life; remainder to trustees to preserve, etc.; remainder to the first and every other son of William in tail male; remainder in like manner to Pigott Parsons, George Parsons, and Thomas Parsons, brothers of Laurence; remainder to the right heirs of Laurence Parsons.

[117] This settlement also contained a general and a special leasing power in the words following:

"That it shall and may be lawful to and for the said Sir William Parsons to make leases for three lives, with renewals for ever, of any house and garden in

Parsonstown, with ten acres of land, plantation measure, and no more, to be held therewith, lying within one mile of the said town, at the best improved rent that can be had for the same at the time of setting, reserving half a year's rent on every renewal, and to make leases of any part of the said lands of which the said Sir William is tenant for life, for the term of three lives, at the best improved rent that can be had for the same at the time of setting; provided always, that such powers shall not extend to any part of the mansion-house, gardens, orchards and demesne lands of Parsonstown; and it is further agreed, that it shall and may be lawful to and for the said Laurence Parsons, and for all and every of the brothers of Laurence, to make leases of all or any part of the said granted and released premises, as he or they shall be or come into possession, for the term of three lives, or thirty-one years in possession, and not in reversion, at the best improved rent, without fine or income, with renewals for ever, reserving half a year's rent on each renewal, of any plot for a house and garden in Parsonstown, and ten acres of land to be held therewith, the said land lying within one mile of the town, (the mansion-house, and the gardens, orchards and demesne lands thereof excepted)."

There was issue of this marriage only one son, [118] William, (afterwards Sir William,) the father of the Respondent.

In 1735 a renewal of the third of the leases granted by Sir W. Parsons appears to have been made by an instrument, in writing, annexed to that lease, as follows:

"Whereas the annexed deed of lease, bearing date the 14th of February 1726, hath since the perfection thereof, through Nicholas Pritchett, the original lessee, deceased, and Walter Pritchett, his son and heir, also deceased, come by mesne assignment into the hands of John Luther, as by an indorsement on the said deed of lease may appear: And whereas the said Walter Pritchett, one of the lives in the said lease mentioned, died on or about the 23d of August last; and the said John Luther, pursuant to the clause for renewal in the annexed deed of lease set forth, having this day nominated the life of William Jessop, to be added and inserted in the place and room of the said William Pritchett, deceased: Now I, Sir William Parsons, Bart. in consideration of £1 sterling, or half-yearly rent of the annexed premises, to me in hand paid by the said John Luther, and in order to supply and fill up the three lives according to the intent of the annexed lease, have added and inserted, and by these presents do add and insert, the life of the said William Jessop to the time and term of the said lease, in the place and stead of the said Walter Pritchett, deceased; and do by these presents demise, rebase and confirm unto the said John [119] Luther, the demised premises in the town of Parsonstown, his heirs and assigns, and for and during the natural lives of John Burke and John Langton, in the next indenture named; and for and during the natural life of William Jessop now inserted in the place and stead of Walter Pritchett, deceased, and the survivor and survivors of them; and for and during the natural lives of such other person, as by virtue of the clause and covenants in the said lease contained, shall from time to time for ever hereafter be added during the said lease or covenants in said lease mentioned, subject nevertheless unto the clauses and covenants in the annexed lease reserved and mentioned. In witness whereof, etc. 12th February 1735 William Parsons."

Sir William died in 1749, and between the date of this last renewal and the settlement next stated, it appears that some fines had been levied by Sir Laurence.

In Hilary term 1751, a recovery of the estates was suffered by Sir Laurence Parsons and William his son, and the uses thereof were, by deed dated 19th January 1751, declared to be to such uses as Sir Laurence and William should jointly appoint, and in default of appointment to Sir Laurence for life; remainder to the use of William and his heirs.

By articles dated 28th of June 1751, and made between Sir Laurence Parsons and William Parsons, of the first part; Margaret Cleare, mother and guardian of Mary Cleare, and the said Mary Cleare, [120] of the second part, and certain trustees of the third and fourth parts; Sir Laurence Parsons covenanted with Margaret Cleare, her executors, administrators and assigns, that within twelve months after Mary Cleare should obtain her full age of twenty one years, and should join William Parsons, her intended husband, in a fine or fines of the real estates therein mentioned, to enure to the uses and purposes therein mentioned. Sir Laurence and

William Parsons should and would levy one or more fine or fines, and suffer one or more common recovery or recoveries, wherein all necessary parties should join; and by good and sufficient deed or deeds, conveyance or conveyances, limit and convey the manor, etc. of Parsonstown, with the several other towns and lands therein mentioned, the estates of Sir Laurence and William Parsons, or one of them, subject as therein mentioned, to the use of Sir Laurence Parsons for life; remainder to William Parsons for life; remainder to trustees to preserve contingent remainders: remainder to the first and other sons of the marriage in tail male; with remainder to the right heirs of Sir Laurence Parsons.

By these articles it was agreed that a leasing power should be given to Sir Laurence Parsons and William Parsons, and Mary Cleare, and each and every of them respectively, when actually seised by virtue of the limitations, to lease the premises (except the mansion and demesne lands) for any term or terms not exceeding thirty-one years, or three lives, or any term for years determinable on one, two, or three lives in possession, and not in reversion, [121] for the best rent, etc.; and that Sir Laurence Parsons and William Parsons might also make leases for three lives, with renewals for ever, reserving half a year's rent as a fine on each renewal of any plot for a house and garden in the town of Birr, (Parsonstown,) and of any quantity of land not exceeding ten acres, English statute measure, to be held therewith, etc.

These articles were registered on the 2d July 1754, and carried into effect by a private act of Parliament, passed on the 29th of April 1758.

The Respondent is the eldest son of this marriage.

By deed, leading the uses of a recovery, which was suffered accordingly, dated 20th of October 1779, and made between Sir William Parsons and the Respondent, then Laurence Parsons, his eldest son, Thomas Dames, and Jonathan Darby, of the first part; Edward King of the second part; and Robert Close of the third part; the manor and lands were vested in Edward King, and his heirs and assigns, as tenant of the freehold, for the purpose of suffering a recovery, the uses of which are by the deed declared to be as follows:—To the use of such persons, and for such estates, as Sir William and Laurence Parsons, or the survivor, should in such form as therein specified declare, direct, limit or appoint; and for default of and until such declaration, direction, limitation and appointment, to the use of Sir William Parsons and his assigns, for and during the term of his natural life, without impeachment of waste, and with all such powers as he now has over the same, and from and immediately after [122] his decease, to the use and behoof of Laurence Parsons, his heirs and assigns.

By deed of renewal, bearing date the 30th day of August 1786, made between Sir William Parsons of the one part, and Philip Langton of the other part; reciting the original lease of the 11th day of February 1726, made between Sir William Parsons, deceased, the grandfather of Sir William, party thereto, and Nicholas Pritchett; and also reciting, that Philip Langton, by mesne assignments, or otherwise, was then become entitled to the benefit of the said lease and covenant for the renewal therein contained; and that the *said lease had been frequently renewed*: the deed witnessed, that Sir William Parsons, in pursuance and execution of the said covenant for renewal, did demise and grant unto Philip Langton, the house and garden wherein Robert Gillespie, formerly of Parsonstown, sadler, dwelt, together with the other houses thereunto belonging; as also six acres of land in Lough Guir, formerly in the possession of Philip Langton, deceased: To hold the same, with all the rights, members and appurtenances whatsoever, for the lives of the three persons therein named, and for and during the natural life and lives of all such other person and persons as should from time to time, successively and for ever, be added by virtue of the covenant for perpetual renewal, contained in the said thereinbefore recited lease, subject to the yearly rent and renewal fines reserved and mentioned in the said second-mentioned original lease. This deed of renewal contained a covenant for renewal, similar to the one contained [123] in the original leases; and like renewals were also executed of the two other leases.

By deed, dated 23d December in the year 1790, and made between Sir William Parsons of the one part, and Philip Langton of the other part, reciting the original lease of 11th of February 1726 to Nicholas Pritchett, and reciting that the same was taken in trust for Philip Langton: the said indenture witnessed, that Sir William

Parsons, in pursuance and execution of the covenant of renewal in the said original lease, and in consideration of the rent and covenant in the same, demised and granted all the said lands and premises comprised in the said second mentioned original lease unto Philip Langton, his heirs and assigns, for the lives of the three persons therein named, and the lives and life of all such other person and persons as should from time to time thereafter be added thereto by virtue of the covenant for perpetual renewal in the said indenture of lease contained, subject to the yearly rent, renewal fines, and covenants in the original lease.

This deed of renewal contained a covenant for perpetual renewal by Sir William Parsons to Philip Langton, in the ordinary form. Like renewals were executed of the two other leases. Sir W. Parsons died in 1791, no appointment having been made under the settlement, whereupon the remainder in fee, for default of appointment, vested in the Respondent.

It did not appear by any direct proof, or otherwise, than by the recital in the deed of 1786, and presumptions from that recital, that the leases, or any of them, had been renewed between the years [124] 1735 and 1786. The rents reserved upon these several leases were from time to time, up to the year 1807, paid to and received by the several persons successively becoming entitled to and seised of the reversion in the lands, including the Respondent.

After the renewals of 1790, two of the *cestui que vies*, named in the deeds of that date, had died, but at what particular time did not appear.

In the Appellant filed a bill in the court of Chancery in Ireland, alleging that he had not until lately received intelligence of the death of the *cestui que vies*; and stating the facts before mentioned, prayed that the Respondent might be compelled to grant renewals of the leases, on payment of the fines due, with interest, which had been already tendered. The Respondent by his answer insisted that the *grantors* of the leases having exceeded the power, the leases were void; whereupon the Appellant filed an amended bill, stating the acceptance of rent under the leases, the possession of the counter-parts by all the successive owners of the reversion, no one of whom had objected to the leases as violations of the power, and that valuable improvements had been made in the premises; under which circumstances the Appellant insisted upon a right accruing by long acquiescence. The answer to the amended bill admitted the fines, and the possession of the counter-parts, but contended that the leases were void on various grounds. The cause was heard before Lord C. Manners in 1811, when the bill was dismissed without costs. In 1815 the Plaintiff in the original bill died intestate, as to the right in the leases. In [125] 1816 the Appellant, as heir at law, revived the cause and brought this appeal.

For the Appellant:—

The case of the Appellant is entitled to particular favour, from an undisturbed and undisputed possession of eighty years under renewable leases; a title which has been termed, "the local law and the old equity of the kingdom of Ireland" (2. Ridgw. Parl. Ca. 405, 406), *Mayor of Hull v. Horner* (Cowper 192); *Eldridge v. Knott* (Id. 245); citing a case, where (it was said) an act of parliament was presumed (by Lord Mansfield. *Quere*).

Sir Laurence Parsons, the Respondent's grandfather, was tenant in tail male under the settlement of 21th of April 1683, on which, and the subsequent settlements, the Respondent rested his defence to the original and amended bill of Philip Langton, the complainant below: Sir Laurence Parsons levied a fine of all the property included in the leases; considering him to be tenant for life, his fine operated as a forfeiture of his life-estate, and gave him a base fee until ousted by entry or claim of a person having an adverse title, and there never was such person; all the subsequent owners received the rent upon the leases. If Sir Laurence executed any leases of the property, his fine necessarily had the effect of confirming or establishing them; if he did not execute any leases, but did any act which, in the contemplation of a court of equity, amounted to an agreement to confirm and establish the leases made by his ancestors or predecessors in title, his fine [126] would confirm and establish those leases in equity. Now, Mr. Langton's bills expressly charge, and the Respondent's answers do not deny, that Sir Laurence renewed the subsisting leases; the Respondent's answers also state and insist on Sir Laurence's right to receive the rents, and his actual receipt of them; but he could only have this right in con-

sequence of either having executed, or having agreed to execute, a renewal; which ever it was it was necessarily established by the fine.—*Goodright v. Mead and Shiloon* (2 Burr. 705).

Sir William, the Respondent's father, died in 1791, and the Respondent himself received the rents from that time till 1807, when the complainant filed his bill, and all that time had the counter-parts of the leases in his possession; this amounts to an acquiescence in the leases, and an agreement to confirm and establish them.

Suppose that it was competent to the Respondent, when his title accrued, to dispute the lease, having suffered five years to elapse the right is gone. Long acquiescence applies equally to the right of renewal and to the lease.

If such leases or agreements are not to be judicially presumed, there has been an uniform possession by disseisin by the complainant below, and those through whom he derived his title, since the death of Sir William, the Respondent's great great grandfather, the original lessor: And thus the Respondent is reduced to the dilemma of either admitting the validity of the leases, and the clauses for renewal contained in them, or of admitting that a disseisin of the person under whom he claims was made [127] at a period of about seventy years preceding the filing of the bill in the Court below.

None of the Respondent's objections to the leases, on the ground of their not being warranted by the power of leasing contained in the settlements of 1708 and 1730, can be supported. The covenants for building, etc. apply only to a first lease, and after so great a lapse of time it must be presumed that this is not a first lease, but a confirmation of some prior lease, which probably conformed to the settlement. Besides, the houses having been in fact built as if the covenant had been inserted, the reversioner is not damaged, and equity will aid the defect. According to the argument of the Respondent, no leases could be made by any tenant for life where houses had been actually built, which is contrary to the principle of the decision in *Shannon v. Bradstreet* (1 S. and L. 60). That the leases are, at all events, conformable to the power in the deed of 1730, which extends to a house and garden, with ten acres, and requires no covenant for building to be inserted. There have been grants under that power, and even where two powers exist, and one is recited in exercising the power; if the act is void under that power, it may be held good under the power not recited. This, in effect and principle, was decided in the case of *Tomlinson v. Dighton* (1 P. W. 149, 10 Mod. 31 and 71), where the question was, whether it was a conveyance of an interest by a tenant for life, or the execution of a power not recited.

The Respondent, according to his own argument, being a purchaser, is bound by a covenant, the [128] covenant for perpetual renewal, of which he had notice at the time of his purchase, although the covenantor had no power, *Taylor v. Hibbert* (2 Ves. j. 437). In this case the Respondent became a purchaser with notice. As to the rent reserved, it must now be presumed that it was the best that could be had. That the three leases are made to one person is not more injurious to the reversioner than if they had been made to three persons.

It was a fraud on Mr. Langton, the complainant below, to permit him to expend the considerable sums of money, proved in the cause to have been expended by him, from the year 1791 (when the Respondent's supposed title to the possession accrued) till 1807, when Mr. Langton filed his bill, in valuable and permanent improvements of the premises, without the Respondent's giving him notice of its being his intention to dispute the right of renewal.

If the Court of Exchequer were of opinion that the leases were void for informality, and that Mr. Langton was not entitled to the renewal prayed for in his bill, the Court ought to have decreed a renewal of the leases on such terms as the power warranted, and the equity of the case required.

For the Respondent: The leases in question appear to have been intended as an evasion of the limit of the leasing power, in point of extent of land to be demised, and were designed as a fraud upon it, these three leases being all made and dated on the same day, for the [129] same term, for the same lives, and to the same person, were manifestly a contrivance to let to one person one piece of ground, containing in all about fifteen plantation acres, but so let in three leases instead of one, merely to evade the settlements: they are therefore to be considered as one lease, and not

as three distinct leases, and thus as demising a greater quantity of land Sir William, the lessor, was permitted by the said power so to let: It appears that the lessee and his family have ever since continued in the possession of the lands as if included in one single lease; and this attempt to evade the settlements, in taking three leases instead of one, clearly proves, that the lessee had full notice of the settlements, as such division could be for no other purpose than a fraudulent evasion of them.

The leases contain no covenant for building on the land not already built upon, nor for keeping in repair houses already built, for want of which the whole object and policy of the leasing power was liable to be defeated, the estate loaded with a perpetual lease, and the tenant at liberty either not to build or to let the houses fall, and convert the ground to other purposes quite foreign from the improvement of the town (*Jones v. Verney*, Willes, 169).

The attempt in the court below to sustain the renewals of 1786 and 1790, as substantive demises, to take effect under the then existing powers, was not warranted by the terms of those powers.

The articles of 1754, and act of Parliament, omit the power of leasing a house and garden for [130] ever, which was contained in the preceding settlement of 1730, and only authorize the leasing a plot for a house and garden, etc.

This omission must be considered as having been purposely made, and with the obvious intent in future of restraining the tenant for life from making a perpetual lease of a house, etc.; and it would appear that the reason of the family having thus by the subsequent settlement of 1754, left out the power of leasing a house, and confined and restricted the power of leasing to a plot for a house, arose from the experience they had, that the power of leasing a house already built did not promote sufficiently the object they had in view, namely, the improvement of the town of Parsonstown, and therefore they wisely confined the leasing power to a plot for a house.

The omission was evidently with a view that no lease with covenant for perpetual renewal should be from thenceforward, except of plots for houses, etc. and this intention could not have been effected without obliging the tenant to build; that is, all such leases should contain building covenants, for otherwise, without a covenant being imposed on the tenant to build, the plot might for ever remain unbuilt upon, and the intention of the parties be entirely defeated; and as those renewals, as well as the original leases, omit any covenants for building, they are on that score as objectionable as the original leases.

Neither a court of law nor equity would give so different an effect to the act of a tenant for life, intending merely to renew a lease which he con-[131]sidered valid, as to make it operate as an original substantive demise, when he must have supposed that he was only executing a renewal in virtue of a covenant supposed to attach on the estate. In the one case, the lessor makes no estimate of the present value, which in the other he does; and most certainly in 1786, when he executed the first renewal, Sir William, had he conceived that he was making an original lease, would have reserved more rent than was reserved in the original leases in 1726, upwards of 60 years before.

As to the points of acquiescence and improvements when investigated, there is nothing resulting from these considerations that could alter or affect the rights of the Respondent, or that ought in any manner to influence a court of equity on the subject, especially as the point was not raised by the pleadings, or made matter of argument in the court below.

As to the attempt made to support those leases, as a charge upon the ultimate reversion which was vested in the lessor in 1708, that question was not raised in the pleadings or arguments below; if it had been raised, it might easily have been answered. It will be found that that reversion has been long since barred and extinguished by the recoveries suffered in Hilary 1754 and Michaelmas 1779, of the intervening estates-tail, under which recoveries the Respondent claims.

These leases, having been executed by the tenant for life, can only take effect out of the powers annexed to his estate; but to do so they should have been made conformable to all the substantial conditions of those powers; and although they might charge [132] the ultimate reversion, had it come into possession, yet as the Respondent does not claim under that reversion, but as a purchaser under the estate-tail,

(enlarged into a fee by the recovery of 1754,) there can be no ground at law or in equity to bind his estate by any leases not conformable to the leasing powers.

For the Appellants. The Attorney-General, Mr. Butler; (and Mr. Sugden, who replied in the absence of the Attorney-General.)

For the Respondents, Mr. Hart and Mr. Wetherell.

In the course of the argument upon the question, as to the effect of the fines levied by Sir Laurence, Lord Redesdale observed, that the deed of 1730 altered the state of the reversion, which, according to the limitations of that deed, was not in the person who levied the fines, so as to cause a merger. Upon the question as to the effect of the leases of 1786 and 1790, he observed that they purported to be renewals merely, and not original leases under a power.

Upon the conformity of the lease to the power the Lord Chancellor observed, that the power was to lease six acres, with covenants for building: That the leases were of houses and gardens, together with six acres of land, and containing no covenant for building.

Upon the question as to the effect of the lease of 1786, and the possibility of its operation under [133] the power in the deed of 1730, Lord Redesdale observed, that, when that lease was granted, Sir W. Parsons was bound by the articles of 1754, and the provisions of the act by which they were carried into effect; and with respect to the fines by Sir Laurence, (he again observed) that the settlement of 1730 had limited the reversion to several brothers in succession; that the immediate reversion had been taken out of Laurence by that deed; and that the ultimate reversion in fee to Laurence, limited by that deed, was not the immediate reversion expectant upon the estates-tail.

On the 9th of March 1821 the judgment was affirmed without further observation.

[134]

SCOTLAND.

COURT OF SESSION.

SIR WILLIAM FRANCIS ELIOTT, of Stobs, baronet.—*Appellant*; GEORGE POTT, Tacksman of the Farms of Langside and Penelrhise.—*Respondent* [14th March, 1821].

A deed, in the form of a bond of tailzie, declared in the prohibitory clause that it should not be lawful for the entailor, nor any of his heirs or successors, to sell; and he and they were thereby bound and obliged not to "sell, analzie, wadset, *dispone*, dilapidate, and put away the lands," etc. The irritant clause is thus expressed: "and if I, or any of the heirs, whether male or female successive, shall contraveen, etc. by the said heirs female, not using the surname, etc. or who, whether male or female, and I shall *dispone* the said lands, etc.; and if I, or any of the persons or heirs foresaid, whether male or female, shall infringe or alter the succession and substitution foresaid, all such deeds, etc. shall be void, etc."

One of the heirs of tailzie in possession granted a lease for 77 years, at a reduced rent, etc. upon a grassum: Held, that the irritant clause, though confused and ungrammatical, was intelligible; and having received a construction in judgment upon a former litigation, could not be held to be unintelligible. Held also, that the lease was an *alienation* within the meaning of the prohibitory clause, and that the word "*dispone*" in the irritant clause was equivalent to the word "*alienate*," [135] and rendered the prohibition effectual, and the act of contravention void, in a question between third parties as lessees, purchasers, or creditors.

By a deed in the form of a bond of tailzie, and executed in the year 1749, by Sir Gilbert Elliott, it is "declared that it shall not be leisome nor lawful to me the said Sir Gilbert Elliott, nor to any of my heirs and successors foresaid to sell, and I hereby bind and oblige me and them not to sell, analzie, wadset, *dispone*, dilapidate, and put away the said lands, baronies and estate, or any part or portion thereof, heritably and irredeemably, or under reversion, (except in so far as the faculties above written to extend), nor contract or ontake debts thereupon, or grant bonds or other securities

therefor, nor do or commit any other facts, deeds or delicts, civil or criminal, whereby the said lands and estate may be anyways apprized, adjudged, forfeaulted, evicted or affected, nor to infringe, alter or innovate this present substitution and course of succession, in defraud and prejudice of the subsequent heirs of provision above mentioned, conform to the order and substitution above specified: neither shall it be lawful to me, nor to any of my heirs of provision foresaid, whether male or female, to suffer the said lands, baronies and estate, or any part thereof, to be adjudged or apprized for debts to be contracted, but shall be obliged to redeem the same within the space of eight years after deducing and leading any such diligence: And if I, or any of the said [136] heirs, whether male or female successive, shall contravene the premises, or do any fact or deed in prejudice hereof by the said heirs female, not using the surname of Elliott and my arms and title, or by the said unmarried heirs female not marrying a gentleman who, and their heirs, shall not use the same and my arms and title as above; or by the said heirs female, and they and their husbands and children not using the said surname, arms and title as aforesaid: or who, whether male or female, and I shall dispoise the said lands and estate, or any part thereof, or contract debts, or commit any other fact or deed during their respective marriages, or in favour of their respective husbands, wives and children (except in so far as is above provided,) whereby the said lands and estate may be evicted or affected in manner foresaid: or shall permit the same or any part thereof to be adjudged or apprized for any such debt and deeds, and not redeem the same within the limited time foresaid after leading thereof: and if I, or any of the persons and heirs foresaid, whether male or female, shall infringe or alter the succession and substitution foresaid: then and in any of these cases, not only shall all such deeds and contraventions to be done by me and the said heirs male and female, or any of them, during their respective marriages, so far as the same may burden and affect the said estate, and infringe or alter the succession, be *ipso facto* null, and of no effect by way of exception or reply, without any sentence and declarator to follow thereupon: but also I shall lose my right of life-rent, and the [137] other persons, doers of said deeds and committers of said contraventions or any of them, shall amit their right of succession, and be debarred from the said lands and estate; and all the infeftments and other rights thereof shall from thenceforth expire and become void as if they had never been granted: and the same shall accress to the next immediate person appointed to succeed to the said estate, and so forth, successive in case of divers contraventions: and that free of all debts, deeds, and delicts done, contracted, or committed by the contraveeners: and it shall be leisome to the next succeeding heirs to use and prosecute any legal way or method competent for establishing the right thereof in their persons, or in the persons of the remanent heirs of provision foresaid to succeed to them in manner above exprest."

Under this entail Sir William Elliott, father of the Appellant, entered into possession of the estate. In the year 1790 Sir William granted to Gideon Pott, father of the Respondent, a lease for nineteen years of the farms of Penchrise and Langside, part of the entailed estate, consisting of between 1000 and 5000 acres, at the rent of £281 8s. After possessing the farms four years upon this lease, a new transaction was entered into between the parties. On the 20th March 1794, Sir William granted a new lease of the same farms to Mr. Pott, at the rent of £285 for 77 years, on payment of a grassum, which amounted to £2904 15s. 9d.: and of the same date with the tack, Sir William Elliott granted a back-bond to the tenant, restricting the rent exigible during his life to £200. Sir William [138] died in May 1812, and was succeeded by the Appellant his son, who commenced the present action for reduction the lease, as an infringement of the restrictions of the entail.

The action having come before Lord Gillies, Ordinary, the Respondent by his defence maintained, in the first place, that the irritant and resolute clauses of the entail were so inaccurately and so incomprehensively worded, as to render the entail unavailable against third parties contracting with the heirs in possession of the estate; and secondly, that even supposing the irritant and resolute clauses to be effectual to the extent of the acts of contravention there enumerated, they could not invalidate the lease under discussion, because that enumeration, while it mentioned the act of disposing, omitted that of alienating, under which alone, in the absence of any express limitation of the power of leasing, the lease could be struck at as contrary to the restrictions of an entail.

On hearing parties the Lord Ordinary, by interlocutor, dated the 27th January 1813, "repelled the reasons of reduction, and assoilzied the defender from the conclusions of the action."

A short representation having been given in by the Appellant, and refused without answers, a second representation was given in, upon considering which, with answers, the following interlocutor was pronounced:—"The Lord Ordinary having considered this representation, with the answers thereto, finds, that the lease in question having been granted in consideration of a grassum, and for a period of seventy-seven years, is to be considered [139] as an alienation; and finds that alienations are prohibited by the entail of the estate of Stobs. But finds that the irritant and resolute clauses in the same deed of entail contain no reference to the specific prohibition against alienating, such as is necessary to render the same effectual against third parties: therefore refuses the desire of the representation, and adheres," etc. The Appellant having submitted this judgment to the review of the Court, "they adhered to the interlocutor of the Lord Ordinary, but found the petitioner not liable in the expenses of process."

In pronouncing this interlocutor, the Court being influenced, as it appeared to the Appellant, chiefly by an opinion that the entail was unavailable against third parties, in consequence of the inaccuracy and obscurity of the irritant and resolute clauses, the Appellant presented a petition, in which his argument was principally directed to establish the general efficacy of the entail. But the Court, having heard this petition, adhered to their former interlocutor.

The Appellant, by his appeal to the House of Lords, complained of the interlocutors of the Lord Ordinary of the 27th January and 19th February 1813, the interlocutor of the Lord Ordinary of 17th December 1813, in as far as the same finds that the irritant and resolute clauses in the deed of entail contain no reference to the specific prohibition against alienating such as is necessary to render the same effectual against third parties: and the interlocutors of the first division of the Lords of the 17th February and 10th March 1814, adhering to the interlocutors of the Lord Ordinary complained [140] of. The Respondent also, by his cross-appeal, complained of the Interlocutors, in so far as they find that the lease in question having been granted in consideration of a grassum, and for a period of 77 years, is to be considered as an alienation; and that alienations are prohibited by the entail of the estate of Stobs, and find the Appellant not liable in the expenses of process.

For the Appellant, Mr. Brougham.

For the Respondent, The Attorney General.*

* This was the second argument. On the first point, the question as to the grammatical construction, no authorities were cited, except that it was urged by Mr. Brougham, that in the Roxburgh and Tillicoultry cases there were the same errors of grammar; but it was argued on general grounds, and the structure of the clauses, on the one hand, that they were unintelligible, on the other, that they were intelligible, though ungrammatical and perplexed, and that they had already received a construction judicially in *Elliott v. Elliott*, May 1803. On the other questions, whether by the word "*disponere*" alienation was prohibited, and whether a lease of 77 years with a grassum was an alienation, the argument was in substance and effect the same as on the similar points in the Queensberry leases, *ante*, vol. 1, p. 339. See the Lord Chancellor's speech in moving judgment.

For the Appellant the following authorities were cited:—Fac. Coll. 19 May 1803, *Elliott v. Elliott*: Spottiswoode's Practics, *voce* Revocation, p. 306. *Voce* Improbatur. 1d. p. 168. Stair, b. 3, t. 2, s. 1, 3, and Introductory Remarks; Stat. 1571, c. 36. 39; 1581, c. 101; 1587, c. 111; 1593, c. 180; 1594, c. 211; 1597, c. 233. 234. 241. 256. McKenzie, vol. 2, p. 487. Kilkerran's Decis. p. 541. *Turner v. Turner*, 17 Nov. 1807, and 6 Dec. 1811; *Malcolm v. Henderson*, 17 Nov. 1807; Duke of Queensberry, 17 Nov. 1807; *Welch v. D. of Queensberry*, 12 Nov. 1812; Balfour's Prac. 171; Hope's Major Prac MS Reg. Maj. b. 2, c. 20 and 23; Ersk. b. 3, tit. 5, s. 1; Craig. Lib. 3, Diog. 4, s. 5, p. 479; and the dict. of Bailey and Jamieson. As to the form of the entail, Jurid. Styles, vol. 1, p. 202.

For the Respondent the following authorities were cited:—Case of Viscount Stormont, Feb. 26, 1662, Stair's Decis.; Mackenzie on Tailzies, v. 2, p. 187; Stair, b.

[141] The Lord Chancellor, after having stated the facts and pleadings, and the points at issue in the cause, proceeded as follows:— It is unnecessary for me to state, that in order to make the prohibition effectual against third parties there must be not only a clause prohibiting the thing to be done, but a clause rendering it null and void, and a clause [142] resolute in its nature, so that all the three clauses must strike at the act complained of; and if the one does strike at the act complained of, and the others do not, it would not be effectual as against third parties.

Two appeals have been presented, one of them against that part of the interlocutor which represented the lease in question as an alienation having been granted in consideration of a grassum, and for a period of seventy-seven years; of that appeal it appears now unnecessary to take much notice, because, by many late decisions, such a lease has been considered in this House an alienation; and therefore, if the prohibitory, irritant, and resolute clauses are sufficient to prohibit alienation, they must now, under the effect of those decisions, be taken to prohibit such a lease as an alienation. With respect to the other appeal, the substance of it is, that the Court ought not to have held the bond of tailzie to be unintelligible; or if they held it to be intelligible, but that the act which is to be taken as the alienation was not struck at by all the irritant and resolute clauses, that they erred in so considering it, because the word *disposing* being in the other clauses, while the word *alienate* is in the prohibitory clause, that the word *disposing* is in law a word which includes in it all that would be expressed by *alienating*; that it is not to be understood as technically meaning merely disposition, but that it will include alienation; and therefore, if a lease for seventy-seven years with a grassum, is an alienation, such an alienation is struck at by the word [143] *dispose*, as much as it would be struck at by the word *alienate*, if the word *alienate* had been in all the clauses.

This case has been twice decided by the Court of Session. In the year 1803 there was a cause in the Court of Session, Sir William Elliott against the heirs of entail of Stobs; it was a question *inter hueredes*, and not a question between strangers, but that does not make any difference as to the point, whether the deed of tailzie is intelligible; it may make a difference as to the other question in this appeal. The case, after stating the deed of entail of the 17th of September 1718, which is the deed of restriction now under consideration, stated that Sir Gilbert made up new titles to his estate, on the footing of his entail, in 1719 and 1720, upon which he and his eldest son were infeft. The entail was recorded in 1721, and Sir Gilbert possessed the lands upon these titles till his death in 1764. He was then succeeded by his eldest son Sir John, who possessed the estate upon the titles made up in his father's lifetime, and died in 1767, being succeeded by his eldest son Sir Francis, who also made up titles in terms of the entail; and, upon his death in 1791, Sir William succeeded, and made up his titles under the entail as his predecessors had done, on which titles he has ever since possessed the estate. In the year 1801 Sir William entered into a minute of sale with Mr. Joseph Gillon, writer in Edinburgh, of a part of the estate. Mr. Gillon suspended the payment of the price, on this ground, that Sir William had

2, c. 3, s. 56; Erskine, b. 3, c. 8, s. 25; *Young v. Bothwells*, Dec. 7, 1705, Forbes; *Redhaugh v. Bruce*, 11 Mar. 1707, Forbes; Cray of Riccarton, 13 June 1712; *Baillie v. Carmichael*, 11 July 1731; Primrose, 27 Jan. 1741; Kirk, p. 510; *Hag v. His Maj. Advocats*, 9 Feb. 1758; Creditors of Hepburn, Feb. 1758, affirmed on appeal; *Bryson v. Chapman*, 22 Jan. 1760; *Bruce v. Bruce*, 15 Jan. 1769, affirmed on appeal; Craig, p. 310, s. 12; Hope's Minor Pract., p. 106, tit. 16, s. 11; *Smyth b. 2*, tit. 3, s. 38; Mackenzie, b. 3, tit. 8, s. 17; Bankton, vol. 1, p. 587, s. 119; Ersk. b. 3, tit. 1, s. 29; Ross, 1 Nov. 1713; Lesslie of Findrassie, 24 July 1752; Balfour of Randolph, 11 Feb. 1758; Case of Dumfrieth, D. P. 15 April 1771; *Hepburn v. Lord Hopatoun*, 15 Feb. 1732, affirmed on appeal; *Campbell v. Wightman*, 17 June 1746, Falc.; *Sinclair v. Sinclair*, 9 Nov. 1749, Falc.; *Weir v. Drummond*, 2 Nov. 1752; *Scott Aisbet v. Young*, Nov. 1763; Case of Tilliecultray, Nov. 1764; *Kemp v. Batt*, 15 Jan. 1749; *Stewart v. Horne*, 8 July 1789; *Brown v. Countess of Dalhousie*, 25 May 1801; Craig, b. 2; Dieg. 3, p. 201, s. 27; Bankton, b. 2, tit. 9; b. 3, tit. 2, s. 1, 2, 5 and 6; Ersk. Inst. b. 2, tit. 7, s. 2; Ersk. smaller work, p. 323, tit. 5; Jurid. Styl. vol. 1, p. 502, 503, 504; Russell's Conveyancing, Index, Dallas's Styles, Supplement to Spottiswoode, p. 38; Mack. Inst. b. 3, tit. 5, s. 1.

no power to implement the minute of sale on his part, being restricted from selling by the [144] entail of Stobs. The bill of suspension was passed of consent. Then there arose another cause. Sir William brought actions of reduction and declarator of the tailzie and subsequent investitures, calling as defenders all the heirs of entail in existence. There is a mode of proceeding in Scotland which we do not adopt in this part of the kingdom, that is, that where persons conceive themselves entitled to certain estates, they bring an action of declarator, when no persons dispute it, against all those who may choose to oppose their claim; and there certainly is great convenience in this practice. The Courts of Scotland are very much attached to this mode of proceeding; whereas our courts of justice are very much in the habit, when they find that the proceeding is to settle a question which cannot be said strictly to have arisen between the parties, to refuse to give any decision whatever upon it. Within my own recollection in practice this House has been called upon to decide, and has occasionally decided in similar cases. Formerly contracts used to be made for sales of estates. Bills were filed in the Court of Chancery for the specific performance of the contracts, the intention and ultimate object being to bring the question before the House of Lords to get their decision, which could not bind others, though it would be a great authority as to whether the party had or not the right to sell. This appears to have been put an end to by another mode of proceeding, which began about the time of *Shapland v. Smith* (1 Brown's C. C. 74), in which case Lord Thurlow decided, [145] that if there was considerable doubt with respect to a title, he would not compel the purchaser to take. Mr. Baron Eyre, (afterwards Lord Chief Baron, and Lord Chief Justice Eyre.) I remember, was a good deal shocked, because he was of opinion there could be no such thing as uncertainty in the law; and he did not approve of that decision. But it has since been taken for granted, that if there is serious doubt of the title, whatever might be the law before, the Court will not compel the party to take the title, and so that mode of proceeding appears to have been very much discussed in the courts of justice in England.

In the result of this action of declarator, Sir William maintained this separate plea, "that the entail was ineffectual to prevent a sale, being defective in its various clauses, in support of which he maintained that the limitations of an entail are not to be extended by inference or implication beyond what is expressed in the entail itself (a proposition to which full assent will be given); and wherever these limitations are directed against third parties, as in the case of a prohibition to sell or contract debt, in order to render these effectual against purchasers or creditors, it is necessary that the prohibitory and irritant clauses should be accompanied by a resolute clause making void the right of the contravener." Then cases are mentioned. "The irritant and resolute clauses, besides, must be precisely applicable to the act of contravention, in order to be effectual against third parties," and Bruce of Tillycultry's case is cited.

[146] In this case it is said "the irritant and resolute clauses, instead of bearing in general that all the acts of contravention contained in the prohibitory clause shall be void and null, or shall subject the heir to a forfeiture, especially enumerate the various cases to which they are meant to apply." That would be more accurately put if it was stated that after the declaration, that they are not to contravene in any respect the provisions contained in the instrument, it enumerates various cases to which such contravention would extend. They say further, "That in order to render void an act of contravention it must be done by Sir Gilbert and the heirs,—it must be done by the heirs during their respective marriages,—and it must be such as to burden or affect the estate, and infringe or alter the succession. But to enter into a minute of sale does not fall under any of the cases enumerated as qualified and explained by the irritant clause, in which cases alone contravention of the entail can be effectual against third parties. The prohibition to sell, analzie, wadset, dispone, dilapidate, and put away the said lands, is most ample; but in the irritant and resolute clauses there is not one word about selling, nor any thing which in sound legal construction can be held to be equivalent to it." (Whether there is any thing which can be held to be equivalent to it is precisely the question.) "The only words having the least reference to this prohibition are those in the irritant and resolute clauses, 'or *who*, whether male or female, and I shall dispone the said lands and estate, or any part thereof.' Now, the relative *who* refers to the nearest antecedent clause, heirs-[147]-

female, their husbands and children, none of which Sir William is; at least, if it does not, this clause is so uncertain as to be insufficient for imposing fetters, which can only be done by clear expression to affect the rights of purchasers and creditors. Again, the disposition must be granted in concurrence with Sir Gilbert himself, 'who, whether male or female, *and I*;' and it can only take place in case they concur to dispose the estate, but does not take place in any of the other ways by which the estate may be alienated; *e.g.* by a minute of sale. The statute 1685 distinguishes between selling, analzieing, and disposing, as being different modes of affecting property. Selling or analzieing, therefore, by a minute of sale, is different from disposing, and the minute of sale may be completed by the purchaser adjudging in implement." I read this, because it appears to me that the substance and marrow of the argument is contained in these pleadings.

On the other hand, the answer appears to me to contain the substance of all that has been stated at the bar on the other side. The act of 1685, permitting proprietors to entail their property, has prescribed no form of words which shall be essential for carrying the entailor's intention into effect, nor have the decisions of the Court as yet supplied the deficiency. It is only necessary that the clauses should be clearly and distinctly expressed, so that the meaning of the entailor may be carried into effect, without resorting to any constrained or violent construction of the words.

In *Bruce v. Bruce* (15 Jan. 1799. Dict. 15539), the entail of Tillycoultry, [148] among other prohibitions, contained one directed against selling, analzieing, dilapidating, or putting away the foresaid lands or estate. The resolute clause did not contain a general reference merely to the various prohibitions as the irritant clause did, but proceeded to a special enumeration of the acts of contravention, which would forfeit the contravener's right, thus limiting and circumscribing the effects of the general reference. Among those acts of contravention the whole clause *de non alienando* was omitted, and no words which could apply to it were inserted. The strict interpretation of entails will probably not be carried farther than it was there. The present question, however, is one very different. On examining the enumeration of cases to which the irritant and resolute clauses of the estate of Stobs are meant to apply, the first part of them refers to the prohibitions with regard to the entailor's surname, title, and arms, and with regard to the heirs female and their husbands and children using the same surname, title, and arms. Then, as the heirs of entail, as well as the entailor, were prohibited from alienating, contracting debt, or altering the succession, the next part of the clause, "quite distinct and independent of the former, and beginning, " or who, whether male or female, and I shall dispose the said lands," ---relates to these last prohibitions. The irritant clause begins with the words, "And if I or any of the said heirs, whether male or female, successive, shall contravene the premises;" and the remainder is merely a continuation of that sentence. The pronoun *who*, therefore, applies to any of the said heirs; and particularly [149] when connected with the words, "whether male or female, and I shall dispose," it can relate to no others than the heirs of entail, as the heirs of entail, male and female, and the entailor himself, had been prohibited from alienation. Nor is the irritancy confined to a deed of an heir, in concurrence with the entailor; that depends certainly upon the whole extent and meaning and construction of the clause. The entailor, by the construction of the tailzie, became a life-renter, and no prohibition against him was necessary; and if he had not, he could not have irritated his own deed, or deprived his creditors of the means of attaching his estate, so long as he continued proprietor of it, so that the addition *and I* to the various clauses is unnecessary, and should be held *pro non scripto*. The intention of the entailor is obvious. The clause itself begins thus, "If I, or any of the said heirs." Afterwards, when *and* is used, it is used as being synonymous with *or*, which, in common language, it frequently is. Again, the irritancy is applicable to a sale of the estate, as disposing is one of the acts specially enumerated, making this case thus far different from the case of Tillycoultry. Selling, however, it is said, is not included under the general term to dispose. But these words are synonymous; they are different modes of expressing the same act, and, together with analzie, are so used by the statute of 1685. Perhaps, of all the terms, sell, analzie, wadset, dispose, dilapidate, and put away, used in the prohibitory clause, *dispose* is the most general, and it is therefore used as an equivalent to them. What this House has found in other cases as to the effect [150] of the word *dispose* I need not remind you. The question

which arises is not whether in many cases the meaning of the word *dispone* may not be to sell, but whether it is so in this case, taken in the way in which it stands here. The irritant clause continues, "Then, and in any of these cases, not only shall all such deeds and contraventions to be done by me and the said heirs male or female,"—this first part applying to such prohibitions as are directed against the entailor or the heirs of entail; and then proceeds,—“or any of them, during their respective marriages,” comprehending the other class of contraventions as to the name, arms, and title which are to be borne by the heirs-female and their husbands, and which prohibitions are contradistinguished throughout every clause in the entail. All these are irritated, so far as they burden and affect the estate, which last term is sufficient to include the sale in question.

Mr. Solicitor-General Blair and Mr. Ross were concerned as counsel in this cause; and the Court of Session were of opinion, which they expressed on the 19th of May 1803, both that this clause was intelligible, and that the word *dispone* in the irritant and resolute clause was quite sufficient to support the entail. But it has been intimated to us, that we are to consider this a case of collusion. Now I do not see how that is made out; for unless the Judges were colluding, I must look at it as containing their opinions in 1803. It is said this is not a *res judicata* between the parties. I agree that it is not a *res judicata* with respect to the Respondent at the bar; but still it is the opinion of the Court of [151] Session upon precisely the same points; and if they were of opinion that a man cannot sell, they must be of opinion a man cannot buy. The question, therefore, upon the whole, appears to be this, whether the opinion of the Court of Session in 1803, or the opinion of the Court of Session in the present case, is the better opinion? It appears to me to be reduced to two points; namely, whether this deed is intelligible; and if this deed be intelligible, what is the effect of it with respect to the sufficiency of the three respective clauses. Now it is a very dangerous thing to come to a decision that an instrument is not intelligible which has been so far the subject of judgment: and though one cannot help seeing that almost every rule of grammar is sacrificed in this deed, yet, if we were to hold this to be unintelligible, I cannot conceive how it can be said to have been satisfactorily determined unless it was understood. I am of opinion this instrument is an instrument capable of being understood, and that reduces it to the question, What is the effect of the word *dispone*, regard being had to the whole context of this instrument? After the decisions which have been come to upon the word *dispone*, and after (what is of infinitely more weight) the great authority to be found in the law of Scotland, antecedent to any such decision, as to the effect of the word *dispone*, I cannot help stating it, after much consideration of the case, as my judgment, that this word *dispone* in these other clauses is quite sufficient for the purpose of protecting this entail; and unless any of your Lordships are of a different opinion, it appears to me that this judgment must be reversed.

[152]

14 March 1821.

Ordered and adjudged, That the said interlocutor of the Lord Ordinary of the 27th of January and the 19th of February 1813, complained of in the said appeal, be and the same are hereby reversed: Further ordered and adjudged, that the said interlocutor of the Lord Ordinary of the 17th December 1813, also complained of, be and the same is hereby reversed: except so much thereof as finds that the case in question having been granted in consideration of a grassum for a period of 77 years, was to be considered as an alienation: and as finds that alienations were prohibited by the entail of the estate of Stobs: Further ordered and adjudged, that the said interlocutors of the Lords of Session, of the 1st division of the 17th of February and 10th of March 1814, also complained of in the said appeal, be and the same are hereby reversed: and the Lords find, that according to the true construction of the deed of entail of the estate, the prohibition to dispose extends to the lease in question, and that the irritant and resolute clauses in the same deed of entail do so refer to the specific prohibition to dispose, as to render the same effectual against third parties, and therefore sustain the reasons of reduction of the lease in question: Further ordered and adjudged, that the said cross-appeal be dismissed this house: Further ordered, that the said cause be remitted back to the court of Session in Scotland, to do therein as shall be consistent with this judgment, and as shall be just.

[153]

ENGLAND.

COURT OF CHANCERY.

The UNITED COMPANY of MERCHANTS of ENGLAND, TRADING to the EAST INDIES,—*Appellants*; ROGER KYNASTON, Esq.,—*Respondent* * [9th March 1821]

[Mews' Dig. xi. 402. Commented on in *Smith v. Peters* 1875, L.R. 20 Eq. 513; and see *A.G. v. Chambers* 1849, 12 Beav. 159; *Ennor v. Barwell* 1860, 4 De G. F. and J. 529; *Bennitt v. Whitehouse* 1860, 28 Beav. 119, at pp. 120 and 121; *Bennett v. Griffiths* 1861, 3 E. and E. 167 at pp. 176-7; see R. S. C. 1883, Ord. 50. As to observations of Lord Redesdale (3 Bli. 161) as to sheriff breaking open doors, see note to *Burdett v. Abbot* 1817, 5 Dow. 165.]

The Respondent, an inappropriate rector, having by a decree of the Court of Chancery been found to be entitled (under the decree made in pursuance of the act 37 Henry VIII.) to the tithes, according to the value, of warehouses in London, occupied by the Appellants, and which never had been rented, the Court has jurisdiction to make an order upon the Appellants to permit inspection, for the purpose of ascertaining the value.

Such an order cannot be executed by force, but operates only on the person, as a foundation for process of contempt, and to take the Bill, *pro confesso*, if necessary.

The Respondent, the impropriator or inappropriate rector of the parish of St. Botolph without Aldgate, part whereof lies within the city of London, or the liberties thereof, being entitled to the tithes of that parish, in the month of July 1801, filed his bill of complaint in Chancery against the Appellants, who were in possession, as the owners and occupiers of certain warehouses and other premises situate in Gravel-lane, Petticoat-lane, Harrow-alley, Cutler's-street, and Parker's-gardens, within that [154] part of the parish lying within the city of London. The bill prayed that an account might be taken of the several sums of money due and owing to the Respondent from the Appellants, in respect of the tithes, rates for tithes, sums or customary payments, or other duties in lieu of tithes, on account of the warehouses and other premises held or occupied by them within such part of the rectory or parish of St. Botolph as aforesaid, or the titheable places thereof, in each year since the said month of May 1801, and that the Appellants might pay to the Respondent the money which should be so found due from them on the taking of such account. The Respondent, by the bill, setting forth a certain decree duly enrolled in the said Court of Chancery, bearing date on the 23d of February 1515, and made by Thomas, then Lord Archbishop of Canterbury, and others, in pursuance of an Act of Parliament passed in the 37th year of the reign of Henry VIII, intituled, "An Act for Tithes in London," and charging that the tithes payable by the Appellants in respect of their premises, and the amount of the several sums to be paid by them, ought to be computed after the rate and in the manner directed by the decree, in proportion to the then or improved or last rent or value of the premises; and insisted upon his right to the tithes after such mode of computation. The Appellants, by their answer, stated "that all the warehouses and dwellinghouses situate in the places specified in the bill, were built by them; that having built, and being themselves the owners of the warehouses and dwelling-houses, they did not then, nor ever did, hold the same or [155] any part thereof under any yearly or other rent, or for any consideration in the nature or in lieu of rent, and that no yearly or other rent had at any time been paid for the said warehouses or ground. That as to all the warehouses then in the occupation of them the Appellants, (except some warehouses called Rumball's, about which at present there is no question,) theretofore mentioned to be situate within that part of the said rectory or parish which is within the said city of London or the liberties thereof, the Appellants never having held the same at or subject to any rent,

* See this case upon the hearing in the Court below, 3 Swan. 248

and no part thereof having been let since they were built, they the Appellants were unable to set forth as to their knowledge what was the then actual value thereof."

The bill was afterwards amended, and the Appellants put in a further answer, the Respondent replied thereto; and the cause, being at issue, came on to be heard on the 2d day of March 1818, before the Master of the Rolls, when his Honor declared, "That the Respondent was entitled, among other things, to tithes after the rate of two shillings and nine pence in the pound upon the annual value of all the messuages, warehouses, and other premises held or occupied by them (the Appellants) within the said parish of St. Botolph without Aldgate, in the city of London, except the said premises called Rumball's warehouses; and he did order and decree that it should be referred to Mr. Thompson, one of the Masters of the said Court of Chancery, to ascertain the value of the premises, except as aforesaid, and to [156] take an account of what was due to the Respondent for tithes at the rate aforesaid; and that the Appellants should pay to the Respondent, what should be reported due to him on taking of the said account, together with the costs of the said suit."

In pursuance of this decree, interrogatories on behalf of the Respondent were, in or about the month of November, carried into the office of the Master, for the examination of the Respondent's witnesses as to the value of the warehouses and other premises above mentioned, and three witnesses were then examined on his behalf, namely, Mr. James Burton, William Montague, and Joseph Kaye. In the course of the following December, interrogatories were carried into the Master's office on the part of the Appellants for the examination of witnesses on their behalf, upon which Mr. Dennis Chapman, Mr. John Shaw, Mr. William Pilkington, and Mr. S. P. Cockerell were examined.

All the persons who had been so examined on the part of the Respondent were surveyors or architects, and, together with those examined on the part of the Appellants, were not otherwise practically acquainted with the nature or value of the premises in question.

Under these circumstances, and upon the special ground, that where surveyors alone are examined upon the subject of the value of any particular premises, their several estimates usually differ so widely in amount that it is extremely difficult, and in some instances almost impossible, upon such testimony, to come to any just conclusion as to the value, the [157] Respondent laid before the Master, in addition to the evidence of the surveyors, the evidence of some experienced warehousemen and wharfingers, whose practical acquaintance with, and knowledge of, the value of premises similar to those, which were the subject of the above inquiry, might assist the Master in forming a judgment upon the matter referred to him.

With this view, the other depositions not having been published, publication was enlarged at the instance of the Respondent, and it was proposed on his behalf to examine two experienced warehousemen, who were stated to be peculiarly well qualified to furnish the Master with practical information; and in order that the testimony of those persons might be as full as possible, application was made on behalf of the Respondent to the Appellants, that those two witnesses might be permitted to inspect the interior of the warehouses in question, preparatory to their being examined.

With this application the Appellants refused to comply, although the other witnesses, who had before been examined, had been permitted to have an inspection of the premises previous to their examination; the Respondent therefore applied to the Court of Chancery for an order upon the Appellants to grant such inspection.

This application was made by motion before the Vice-Chancellor, on the 6th of February 1819, supported by the affidavit of Richard Grose Burfoot, the Respondent's solicitor, when his Honor ordered, "That it should be referred to Mr. Thompson, the same Master to whom the cause stood referred, to [158] inquire, and state to the Court whether an inspection of the several warehouses and premises before mentioned to be in the occupation of the Appellants in Gravel-lane, Petticoat-lane, Harrow-alley, Cutler's-street, and Parker's-gardens respectively, by the said Joseph Sills and Robert Smith, (in the said order, by mistake, called William Smith,) preparatory to their being examined as witnesses upon interrogatories carried into the said Master's office by the Respondent, in pursuance of the decree made on the hearing of the said cause,

the 2d day of March 1818, (and which is the decree hereinbefore stated,) was necessary for the said Master to form his conclusion upon the matters thereby referred to him; and after the said Master should have made his report, such further order should be made as should be just."

The Appellants were dissatisfied with this order, and accordingly applied by motion to the Lord Chancellor to discharge it; but he being of opinion, after argument, that the order was right, refused the motion.

Pending these proceedings before the Lord Chancellor, the Master, in pursuance of the order of the 6th of February, made his report, bearing date the 24th day of March, whereby, after reciting the order, he certified that there had been laid before him the affidavits of Richard Grose Burfoot, Joseph Sills, wharfinger and warehouse-keeper, and Robert Smith, wharfinger and warehouse-keeper, and the further affidavit of the said Richard Grose Burfoot; and the said Master, after stating the purport and effect of those affidavits, "was, upon consideration [159] of the said affidavits, and of what had been alleged before him by the solicitors for the said parties, of opinion that an inspection of the several warehouses and premises hereinbefore mentioned to be in the occupation of the said Appellants, in Gravel-lane, Petticoat-lane, Harrow-alley, Cutler's-street, and Parker's-gardens respectively, by the said Joseph Sills and Robert Smith, preparatory to their being examined as witnesses upon the interrogatories exhibited by the said Respondent before him for the examination of witnesses, in respect of the matters referred to him by the said decree of the 2d of March 1818, was necessary for him to form a satisfactory conclusion upon the matters referred to him by the said decree."

This report having been filed, the Respondent preferred a petition unto the Lord Chancellor, praying that the report might be confirmed, and that the aforesaid Joseph Sills and Robert Smith might be at liberty forthwith to inspect the several warehouses and premises.

Upon the 7th of April 1819, this petition came on to be heard before the Vice-Chancellor, when counsel for the Respondent attending accordingly, and no one attending for the Appellants, although they had been duly served with a copy of the said petition, and his Lordship's order made thereon, as appeared by affidavit then produced and read, the Court ordered, "That the said Master's said report should be confirmed. And it was ordered that the said Appellants should permit the said Joseph Sills and Robert Smith to inspect the said several [160] warehouses and premises in Gravel-lane, Petticoat-lane, Harrow-alley, Cutler's-street, and Parker's-gardens respectively, preparatory to their being examined as witnesses upon such interrogatories as aforesaid."

The East India Company then presented a petition of Appeal to the Lord Chancellor, stating themselves to be aggrieved by the said two several orders of his Honor the Vice-Chancellor, bearing date the 6th day of February and 7th day of April, 1819, and by each of them, and praying that the same might be reversed.

On the 1th day of May 1819, upon the hearing of the petition, the Lord Chancellor affirmed the two orders of the Vice-Chancellor.

From these three orders, bearing date respectively the 6th day of February, 7th day of April, and 1th day of May 1819, the appeal to the House of Lords was presented.

For the Appellants: The occupiers of private dwelling houses, warehouses and premises, are by law entitled to the exclusive possession and enjoyment thereof, and the same cannot, against or without the consent of such occupiers, be lawfully entered by any person, under any pretence whatsoever, except by a lawful warrant or authority for that purpose:

The Court of Chancery has never been, and is not, possessed of any authority to order any subject of this realm to open his doors, and permit an inspection of the interior of his dwelling or premises for any purpose whatsoever; nor is it pretended [161] that any instance can be found; but, on the contrary, it is admitted that no instance can be found in which the Court of Chancery has ever heretofore assumed or exercised any such authority.

For the Respondents: It was competent to, and within the authority of the Court of Chancery, in such a case as the present, to require and compel the Appellants to allow the witnesses of the Respondent to survey and inspect the premises in question:

An inspection of the interior of the above-mentioned premises by Joseph Sills

and Robert Smith, previous to their being examined, is necessary, in order that their evidence may be complete and satisfactory, and that the Court may have such full information as is essential to enable it to form a correct judgment, with respect to the true value of these premises:

It is apparent, that unless the witnesses on both sides, in cases like the present, are permitted to have such inspection as is here sought, the Court will in effect be obliged to determine all such cases upon evidence adduced on one side only, and by that party which is most materially interested in depreciating the premises, which are the subject of inquiry, below their real value.

For the Appellant, The Attorney General, Serjeant Bosanquet, (and Mr. Wyatt).

For the Respondent, Mr. Wetherell, Mr. Ralph Palmer *.

[162] The Lord Chancellor, in the course of the argument, asked whether, in case of an agreement between landlord and tenant, that the value of timber used in repairs should be allowed at the end of the lease, a right would not exist, and, as incident to the right, a power in a court of equity to compel inspection for the purpose of valuation: and it being observed, in answer to this question, that the right and power in the case supposed, would arise out of contract, he asked whether the act of Parliament was not a contract for all parties. The reason (he observed) why all these suits were brought into equity was, because the lord mayor's court was unable to deal with them.

Lord Redesdale, after stating the bill and answer, the order in question, and the proceedings upon it, made the following observations: The question is, whether the order of the 7th of April 1819 can be supported. The ground stated for the Appeal is, that this is a private dwelling-house, and that the occupier is entitled to exclusive possession,—that no adverse entry can be made but by lawful authority—and that the Court of Chancery has no authority to order that an entry should be allowed. As to the first ground of objection, it does not directly apply to the case, because the order is, not directly to compel, but, upon the party, that he shall permit inspection. The objection that the Court has no power, is the material ground of Appeal. If it be true that it has no such power, there are many cases in which there must be a total defect of justice. In this case the Master has re-[163]-ported his inability to form an opinion of the value of the premises, without such inspection as the order requires: and how otherwise is it possible to judge of the value? If there are no means to form any judgment upon this subject, the Court would have no power effectually to execute the decree which has been pronounced in the cause. The result of this state of things would be, that the East India Company would be their own valuers, and the question in the cause must be decided upon evidence furnished by one of the parties to the exclusion of the other. The objection, upon the face of it, appears to be unreasonable.

The arguments urged for the Appellants at the Bar are founded upon the supposition, that the Court has directed a forcible inspection. This is an erroneous view of the case. The order is to permit; and if the East India Company should refuse to permit inspection, they will be guilty of a contempt of the Court, in which case, being a corporation which cannot be affected by personal process, a sequestration issues against their goods, to compel obedience to the order, or, as a preliminary step, to authorize the Court to take the bill *pro confesso*. So it is in the case of insufficient answers, and other proceedings of a suit in equity. The bill cannot be taken *pro confesso*, until the process against the person for contempt has been exhausted. In this case therefore, if the order to permit inspection be erroneous, and not the subject of process for contempt in cases of disobedience, the bill cannot be taken *pro confesso*, and the justice of the Court is defeated. In the argument much reliance seems to [164] have been placed on Semayne's Case (5 Rep. 92), which may be considered as the foundation of the objection. But there the question was collateral. It was an action upon the case against a surviving partner, for obstructing the execution of a writ of extent, issued upon a recognizance in the nature of a statute-staple, by shutting the door of his house against the sheriff and jury, who came to extend the goods of the deceased partner. According to one of the resolutions in that

* The arguments were in substance the same as upon the hearing in the court below. 3 Swans. p. 248.

case, the sheriff has not authority by law to break open doors to execute process at the suit of a subject, although request be made, and admission to the house refused: and the substance of the reason given for this resolution is, that it would be attended with danger to the public peace. Whether this reasoning stands on a solid ground may be questioned.

On process at the suit of the Crown, where goods are fraudulently removed, and in cases of replevin, the doors of a house may be broken by the sheriff after request and denial. In the latter case the power is given by statute. But how can that reasoning, though ever so well founded, impeach or affect the order made in this case? It is an order operating on the person requiring the defendants to permit inspection, not giving authority of force, or to break open the doors of their warehouse. The only consequence arising from the personal mandate is, that in case of refusal the process of contempt issues, and finally the bill is taken *pro confesso*. The reasoning, therefore, in Semayne's case is out of the question.

[165] It was suggested, in argument for the Respondent, that as courts of equity assist the courts of law to arrive at a judgment in a cause, so by analogy they might assist them in the execution of the judgment upon a *fiery facias*, or otherwise. But this notion is founded upon a mistaken view of the practice of equity. The assistance given to courts of law by courts of equity is to remove legal impediments, as a nominal title in a third person; and this interference is necessary, because the courts of law have no power to remove the impediment. To assist the execution of a writ of *fiery facias* would be to make a new law in courts of equity. They proceed always indirectly by process of contempt, in all cases except where the decision is upon a title to land, in which excepted case they decree possession, and direct the sheriff to execute the decree.

What was the origin of the power of the Court, it might be difficult to determine. It now stands upon usage, and is not confined to cases precisely similar to those which have preceded, but is adapted to emergencies to make the jurisdiction of the Court effectual.

Courts of equity giving judgment on the peculiar subject of their jurisdiction in cases of trust or fraud, or other cases, direct possession to be given, or direct tenants to attorn and pay rents, or compel the specific execution of agreements. In case of chattels, they frequently order specific delivery of the article demanded, but enforce their decrees and orders only by process of contempt. In the case of the silver altar (*The Duke of Somerset v. Cookson*, 3 P. W. 390), which depended on the peculiarity rather than [166] the intrinsic value of the thing, a jury could not have given an appropriate remedy in damages. In such cases courts of equity enforce obedience by process of contempt, and never, but in the excepted case of a decree for land in a judgment upon title, direct the sheriff to take and give possession by force.

In the case of realty, the Court orders the failing party to deliver possession. If he disobeys the order, the sheriff is directed to put the party in possession, for whom the decree is made. In the case of personal chattels, the Court operates on the person by process of contempt, and effects the end indirectly, which, according to their practice in such cases, is not permitted to be done *per directum*.

In this case the substantial question is, whether such a power in the Court is not necessary for the purposes of justice. It is objected that it is new practice, and that there is no case to be found which warrants it; but the case of Lord Lonsdale (see Notes at end of case) is directly in point, and much stronger than the case now before us for decision.

This is a case where a plaintiff has a claim for a payment out of property, according to its value; and the Court is unable to ascertain the value without inspection. To the extent of the value the plaintiff has an interest in the property of the defendant which is the subject of the order which was made after a decree.

In Lord Lonsdale's Case the order was made before the decree, and upon a question where the rights of the parties were uncertain. It might have turned out, after the order of inspection in that case, [167] that the plaintiff had no right. But in this case his right is ascertained. The only difference (which is immaterial) is, that in that case it was a mine, in this a house; but both are equally private property. In that case the result of the inspection was, a discovery that coal to the amount of

£3000 had been taken away from Lord Lonsdale. If the practice of the Court had depended on the will of the party, the defendant in that cause would not have permitted inspection by any person but his own agents. Such an order was made in that case, and there was no appeal against it. So in the case of Lord Byron (1 B. C. C. 588. See also *Lane v. Newdigate*, 10 Ves. 192), the order was in effect mandatory. But if this had been the first instance, it would not be a substantial objection; for if so, every order made for the first time might be resisted on that ground.

The Lord Chancellor: This appeal is brought before the House, in consequence of a strong impression on the mind of Sir Arthur Pigott, who always misunderstood the order. After the Vice-Chancellor had referred it to the Master, to consider whether it was necessary that inspection should be had, and the motion was made before me to discharge that order, I suggested that the order should not be imperative to inspect, but on the defendants to permit inspection. That suggestion was adopted by the Vice-Chancellor in the order subsequently made, which is now the subject of appeal. This is necessary to be noticed, on account of the reasons appearing in the Respondent's case. That course, I apprehend, is at all events lawful. If the defendants refuse to permit inspection, the Court will then have [168] to consider what ought to be done: whether they will compel the inspection, and how. No such order has yet been made, but the Court can find the way to do complete justice. The time may come, when the defendants may be of opinion that the order is beneficial to them. I do not at present intimate what I mean; it is sufficient to say, that the means of enforcing what is due to justice can be found.

9th March, 1822. Ordered and adjudged, That the said Petition and Appeal be dismissed this House, and that the said orders therein complained of be confirmed.

THE memory of the case mentioned by Lord Redesdale in the text, p. 166, had almost perished in the Profession. The attorneys and agents of Lord Lonsdale in the cause were dead, and all the Counsel, except Lord Redesdale, to whose kind condescension the Reporter is indebted for furnishing a clue to obtain the following account of the case, extracted from the Register's Book.

The Earl of Lonsdale v. J. C. Curwen, Esq.

[Mews' Dig. xi. 402. Discussed in *Bennett v. Whitehouse*, 1860, 28 Beav. 119, at pp. 120, 121; observed in *Bennett v. Griffiths*, 1861, 3 E. and E. 467, at pp. 476-7.]

IN this case the Earl of Lonsdale had filed a Bill against J. C. Curwen, Esq. by which, and the affidavit of John Walker, it appeared that the Earl of Lonsdale was seised of the manors of Seaton and Stainburn, and certain closes called the Clossoks, lying on the south side of a rivulet called the Mill Race, near Workington, which divides the manors of Seaton and Workington; that there were mines of coal lying under the Clossoks, belonging to the Earl of Lonsdale, and that J. C. Curwen was seised of lands on the south side of the Mill Race, under which there were mines of coal: That John Walker (who made the affidavit,) had for several years been employed by Mr. Curwen as director of his collieries under ground, and in particular of that part of his collieries where his coals were raised at a colliery called John Pit, and from whence about five years previously, by the direction of Mr. Curwen, he had caused the working of the said pit [169] to be extended and carried into and under the closes called the Clossoks for the length and space of 40 yards and upwards; and also caused large quantities of coal to be dug out and taken from under the closes called the Clossoks, to the amount of 600 waggons, or 2100 tons, of about the value of £300 or upwards; that having been directed by Mr. Curwen to extend the workings farther under the Clossoks, he had remonstrated with Mr. Curwen against his doing so, on which Mr. Curwen had engaged one Edmund Bownass, who had the direction of the E. of L.'s collieries at Clifton, about two or three miles from Workington, to take the charge and direction of the working under the Clossoks: that E. B. afterwards proceeded to have the workings carried on under the said closes to the extent of about 212 yards in length, and in breadth to an average of about 105 yards, and that in consequence of such workings the greatest part of the coals which had been

raised at the John Pit for the preceding two years had been dug out of and from under the Clossoks, amounting to 6000 waggons and upwards, of the value of £3000 and upwards, over and above the £300 before mentioned: that Mr. Curwen, about the 13th of Aug. then last, gave orders and directions to the workmen employed in the workings under the said closes to rob or take away several of the pillars which had been left for the carrying on the workings, and which they had ever since been and then were doing, by which means the workings would be destroyed, and it would be rendered impossible for any person to discover the extent of the workings, or the quality of the coals dug and taken away thereout: That Mr. Curwen, in a conversation with John Walker about taking away the coals under the said closes, and the danger of a discovery thereof, asked him whether he (Mr. Curwen) could not drown the workings by letting the water out of his own collieries into the workings, which would prevent any discovery thereof from ever being made, which deponent said he (Mr. Curwen) might do; on which Mr. Curwen directed him to go on: That Mr. Curwen, by letting the water out of his own collieries into the workings would ruin and destroy the workings of very large quantities of coal belonging to the E. of Lonsdale, to a very large and almost inestimable amount. It also [170] appeared by affidavit of J. B. Garforth, that the Plaintiff was seised, etc. and that the Defendant, without permission, was then digging, and carrying away coal from under the lands against the will of the Plaintiff.

The bill prayed an injunction to restrain the Defendant, his servants, etc. from digging or getting coal in or under any of the premises in question, or any part thereof, and particularly from robbing or taking away the pillars which had been left in the workings, and that the Plaintiff, his, etc. might be at liberty to inspect the workings of Defendant under, etc.

Upon a motion for the purpose expressed in the prayer of the bill, it was Ordered (10th April 1799), that an injunction should be awarded to restrain the Defendant, his servants, etc. from digging or getting coals in or under any of the premises in question, or any part thereof, and from carrying on any workings, and in particular from robbing or taking away the pillars which had been left in the workings under the Plaintiff's parcels of land in question, until the, etc. and that the Plaintiff, his servants, etc. should be at liberty to inspect the workings of the Defendant under the Plaintiff's inclosures called the Clossoks. Reg. Lib. A. 1798, p.

By an order, dated the 7th June 1799, reciting the foregoing order of the 20th April 1799, and that it was alleged that John Howard, etc. as agents on behalf of the Plaintiff, on the 29th of April, had proceeded to inspect the workings of the Defendant in, etc. but were prevented from completing such inspection, because the pipe or air-course which conveyed the pure air had been broken down or taken away, and certain earth, rubbish and other impediments, were lying at the ends, roads or passages leading to the workings; and that on the 3d of May, for the purpose of making a further inspection, the agents of the Plaintiff had made a demand in writing that the Defendant should remove all the obstructions and impediments, and also given notice to the Defendant that they should proceed further in the inspection on the 4th of May, but that the Defendant had refused to allow any further inspection of the workings by the plaintiff or his agents; and that it was the principal object of the suit to have the extent of Defendant's workings under the inclosures ascertained: [171] that it was prayed that the Plaintiff, his servants, etc. might be at liberty as often as should be necessary to make further other inspections into the workings of the Defendant, under, etc.; and that in order to enable the Plaintiff, his, etc. so to inspect the same, the Defendant might be directed to restore the several air-courses theretofore used, and existing within the colliery, and to remove the earth, etc. lying at the ends, roads and passages leading to the workings; and that the Plaintiff, his servants, etc. might also be at liberty to use all necessary means to ascertain the workings and the extent thereof: It was ordered that certain persons named in the order should be at liberty to view the mine, and that such persons as the viewers might think proper to appoint, should attend such viewing of the mine; that the Defendant should cause the obstructions to be removed, and open the air-courses as the viewers should think necessary for such inspection, and that the viewers, and such other persons as they should appoint, should be at liberty as often as should be necessary, to make from time to time inspections into the workings of

the Defendant under the premises of the Plaintiff, so as to enable the viewers to make a perfect and complete report of the workings.

No further notice of this case occurs in the Register's Book: and according to information communicated by Lord Redesdale, the case was compromised by the payment of a large sum for the coals taken from under the grounds of Lord Lonsdale.

The practice in Courts of Equity of granting orders for inspection of mines, machines, etc. is well settled. But no notice has ever been taken of the point in the books of practice, and no authorities are to be found upon the subject in the Reports of Cases in Equity: except the case in the Court below, of *Kynaston v. The East India Company*, as reported 3 Swan, 248. and upon Appeal to the House of Lords, now reported in the text, and which case, as it relates to warehouses, is distinct from former authorities, and new in its kind. Two cases of orders for inspection extracted from the Register's Book are therefore subjoined.

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Walker and others v. Fletcher and others.

[Mews' Dig. xi. 402. Observed on in *Bennett v. Griffiths*, 1861, 3 E. and E. 467, at pp. 476-7.]

IN this case it appeared from the allegations of the Bill, supported by affidavits, that the plaintiffs being possessed of divers mines of coal at, etc. which they had for a long time (then) past wrought in copartnership: and that John Harris then was seised in fee, in trust for all the plaintiffs, of a close of land (with the mines of coal under the same), which at the east end abutted on a certain close belonging to the defendant John Fletcher, called the Seggs, and on the south side on another close called Flowered Moss: and that the Defendants had begun to work the same: That there was under the close belonging to the Plaintiffs, called Flowered Moss, and the other closes, called Flowered Moss and the Seggs, a mine or vein of coal of very considerable value: and that the defendant John Fletcher, together with the Defendants Joseph Steel and John Wilson, then were, and for some time then past had been carrying on and working divers collieries and coal-mines in copartnership: and the Defendants as such copartners, or their servants and workmen, about three years before, had sunk a coal pit and erected a fire engine in the close of the Defendant John Fletcher, called the Seggs, at the distance of about 50 yards from the Plaintiff's close called the Flowered Moss, and had ever since worked the said colliery, and had carried on their works from the engine-pit to the rise of the colliery towards the Plaintiff's close: That the Defendants had driven and carried their works towards the south-east corner of the Plaintiff's close, and had caused a drift or course of great width to be dug from the south-east corner, under the Plaintiff's close, for the length of 70 yards: and had also driven four or more boards or drifts out of their colliery into the said drift or course, and had taken from under the Plaintiff's close very great quantities of coals belonging to the Plaintiffs, which was done unknown to the Plaintiffs, and without their privity or consent: That the Plaintiffs had (then) lately begun to sink a coal pit in their close called Flowered Moss, and had thereby or otherwise discovered that the Defendants, or their several workmen or [173] agents, had dug or taken such coals as aforesaid: That a few weeks after the sinking of the pit was begun by the Plaintiffs, the Defendant Steel was present, and declared that the Plaintiffs should never have a colliery or pit there, or to that purport or effect: That every means to prevent the same had since been used by the Defendants, and when the defendants found that such their workings under the Plaintiff's close had been discovered, they caused part of such workings which laid near the pit sunk by the Plaintiff to be filled up, and also plugged the bore hole, and made barriers and walls in their workings under the closes called the Seggs and Flowered Moss, or one of them, and had filled the same with wood, earth, clay and other materials, and thereby prevented the water flowing from the coal under the Plaintiff's close, in such manner as it had before done, and the pit which the Plaintiffs had begun to sink and dig was thereby overflowed with water

to the depth of four or five yards, so that the Plaintiffs were prevented from working in and sinking the same; and the water also, by being so stopped, in part forced and extended itself to another colliery which the plaintiffs were working, and which was near a quarter of a mile from the Defendant's Seggs close, and was likely to extend much farther, and considerably to injure such last-mentioned colliery: That from the proceedings of the Defendants, which they still continued to pursue, and threatened to carry on to a much greater extent, unless such plugs, walls, dams and barriers were taken away, the plaintiffs were in great danger of losing the whole benefit and enjoyment of their mine or vein of coals under their close, and their workings in other places might and would be greatly damaged; and the defendants by continuing to carry on their workings under the plaintiffs close had taken and got from under the same great quantities of coals of great value: That in order to discover, and if possible to prevent the proceedings of the Defendants, and the injury done thereby to the Plaintiffs colliery, the Plaintiffs had caused to be sunk in their close, the pit before mentioned, which was of the width of five feet, and of the length of seven feet; that the nearest part of the pit was near six yards from the Defendants close called the Seggs; and that when it had been sunk to about the depth of 32 or 34 yards, the Plaintiffs caused a perpendi-[174]-cular hole to be bored down to the coal, which was at the depth of 35 fathoms, or thereabouts, from the surface, and they found the coals at the bottom of such bore-hole entire; but having had reason to suspect, from the proceedings of the Defendants, and the observations and threats used by them shortly after the Plaintiff's pit was first begun, that the coal had been wrought and taken away within a very short distance of such hole, Jeremiah Harris and Joseph Muncester, on behalf of the Plaintiff, requested leave of the Defendant John Fletcher, and also of the agents or workmen then attending the Defendant's colliery, that Jeremiah Harris, as coal agent of the Plaintiffs and other persons then present, and along with him, might be permitted to go down into the Defendant's coal mine and view the works, but the Defendant John Fletcher refused to comply with the application, unless Jeremiah Harris could show a legal authority to enable him to do so: That the Plaintiffs not being able to obtain a view of the Defendants colliery by means of such applications, the Plaintiffs caused an oblique hole to be bored in their pit, so as to strike the coal at a little distance from the perpendicular bore-hole, that the oblique bore-hole was made in the hollow works made by the Defendants under the Plaintiffs close called Flowered Moss, and was between five and six feet, or thereabouts, on the east side of such perpendicular hole, and when the boring rods in such oblique state had reached the depth of the coal, which happened on or about the 8th of September then last, the boring rods entered into the hollow working made by the Defendant under the Plaintiffs close, and four or five yards, or thereabouts, to the west of the boundary line between the Plaintiffs Flowered Moss close and the Defendants' Seggs close, from which workings the Defendants, their servants or workmen, or some of them, had taken or carried away the coal; and on further examination it had appeared that the Defendants, their servants and workmen, had taken and carried away the coal under the Plaintiffs close, to within 18 inches or two feet, or thereabouts, of the first perpendicular bore-hole; but the defendants having refused to permit the Plaintiffs or their agents to go into and examine their workings, the plaintiffs were not able more particularly to set forth the extent of the workings of [175] the defendants, nor the quantities of coal the Defendants had taken from under the same: That the Defendants had then blocked up their workings, or some of them, under the Plaintiffs Flowered Moss close, by placing framed walls, earth, rubbish, or other works or inventions, to prevent the Plaintiffs and their agents having any access to the same, or making any discovery of the injury done by the Defendants to the Plaintiffs; that the mine or vein of coal under the Defendants Seggs close, and part of Flowered Moss close, belonging to the Plaintiffs which adjoined thereto, dipped to the south, and therefore inclined from the place where the Plaintiffs had sunk the pit towards Seggs close; and that such vein of coal was covered with a bed of coal metal about eight yards thick, which was covered with a bed of stone about four yards thick, and beds of coal, metal and stone, also dipped in the same direction as the coal, and that the water flowed down sunk beds towards Seggs close. And that soon after the Plaintiff had bored the first-mentioned oblique bore-hole in the workings made by the de-

fendants under the Plaintiffs Flowered Moss close, their servants or workmen, had put or caused to be put, a plug or plugs of wood and iron into such bore-hole; and also made or erected walls, fences or barriers in the drifts or workings, which they had filled with earth, clay, stones and other materials, with intent to make the same water-tight, and thereby prevent the water running down from the coal, and the water soon afterwards began to run, and did afterwards rise in the pit to the height of four or five yards, which was then dug down to just within the bed of stone only; that the Plaintiffs had since endeavoured to let the water pass the pit, and to sink the same to the coal, for which purpose the Plaintiffs had caused another oblique bore-hole to be bored near to the first-mentioned perpendicular hole; but when the boring-rods reached to the place where coal should have been, the Defendants, to prevent the Plaintiffs from drawing the rods, and in order to deprive the Plaintiffs of the use thereof, in sinking the pit deeper, fastened the end of the lowest rods used in boring the last-mentioned oblique hole with an iron fork or key, or other instrument or means, in the hollow works made by the Defendants under the pit so sinking by the Plaintiffs in their [176] close, and had actually prevented the Plaintiffs and their workmen from drawing the boring rods upwards, although a very considerable force had been applied for that purpose, and the boring-rods still remained, and were kept fastened by the defendants in the hole whereby the rods were wholly lost, and rendered useless to the Plaintiffs, and the Plaintiffs could therefore no longer work in or sink the pit as they had intended by the usual and ordinary means pursued by them; and the defendants and their workmen had very lately put and placed several wooden machines, inventions or contrivances, called framed dams, in the hollow works leading out of their coal mines to the colliery and mine under the Plaintiffs close, or communicating therewith, by means whereof the water was dammed or blocked up, so far as the said inventions were capable of doing: And the defendants absolutely refused to pull down the walls, framed dams and barriers, and to permit the water to run as it did before: that in order to deter the Plaintiffs from proceeding further in sinking the pit, J. Fletcher the younger, the son of the Defendant Fletcher, had given notice to the Deponent, who was then employed by the Plaintiffs in sinking the pit, that the Defendants framed dams were then closed, and that whoever should be at the bottom of the Plaintiffs pit would be in danger of being blown up, and that he came to give notice of the danger, that if care was not taken they must abide by the consequence after such notice: that by stopping the water from running off, the Plaintiffs had been hindered a very long time, and been put to a very great additional expense in endeavouring to sink their pit to the bottom, and that the water intended to have been stopped by the framed dams rendered such pit in a great measure useless, by means of the water standing at the bottom thereof, in the hollow works made by the Defendants under the Plaintiffs close: that the Plaintiffs, if the pit had been sunk to the bottom, could not win the residue of their colliery adjoining on account of the coal being laden with water, so stopped by the said framed dams: And the Defendant not only threatened, but actually continued and refused to move the same, and threatened that they would wholly prevent the Plaintiffs from working their colliery, and were endeavouring to make the framed [177] dams so tight by wedging as to drive the whole of the water back into the Plaintiffs colliery: and they also threatened and intended to prevent the Plaintiffs from working the coals under their close called Flowered Moss, or whereby the Plaintiffs might be enabled to convert the coals under their Flowered Moss close aforesaid to their own use. And in conformity with the declaration of the defendant Steel, the Defendants had endeavoured and were using and daily pursuing every means in their power to deprive the Plaintiffs from deriving any benefit from their colliery, or from any means of discovering the extent of the injury done to the Plaintiffs by the proceedings of the Defendants and their workmen.

The bill was filed in 1804, praying that the Defendants, their servants and workmen, might be restrained by the injunction of the Court from digging or getting any coals from under the Plaintiffs close, or in any manner digging under the same; and might be ordered to pull down the walls, dams or barriers which they had erected in their workings, whereby the water was prevented from flowing from the coals and colliery under the Flowered Moss close as it did before: And that the workings of the Defendant might be restored to the same state and condition as the same were

in before the walls, dams or barriers were made: And that the Defendants, their servants and workmen might be restrained by injunction from making any such erections, or stopping up their works, or otherwise preventing the water from flowing from the beds and veins of coal, and other beds and veins under the said close; and that proper persons to be appointed by the Plaintiffs might be allowed, on reasonable notice being given for that purpose to the Defendants, to inspect the workings of the Defendants under the close called Seggs close, or under or near to the close called Flowered Moss close.

On the 14th of December 1801, a motion was made to the effect of the prayer of the bill: upon hearing which, it was ordered, "That an injunction should be awarded against the Defendants, to restrain them, their servants, workmen and agents, from digging or getting any coals from under the Plaintiffs close in the pleadings mentioned, called Flowered Moss close, or in any manner digging under the same, until the Defendants should fully answer the Plaintiffs bill; and this Court should make another order to the contrary; and the Defendants were to be at liberty to view or inspect the Plaintiffs Agill pit, Walker pit, and the pit in the plaintiffs said close, called the Flowered Moss, in the division of the Defendants lands, on giving a fortnight's notice in writing to the plaintiffs, or one of them, with the name and description of the person to view and inspect on the Defendants part. And it was ordered, that the Plaintiffs should be also at liberty to view and inspect the Defendants pit mentioned in the pleadings, on giving the like notice in writing to the Defendants, or one of them, with the name and description of the person to view and inspect on the part of the Plaintiff. And it was ordered, that the Defendant should remove the framed dams or barriers in their works, as the viewers should direct, who were to cause the same to be removed unless they should be of opinion that the colliery would be thereby destroyed. And it was ordered, that the viewers or inspectors should be at liberty to replace such frames, dams or barriers, if they should think proper, without prejudice to any application the Plaintiffs might thereafter make, to remove them. And it was ordered that no alterations should be made by the Plaintiffs or Defendants in their respective works till after the first view or inspection; but so as not to prevent the regular working of their respective collieries or mines. And the Plaintiffs were to be at liberty to attend each view or inspection of the Defendant, with a viewer or inspector on their parts; and the Defendants were to have the same liberty of attending with a viewer or inspector each view or inspection of the Plaintiffs. And it was ordered, that all views or inspections subsequent to the first, by either the Plaintiffs or Defendants be, on giving a like notice in writing, with the name and description of the person to view or inspect on their parts respectively."

Brown and others v. Moore and others.

In this case it was alleged that the Plaintiff Brown had invented a machine to make bobbin or twist-net, resembling [179] the Buckinghamshire lace net, as made by hand with bobbins on pillows, and in April 1811, obtained letters patent for the exclusive enjoyment and use of his invention in England, for the term of 14 years: that suspecting the defendants, who were manufacturers at Nottingham, of pirating his invention, the Plaintiff bought a piece of their lace, which from the circumstances of the beam-thread traversing diagonally across the work, which was peculiar to the Plaintiff's machine, it was sworn by experienced workmen must have been manufactured by a frame essentially similar to the Plaintiff's, with which they were acquainted, and that the lace so purchased was in all essential particulars exactly resembling the lace made by the patent machine of the Plaintiff; that the bobbins or brass jacks of the Defendant's machine, which had been shown to a witness, were exactly similar to the Plaintiff's, which were also peculiar to his patent machine and never before used in other machines: that a *quodam* partner of the manufactory of the Defendants had explained to a witness the construction and working of their machine, which according to that description was in all essential points precisely similar in construction to the Plaintiff's machine. These facts being alleged by the bill, and supported by affidavits, an injunction was granted on motion to restrain the Defendants, etc., during the remainder of the term of the letters patent from using the invention of the Plaintiff. Lab. Reg. A. 1811, 1495.

Reg. Lib. A. 1816.

Upon application to dissolve the injunction, the defendants having put in their answer, an order was made, that the Plaintiff should bring such action as he should be advised, and that in the mean time the injunction should be continued. The action (it appears) was tried, and failed partly for want of sufficient proof of the resemblance of the machines. Whereupon an application was made for an issue to try whether the Plaintiff's machine was an original machine for making bobbin lace or twist-net, or only an improvement upon any prior existing machine, and if original, whether the net manufactured by the Defendants was a piracy, which was refused: but the Plaintiffs undertaking to bring an action against the Defendants for infringing the patent right, it was ordered [180] (on the undertaking of the Defendants) that they should admit on the trial, that since the trial of the former action they had made lace with the machines *inspected* by Mr. Bramah, etc.

It appears, therefore, that there had been an inspection of the Defendant's machine, and the solicitor for the Plaintiff has informed the reporter that such inspection was made under an order of the Court; but he has been unable to find it in the Register's Book. It appears by entries of two orders, on the 22d and 28th February 1817, that after the direction of the new trial, it was ordered on motion, that Mr. Millington, either alone, or in company with Mr. Bramah, on behalf of the Plaintiff, might inspect and see the model of the Plaintiff's machine, marked according to the specification inrolled by Plaintiff J. B. in pursuance of his patent previous to the ensuing trial in the Court of C.P. that Plaintiff should put the machine into a state to work, according to the specification inrolled, etc. and permit Mr. J. M. to see it work in that state on the succeeding morning.—Reg. Lib. A. 1816.

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IRELAND.

COURT OF CHANCERY.

COLCLOUGH.—*Appellant*; STERUM and others,—*Respondents* [14 March 1821].

[Mews' Dig. i. 367; xiv. 1375, 1397, 1412, 1717. See Conveyancing Act 1881, s. 70. *In re Hall Davie's Contract* 1882, 21 Ch.D. 41; *Jones v. Barnett* (1899), 1 Ch. 611; *affd.* C.A. (1900), 1 Ch. 370.]

A person purchasing lands under a decree is bound to see that the directions of the decree are observed.

Lands in strict settlement, with a power to grant leases, being subject to prior incumbrances, are, by a decree in a suit instituted by the incumbrancers, directed to be sold subject to the charges prior to the deed of settlement. Pending the suit, the tenant for life under the settlement grants leases not authorized by the power, and raises money upon annuities for his life, which he charges upon the lands, and they are sold subject to those charges.

Held (reversing the decree of the Court below), on a suit by the remainder-man in tail, that the sale, subject to charges not warranted by the decree, is void.

Where considerable delay has occurred in the prosecution of a suit, costs are not to be given, although the decree is reversed.

Sir Vesey Colclough, upon his marriage in 1767, being tenant in tail of a manor and lands called Tintern, etc., subject to portions, etc., conveyed them by deeds of lease and release to a trustee in fee (subject to a term of one thousand years thereby created) to the use of himself for life, remainder to the sons of the marriage successively in strict settlement. The incumbrances then affecting the estates, according to a covenant in the settlement, did not exceed £14,000. The [182] term was created for the purpose of raising £3000 according to the appointment of Sir Vesey Colclough, and the trustees of the term had a discretion to raise a further sum of £3000 for the use of Sir Vesey by sale or mortgage; and it was provided, that the interest of the existing incumbrances, and of the two sums of £3000, when raised, should be

paid out of the rents and profits of the estates by the trustees of the term, and that Sir Vesey and the successive owners of the freehold for the time being should receive the residue of the rents and profits. By the settlement, a power was given to Sir Vesey of leasing for three lives, or 31 years, in possession, etc. for the best rent without fine, etc.

In July 1767, the deed was registered, and a fine levied according to covenant. The Appellant was the eldest and only surviving son of the marriage. The two sums of £3000 were raised under the power, and paid to Sir Vesey; but the trustees of the term permitted Sir Vesey to receive all the rents of the estates, and omitted to pay the interest upon any of the incumbrances affecting the estate.

In 1772 a bill was filed in Chancery in Ireland by the husband of one of the daughters of Caesar Colclough, the grandfather of Sir Vesey, and others, who were entitled to prior incumbrances affecting the lands in settlement, praying that the debts owing to them, and charged on the lands, might be raised by a sale.

In 1778 a decree was made in the cause, referring it to the Master to take an account of the incumbrances affecting the lands comprised in (and prior to the registry of) the settlement of 1767, of [183] the yearly value of the lands, and the parts most proper to be sold. The incumbrances were accordingly ascertained; but the yearly value of the lands, and what parts were most fit to be sold, were not stated in the report.

In August 1778 Caesar Colclough was appointed receiver, in the suit instituted as before mentioned, to raise the sums charged upon the lands.

In 1780, by the final decree in the cause, the incumbrances mentioned in the report, amounting to £25,000, great part of which was an accumulation of interest, were declared to be charges on the estates comprised in the settlement of 1767, which settlement was recited in the decree; and it was decreed that those incumbrances should be paid, or that the lands should be sold for payment. Pending the suit to raise the prior incumbrances, annuities charged on the lands for the life of Sir Vesey, and leases not authorised by the power, were granted by Sir Vesey to Caesar Colclough, the receiver in the suit.

In 1781 the lands were set up to sale in the Master's office, subject to the annuities, and the leases, and were purchased by Thomas Richards. The deed by which the lands were conveyed to him recited the grants of the annuities, and that the lands were sold subject to them.

At the date of these transactions the Appellant was an infant. Sir Vesey, his father, had been appointed and acted as his guardian, and among other things signed, in his name, the deed of conveyance to the purchaser under the decree. Sir Vesey died in 1794, leaving the Appellant, his [184] eldest son, who, under the limitations of the settlement of 1767, became entitled to an estate tail in the lands, subject to a jointure and portion.

At the time of his father's death the Appellant was a prisoner in France, and so remained until the year 1805.

In 1802 a notice was served upon the Respondents, who were the co-heiresses of Thomas Richards, the purchaser, and their then intended husbands, that it was the intention of the Appellant to impeach the purchase made under the decree.

The bill in the cause, which was the subject of appeal, was filed against the Respondents in 1805, praying that the deeds of conveyance to Richards might be declared fraudulent, and void, that possession of the lands might be restored to the Appellant; and that the Respondents should account for the rents, etc., the Appellant offering to pay the purchase-money, with interest.

The cause was heard in 1811 on pleadings and proofs, when the bill was dismissed. The appeal was against the decree dismissing the bill.

For the Appellant, Mr. Agar, Mr. Shadwell, (Mr. Seton.)

For the Respondents, Mr. Wetherell, Mr. Lovat.

Lord Redesdale, after stating the facts of the case, proceeded to the following effect:—It is to be observed, that according to the express declaration of the decree, all the debts and incumbrances subsequent to the registry of the deed of 1767, were [185] excluded, for the estate was thereby directed to be sold for payment of incumbrances prior to the registry of that deed. That Vesey Colclough was no distress is evident. The lands were under the dominion of a receiver; annuities had been

granted, by which they were improperly burdened; and it was under these circumstances that the auction took place. Part of these transactions has been the subject of another suit (*Colclough v. Bolger*, 28 June 1816, MS.; and *Dow*, v. p. 54), in which the decree of the court below was reversed on grounds and under circumstances in some respects, but not altogether, similar to the present case. It appears that from the death of the father in 1794, the Appellant was a prisoner in France till October 1805. A part of this estate was sold to a Mr. Richards, and the transaction is impeached on the ground of fraud: the purchaser having obtained the estate at an under-value was held a party to the fraud, whether personally, or by the medium of an agent, is immaterial. The estate was put up to sale subject to two annuities granted by Sir Vesey Colclough to Caesar Colclough, for the life of Sir Vesey. It is clear that such a sale was not warranted by the decree, which included only incumbrances prior to the settlement of 1767, rejecting those which were subsequent. It appears to me that the Appellant was injured by the sale subject to those annuities during the life of his father, which reduced the value of the estate to that extent, and which induced the party to buy the annuities at a sum greater than was advanced to Sir Vesey Colclough. To the [186] extent of those sums at least the estate was injured in value.

It is argued that persons purchasing under the authority of a decree ought to be safe; but it is a settled maxim of equity, that persons purchasing under decrees of the court are bound to see that the sale is made according to the decree. In a case, the name of which I do not at this moment recollect, it was laid down by Lord Hardwicke, that it was the business of a purchaser to see that the persons who had the right to convey were before the court. If he takes a title which a decree in an imperfect suit does not protect, he must abide the consequence (see *Giffard v. Hart*, 1 Scho. and Lef. 386. *Hamilton v. Houghton* [2 Bli. 169]). On these principles the Appellant has a right to impeach the transaction. The decree protects parties only according to its terms. The provision of the decree was, that the estate was to be sold, subject to incumbrances prior but not subsequent to the settlement of 1767. And as to these latter incumbrances, the decree directed that the estate should be free from them. On this account the judgment is erroneous, and the purchase is with notice, because the title is founded on the decree: the purchaser had, moreover, full notice of the settlement, because it is recited in his conveyance. Such a sale, therefore, cannot be protected by the decree. Another objection to the proceeding is, that the estate was sold subject to leases which had been granted under pretence of the power, but were in fact contrary to it. It is probable, from circumstances established in evidence [187], that the leases were fraudulently granted by Sir Vesey Colclough; that the purchaser had notice of the undervalue there is strong circumstantial proof, sufficient to impeach the transaction on that ground. It is not, however, necessary to resort to the ground of fraud; and without resting my opinion at all on that circumstance, but confining my view solely to the fact that this sale was made subject to the annuities, I think the decree is wrong: that is a clear ground: the other might require further investigation. Instead of dismissing the bill, the Court below ought to have granted relief. The consequence, if the sale is to be impeached, will be that the estate must be held by the trustees only as a security for the money paid into Court upon the purchase, with interest. The purchasers must, under the circumstances, be answerable for the rents of the estate from the death of Sir V. Colclough, not at an earlier period, though Sir V. Colclough was bound to keep down the interest of incumbrances. The rents and profits must be set against the principal and interest, and the balance paid into Court. The estate must be re-conveyed to the Appellant under the settlement of 1767. As to the lease subsequently granted by Sir V. Colclough being without consideration, and charged to have been fraudulently done by the aid of the receiver, the estate must be relieved from that incumbrance. As to the other leases, if they can be impeached, he may, as tenant in tail, try that question in a Court of law. The decree must be reversed, with a direction that the Respondent is liable for the rents, but that the purchase-money is a lien upon [188] the estate. The rent to be charged ought not to be higher than what is reserved upon the lease. On payment of the balance (if any) of the purchase-money above the rent, the Respondent must re-convey the estate to the Appellant, in tail, with remainders, according to the settlement.

The Lord Chancellor: If this decree is to be reversed it may be expedient to delay the final settlement of the order, that the parties may have the opportunity of suggesting any correction of the minutes, or supplying any defects.

The reversal of the decree may be a hardship upon the present Respondent; but if justice requires such a measure, the consideration of hardship must be disregarded. The decree cannot be supported unless the doctrines of Equity in Ireland differ from those in England. Sales under decrees are entitled to protection when they are conformable to the decree, but not otherwise. It might be consonant to moral justice to set a value upon the annuities, and add that value to the purchase-money; but where parties have made a purchase contrary to the authority of the decree they cannot be permitted afterwards to conform for the purpose of taking the benefit of the decree. As to the lease, the main defect is the under-value. In other respects there is strong ground for suspicion, but that is not a safe ground for decision. Judicial acts, in cases of fraud, must rest on clear evidence. By the decree, the Master was directed to inquire what parts of the estate were most fit to be sold. No report was made on that point: but whether that defect [189] ought to affect the purchaser may be questionable, since the Court itself ought to have noticed that defect in their proceedings. But the decree reciting the settlement directs a sale of the estates subject to incumbrances of a particular period. The estates are in part sold subject to after incumbrances, in which the purchasers had an interest, and directly contrary to the decree. The loan of money—the purchase of the annuities—the leases at undervalue, and other circumstances appearing on probable evidence, furnish grounds of suspicion. But at all events it is clear that a decree not obeyed, but violated, cannot be a protection to a purchaser.

Lord Redesdale: The length of time which has occurred between the death of Sir Vesey Colclough and the filing of the bill is a reason why costs should not be given.

Die Merc, 14 Mar. 1821. Ordered and adjudged, That the said decree complained of in the said appeal be and the same is hereby reversed; and it is declared, That the sale of the lands of Curraghduffe, Cloneburne, and Ballycreene otherwise Ballyvoereene, in the pleadings mentioned, ought to be deemed fraudulent, and void as against the Appellant, and the several other persons claiming after him under the deeds of settlement of the 12th and 13th of June 1767, and ought to be set aside, so far as the same affected the interests of the Appellant, and the several persons claiming after him under such settlement: And it is further declared, That the deeds of conveyance of [190] the 7th and 8th of March 1782 of the said lands of Curraghduffe, Cloneburne, and Ballycreene otherwise Ballyvoereene, ought to stand as securities only from the death of Sir Vesey Colclough for the sums of money actually paid by the said Thomas Richards, deceased, for the purchase of the said lands, according to the orders of the said Court of Chancery, together with interest for such sums of money from the death of Sir Vesey Colclough: And it is further ordered, That it be referred to one of the Masters of the Court of Chancery to take an account of the sums of money so paid by the said Thomas Richards, in pursuance of the orders of the said Court, and to compute interest thereon from the death of the said Sir Vesey Colclough; and also to take an account of the rents and profits of the said lands, which accrued after the death of the said Sir Vesey Colclough, received by the said Thomas Richards in his lifetime, or by the Respondents, or any of them, after his death, or which, without their wilful default, might have been received; in taking which account the said Master is not to charge the estate of the said Thomas Richards, or the Respondents, with any greater rent for the lands subject to the leases in question granted by the said Sir Vesey Colclough, than the rents reserved by such leases, without prejudice to the question whether such leases were void against the appellant, or those claiming under him, under the said settlement of the 12th and 13th of June 1767; but the said Master is not to consider the said lands as subject to any other lease, or any other charge or incumbrance thereon made or created subsequent to the registry of the said settlement, and not warranted by the powers contained in such settlement, and particularly is not subject to any lease or incumbrance made or created by the said Thomas Richards, or any person or persons claiming under him: And it is further ordered, That the said Master do apply such rents and profits, in the first place, in or towards discharge

ing [191] the interest accrued after the death of the said Sir Vesey Coleclough, on the sums of money paid by the said Thomas Richards as aforesaid: and in case the same shall appear to have exceeded such interest, then that the said Master do apply the same in reduction of the principal sum: And it is further ordered, That the said Master do thereupon ascertain the balance: and upon payment of any sum remaining due for principal and interest upon balance of such account, or in case such principal and interest shall appear to have been satisfied by the application of such rents and profits as aforesaid, it is further ordered, That all proper parties do join in a re-conveyance of the said lands to the Appellant, according to his rights and interests in the said lands, under the said indentures of lease and release of the 12th and 13th of June 1767, and to the uses of such settlement now capable of taking effect, freed and discharged from any lease or incumbrance made by the said Thomas Richards, or any person or persons claiming under him: and in case, on taking such account as aforesaid, such principal and interest as aforesaid shall be, or appear to have been, overpaid by the application of such rents and profits, it is further ordered and adjudged, That the balance of such account shall be paid to the Appellant by the person or persons from whom such balance shall appear to be due: And it is further ordered and adjudged, That in case it shall appear that the Respondents cannot perfect the conveyance hereby directed to be made, free from incumbrances made by the said Thomas Richards, the Appellant, and the persons claiming after him, under the said settlement of the 12th and 13th June 1767, are entitled to satisfaction for the value of such incumbrances out of the assets of the said Thomas Richards: and that the said Court of Chancery do give all necessary directions for such purpose, but without prejudice to any question between the Appellant and those claiming after him under the said settlement of the, etc. and [192] any person or persons not a party or parties to this suit: And it is further ordered and adjudged, That, as between the several parties to this suit, the Lords do not think fit to give any costs of this suit to this time, but that all subsequent costs be reserved for the consideration of the said Court of Chancery, who shall make such order touching the same as shall be just: and it is further ordered, That the said Court of Chancery do give all necessary directions for carrying this judgment into execution.

[193]

SCOTLAND.

COURT OF SESSION.

Mrs. JANE LINWOOD, Widow of JOHN LINWOOD, late Farmer at Freugh, and her Six Children, ELIZABETH, JANE, HANNAH, JOHN, THOMAS, and GEORGE LINWOOD, lawful Children of the said JOHN LINWOOD, Paupers.—*Appellants*: VANS HATHORN, Esq. of Garthland, Writer to the Signet, and others.—*Respondents* [19th March 1821].

[3 Scots R. R. 333: Discussed in *Mackintosh v. Mackintosh*, 1864, 2 Macph. 1357, at pp. 1361, 1364.]

An appeal, in which the essential parties are not served with the peremptory order to answer, and do not appear at the hearing, cannot proceed as against one of the Respondents.

Whether according to the practice of the House the hearing of the cause may be adjourned for the purpose of serving the absent parties, on payment of the ordinary costs.—*Quære*.

Agents and servants acting under general orders, but without the special direction of their master, having cut a tree on the side of a public road, which in falling killed a passenger, the widow and children of the person killed brought an action for damages against the master and the servants, in which action there was a judgment for the defendants. On appeal against this judgment, the

agents and servants, as well as the master, were named as parties in the appeal, but were not served with the peremptory order to answer the appeal, nor brought before the House as parties at the hearing. The proceeding was held defective on this ground, as it would deprive the master of the remedy over or relief against the agents and servants, in case of a reversal of the judgment as against the master alone.

Semb. that under the circumstances of the case, if there had been no such defect of parties, damages ought not to have been given.

[194] This action was instituted in the Court of Session in Scotland, by the Appellants, in order to obtain an assythment or reparation for the loss which she and her children have sustained by the death of John Linwood, which was occasioned by the fall of a tree cut down upon the estate of Garthland, belonging to the Respondent, Mr. Vans Hathorn.

The tree was about eighteen inches diameter, and situated on a part of the property of Garthland, only a few feet removed from the public highway leading from the Mull of Galloway to the market-town of Stranraer. It was cut on the 27th November 1812, which happened to be a market-day at Stranraer. Mr. Linwood was riding along the road about mid-day on his way to the market, in company with three neighbouring farmers. No person was placed upon the road, or elsewhere, to give notice of danger, and no rope or other instrument employed to direct the fall of the tree: M Kie and Graham were in the act of cutting it, and a strong wind was blowing from the east, on which side of the road the tree was standing, when Mr. Linwood and his companions rode up: the tree giving way at the moment when he was passing, fell upon him and bruised him so severely, that he expired in less than an hour after the accident.

The Appellants, the widow and children of Mr. Linwood, instituted an action, in which they called as defenders Mr. Vans Hathorn, the proprietor, together with John Hathorn, William Reid, Peter McKie and John Graham, who, as the Appellants [195] alleged, were all concerned in the transactions as the agents and servants of Mr. Hathorn.

The summons concluded, that these several persons "ought and should be decreed and ordained to make payment, conjunctly and severally, to the pursuers, of the sum of £2000 sterling as a reparation to them of the great loss and damage which they have sustained, and will sustain, by the said John Linwood being deprived of his life in manner aforesaid," besides expenses of process, and of extracting the decree.

Parties having been heard, and the Appellants having put in a condescendence by appointment, which was followed with answers, Lord Craigie, (Ordinary) allowed them a proof of their allegations. Accordingly a proof was led as to the facts founded on in support of the action.

The proof given on the part of the pursuers related, 1. To the situation, and the fact of cutting the tree: the improvident manner in which it was done, and the accident consequent upon it. 2. That the other parties acted under the orders of Mr. Vans Hathorn. On this point the proof did not go to any particular order as to the tree in question, but only as to general agency and management. 3. As to the situation, character and circumstances of Mr. Linwood, as a foundation to estimate the damages sustained. This part of the proof consisted chiefly of his skill as a farmer: his age: the duration of an unexpired lease, and his average farming profits.

Distinct from the pecuniary damage, the Appellants claimed consideration of a *solatium* due to the family for the loss of a husband and parent.

[196] The proof having been concluded, and the term for proving circumduced, the Lord Ordinary appointed the parties to prepare memorials upon the whole cause, and thereafter he pronounced the following interlocutor: "Having considered the memorial for the pursuers, also the memorial for the defender, Mr. Vans Hathorn, separate memorial for William Reid, another of the defenders (no memorial having been given in for Peter McKie and Matthew Graham, also defenders, nor for John Hathorn, who is now dead), with the proofs brought by the parties, writings produced, and former proceedings, appoints the parties to prepare, print, and box informations, betwixt and the first sederunt day in February next, and makes *avizandum* with the cause to the Lords of the Second Division of the Court: and at the same time appoints

the proofs and writings founded on by the parties, to be printed and annexed to the information for the pursuers, the expense of printing the proofs and writings founded on, in the meanwhile, to be defrayed equally by the parties.*

Informations were prepared in obedience to appointment; and thereafter the following interlocutor was pronounced: "The Lords, on report of Lord Craigie, and having advised the informations for the parties, sustain the defence, assoilzie the defenders, and decern."

The Appellants submitted the case to the review [197] of the Court in a reclaiming petition, which was appointed to be answered, but "The Lords having advised this petition, with the answers thereto, for the defenders, adhered to the interlocutor reclaimed against, and refused the desire of the petitioners."

The Appellants, conceiving themselves to be aggrieved, appealed against the above-recited interlocutors.

For the Appellants, the following authorities were cited, on the general liability for direct or consequential damage arising from negligence:—Inst. lib. 4, tit. 3, s. 5. Bankton, B. 1, tit. 10, s. 41. Stair's Inst. 1, 9, 7. Balfour's Pract. 516. Fountainhall's Decis. Index. Ersk. b. 4, t. 4, s. 105. That the civil remedy is not excluded by a decision upon a criminal charge for the same act.—*The Creditors of Buchanan v. Buntein*, Kilk. p. 495; *Ker v. Agent for the Sun Fire Office*, Fac. Coll. 17 Dec. 1793. That the owner of property is liable for the act of his agents and managers, Dig. lib. 9, tit. 3, l. 1; Blac. b. 1, c. 14, *ad finem*; Scotch Stat. 1669, c. 16; *Innes v. Magistrates of Edinburgh*, Fac. Coll. 6 Feb. 1798; *Black v. Caddell*, 9 Feb. 1804; *Drummond v. McGregor*, 26 Feb. 1813; *Keith v. Keir*, 10 June 1812; *Macmannus v. Crickett*, 1 East; *Smith v. M'Ine*, 8 March, 1810. Elch. Dec. 218, and in D. P. (*Laugher v. Pointer*, K. B. Trin. Term, 1826; a case not reported).

For the Respondents were cited, on the general question of responsibility, the exception to the rule [198] stated from the Digest, for the Appellants, viz. the *casus fortuitus*, as a sudden gust of wind, which was stated to be the cause of the accident in this case.—Dig. lib. 9, tit. 2, l. 30, s. 3. That assytlment is only due upon the crime, and when that is established in a competent court, and cannot therefore be due after an acquittal.—Hume on Crimes, vol. 1, p. 448. That masters are not liable for the acts of servants where they exceed the authority given.—Bankton, b. 1, t. 2, s. 30. Stair, b. 1, tit. 9, s. 5. Kaime's Principles of Equity, b. 1, p. 1, c. 1, s. 2, p. 63. *Macmannus v. Crickett*, *qua supra*. Dict. of Holt, C. J. in *Middleton v. Fowler*, Salk. 282. That assytlment is a civil reparation in damages to the party for an act which, as to the public, is a crime, and is due from the criminal only. *Lady Leithhall v. L. Fife*, Kaime's Sel. Decis. No. 25, Act. 1593, c. 174.

For the Appellants, Mr. Wetherell, Mr. Oliphant.

For the Respondents, The Attorney-General, Mr. C. Warren.

All the parties in the suit below were named in the petition of appeal; but none of them had been served with an effectual order to answer the appeal; and on the hearing of the appeal Vans Hathorn only appeared. There was, therefore, no effective appeal against the other Respondents: Graham, the party immediately concerned in the act, was one of them. In this state of things it was urged, on the [199] behalf of the Appellants, that the condition of the summons being joint and several, relief might be had against any one or more.

[During the argument, the Lord Chancellor made the following observations.]

The case must be considered as heard *ex parte* against all the parties but Vans Hathorn. With respect to the other parties, the peremptory order has not been served or applied for; they are not before the House, and the Appellants are not entitled to be heard as against them. The summons says that Graham was acting for the behoof or under the directions of Vans Hathorn, or John Hathorn, or W. Reid, or P. McKie: of such an allegation the sufficiency might be questioned. Proof that Vans Hathorn gave authority to any of them makes a different case. Where a judgment is given against several defendants, the plaintiff may take execution against one, and for the one who pays the damages the judgment itself and the fact of payment is evidence

* A note explanatory of his view of the case, was subjoined by the Lord Ordinary to this interlocutor. For the argument in the Court below, and the opinion of the Judges, see Fac. Coll. 1815, 1819, No. 115.

against the others for the purposes of contribution; but where there is a judgment of acquittal, the difficulty is great. The Master, in such a case, could never proceed against a servant who has been absolved by verdict. The conclusion of the summons is joint and several. But suppose an action against a coachmaster and a coachman, and an acquittal by verdict, could the master afterwards proceed against the servant? There is another way of viewing the case: if Vans Hathorn is liable, Graham also may be liable to him, and he might recover over against [200] Graham; if, therefore, the appeal is given up as against Graham, how can it proceed against Vans Hathorn?

A question then arose, Whether the Appellants paying the costs of the hearing should have liberty to bring all the parties before the House? The Respondent's counsel, the question being put to them by the Lord Chancellor, were not willing to assent to this proposal, and the cause having been fully argued, stood over for consideration.

The Lord Chancellor: In the course of hearing this cause a question presented itself, Whether it was possible that we could proceed to determine it without bringing before the Court third persons who were not effective parties to the appeal at the time when the cause was heard at the Bar? It was at first thought by the House that the cause might stand over, with liberty for the solicitor to apply for leave to bring those parties before the House; that suggestion being made without prejudice to the question, Whether, according to the course of practice of the House, such a petition could now be available? Upon further consideration, however, it seemed expedient to go on to the extent to which the argument could go at the Bar, as it might turn out that the opinion of the House might be, that if those parties had been here the judgment could not be reversed. Having attended to all the circumstances of the case, with all the feeling which belongs to it, and the consequences to the Appellant of the unfortunate accident out of which the cause [201] arises, it does not appear to me that there is sufficient reason to advise the House to reverse the judgment; and I think we may venture to proceed in the present state of the cause, in respect of parties. It would probably have made no difference, as to the result, if the other parties had been here; because, in the circumstances of the case, it appears to me that the same judgment would have followed. The ordinary question being put, that the judgment should be reversed, I must humbly express my opinion that it ought to be affirmed.

Judgment affirmed.

[202]

SCOTLAND.

COURT OF SESSION.

Messrs. DENNISTOUN, BUCHANAN and Company, Merchants in Glasgow.

Appellants: DAVID LILLIE and others, Underwriters in Glasgow. *Respondents* [5th April 1821].

[Mews' Dig. xiii. 1166, 1196; 3 Scots R. R. 636.]

Agents of the owners of a ship, by a letter, saying, "The *Brilliant* will sail from Nassau for Clyde on the 1st of May, a running ship," instruct their correspondents to effect an insurance on the ship, which is done accordingly by them, showing this letter to the underwriters. There being a favourable opportunity of convoy, the ship sailed on the 23d of April. On the 11th of May she was captured. Held, in the court below, and on appeal, that the expression of the letter was positive, and not the statement of an expectation, and that the exhibition of the letter being a representation material to the risk covered by the policy, which was not true in fact or in the event, vitiated the policy.

Upon the 17th of June 1811 the Appellants, Messrs. Dennistoun, Buchanan and Company, merchants in Glasgow, received a letter of advice from Messrs. William Doul

and Company, their correspondents at New Providence, dated 2d April 1814, containing copies of their letters to the Appellants of the 19th and 24th of March preceding.

The following are extracts of such parts of the letters as relate to the subject of insurance. By the [203] letter of the 19th March the Appellants are informed thus: "At a prize sale of a South Sea whaler and her cargo of oil, that took place here yesterday, we purchased on your account about 40,000 gallons of spermaceti oil, at 3s. 9½d. sterling per gallon; 14,000 gallons of which we intend to ship upon that remarkable fast-sailing schooner *Brilliant*, of 157 tons burthen, mounting six nine-pounders, to sail, *with or without convoy, about the first of May*; and on the value of which shipment you will please to make insurance. Messrs. Seton and Elliot will ship on board the *Jessie* 60,000 lbs. St. Domingo coffee, which they wish you to have insurance done for at 50s. per 100 lbs., and 17,000 lbs. Cuba coffee, at 60s. per 100 lbs. They also wish you to have insurance effected on the *Brilliant* from hence to Greenock, valuing her at £1400 sterling; to all of which we beg your attention." The letter of the 24th says, that the *Brilliant* would be cleared out as bound to Greenock and a port on the Continent. And in the letter of 2d April Messrs. Duff and Company state, towards the conclusion of the letter, which relates to a variety of other matters, "The *Brilliant* will sail on the 1st of May, a running vessel, in which the writer of this will take his passage."

Upon these advices an insurance was effected, *on ship and goods*, on the 18th of June, being the day after receiving the letters above quoted, although the contract or policy bears date on the 21st of June, three days later. At the time of entering into the contract the letters of advice were shown to the Respondents, who were some of the under-[204]-writers at Glasgow, with whom the insurance was effected.

The terms of the policy were, "From Nassau to Clyde, with leave to call at all ports and places whatsoever, *for convoy, or for any other purpose whatever, without* being deemed a deviation; and with or without letters of marque, leave to chase, capture, man and convoy, or send into port or ports, any vessel or vessels."

The insurance was done at the rate of six guineas per cent., to return three pounds per cent. "for convoy for the voyage, or two pounds per cent. for *partial convoy and arrival*."

About the 20th of April His Majesty's ship *Martin* came into the harbour of Nassau, and being bound for Halifax, the commander offered to take the *Brilliant* under his protection. This being considered a great advantage, as the risk of capture between Nassau and Halifax was imminent, extraordinary exertions were used to complete the loading of the *Brilliant*, and she sailed under convoy of the *Martin* on the 23d of April, being about eight days earlier than the date of sailing proposed in the foregoing letters.

Upon the 11th of May the *Brilliant* was captured by an American privateer, and carried into Boston.

When the intelligence of the capture arrived, the Appellants applied to the underwriters, and many of them settled the loss. But the Respondents resisted payment: whereupon the Appellants brought an action before the Court of Admiralty, concluding for payment of the sums respectively underwritten for them; and, after the usual pleading, the Judge Admiral pronounced the following interlocutor:— [205] "The Judge Admiral, having advised the libel, defences, answers, replies, and writings produced, finds, that by a letter, dated the 19th of March 1814, from William Duff and Company, the correspondents of the pursuers, of New Providence, to them, they mentioned the ship *Brilliant*, a remarkable fast-sailing schooner, was to sail, with or without convoy, about the 1st of May; and that by an after letter dated the 2d of April last, 1814, the incorrectness of the word '*about*,' as applicable to the 1st of May, was explained by the same correspondents informing the pursuers that the *Brilliant* was to sail for New Providence on the 1st of May, a running vessel, and in which the writer of this (William Duff) will take his passage: Finds it admitted, that these letters were communicated to the defenders, whereby they saw that the vessel was positively intended to remain in New Providence, and not to sail therefrom till the 1st of May last, and under this impression subscribed the policy in question: Finds, that the *Brilliant* sailed on the 23d of April from New Providence, and, for any thing known, may have been captured before the 1st day of May, when she was held forth to the defenders as remaining in the harbour: Finds, therefore, that

although the representation made by the pursuers was absolutely innocent on their part, the fact stated by them to the defenders was not verified, and a material change was thereby made in the risk undertaken by the latter; and therefore assilizes the defenders, and finds them entitled to expenses."

[206] The Appellants brought the foregoing interlocutor under review of the Judge Admiral, by petition, and the interlocutor thereon was, "The Judge Admiral having advised this petition, and another dated 23d February last, with the writings produced, remains of the same opinion, that the risk which the underwriters undertook, being confessedly that on a vessel to sail on the 1st of May, was perfectly different from one on a vessel which sailed on the 23d April, inasmuch as the defenders undertook a risk on a vessel understood to be in the harbour, and safe on the 1st of May, when in fact she had been eight days at sea. Refuses this petition, and adheres to the interlocutor complained of."

"Note.—The petitioners do not seem to dispute, that if the vessel had been taken before the 1st of May they would have had no argument. They however state that the vessel was not captured till 11th May. This, in real reasoning, makes no difference, since it is a thousand chances to one that if she had not sailed till 1st May she would not have fallen in with the vessel which took her. The case of a vessel sailing the day before she is represented to sail is quite different from that of a ship being detained by unavoidable accidents beyond that day. In fact, it is an insurance on a vessel in jeopardy, when she is represented to be comparatively safe." And on the 19th of April 1815, the Judge Admiral modified the defenders account of expenses to £10 1s. 1½d., and decreed against the Appellants for payment of the same, and for the fees of extracting the decree.

[207] The Appellants pursued an action of reduction before the Lords of Council and Session of the foregoing interlocutors pronounced by the Judge Admiral. This action was discussed before Lord Pitmilly, Ordinary, who pronounced an interlocutor, repelling the reasons of reduction, etc.

The Appellants submitted the question to review in a representation, to which answers were given in; but the Lord Ordinary adhered to the interlocutor.

The Appellants then brought these interlocutors under review of the Second Division of the Court of Session by a petition. The Lords adhered to the interlocutors complained of, etc.

The appeal was against the foregoing interlocutors.

On the part of the Appellants distinctions were taken between a warranty and a representation,* and it was contended that the letters exhibited did not amount to a warranty, or any thing more than a representation, which was not material; and that the statement of a future event, as an intended day of sailing, can be no more than an expectation.—*Boorden v. Vaughan* (10 East, 445); *Hubbard v. Glover* (3 Camp. N. P. C. 313); *Barber v. Fletcher* (Doug. 305. In this case the word expected was used); *Bice v. Fletcher* (Doug. 271. See also Park, p. [313, 479].) It was [203] further argued, that the representation not being made *malis fide*, the policy was not vitiated by such a misrepresentation.

For the Respondents it was contended, 1. That the day of sailing was a fact material to the risk, and being within the control of the Appellants, a statement of intention was equivalent to a statement of fact. 2. That the vessel having sailed on the 23d of April, was, at the time when the insurance was effected, what is termed "a missing ship."—*Ratliffe v. Shonlired* (Park, 180; Marshall, 1, 168); *Talbot v. Bratton* (Park, 182; Marshall, 167).

For the Appellants, The Attorney General, Mr. Abercrombie.

For the Respondents, Mr. Wetherell, Mr. Denman.

[In the course, and at the conclusion of the argument, the Lord Chancellor made the following observations.]

The second letter, in which it is expressed that the vessel will sail on the 1st of May, was shown to the underwriters, and is it not the same thing whether the party means to misrepresent, or whether the thing actually communicated is a misrepres-

* *Pawson v. Watson*, Cowper, 790; Park on Insur. c. 10, 203, 205, c. 48, pp. 321, 322; Marsh on Insur. c. 9, s. 2, p. 312.

sensation? The authorities turn upon the difference between expectation and representation. In the case of *Barber v. Fletcher* the representation is, that the ship is *expected* to sail. If the accuracy of a representation as to time is to be given up, that doctrine must apply equally to the question [209] of place. The letter of the 2d of April speaks in terms of uncertainty as to the sailing of the *Dart* and the *Jessie*, but as to the *Brilliant* the statement is positive. Do the Appellants carry their arguments so far as to assert, that in cases which go beyond expectation, where there is a misrepresentation of a material fact, without a warranty or *malâ fides*, the policy, according to the authorities, is not vacated? In the case of such a misrepresentation, *malâ fides* is not necessary to render the contract inoperative. The principle of the judgment is the same in all the cases, although we cannot agree in all the decisions. The principle, and the application of the principle, are different things. To maintain the argument for the Appellant it is necessary to contend, that if the vessel had been captured on the 2th of April the underwriters would have been liable.

The Lord Chancellor: This case resolves itself into two questions:—First, whether the representation was made, of which there is no doubt: and secondly, whether it is a representation of an expectation, or a statement as of a past fact, which is material to the risk.

I have formed an opinion upon the subject, but wish to give it further consideration: and this is the more necessary, as this branch of law is not well understood in Scotland. The case is to be determined upon a consideration of the facts, as a jury would decide under the direction of a judge as to the law applicable to those facts. The question for a jury would be, Was there in this case a misrepresentation of a material fact affecting the risk covered by the policy.*

The Lord Chancellor: In the absence of the noble Lord (Redesdale), who was present at the hearing of this appeal, and by his desire, I suggest, that upon inspection of the policy of insurance (which is not sufficiently stated in the printed cases), it appears to be a policy upon the ship, as well as goods. It is not therefore like the case of *Borden v. Vaughan*, which was cited on the argument. In that case the policy was effected by the owner of goods, and on goods only. If there should be any desire to make further observations on the matter of the policy, they may be suggested at the meeting of the House on Wednesday.

The Lord Chancellor (after stating the question on the appeal): There is a difference between the representation of an expectation and the representation of a fact. The former is immaterial: but the latter avoids the policy if the fact misrepresented be material to the risk. After the most attentive consideration of the case it appears to me that the judgment of the court below is right.

Judgment affirmed.

[211]

ENGLAND.

(ON APPEAL FROM THE COURT OF EXCHEQUER.)

CONINGSBY NORBURY, Esq.—Appellant: The Honourable and Reverend PEARCE MEADE, and ELIZABETH his Wife, and SAMUEL STED, Esquire.—Respondents [9th April, 1821].

[Mews' Dig. i. 330, 364; viii. 724. Discussed in *Andrews v. Dwyer*, 1833, 2 Cl. and F. 332.]

A Plaintiff in equity must state his title in his bill, and, unless it is admitted by the Defendant, must prove it.

In suits for tithes, the jurisdiction of a Court of Equity is limited to discovery and account. The title to tithes, as of other real property, is a question of a legal right upon which a Court of Equity has no jurisdiction: and if the title is disputed and doubtful, the Court has no right to make a decree.

* Before the motion for judgment was finally made, the Lord Chancellor intimated that the House would (if desired) hear a further argument on the terms of the policy: but the proposal was declined by the agents.

A person suing as lay impropriator, for the tithes of a parish in which there has been within living memory a parish church and a burial ground, in order to establish his title, must show that there has been an appropriation, and when it was made; because if it was not prior to the 15th Ric. II. c. 6. it is further necessary, according to that statute, that an endowment of a vicarage should be shown, and if the Plaintiff does not allege and prove either that the appropriation was before the 15th Ric. II. or that a vicar has been endowed, *prima facie* the appropriation is invalid.

Lands which had belonged to one of the lesser monasteries were not exempted as such from the payment of tithes in the hands of the grantees of the Crown, under the stat. 27 H. VIII. c. 20. At common law it has been held, that if such lands were otherwise discharged of tithes the discharge being terminated by the dissolution of the monastery, the right of the ecclesiastical rector revived: but as between two monasteries, the one holding an impropriate rectory, and the other lands within the rectory, whether the same doctrine is applicable. —*Quære.* *Semb.* that the case is not similar to a claim of exemption, as derived from a religious order, nor from unity of possession, but both bodies being capable of making an alienation, the monastery [212] having the impropriate rectory might convey the tithes to the other body holding the lands. It is the case of a right of exemption by conveyance, and *semble*, that it is a title which admits of proof by presumption.

Upon a lease of tithes, by a lay impropriator, if the tithes of particular lands are excepted, it might admit of the construction that the lessor is entitled to that which he excepts. But if a former owner of the tithes upon a lease has made a parol declaration that he is not entitled to the tithes of those lands, that declaration is in itself important evidence, and gives a construction to the exception in the lease.

The original Bill filed in this cause in Easter Term 1810 stated that the then Complainant, the Bishop of Dromore, in Ireland, was seised of the impropriate Rectory and Parsonage of the parish of St. Nicholas, in Droitwich (Worcestershire), and thereby entitled to the great and small tithes arising within the parish. That from the time of Plaintiff's seisin the Defendant held and occupied a certain farm in the parish, for which he had paid tithe by an annual composition till Michaelmas 1807, but that since that time he had refused to pay the Plaintiff such composition for the small tithes; and that besides the said lands, the Defendant occupied other lands, called the Lower Friars (about seven acres), on which he had reaped and mown grain, pulse, hay and clover, and had agisted barren cattle, the tithe of which he had not paid. Upon this statement the bill prayed an account and de rec for the single value, &c.

The Defendant by his answer denied the title of the Plaintiff to all tithes as impropriate Rector; admitted his possession of the lands mentioned in the Bill; but contended, as to the farm before mentioned, that the composition which had hitherto [213] been paid was in satisfaction to Plaintiff, or his agents, for the great tithes only, and denied that he was entitled to small tithes; and he alleged, that in case any small tithes were payable, the Rector would be bound to contribute to the repair of the church, and to provide some ecclesiastical person to perform the duties within the parish, to whom such small tithes would have been payable if due at all; and that as no such person had been provided within memory, there must, therefore, at some former period have been an agreement between the then impropriate Rector and the parishioners, that in consideration of his foregoing the small tithes in the parish he should be relieved from the duty of serving and repairing the church: in proof of which, (the answer alleged) there had been no service performed in the church in the memory of any person living, except in two instances, within the last thirty years, of two persons having been buried in the churchyard; that the church itself was dilapidated, and that the tower, with a bell therein, and the outside walls of the old church, were standing till within a few years; but that the walls and bell had lately been pulled down by the orders of the Plaintiff for the purpose of disposing of them for his benefit, and that the parsonage-house had, till about ten years previously, been standing, and was inhabited, but that one of the late lessees of the tithes had since pulled it down, and

disposed of the materials: and that in further evidence of such agreement there had never been any small tithes in kind, or any composition in lieu thereof, paid in the memory of any person living, except that two of the late lessees had demanded and received from some cottagers or [214] small householders a trifling composition in lieu of vegetables growing in their gardens: and submitted, that the Plaintiff was not, under the circumstances, entitled to any small tithes, or that if he were, it was his duty to procure the parish church to be served, and contribute to its repairs, and rebuild the parsonage house.

The Appellant also in his answer admitted his occupation, and having had titheable articles upon the lands called the Lower Friars, without paying or making any satisfaction for the tithes: and stated that he occupied those lands by virtue of a lease granted by the Marquis of Exeter, then deceased, and his wife, formerly Emma Vernon, the then owners of the land: and that he believed the lands called the Lower Friars were part of the possessions of the dissolved Priory of the Friars Augustines, in Droitwich, commonly called the Augustine Friars, and were granted by letters patent, bearing date the 24th of February, in the 34th year of the reign of King Henry VIII. to John Pye and Robert Were *alias* Browne, in fee: and the same were afterwards, by bargain and sale, bearing date the 2d of February, in the 2d year of the reign of King Edward VI. duly conveyed to Sir John Packington, knight, his heirs and assigns, who at that time, as the Appellant had been informed, was, or claimed to be, entitled to the tithes of the lands. The Appellant, by his answer, further stated, that he believed that the lands and the tithes thereof (*in case the said Sir John Packington were entitled thereto*), were afterwards duly conveyed and granted by divers mesne conveyances to several persons, and at length were conveyed and granted to, and had been vested in, an ancestor of Emma Vernon, one of the lessors [215] under whom the Appellant was in possession, and through which ancestor, the Marquis of Exeter, and his then wife, derived title. And further stating, that by such means, *or otherwise*, the tithes of the said lands had been duly granted, and legally passed to, and became vested in, the owners of the land, and had descended upon, and became vested in, Emma Vernon, and by means thereof, *or otherwise*, the lands *were exempt* from the payment of tithes in kind, or any satisfaction in lieu thereof, and that no tithes in kind, nor any satisfaction in lieu thereof, had ever, within the memory of any person living, or since the lands were, as before stated, conveyed to Sir John Packington, been paid for the lands in question. But on the contrary, such lands had always been deemed, and reputed to be, tithe-free, and no demand had ever been made upon any owner or occupier of such lands for any tithes in kind, or any satisfaction in lieu thereof, until the exhibiting of the Plaintiff's original Bill.

The cause being at issue, witnesses were examined on the part of the Plaintiff in the suit, but not on the part of the Appellant. The parol evidence on the part of the Plaintiff, who deduced his title to the impropriate Rectory by descent from Sir John Packington, tended principally to show that both the great and small tithes had been always considered as included in the composition which had been paid to the Plaintiff, and as due to him in quality of lay impropriator, and not as vicar, or to any other ecclesiastical person, there having been no such person within memory: and that no claim to any of the small tithes had ever been set up by any other person: and several old leases of the great and small tithes by Plaintiff's predecessors were produced.

The cause came on to be heard and was argued [216] upon the 29th January, 3d and 6th of May 1816. On the part of the Plaintiff, conveyances, leases, a will, and other assurances, commencing as far back as the year 1670, were read to show that the impropriate rectory, and all tithes within the parish of St. Nicholas, in Droitwich, had been conveyed, demised, and disposed of as lay property. In one of the leases, dated the 10th of August 1801, from the Plaintiff in the original Bill to one Richard Smith, the demise is of all tithes in the said parish, except the tithes of the Lower Friars: and the depositions of several witnesses were read to show that the Plaintiff in the original Bill, and those under whom he derived title, had been in perception of the tithes in the said parish: but none of them proved that any tithes had ever been paid, or satisfaction in lieu of tithes made for the Lower Friars: on the contrary, Richard Smith deposed on the part of the Plaintiff, that William Clive-land, a former proprietor of the tithes as lay-rector, under whom the Plaintiff in the original Bill derived title, was in possession of the tithes of the said parish.

except of certain lands in the said parish, a part of which were called the Upper and Lower Friars. On the part of the Appellant, various grants, proceedings and written documents, were produced to show that the Lower Friars had been as early as the 34th Henry VIII., granted out by the Crown, and vested in grantees, some or one of whom (particularly Sir John Packington) was at the same time proprietor, not only of the land, but also of the rectory and tithes, and while he was proprietor of both, granted and conveyed away the land, (but no deed mentioning tithes was produced;) and that by mesne conveyances, descent, or otherwise, the Lower Friars came to the [217] present owners, under whom the Appellant held them as lessee. On the part of the Appellant, also were produced in evidence, three leases, dated the 10th January 1783, 21st March 1786, and 10th March 1788, from William Clieveland to George Bedford, of all the tithes in the parish. The deposition of Richard Smith, read for the Plaintiff, was likewise read for the Appellant, as was also the deposition of George Bedford, (the lessee in the leases before mentioned from William Clieveland,) a witness examined for the Plaintiff, in which he stated, that in the year 1780 William Clieveland, his lessor, set the tithes in the parish of St. Nicholas, which were then in the possession of witness, and which he continued to enjoy till the death of William Clieveland, except the tithes of lands in the said parish called the Upper and Lower Friars, and a meadow called the Vines, comprising, amongst others, the lands in question, which William Clieveland informed the witness were tithe-free.

The cause stood adjourned from the 6th to the 20th day of May 1816, on which latter day the Court (Dissentiente, Wood, B. See 2 Price, p. 338) below delivered their opinions, *seriatim*, and ordered and decreed, that an account should be taken of the tithes demanded by the original Bill against the Appellant, with costs.

The Appellants, at the hearing, proposed to read a conveyance from Sir John to Thomas Packington, and the will of Thomas, devising the rectory to Mary Packington, through whom the Respondents claimed*; but the Court intimated that such evidence [218] would be useless without showing an express grant of the tithes of the Lower Friars; and as to the other land occupied by the Appellant, it was admitted they had no defence; if the Court were of opinion that the plaintiff had proved his title, which appearing to be the opinion of the Court, the defence was confined to the claim of the tithes of the Lower Friars.

The Respondents became entitled, and were made parties to the suit by a supplemental bill, as the devisees and representatives of the Bishop of Dromore, who died pending the original suit.

The Appellant in the session 1817 presented a petition against this decree, in so far, as an account was thereby directed of the tithes of the Lower Friars, praying that so much of the decree might be altogether reversed, or that a trial at law might be directed upon the legal right before any account should be decreed.

For the Appellant, it was argued that tithes in the hands of laymen are now of a different nature from what they were at common law while they constituted the revenues of ecclesiastics; for by the several statutes respecting the dissolution of monasteries and religious houses, they were made and declared, in the hands of laymen, as temporal inheritances and lay-fees; and more particularly by the statute of 32d Henry VIII. c. 7, that lay persons shall have the like remedies for recovery of tithes in temporal Courts, and, consequently, subject to the like limitations and restrictions as are applicable for lands and other hereditaments. Tithes are thereby also declared to be the subject of, and pass by, the like conveyances and assurances as other temporal possessions; and at this day tithes have all [219] other incidents belonging to temporal inheritances. Since grants of tithes are now capable of being made, and liable to be lost, the same evidence ought to be allowed from whence they are to be presumed, and the want of them supplied, as would suffice in regard to lands and other hereditaments; and the like bar, by adverse possession and length of time, by analogy, ought to be interposed against the remedy for recovery of tithes.

In favour of Holy Church, the policy of the law was that laymen should not prescribe in *non decimando*, thereby spoiling spiritual persons of their revenues. When tithes were converted into lay-fees the maxims referrible to presumed grants, descents, discontinuances, non-claims, etc. necessarily follow, which were nothing

* It appears that these documents were entered as read. See the addit. Appx. II.L. iv. 585. 194

more than the wise arts and inventions of the law to protect and quiet the possession, and strengthen the right of purchasers. The fact of long and uninterrupted retention of the tithes in question creates a legal right, which ought to be tried at law: a Court of Equity has no right to decree upon depositions against it. The adverse claim is against long and quiet possession and enjoyment, and to overturn property in which the owners have thought themselves secure, now beyond all memory of writing, or man. A Court of Equity cannot set aside or decide against the consequences of this legal right; it would be determining a right against constant possession, and constant usage and enjoyment. There is nothing a Court of Equity cannot presume in favour of possession. Possession is every thing; estates are bought by it, and held upon the faith of it; a claim against long possession is always reprobated; and here a Court of Equity, on a question arising on a legal right, ought not, at least in the first instance, and without a previous trial at law, to have determined and made a decree.

The circumstances of this case amount to a long and uniform non-payment and retention of the tithes by the owners and occupiers of the land in question; and not merely a non-claim, but positive disclaimer on the part of one or more of the improPRIATORS, particularly William Cleveland, under whom the Respondents derive title, making several leases of the tithes, with an exception of the tithes from the lands in question, accompanied at the same time by a declaration from the lessor to the tenants that such exception was inserted because the lands were tithe free.

It is true the property in question is small, but the principle to be established by this decision confessedly great. Prescription has no place here; presumed grant is the basis upon which the Appellant rests his defence; arguments of inconvenience deserve attention; tithes of great value in this kingdom are enjoyed under titles similar. The consequence of removing land-marks is dangerous; and why, in the legal code, are tithes to present an anomaly? Why are ingredients which strengthen the title and secure the possession, with reference to other property, to weaken and destroy in this? Why furnish a precedent to shake and render doubtful those rights which length of time and quiet enjoyment had taught the possessors to believe irrevocably fixed in them? A precedent which will encourage innovating speculators to set up new tithe-claims, disturbing the peace of their neighbours in many [221] parishes, and possibly spoil the ancient possessors of their acknowledged rights.

For the Respondents, the case was put upon the ground of the maxim, supported by a long series of uniform decisions, that there can be no prescription in *non decimando*.

An objection * being suggested for want of proof of the appropriation before the 15 Ric. II. or the endowment of a vicarage, an observation, said to have been made by Lord Chief Baron Thomson (and not noticed in the report of the case,) "that as there was a place of worship there might have been a vicarage endowed," was cited for the Respondents, to which Lord Redesdale replied, that there could be no parish without a church, and that there might be a chapel also; that the original appropriation of tithes was to the incumbent of the church of the parish, and *prima facie* belonging to him; but that this had been modified, and certain portions of the tithes might be vested in other persons; but it was an exception to the general law.

Upon the objection as to the deficiency of proof of title * in the Plaintiffs, it was urged that the property was conveyed as a rectory in 1642, and devised as such in 1663; that the documents showing title in the Plaintiffs were produced and relied upon by the Defendants; that a grant from the Crown was the best but not the only mode of proof, and the fact being admitted by the Defendants, that there was no need of proof.

It was further urged on behalf of the Respondents [222] that the defence raised by the answer, consisting of title and exemption, was double, uncertain, and inconsistent, which had been held not to be allowable; *Ward v. Shepherd* (3 Price, 528). That the lands and the rectory being in the same person furnished no ground to presume a release of tithes; that in the cases † where the Courts of Equity had refused to

* See *post*. the observations of Lord Redesdale, pp. 224 and 233, *et seq*.

† *Scott v. Airey*, 3 Gwill. 1174, citing *Rotherham v. Fanshaw*, which has since been reported by Mr. Eden, vol. i. p. 276.

interfere on behalf of a lay-impropriator against the occupier of lands, to enforce tithes, they did so on the ground of long adverse possession and colour of title, supported by documentary proof: that the tithes in question in those cases had been from time to time, for a long series of years, conveyed and dealt with as matter of property. In this case no such proof existed, and as the lands in question belonged to one of the lesser monasteries that furnished no ground to presume an exemption.

On behalf of the Appellants, in reply, upon the objection as to the double pleading of the answer, it was urged that such pleading was allowed in the case of *Jennings v. Lettice* (3 Gwill. 952); that the words "or otherwise," which seemed indefinite, might refer to conveyances under the statute of Henry VIII. or other modes of conveyance which might be presumed in favour of the Defendant.

For the Appellants, The Attorney-General, and Mr. H. Martin.

For the Respondents, Mr. Wetherell, and Mr. Roupell.

[223] Lord Redesdale *: It may be important to consider how unity of possession may affect the right to tithes. Suppose I had a rectory impropriate, and lands within the rectory which I had leased exempt from tithes, and then conveyed the reversion of the lands as I held them, that would be exempt from tithes. The rectory and the lands having been both in the Crown it is important to inquire whether the rectory or the land were first conveyed. Suppose the grant, and the record of the rectory and of the lands, to have been lost, would not the actual state of things, the enjoyment, furnish a presumption of title?

The Lord Chancellor: In *Scott v. Avery* (3 Gwill. *qua supra*) it was decided that a Court of Equity in such a case would not interfere. In one of the cases Baron Eyre said if these doctrines were to be maintained the Courts had gone presumption-mad.

The question is, whether in the face of enjoyment we can interfere; whether we must not leave it to law? The Court of Exchequer, in those cases in which they refused to act did not intend to determine whether there was or was not a title to the tithes, but merely that there was not sufficient ground to warrant a Court of Equity in disturbing the possession.

Lord Redesdale: The real question in *Scott v. Avery* was, whether there was not evidence of [224] a portion of tithes within the rectory. A portion could not be in lay hands unless it had come through the Crown by grant.

The Lord Chancellor: In the case of a spiritual rector it has been held that there can be no prescription in *non decimando*. If non-payment of tithes is a different thing, and sufficient to ground a presumption, a title may always be made out; for you may presume first a portion of tithes, and then the loss of a grant.†

Two preliminary questions may be raised in this case, the first, whether the title of the Plaintiff is sufficiently set out in the bill, and supported by proof in the cause? Secondly, whether the points of defence raised by the answer are sustainable?

Lord Redesdale: According to ancient practice, in suits by lay impropriators, the production of the original grant, and a regular deduction of the title by the necessary documents, was required. That practice was altered in consideration of the frequent loss of the instruments of title; but it is still necessary to produce the original grant, and to prove a possession corresponding with the title. If the impropriation has taken place since the 15 R. II. an endowment of a vicarage by tithes, salary, glebe, or otherwise, must also be proved.

[225] The Lord Chancellor: A lay impropriator must claim under his deeds. If he shows uniform exclusive possession, that may raise a presumption in the absence of deeds; but here, neither the title by deed, nor the perception of the tithes, is shown; and yet it is required of the Defendants, if they claim by title, that they should give that strict proof which the Plaintiffs fail to give. The question is, whether they have evidence equivalent to the production of deeds? They claim contrary to the common law. They must show a legal commencement of their title. They must show

* The following observations were interlocutory, and occurred in the course of the argument.

† See in *Rose v. Calland*, 5 Ves. 186, the remarks of Loughborough, C. on the case of *Nagle v. Edwards*; 4 Gwill. 1112. See also *Lord Petre v. Blencoe*, 3 Aust. 745; *Cranthorn v. Taylor*, 2 B. C. C. 112; *Gurnley v. Burt*, Bumb. 169; *Penny v. Hope*, Bumb. 115; *Barwell v. Coates*, Id. 129.

an impropriation before the 15 Richard II. or the 4 Henry IV., or they must show the endowment of a vicarage. The first of those statutes enacts, that there shall be no impropriation without such an endowment. The second requires that a vicar should be canonically instituted. There is no such vicar in this parish; and the title of the Plaintiff by deed or possession is not clearly made out: the deduction of title in the Plaintiff may be material to the defence. The decision of this case has proceeded on the single ground, that a prescription in *non decimando* is illegal; but if that is alleged as matter of title it may raise a different question.

At the conclusion of the argument, The Lord Chancellor made the following observations:—

This being the first case involving the particular point, which is of great consequence, and a noble and learned Lord,* who has given particular attention to the subject, being absent, the House ought not to [226] proceed to judgment at present. There is also another circumstance requiring great consideration, provided the case ought to be decided upon the evidence which has been adduced at the bar, attending to the special circumstances under which it is represented this case has come before us. I am sure the House will feel the importance of considering, with great diligence and attention, what they will or will not do after there has been, as represented, a long course of uniform decision in the Courts below; for it will be impossible to give a judgment on the general ground without affecting many decisions which have been made in the Courts below, and probably disturbing considerable property which is at present held under those decisions. If this case, on the one hand, is to proceed on the special evidence to which I have alluded, it ought to be understood that it does proceed on that specialty which occurs in this case; or, on the other hand, if the judgment of the House is intended to reverse all the decisions to which I have alluded, it is fit that question should not be left in the same state of doubt in which it has been represented to exist. It seems necessary, therefore, that you should have some further time for consideration; I wish also to see a copy of the answer, for all the rules of pleading which used to be adopted when I practised in the Court of Exchequer seem to have been lost sight of. In making this observation I do not mean to reflect upon the memory of that respectable gentleman (Mr. Hall), whom I well knew when living, and who drew the answer; but I take it from the answer itself, that he found he had a very difficult case to [227] deal with, and that he felt he must deal with it in the best way he could.

It appears to me that this is a case extremely simple, for the words stand thus (in the Appellant's printed case): "That the Appellant, soon after filing the same original bill, put in his answer thereto, declaring his ignorance of the Plaintiff's alleged title, but admitting the Appellant's occupation, and having had titheable articles upon the lands in question, without paying any satisfaction for or in respect of the tithes; and stating that he was in the occupation of the lands in question by virtue of a lease granted thereof by the late Marquis of Exeter, then deceased, and his wife, formerly Emma Vernon, the then owners of the land, and that he believed the lands," (not the lands and the tithes, but "the lands) called the Lower Friars, were part of the possessions of the dissolved priory of the Friars Augustines in Droitwich, commonly called the Augustine Friars, and were granted by letters patent, bearing date the 24th February, in the 34th year of the reign of King Henry VIII., to John Pye, and Robert Were alias Browne, in fee, and the same " (that is, the lands) " were afterwards, by bargain and sale, bearing date the 2d of February, in the second year of the reign of King Edward VI., duly conveyed to Sir John Packington, knight, his heirs and assigns," (and then, with respect to the title to the tithes, all he says is this,) " who at that time, as he had been informed, was, or claimed to be, entitled to the tithes of the lands:" under what sort of claim, or how [228] entitled, this pleading does not in any manner point out. The words in which it is set forth merely state some unspecified claim to the tithes: then it goes on to say, " that he believed that the said lands and the tithes thereof (in case the said Sir John Packington were entitled thereto)." Now if the declaration of Clieveland, that these estates were tithe-free, is a declaration of any importance, I think we may say this qualifying parenthesis brings down a little the value of the assertion. " he

* Lord Redesdale, who had left the House before the conclusion of the argument.

believed that the said lands and the tithes thereof (in case Sir John Packington were entitled thereto) were afterwards duly conveyed and granted, by divers mesne conveyances, to several persons, and at length were conveyed and granted to, and had been vested in, an ancestor of the said Emma Vernon, one of the lessors, under whom he was in possession, and through which ancestor the said late marquis and his then wife derived title thereto: and further stating, that by such means, or otherwise," (and here it occurs to me, which it did not at first, that these words "or otherwise" are put in with great caution and with great propriety, considering there was the parenthesis going before, "in case Sir John Packington were entitled thereto:") "and further stating, that by such means, or otherwise, the tithes of the said lands had been duly granted and legally passed to and became vested in the owners of the land, and had descended upon and become vested in the same Emma Vernon, and by means thereof, or otherwise, the said lands were exempt from the payment of tithes in kind, or any satisfaction in lieu [229] thereof, and that no tithes in kind, nor any satisfaction in lieu thereof, had ever within the memory of any person living, or since the said lands were, as before stated, conveyed to the said Sir John Packington, been paid for the lands in question, but on the contrary such lands had always been deemed and reputed to be tithe-free." This pleading, therefore, simply brings the title down to Sir John Packington. This lessee does not pretend to be the lessee of the tithes, but only the lessee of the lands, which shows the distinction between enjoyment and possession of tithes as a separate inheritance, and leads to the understanding of that principle, whether good or bad, on which the courts have hitherto proceeded: for if Sir John Packington let him the lands, he cannot say he let him the tithes; if he pays a rent for the lands, he enjoys the lands for the payment of the rent; and Sir John Packington has the use and enjoyment of the lands by the payment to him of the rent, but neither he nor the other is in the enjoyment of the tithes; that principle being felt, they found it necessary to go on and lay hold of another defence, and say the lands were exempt from the payment of tithes: that they had always been deemed and reputed to be tithe-free. I do not know in what way at the present day the Court of Exchequer call upon parties to plead; but I think it would not be deemed sufficient simply to aver that the lands were exempt from the payment of tithes, and had always been deemed and reputed to be tithe-free; or on the other hand, if the plea be good as to the exemption from the payment of the tithes, then the question will [230] be, whether there is not a double plea under the title of freedom from the payment of tithes; if you could not make out the freedom from the payment of tithes simply by the party talking with the owner, the Court would never apply that as positive evidence to warrant the taking of tithes in pernaney: it appears to me that this raises very great difficulty in the case, if we are to get at the great point of the case without evidence. I address myself without prejudice, speaking according to my impression of the law, being bound so to state it under the sanction of the cases (a); and according to (unless I greatly misunderstand it) the doctrine which has been laid down by men of talents and knowledge, to which, whether taken collectively or singly, I cannot pretend. The principle they have gone upon is this, that there is a very considerable difference (the grounds of which you may have hereafter to explain) between a mere detainer of tithes, and where tithes have been detained under what is called a colourable title: and it will be found, when you come to discuss that matter, that it is not quite so clear that evidence may be so fabricated at the back of the rector as not to shut it out from being received. Supposing the Court to be bound by that, still you have a long course of decisions which must be considered with all that attention which belongs to principles involving the security of property, and which decisions have been acquiesced in for a long period of time.

This is certainly an important case, and for these [231] reasons, and others which might be stated, I should feel more satisfied in having some time to review my present opinion, and to see whether my recollection is right as to the doctrines of law which I have now stated. It will afford me an opportunity to rectify and correct any errors I may have fallen into, by consulting with a noble and learned person not now present, who has paid great attention to this subject.

(a) *Charlton v. Charlton*, 4 Will. 705; *Ald. etc. of Bury v. Evans*, id. 757; *Fanshaw v. Moore*, id. 780; *Jennings v. Lettis*, id. 954

The Lord Chancellor: Upon looking to the pleadings and proofs of this cause, I mean to propose that one counsel on each side should be heard upon two points; the first is, *the title of the Plaintiff not being admitted by the answer, whether it is sufficiently proved by the evidence*; and the other is, supposing the title to be sufficiently proved, whether the pleading, on the part of the Defendants, is the proper pleading to bring forward the points on which the Defendant relies. I propose this course because it is highly expedient that when you are deciding a question of so much importance as the principal point in this cause, care should be taken that the proceeding of the House should not be represented hereafter as a proceeding not quite clear in point of pleading.

It was thereupon ordered, on the motion of the Lord Chancellor, that one counsel on each side be heard upon the question whether the title of the Plaintiff is sufficiently set out and proved; and supposing it to be so, whether the points insisted upon by the Defendant at the hearing are properly pleaded.

[232] Mr. Martin and Mr. Wetherell accordingly argued these points before the House, and the cause then stood over for judgment.

The Lord Chancellor: In the case of *Norbury v. Meade*, if it should appear to those who are to advise the House, that it is necessary to make any alteration in the judgment, it cannot be proposed without addressing your Lordships at very considerable length upon the doctrines with reference to cases of that nature. It is, therefore, necessary to ask of your Lordships for some further time to consider the proposed judgment.

Lord Redesdale: The question in this cause was considered as principally depending upon this, whether a grant of tithes, from a lay impropriator to the owner of certain lands in the parish of St. Nicholas in Droitwich, ought to be presumed or not; and the arguments principally went originally upon that ground. A doubt was then stated whether the Plaintiffs in the suit, who are the Respondents in this Appeal, had or had not sufficiently shown their *title*, so as to give them a right to demand of the Court a decree in their favour. The Court of Exchequer have, upon the hearing of the cause, made a general decree with respect to certain lands, as to all tithes, great or small, with respect to which the defence was of a different description. As to the lands which are the subject of this Appeal, they have also made a similar decree, being founded upon the supposition that the defence set up by the Defendants was insufficient, who insisted [233] that under the circumstances of the case those lands ought, in some manner or other, to be presumed to be discharged from the payment of tithes. The defence was not very precise; but upon looking into the case, the title set out by the Plaintiffs was certainly greatly deficient, because the Plaintiffs in that suit claimed as being entitled to an impropriate rectory; but they did not show how they were entitled; and they did not state, in their bill, or produce in evidence before the Court, any thing clearly to show that title.

The Plaintiff in this suit must recover by force of his title; and supposing the defence to be ever so defective, if the Plaintiff does not show a title the Court has no right to make a decree in his favour unless that title is clearly admitted by the Defendant; but here the Defendant unquestionably disputed the title. The consequence was, therefore, that the Plaintiff was bound to prove his title.

The claim was of all tithes, great and small, within this parish; and it appears from the evidence that there was a parish church, and a burial ground appertaining to that church, and therefore that there had been at some time a rector of that church, in whom all the rights of that church were vested. Undoubtedly there might have been an appropriation of that church, but it was very material to ascertain when that appropriation was made, because if the appropriation was made subsequent to the 15th of Rich. II. it could be no lawful appropriation without the endowment of a vicar; and if there was no vicar endowed the appropriation was [234] not good; therefore it was important to make out the title of the Plaintiffs in that suit, that they should have shown, or given some species of evidence to show, that it was an appropriation prior to the 15th of Rich. II., or to show that there was an endowed vicar. They have shown neither, and therefore, *primâ facie*, the appropriation under which they claim is not a good appropriation, because if it was not prior to the 15th of Richard II., and therefore an appropriation capable of being made without the endowment of a vicar, the consequence was, that being subsequent to the 15th of

Richard II. it was not a good appropriation, because the law has expressly forbidden such an appropriation without the endowment of a vicar.

By some means, however, this appropriation was in the hands of one of the monasteries which were dissolved in the reign of Henry VIII.; and there was also in the hands of another monastery a property of land, including the lands which are the subject of this Appeal. The claim set up by the Plaintiffs in this suit was to the whole of the tithes, great and small, of these lands. It is clear from the evidence that the Plaintiffs were not in possession of these tithes, and that the persons, the owners of these lands, and these tenants have constantly insisted that these lands were not liable to pay tithes to the persons who claimed the impropriation.

It appeared that the claim to the impropriation was at one time in the same family in which the lands, now the subject of litigation, were also vested, under the statute of Henry VIII., which had trans-[235]ferred the right both of the impropriation and the lands, if properly vested in the respective monasteries. They are both by grants of the Crown, as it was to be presumed, in one case shown, in the other case not; but they were to be presumed to be vested in the person who set up these different claims. If the Plaintiffs in the suit could not show a distinct title to demand all the tithes, great and small, the Defendants ought not to have been called upon for their defence. The Court, however, seems to have proceeded upon this ground: they assume the right of the impropriation, and then assuming that right, they seem to have conceived that the Defendant must make out his title to hold these lands exempt from the payment of tithes. He could not claim that exemption in right of the monastery from which he derived his title under the statute of Henry VIII., because it was one of the smaller monasteries, with respect to which the exemptions to which they had been entitled were not preserved by the statute. But even here, as I apprehend, the Court made a mistake, because all that has been decided upon that subject amounts only to this: if the monastery which claimed to hold discharged from the payment of tithes, claimed to hold so discharged against an ecclesiastical rector, there the common law said, that the discharge being put an end to, the right of the ecclesiastical rector remained. It may have been, but I cannot find that it has been, decided, that the same thing holds between two monasteries, one claiming an impropriation, and the other claiming land, because both those bodies were capable of making a complete [236] alienation. The monastery which held the impropriation could make an alienation to another monastery of the tithes which were due from the lands of that monastery; and it was not an exemption claimed by a religious order, but a title derived from persons capable of making a title; exemption by the unity of possession is a totally different thing; but this is a case in which their right may be an exemption from the payment of tithes by actual conveyance from one monastery to the other. That such things exist, I know. The conveyance of tithes is capable at least of a species of proof. One monastery having lands, and another monastery having an impropriate rectory, they came to an agreement, the monastery who had the impropriation discharging the other monastery from the payment of tithes on those particular lands. I do not conceive that there was any thing illegal in that, and therefore that is a species of title that was capable of being shown even by presumption.

But the Plaintiffs in the suit, according to what has been offered in the Court below, must found their claims upon presumption. They show no title directly: it can only be raised upon a presumption derived from their receipt of some species of tithes that they claim a right to, the receipt of all the tithes within the parish. The evidence of title on the part of the Respondents is only the evidence of a qualified possession; and being so, it raises clearly a presumption of title, but it does not show how it commenced. The title, so far as they do show a title, or that from which a title may be presumed, does not include the lands in question, [237] for they show no possession of the tithes of those lands. On the contrary, it appears there was a constant denial of their title to the tithes of those particular lands, together with something very like a disclaimer on the part of the person who claimed the impropriation, of a right to the tithes of those particular lands.

The Court below seem to have proceeded upon the general ground, which is applicable, unquestionably, to the case of an ecclesiastical rector, that a prescription *in non decimando* is purely illegal; that there can be no such prescription. There

might, it was admitted, be a right by grant, but then that grant must be shown: There might be a right under a reservation by the statute of Henry VIII. dissolving the greater monasteries, but that circumstance does not apply to this case; and the Court proceeded to take it for granted that the Plaintiffs in this case had the rectory, and having the rectory, that a prescription *in non decimando* was a thing purely illegal against an impropriator as well as against an ecclesiastical rector.

Now what is the ground of that doctrine in respect to tithes? Before the Reformation, if land was within a parish, the incumbent, the rector of that parish, must be entitled to the tithes of that land, or to some compensation for those tithes, by *modus* or composition real, which comes to the same thing, unless the lands for which the exemption was claimed were lands that were vested in a monastery claiming an exemption, under certain circumstances, from the payment of tithes. The ground of this was, that though the rector, under certain circum-[238]-stances, or the vicar, if there was an endowed vicar, might take a compensation; he could not alienate the tithes without compensation.

After the Reformation a number of rectories and lands vested in monasteries were vested in the Crown by the two Acts of Parliament of the 27th and 31st of Henry VIII., the latter reserving to the lands of a monastery discharged from tithes at the time of the Dissolution the same discharge in the hands of the Crown, or the grantee of the Crown, the former statute not containing that provision. But no title to discharge could be set up under the monastery through which the lands in question were taken, against a person clearly entitled to the rectory of that parish, neither before nor subsequent to the Dissolution, because if there had existed such a right prior to the Dissolution, as to the lesser monasteries not being reserved, that right could not prevail.

The lands and the rectory were united in the Crown by different titles: this appears clearly with respect to the land, and it must be to a certain degree presumed with respect to the rectory, because the persons who claim the rectory as a rectory impropriate cannot claim that but by a grant of the Crown; and though there is no evidence whatsoever with respect to the grant of the rectory, yet as they must claim under a grant of the Crown, they cannot pretend to say that their title may not be affected by that circumstance, because the lands, when they were in the hands of the Crown, might be occupied by the lessee of the Crown, discharged of tithes by the unity of possession in the Crown: [239] and if discharged of tithes by unity of possession in the Crown, and the Crown made a grant of those lands, having itself the rectory, and made the grant in such terms as would convey the lands to the grantee, precisely as the lessee of those lands held them, the consequence seems to me to be that the grant of the Crown would convey the tithes of those lands. The Crown was capable by its grant of discharging these lands from the payment of tithes, that is, by conveying a right to the tithes, and consequently of discharging the lands. I cannot see why a presumption of that kind is incapable of being maintained. It seems to me to be a title capable of a legal beginning; and the ground upon which it is held, that there can be no presumption against an ecclesiastical rector or vicar of this description is, that there can be no legal beginning of such a title.

If the Respondent in this case had shown that the King demised the lands separately, and the rectory, including the tithes of the land in question, had also been demised separately, so that there was a separate grantee of the tithes at the time of the grant of the lands by the Crown, that would tend to rebut such a presumption: but there is not the slightest evidence of that description. The Respondents have not done what they ought to have done, and what the Court ought to have called upon them to do before they proceeded farther in the cause; they ought to have called upon them in the first instance to have shown the grant of the Crown under which they claim, for they could have no title except under a grant of the Crown; and therefore, unless the Defendant fully admitted the right of the Plaintiff, [240] and so dispensed with the production of his title, in all cases of this description the person claiming an impropriate rectory must produce the grant of the Crown. I admit, that it is now held that it is not necessary for an impropriate rector, in such case, to deduce his title from one person to another, after a grant from the Crown has been shown. Why? because the Courts are aware that deeds of that description may be lost; and therefore, if the grant of the Crown is shown, and if a

recent title, or possession according to that title, is shown, then the Court will admit a presumption that the title has been properly deduced.

But why is there to be a presumption on one side, and no presumption on the other? It seems to me extraordinary that a Court of Equity should hold that there may be a presumption in favour of a rectory impropriate, but that there can be no presumption against a rectory impropriate. What difference is there between the title of a lay rector impropriate to the tithes of land, and the title of the other person who holds the lands from which the tithes are claimed? They are both equally fees; both equally capable of alienation; and why there should be a presumption in favour of a lay rector, and no presumption in favour of the occupier of the lands, I must confess I cannot conceive. In both cases it must be founded upon the very probable supposition of the loss of instruments. I believe it will be found that the titles to half the estates in the kingdom would be held to be bad if there was no presumption of the loss of instruments. In the case of rectories impropriate very few persons would be [241] able to deduce their titles correctly from the grant of the Crown; they must deduce their titles from circumstances arising in past times. In this case it appears to me that there is such ground of presumption; and I cannot conceive how a Court of Equity should imagine that, upon the ground upon which a Court of Equity is to deal with such a case, they could make the decree they have made.

It appeared from the evidence that both the rectory and the lands came to Sir John Packington, and that Sir John Packington having the rectory granted the lands. When he conveyed the lands, could he not convey them as he held them? Is it probable that he conveyed them subject to tithes, holding them himself not subject to tithes, though he might, if he thought fit, have made a separate demise of the tithes and of the land. That circumstance alone seems to afford ground of presumption, and a very strong ground of presumption, especially coupled with this, that there is no evidence of the persons, who afterwards derived title from Sir John Packington to the rectory impropriate, having ever received or ever claimed tithes of these lands; but on the contrary, that the person under whom Mrs. Meade now claims had in effect said that he was not entitled to the tithes of these lands; that these lands were discharged from tithes. That disclaimer on the part of an ecclesiastical rector would not operate much, but a disclaimer on the part of a lay rector ought to operate in the same way as if a man seised of lands at this day had a right of way or any easement over the lands of another; I cannot distinguish between them. In the case of a right of way over [242] the lands of other persons, being an easement belonging to lands, if the owner chooses to say I have no right of way over those lands, that is disclaiming that right of way; and though the previous title might be shown, a subsequent release of the right might be presumed. What is the difference between that case and this? I conceive that a lay rector may release the tithes, and the consequence would be, that the lands would be discharged; but the Court of Exchequer has said, unless you can produce the deed by which that release is made, the tithes, though not paid for a hundred years, must now be paid, because you cannot produce that deed. Then the Court of Exchequer will presume a loss of deeds in favour of an impropriate rector, but not in favour of the owner of the land: that seems so unlike equal justice that I cannot conceive how it could ever have been adopted.

All the circumstances of this case afford strong grounds for presuming that if the lands were subject to the payment of tithes after the Dissolution of the Monasteries, and if the title to the rectory and the title to the lands had passed to distinct owners, and never had been united in one person, that the person who had the impropriate rectory had, in some way or other, discharged those lands from the payment of tithes, that is, conveyed the right to the tithes, that is the nature of a discharge. If a deed were executed which said no more than "I discharge these lands of tithes," it would operate, because no person claiming under the party discharging could claim in opposition to his deed, he having a right to discharge them; and although [243] he had not used the proper form of release, yet if he used word of release it would be the same thing as in a right of way, or any other right; but where the fact is, that the lands and the tithes, as in this case, were at the same time in the same person, and that the lands were conveyed by that person, and conveyed before the rectory was conveyed, there is the strongest ground for presuming that the lands were so conveyed as discharged from tithes.

Either Sir John Packington must, after he conveyed the lands, have continued to receive the tithes, notwithstanding his grant of the lands, or he did not continue to receive the tithes; if he continued to receive the tithes, then that must, in some way, have been capable of proof by evidence, that is, if the same receipt of tithes (which probably would have been the case) had been continued down to a late period; whereas the evidence is the other way, that never, at any time, were tithes of these lands demanded by the person claiming the impropriate rectory under Sir John Packington. This is a circumstance very strong to show that either the lands were considered by Sir John Packington as discharged from the payment of tithes by some prior deed, and therefore conveyed by him as so discharged; or, that if they were not so discharged prior, yet when he conveyed the lands he conveyed them as he held them, not subject to the payment of tithes.

If he made such a conveyance his subsequent conveyance of the rectory would not carry these tithes, because he had abandoned his title to them; he had no right to convey them, and this makes it [244] extremely important in this case to call on the Respondents for the production of their own title, that it may appear whether Sir John Packington, after he had conveyed the lands, did or did not convey the tithes of those lands: the presumption must be, that he did not convey the tithes, unless the contrary is clearly proved; the production of that conveyance might not indeed decide the question, because it might be conceived, in general words; it might convey the property to another part of his family, and possibly without exception of incumbrances, etc.

The Court of Exchequer seems to have proceeded upon the ground that they were only to look at the defence, that they had no occasion to look at the title of the Plaintiffs, and looking at the defence alone, on that they proceeded; and they held that that defence was not good, and why? because it would not be good against an ecclesiastical rector. Now I apprehend that there is such a clear distinction between an ecclesiastical rector and a lay impropriator, that reasoning applicable to the case of an ecclesiastical rector is not applicable to the case of a lay impropriator, unless it can be shown that it is so applicable. The ecclesiastical rector is incapable of alienating; the lay impropriator is capable of alienating; and from the time of the dissolution of the monasteries the lay impropriations, as vested in the Crown, became as much lay-fees as the lands out of which the tithes issue, and therefore I cannot conceive upon what ground there can be a distinction between the case of a person claiming a lay impropriation, and the case of a person [245] claiming lands: the title is one and the same; of the same description; and particularly in the case of a person claiming any thing to be received out of the lands, or profit of any kind to be taken out of the lands. If a profit of any kind that is to be taken out of lands has not been taken for a vast number of years, and the lands have been enjoyed without yielding that profit to a third person, the consequence is, that the title to that profit shall be presumed to be discharged whatever is the nature of that profit. And what is the distinction between that case and the case of an impropriate rector claiming tithes? I can perceive none; and it seems, therefore, to me, that in this case, when all the circumstances are considered, even upon the defence, it would be impossible to hold that a Court of Equity had a right to make the decree which the Court of Exchequer has made.

The decision of the Court of Exchequer in this case is upon a legal right; they have said that the Plaintiffs in the suit in the Exchequer have a legal right to these tithes, unless the Defendant can show that they have it not. Now in what case is a Court of Equity authorized to decide on a legal right? There is no equity in the case of tithes; it is merely an incident to a right to an account. The person who claims in a Court of Equity a right to a decree for tithes, generally speaking, claims it merely as incident to a right to have an account of what the tithes are, or discovery from the Defendant of the tithes that have arisen from his lands, and then to an account of the tithes which have so arisen; and the equitable remedy is merely an [246] incident to a right of discovery and account. In tithes there is no equitable right to sue for, any more than in any other species of real property. It is merely incidental, and arising from the nature of the particular thing that is demanded. It is not an original jurisdiction to decide a question of right; the Court of Ex-

chequer had no right to decide the question: it is a legal question, which ought to be decided in a Court of Law, if there really is a question of right.

The Court of Exchequer, in this case, assumed the legal right, and entered simply into the question whether the Defendant has shown a ground to controvert that legal right. Now in this case the Plaintiffs not having shown a clear legal right, the Court of Exchequer had no right, as a Court of Equity, to decree the account as incident to a discovery of the quantity of tithes subtracted, which is the ground of the decree of a Court of Equity on this subject.

The equity in a case of tithes arising therefore only, as I conceive, incidentally from a clear legal title, where a clear legal defence is made in opposition to that title, the Court had no right upon the title shown to pronounce the decree they have pronounced. The Court ought not to have pronounced any decree in this case in respect to the tithes of these lands; and with respect to the decree actually made in this case, I do not see how the Court could have decreed an account of all tithes, both great and small, there being nothing in this case to show that the Plaintiffs have a good title to all tithes, great and small.

[247] In the first place, I apprehend there never was a time when an impropriation could be made without providing, in some way, for the service of the church. After the 15th of Richard II. there must be an endowment of a vicar. Before the 15th of Richard II. there ought to have been either a vicar endowed, or the service of the church performed by a curate. Now what is the case here? There is no service; the church itself has fallen totally to decay; a great part of it has tumbled down, and the remainder of it was removed by the late impropriator. There must be, therefore, something with respect to this title which does not appear to the Court. There must have been, at some time, service performed at that church; even within memory burials have been performed; even within these twenty years persons have been buried in the churchyard in a parish, where, the Court say, the Plaintiffs in this case are entitled to all tithes, great and small. If there was an endowed vicar he must have something out of the rectory; and it is incumbent on the rector to show what that endowment was, and how it was limited. It is true that the vicar might not be endowed with tithes; he might be endowed with land, or with an annual payment; but the endowment, whatever it might be, ought to have been shown, in order to entitle the impropriate rector to all the tithes. If the impropriation was before the statute of endowments it was not absolutely imperative by law to endow a vicar, yet there ought to have been some evidence given of the impropriation, because all, except, perhaps, very ancient impropriations, at least, I believe all the impropriations in the [248] time of Edward the first had a vicar endowed. A great many of the Pope's bulls for the purpose of impropriation expressly required that there should be a vicar endowed; because it was a subject of great clamour in the church that tithes were appropriated to monasteries, and no provision made for the due service of the church; and therefore it was frequently in bulls provided that there should be a vicar endowed. It is therefore extremely important that the actual impropriation should be shown, or that it should be shown that that impropriation took place before the time of legal memory. Before the Court decreed the payment of tithes, both great and small, some such proof of title ought to have been given. It is important with a view to the church itself. By proceeding without such proof of title in the case of a rectory impropriate, the protection which ought to be afforded to the church is disregarded. Some evidence should be shown to the Court that the rector impropriate is entitled to all the tithes, both great and small. The grant of the rectory impropriate is not conclusive as to the right, since there may be a vicar endowed; and unless the impropriation was prior to the 15th of Richard II. there must be a vicar endowed; and as prior to that time there generally was a vicar endowed, or some provision made for the service of the church, the Court of Exchequer has proceeded against what we may call common right on this subject, on common law, in making a decree, directing an account of all tithes, both great and small, arising on the lands in question.

With respect to that part of the case which is not [249] before the House on appeal nothing can be done. With respect to that which is before the House the Plaintiffs have not shown their title, and it is not admitted. They produce no evidence whatsoever of the fact of their title. They produce no evidence of posses-

sion according to their claim: on the contrary, the evidence is directly against them upon the fact of possession. The evidence is also strongly against their right; on the point of presumption they show no title by possession; and upon a circumstance, which is considered slight, but which I hold to be important, a disclaimer by the impropriate rector of these tithes, the presumption is against the title.

Under these circumstances, therefore, the Court of Exchequer ought to have dismissed this Bill with respect to these lands, and directed that the Plaintiffs, the Respondents here, should file a new Bill, if they thought fit, stating their title, and proving it by the production of those documents which the Court ought to have required to be produced, and by showing how it has happened that there is not in this parish a vicar endowed, or a person acting as curate, or in a capacity of that description, for the service of the church, so that the church itself is now gone into decay, and this parish is loaded with the payment of tithes, having no church-duty performed in it, for which tithes were given: under these circumstances the claim of the Respondents requires to be supported by the strongest and clearest evidence; and here there is an absence of all evidence, and the title is denied on the part of the Defendant. I think the proper way to dispose of [250] this case will be to reverse the decree pronounced, so far as relates to these lands, and to dismiss the Bill so far as relates to these lands, leaving it to the Respondents to file a new Bill, with a direction that this decision shall not be pleaded in bar of the Plaintiff's title.

The Lord Chancellor: In this case I withhold my final opinion till Monday morning, because I look upon it as a case of great importance, though it relates to a property of small value; yet in my view it may not be of so much consequence as it appeared to be when the learned Counsel first addressed your Lordships. It had escaped me, till I looked over the papers this morning, that the appeal was not against the whole of the decree: that the Defendant's appeal is only against so much of this decree as relates to the tithes of the lands called Great Friars. The appeal is brought here for the purpose of controverting a doctrine (which has been understood as hitherto unsanctioned,) by arguments not affecting any decision of the House of Lords, but the doctrine of the Courts of Exchequer and Chancery, both acting as Courts of Equity, affecting the practice of those Courts in matters of tithes, where the title of a lay impropriator is in question.

The points principally argued at the Bar were, that in this case the Court of Exchequer ought not to have decreed as they have, because it should have been presumed that there was a title in the Defendant. Now if I understand the decisions that have been made in the Courts below, they authorize me to say, that in the cases to which I have been [251] alluding they did not mean to decide the point whether there was or was not a title in the Defendants, where they have refused to make a decree at the instance of the Plaintiff; and the principle applies not only to suits by lay impropriators, but also to suits by clerical persons. What they have said, as I understand them, in the case of *Scott v. Airey*, and other cases referred to at the bar, is this, that if a person shows that he has had a pernaney or enjoyment of tithes; that he had not paid them to the rector, whether the lay rector, or the ecclesiastical rector; and can show by his title deeds that the tithes of his land have been made the subject of conveyances, to which, neither the lay rector nor the ecclesiastical rector, was (the latter could not, be) a party; the circumstance of the rector not demanding, whether a lay rector or an ecclesiastical rector, and the land owner asserting in his deeds a title to that which he was not only withholding, but enjoying, in cases attended with these circumstances, as I understand them, it has been determined by the Courts of Equity that it is not fit that they, being Courts of Equity, should make a decree, or interfere, but leave the party claiming to make out a title at law. On the other hand, with respect to a lay rector, where, unquestionably, it must be admitted that the claim is of what may be called a temporal inheritance, altogether different from the claim of an ecclesiastical rector; and when tithes in his hands having become lay property generally, are to be looked at as governed by the same principles as [252] other property; it has been decided, that if the occupier of land can do no more than show that he has not paid tithes to the lay rector, the doctrine, that he shall not prescribe in *non decimando*, applies equally as in the case of an ecclesiastical rector. If he cannot show some title, or some enjoyment of the tithes, which connect the title in him to tithes with that

enjoyment, in that case he shall account for the tithes to a lay as well as to an ecclesiastical rector. This is the doctrine which was chiefly discussed and assailed at the Bar; and I believe that this appeal was brought with a view to overturn it; but it seems to me, that in looking at that great point they have overlooked the true point of the case; because, whether Courts of Equity have been right or wrong in the establishment of these doctrines, I apprehend that we are bound to suppose that in all cases in which they have applied them the Plaintiff has made out his title. The Plaintiff can only recover by force of his own title; and I agree with what has been stated by my noble friend on the other side of the House, that the Court ought not to call on the Defendant to enter on his defence at all till the Plaintiff has shown his title.

In the present case the Bill is brought for the payment of tithes of all the lands occupied by the Defendant, including the lands called the Lower Friars, which formerly belonged to a monastery, the rectory at the same time belonging to another monastery. The Defendant not admitting the Plaintiff's title he must show, by evidence, that he has a title; and upon [253] reading the evidence it does not appear to me that he has made out his title by proof.

But here we have an embarrassment, for the Defendant does not appeal against that part of the decree which directs an account of the small tithes, generally, which according to the whole evidence the rector never enjoyed; but submitting to account for the tithes of other lands, which is, *pro tanto*, admitting the rector's title, he does not submit to account for the tithes of the Lower Friars, which form the subject of the present dispute. I was startled when I first found that, because it struck me, as raising the question, whether he had not admitted the rector's title, but that opinion is much too strong if the justice of the case does not require me to give it.

The question then is, Has the Respondent shown a title so as to bring himself within the cases, and to make it necessary to discuss, for the first time, a case of this kind which has come to the House of Lords? Has he so proved a title as to make it necessary for us to discuss whether the species of decisions to which I have been alluding have been right or wrong? Now I apprehend the nature of the title he has proved is neither more nor less than this: the proof applies to enjoyment, and it applies also to the contents of certain instruments which are produced. With respect to enjoyment, he never enjoyed the tithes of this parcel of land which, as well as the rectory, belonged to a monastery. I take that to be material; and it is likewise in evidence that he did not enjoy the small tithes.

There is a statement in the answer which is not [254] proved, but for which we cannot help conjecturing there must have been some foundation. It is supposed that this impropriate rector, (who was the impropriate rector of a parish in which there was a church; in which, to this hour, there are the remains of a church; in which, to this hour, there is a burial place, and where, though the inhabitants can have no spiritual food in their lives, they may have rest when they are dead,) made a bargain with the parishioners, that if they would free him from the necessity of procuring service to be done at the church, he would make them a present of their small tithes. I do not know that there is distinct evidence of the fact, but there has been no service; and what the noble Lord has said is extremely important, with respect to the duty which attaches on the impropriator to provide for the religious service of the parish, both before and after that statute of the 15th of Richard II. Something, therefore, may be conjectured upon that ground, there having been no such enjoyment.

But it is said, although there has been no such enjoyment, here is the character of impropriate rector vested in the plaintiff. Now it must depend upon the evidence whether the character of impropriate rector is vested in this plaintiff so as to bring him within those decisions, be they right or wrong, to which I have been alluding. How does that stand? He does not produce any grant from the Crown; he does not account for the circumstance that no grant is produced; he does not advert to the fact that the property both of the one nature and of [255] the other were vested in ecclesiastical bodies, who might deal with each other in the manner which the learned Lord has pointed out; he gives no account whatever what became of this property from the time of the dissolution of the monastery till that deed, which, if I recollect rightly, is in the year 1612, a conveyance from Sir John to Thomas Packington;

wherein it is described as the Rectory of St. Nicholas in Droitwich. But in the will of Thomas Packington how is that property described, which was taken under the deed? He devises it to his wife, together with all the tithes of corn, grain, and hay; why then, if previous to the dissolution of the monasteries these monasteries might have so dealt with each other as that tithes should not be demandable out of the estate, that might be so, but if that were not so, if the rectory was conveyed to Thomas Packington by Sir John Packington, and if Thomas Packington devises to his wife the rectory, that is, tithes of corn, grain and hay, and if from that day to this day the tithes of corn, grain and hay, that is, the great tithes, upon the whole of the evidence taken together were the tithes that were collected, I say, the person who claims under her must take as she claimed under her husband, and that the enjoyment is an enjoyment showing that she was entitled to the tithes of corn, grain and hay, but to nothing else.

I concur with the noble Lord in his statement, that after it has been shown that the Crown has granted the rectory, if there is possession and enjoyment on the one side, and on the other hand nothing to qualify or limit that possession [256] and enjoyment, a presumption arises that deeds have been lost, and that the connection cannot be made out. But here, looking to the first written evidence of title, it is an instrument between the Packingtons, which shows that the rectory, with all profits that would belong to the rectory, great tithes and small tithes, and so on, were not the subjects to be taken under that deed.

After this conveyance I do not recollect a conventional deed of any kind being proved, and then you come to the enjoyment of Mr. Clivecland, who appears to have been the impropiator. Leases granted by him are in evidence, expressed in terms equivocal and ambiguous; but it is proved that he made a declaration, which has been treated as a matter of little importance, not only in the argument here, but in the judgment of the Court below. But to me it appears a declaration of very considerable consequence, because, if both as against an ecclesiastical rector and a lay rector, by asserting a title to tithes, in title-deeds and otherwise, the relief in equity for those tithes is prevented, what is that but a declaration made behind the back of the rector, and received behind his back? Is that much stronger than the express declaration of a man who would be entitled to all the tithes, that he is not entitled to the tithes of such particular land? It seems to me an extremely strong thing; but it does not rest there, because this bill, being filed in 1810 by a lay person for an ecclesiastical right, in the last lease made in 1801 the tithes of these lands are excepted. I am aware that where a person makes a demise, and excepts something, it may be [257] taken as evidence that he had that which he excepts; but you must look at the circumstances of each case to know whether that was the meaning of it, and if you find he succeeded a person who declared he had not these tithes, you account for the exception, and remove the matter of doubt.

The inclination of my opinion is, that as this case stands before us, we have enough, without entering into the great questions that have been argued at the bar, to enable us to say that the Plaintiff has not made out a case to recover; that he has not gone far enough to raise the necessity of agitating the questions discussed at the bar, but that you may safely say his bill ought to be dismissed, without prejudice to any other bill being filed; and that notwithstanding the embarrassment arising from the Defendant's submitting to another part of the decree. I cannot at present foresee, even with the anxiety I have and profess to have not to disturb other cases, that I am likely, by reconsideration, to alter the opinion which I have now expressed.

The Lord Chancellor: In this case I propose to adopt the following judgment, because it appears to me that the circumstances of the case make it altogether unnecessary to examine, either by way of confirming or by way of weakening the doctrine of any of the cases that have been cited at the bar; I mean as to what is to be done in cases either of lay impropiators or ecclesiastical rectors, with respect to tithes of particular lands which have not been retained or enjoyed in pernaney under colour of title. In this case the Plaintiff's title [258] was not admitted by the defendant; and the question is, Has the Plaintiff's case in this cause been so proved, not being admitted, as clearly to raise the question upon a colour of title in the cases to which I have been alluding? It appears to me, by examination of the evidence, that it certainly has not, and consequently it will be sufficient to reverse

the decree, taking care, nevertheless, in the terms in which you give the judgment that the reversal of the decree shall not operate to the prejudice or the affirmance of any of the decisions which have been mentioned in the course of the argument at the bar.

The manner, therefore, in which you should proceed should be, "to reverse the decree of the Court of Exchequer, so far as the same is complained of by the petition of appeal." You will recollect that the Appellant submits to the decree as far as the tithes of other lands, including the small tithes, are concerned; and I mention the circumstance in order that it may be observed that we have not overlooked it, because it would be very difficult to account for this reversal of ours without affecting the decree for the small tithes, as well as the decree for the lands in question, if it had not been that the Appeal is confined to the latter, and therefore cannot touch the former. "The House may further order, that the original bill in the Court of Exchequer, so far as the tithes of the lands called the Lower Friars, in the occupation of the Appellant, are claimed thereby, be dismissed." If the reversal stopped here it might be understood to have an effect with respect to for-[259]-mer decisions, against which I am extremely anxious this judgment should not operate at all; it ought therefore to be added, "but without prejudice to the Respondents demanding the said tithes in any other suit;" and therefore, if in any other suit, either by the admission of the defendant, or by the proofs in the suit, he shall so establish his title as to authorize him to insist, as far as he can insist, on a decree of the same nature, and on the same principles which have been adopted in the cases to which I allude, this reversal will not prevent his doing so; and of consequence this reversal so qualified will not prejudice those cases at all, at least it is not intended by this judgment either to prejudice or to give more effect to those decisions than they ought to have.

Die Lunae, 9 Aprilis 1821. After hearing counsel as well on Friday the 9th and Wednesday the 11th days of February, as Friday the 16th day of March last, upon the Petition and Appeal of Coningsby Norbury, Esq., complaining of a decree of the Court of Exchequer, of the 20th day of May 1816, made in two certain causes, in the first of which the Right Reverend Thomas Percy, Doctor in Divinity, deceased, was Plaintiff, and Coningsby Norbury, Esq. Defendant, by original Bill, and in the other the Right Honourable and Reverend Pierce Meade and Elizabeth his wife, and Samuel Isted, Esq., were Plaintiffs, and the said Coningsby Norbury was Defendant, by Bill of revivor, and praying that the said decree might be reversed, in so far as the same directs an account to be taken of the tithes which arose upon and from the lands called the Lower Friars, or that the Appellant might have such other relief in the premises as to this House, [260] in their Lordships great wisdom, should seem meet; as also upon the Answer of the Honourable and Reverend Pierce Meade and Elizabeth his wife, and Samuel Isted, Esq., put in to the said Appeal; and due consideration being had on Wednesday the 21st day of February last, and on Friday last, and this day, of what was offered on either side in this cause, It is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, That the said decree, so far as the same is complained of in the said Appeal, be and the same is hereby reversed. And it is further ordered and adjudged, That the original Bill in the said Court of Exchequer, so far as the tithes of the lands called the Lower Friars, in the occupation of the Appellant, are claimed thereby, be dismissed, but without prejudice to the Respondents demanding the same tithes in any other suit.

[261]

ENGLAND.

(COURT OF EXCHEQUER.)

NORBURY,—*Appellant*; MEADE and others. *Respondents* [19th May 1825].*

A decree having been made upon a bill in Equity by a lay-impropriator for an account of tithes, the Defendant in the suit appeals against so much of

* This case is introduced here out of the order of time on account of its connexion with the preceding case. [See note to 3 Bl. 211.]

the decree as relates to part of the lands made subject to the account. The decree is reversed, upon the ground that the Plaintiff in the suit has not proved his title: whereupon the Defendant in the suit presents a new appeal against the remainder of the decree: held that a second appeal in such a suit cannot be maintained. Whether such an appeal would be entertained in a suit where the question of title is in issue. *Quære.*

A party having appealed against one part of a decree, in a suit where the title is not in issue, thereby virtually submits to rest of it, and cannot afterwards present a new appeal against other parts of the same decree. When such an appeal is presented the party served with it ought not to answer, but to present a counter petition to have it dismissed. If he treats it as an effective appeal by answering, and suffering it to proceed before he presents a counter petition, he will not be entitled to costs.

In consequence of the opinion expressed in moving the judgment in the case last reported, the Appellant, on the 31st May 1821, petitioned the House of Peers for permission to present, during the then session of Parliament, a petition of appeal against so much of the decree as was not appealed against by the former appeal. The House, on the report of the committee, rejected that petition, but without prejudice to the Appellant presenting a petition in due time in the next session of Parliament.

[262] On the 21st January 1822, the Appellant served notice on the Respondent's solicitors, of his intention to present a petition of appeal in the current session against so much of the decree as directs an account and payment by the Appellant of the small tithes in the decree mentioned, and of the costs of the suit.

A petition of appeal was accordingly presented, and, on the 15th February 1822, the House made an order that the Respondents should have a copy of the appeal, and put in their answer.

The Appellant entered into the usual recognizance for prosecuting his appeal, and on the 10th May 1822 the Respondents put in their answer to the appeal.

The Appellant then printed and delivered copies of his case, as required by the order of the House, and also delivered copies to the agents for the Respondents, and set his appeal down in the paper for hearing.

In the mean time the Court of Exchequer had virtually suspended proceedings under the decree, so far as related to the account thereby directed to be taken, and the payment of the costs taxed, until the House should have decided the second appeal: for the Respondents, on the 28th of December 1820, before the House had decided on the first appeal, applied by motion to the Court that it might be referred back to the deputy remembrancer, to apportion the costs taxed in respect of so much of the suit as was not the subject of appeal, which motion was opposed by the Appellant, and refused, with costs: and on the 28th of July 1821, after the judgment on the first appeal, the Respondents having again moved for a similar order, it was again refused.

After these proceedings the Respondents presented [263] a petition to the House, praying that the second appeal might be dismissed, with costs, on the ground, that the Appellant having by his former petition appealed against a part of the decree only, he had thereby submitted to the other part of such decree, and ought not therefore to be permitted now to appeal against the same. The Appellant insisted that he had not by his former appeal submitted in any respect to the decree, and that the Respondents had not taken this objection by proper averments in their answer to the Appellants second petition of appeal, as they ought to have done if they meant to rest their case upon any such alleged submission.

The Appellant further insisted, that if he had in any respect submitted to the decree, that upon discovery of any error in the judgment of the Court, he was at any time at liberty to appeal against the same, provided he presented such appeal within the time limited by the general order of the House, which had been done in the present appeal.

On these grounds the Appellant presented a counter-petition, praying that the petition of the Respondents might be dismissed, and that he might be heard at the bar by his counsel upon the matter of the second appeal.

The petitions in the usual course were referred to the appeal Committee, but the question of practice arising upon them being new, and of great importance, the matter of the petitions was appointed to be heard before the House by counsel, and accordingly came on to be argued at the bar.

The Solicitor General, and Mr. Roupell, for the original petition.

[264] Mr. H. Martin, and Mr. Simpkinson, for the counter petition.

For the first petition.—There is no instance of a petition of appeal to the House of Peers against part of a decree at first, and afterwards against the remainder of the decree; if such a practice could be permitted, the principle would extend to the admission of any number of successive appeals against the same decree, as where a number of moduses are pleaded, which would be dangerous and inconvenient in practice, and oppressively injurious to parties litigant. The grounds of objection in the new appeal and the old are precisely similar. The ground on defence, the defect of proof of title as impropiator, was apparent on the record, and open to the cognizance of the defendant at the time of the original appeal: If the practice of splitting appeals has existed, instances might be produced, and the absence of precedent is proof against the existence of the practice. If such a doctrine were established by the decision in this case it would lead to great oppression, delay and vexation.

Against the petition.—There is no positive rule or standing order of the House to prevent appeals against decrees in parts: The Appellants were taken by surprise, as to the ground of objection to the decree, which had not been adverted to by the counsel or the Judges in the court below; viz. the defect of proof of title in the plaintiff, which distinguishes this from the case of splitting appeals upon a decree respecting distinct moduses; the object of the House is always to do substantial justice.

In one case (*Roper v. Radcliffe*, 5 B. P. C. 360) an appeal being against part of a [265] decree, it was reversed; and the House gave leave to the Appellant to apply to the court below to vary the other part of the decree. So in another case (*Evelyn v. Evelyn*, 6 B. P. C. 114) the House dismissed an appeal by consent of parties, declaring the order to be without prejudice to presenting a new appeal. If the House should reject the new appeal, there will be an inconsistency in the decree of the court below; as to one part, the account of titles will be refused, because the plaintiff has no title; as to the other, it will be directed, although it will appear by the judgment of this House operating on the court below that he has no title. The whole ground of the Respondents claim is annulled by the judgment in the first appeal, and this proceeding is only a corollary from that judgment. There has been no acquiescence in any part of the decree; and if the Respondents had intended to take this ground of objection, it should have been taken earlier. They have answered the second petition of appeal, and suffered the Appellants to proceed upon it, to print their cases, and act upon it for two years without objection. It is now too late to object.

* There has been no submission, actual or virtual, to that part of the decree which was omitted in the first appeal. No case has been found in which two appeals, at different times, against different parts of a decree, have been brought before the House; but there are cases which furnish analogy and principle, which tend to show, that in the [266] opinion of this House an appeal against part of a decree is not an acquiescence in the rest of the decree: that appears by the case of *Roper v. Radcliffe*. The question in that case was, whether a devise, or bequest of money, to arise from the sale of land to a papist was a devise within the Acts relating to papists. Lord Harcourt held, that as the land was directed by the will to be sold out and out, it was not an interest in land within the meaning of these Acts; that it was a devise or bequest of the surplus of money. Against that part only of the decree, the bequest of the surplus, an appeal was presented to this house. Upon argument, the House being of opinion that it was a devise of an interest in land within the meaning of the Popery Laws, the decree, so far as the appeal complained

* The argument from this point is by Mr. Simpkinson. It is given distinctly, as well on account of the difference in the topics, as the novelty and importance of the case.

of it, was reversed: But after the declaration reversing the decree, the order of the House proceeds thus—"And as to the payment of any of the simple contract creditors out of the money arising by the sale of the trust-estate, in case the personal estate should not be sufficient for the payment thereof, no complaint thereof being made by the Appellant, the decree was to stand: but without prejudice to the Appellant applying to the Court of Chancery, if he conceived himself aggrieved, thereby to vary the directions in the said decree touching the payment of the simple contract creditors, as he should be advised: and the Court of Chancery is to give all such directions in pursuance of this order as may be just."

This permission to apply, and direction to the Court of Chancery, on a subject which formed no [267] part of the appeal, was in effect a direction to that Court to re-hear that part of the case which was not before the House on the appeal. Suppose the party to have availed himself of this liberty, and the cause had been accordingly re-heard on this unappealed portion of the decree, and an order thereupon made by the Court below, would it not have followed as a matter of course, that if the party had been dissatisfied with the order upon re-hearing, or any thing relating to the re-hearing, he might have applied to the House by way of appeal upon that subject? In such a case there would of necessity have been two successive appeals against different parts of the decree in the same cause.

The proceedings in this House in another case (*Drake v. Smith*, D. P. 1823, MS.) lately pending, illustrates the position, that an appeal against part of a decree is not to all intents and purposes a submission to the rest of the decree. In that case a bill was filed by a vicar for tithes. There were four townships in the parish: one called Shafton. The claim was by the Plaintiff, as vicar, of all the tithes, except a moiety of corn and grain. Lord Westmoreland, who claimed a portion of tithes in Shafton, was made a defendant with persons who were occupiers of lands in that township. Lord Westmoreland, by his answer, insisted that he was entitled not to a moiety, but to the entirety of the tithes of corn and grain in Shafton. The other defendants admitted occupation, and that they had had titheable corn and grain on their lands.

Upon the hearing the bill was dismissed, with costs, as against Lord Westmoreland: and, as against the occupiers, an account was directed of the articles [268] of titheable produce specifically: and the decree concluded with the general words, "all other titheable matters and things demanded by the bill," which included the moiety of the tithes of corn. Against that part of the decree which directed an account of the tithes of hay, wool and lambs, and some other things, the defendants appealed to this House, but that part of the decree which directed a general account of all things demanded by the bill was left untouched by the appeal. When the case came before the House the discrepancy was discovered, and the House refused to hear the appeal until the decree was rectified. It therefore became necessary to apply to the Court of Exchequer to re-hear the case, and to have that part of the decree rectified, in order that the appeal might be brought before the House in a perfect state. But if appealing against part of a decree is an affirmance of the rest of the decree by the effect of acquiescence, no application could have been made to the Court below to rectify the decree: for according to the argument the party had bound himself by virtual submission to the decree.

The effect of the order upon the former appeal was to annul the title of the Respondent, and to take away all right to account in this cause. If he had submitted on the presentation of the second Appeal no costs would have been incurred, and if he had intended to raise the question of practice he ought to have taken the objection when the appeal was presented.

Mr. Wetherell, in Reply: The cases cited are not in point. In *Roper v. Radcliffe* leave was [269] given to the party to raise the question, whether the simple contract debts were well charged on the estate. It is nothing unusual when a decree is reversed if collateral parts of it are affected by the reversal, to give directions as to what is to be done in the Court below. It is a declaration, explanatory of the judgment of the House, to prevent a consequence, flowing from the reversal of the decree, which might be injurious to the parties, if no declaration were made, or direction given on the subject. In the case of *Drake v. Smith* the title of Lord Westmoreland was not properly brought before the House when the case was first

brought for hearing on the appeal; and the House directed that the cause should go before the Court of Exchequer to make his title apparent in the cause, and to enable him to appear at the bar as a party in the appeal.

As to the supposed discrepancy between the order of the House on appeal and the judgment in the Exchequer, if there had been any decision upon the title in the appeal, the point might deserve consideration; but in this judgment of the House no question of title is decided: it is expressly reserved.

In the course of the argument the Lord Chancellor asked whether the decree was general, to which it was answered, that it was so as to the account.

Upon the argument, founded on the absence of any order of the House to exclude a second appeal in the same cause, he asked whether any instance of such an appeal could be produced. As to the effect of any acquiescence or [270] agreement between the parties upon the subject: he said the objection must arise from the practice of the House, without regard to the arrangements or conduct of parties.

As to the argument, that after the judgment on the former appeal, if the decree for the small tithes should be suffered to stand, it might appear by the record that the Court of Exchequer had decreed the small tithes to a person having no title, Lord Redesdale observed, that the order on the former appeal was made without prejudice to any demand to be made by the Respondents in any other suit: that the House had expressed no opinion as to the parts of the case not then the subject of appeal, and that the cases were very different.

Lord Redesdale: I think the petition of appeal should be dismissed. The case came originally before the House on an appeal, which applied to the tithes of certain abbey-lands called the Lower Friars. The decree against which the appeal was made was upon a bill in which the Plaintiff sued in the character of improPRIATOR, for all tithes, great and small, of the whole parish. The defence set up by the Defendants in that case was with respect to the tithes of the lands called the Lower Friars; that they were abbey-lands, and exempt from tithes. The Court of Exchequer were of opinion that that exemption was not proved, and therefore decreed an account of those tithes of the lands called the Friars. The Court of Exchequer also decreed against the Defendant for the tithes of other lands, including the small tithes. The question before the House on the first appeal was, [271] whether these lands called the Friars were exempt from tithes, as the Defendants contended: it appeared that the Respondents in that case had not given sufficient evidence of their title to the tithes of these lands, for a part of the evidence which they produced, and which proved their being in possession of all the tithes of the rest of the parish, excepted the abbey-lands, particularly leases of the tithes of all the other lands except the abbey-lands. There was also evidence of the actual receipt, (that is, receipt by letting the tithes) of all the tithes of the rest of the parish except the abbey-lands. It appeared, by the evidence of a person who claimed to be improPRIATOR, that he had said they were exempt from the payment of tithes. Upon this case, so appearing before the Court of Exchequer, they thought fit to make a decree with respect to the abbey-lands, as well as the other lands in the occupation of the Appellant, for tithes generally including the small tithes. Now the ground upon which this House reversed that decree with respect to the abbey-lands was this, that the Respondent had not sufficiently shown a title to the tithes of the abbey-lands, but they had shown a *prima facie* title to the small tithes of the other lands, and therefore the House having really nothing before it with respect to these lands on which it could make any order whatever, did not touch that part of the decree. The House was also doubtful as to the tithes of the abbey-lands. They therefore, in the order which they pronounced, declared it to be without prejudice to the Respondents in that appeal claiming the tithes in any other suit. It [272] the decree against part of which the Appellant now seeks to appeal with respect to other lands had been a decree establishing the title to the tithes, the question might be different; but it is a decree merely for an account, and therefore it is a decree without prejudice to the title. What was decided by the House on the former appeal was also without prejudice to the title: for the House, in the judgment which it thought fit to pronounce on that appeal, ordered that the decree, so far as the same was complained of, (that is, with respect to the abbey-land being exempt,) should be reversed: and it was ordered, that the original bill, so far as it regarded the tithes of the Lower Friars, or *clavius*

thereto, should be dismissed, but without prejudice to the Respondents demand in any other suit. The parties therefore are in this situation, that the dismissal of the bill in the Court of Exchequer by the order of the House, does not prejudice the title; it prejudices the demand that was made in that suit, and it puts an end to the title of the Plaintiff in that suit with respect to the titles of the abbey lands, but it does not determine that he has no title to these titles, and he might have instituted a suit for the purpose of ascertaining his title to these titles. The decree of the Court of Exchequer which was pronounced at first does not at all prejudice the rights of the Appellants in that case, who have now presented a further petition of appeal: it does not prejudice their right to insist on the exemption from payment of small tithes to the Respondents: they set up no exemption from the payment of small tithes at all, with respect to [273] these lands: but their defence was, that the Plaintiff was not entitled to these small tithes. Now the evidence did prove a *prima facie* title, and therefore was sufficient to ground the decree of the Court of Exchequer. Had they thought fit to present an appeal against the whole decree, the House might have determined the whole case. How it would be determined on the whole case I cannot now pretend to say, for the whole case has not been argued before the House. But as the party had the opportunity, if he thought fit, to have presented the appeal against the whole case, I think it would be extremely mischievous to permit a second appeal, in such a case as this, to be presented to the House. If it was a decree which concluded the title, that might be a question of separate consideration, but as it is a decree which does not conclude the title, but leaves both parties in the situation in which they would have been, except as to the account, I think there is no reason whatever for doing what does not appear ever to have been done before, permitting a second appeal to be presented by the same party, for the purpose of bringing the question again before the Court, with respect to the title which the Respondents in this case may have to the small tithes of the other land in the occupation of the Defendant, which is now the only subject of question.

Under these circumstances, therefore, it appears to me that this appeal ought to be considered as improperly presented, and therefore dismissed. It is not a case in which costs ought to be given, especially as the Respondents have thought fit to put in [274] an answer to this appeal. They ought, immediately on the appeal being presented to have presented a petition to the House, praying that the appeal might not be heard: not having so done, it seems to me not a case in which there should be any costs given to the Respondents: I therefore move that the petition of appeal be dismissed without prejudice to any question of right, and without costs.

The Lord Chancellor: I rise for the purpose of stating the question, whether this petition be or not received. I am quite satisfied that this second appeal ought not, under the circumstances, to be upheld. Whether, if the title had been brought into question, the appeal should have been received, I desire to withhold my opinion; that is a question of great importance, and I should be sorry to prejudge that question by any thing falling from me at present. I am satisfied that this petition of appeal should be dismissed. But the persons who complain of this petition of appeal have not done what they had an opportunity of doing. When the order was made for hearing the appeal they should have presented a petition to the House to put an end to that petition of appeal: under these circumstances I think the costs are properly refused.

Petition of Appeal dismissed.

[275]

SCOTLAND.

(COURT OF SESSION.)

Dr. JAMES ROBERTSON BARCLAY, of Keavil.—*Appellant*: The Right Honourable WILLIAM ADAM, Lord Chief Commissioner in the Jury Court of Scotland.—*Respondent*.

An entail in the prohibitory clause provided that it should not be lawful to sell,

alienate, or put away the lands, etc.; nor to alter the course of succession; nor to contract debt, etc.; nor to do or commit any fact or *deed*, civil or criminal, whereby the lands, etc. might be adjudged, evicted, or forfeited, etc.; nor to permit the estate to be adjudged or affected for any debts or deeds contracted or committed by the grantor or the heirs of entail; It contained an irritant clause in the following words: "All which debts, *deeds* and contractions are hereby declared null and void, etc." The resolute clause provided that the heir in possession, if he should not redeem any adjudication which might be led against the estate for and upon the debts and *deeds* of, etc. should forfeit, etc.

Held, that the word "deeds" in the irritant clause does not apply to all the things enumerated in the prohibitory clause, but is restricted by the context to such deeds as are of a nature to create a debt or burden; that it refers especially to the debts and deeds previously prohibited, and cannot be extended to the prohibition against selling.

Upon a sale therefore by the heir in possession, an objection to the title by a purchaser, on the ground that the irritant clause struck at alienation, was held invalid.

In the month of November 1820, the Appellant purchased from the Respondent certain lands situated in the county of Fife. By the agreement the Appellant undertook to pay £3950 as the price [276] of the estate; and the Respondent bound himself to execute and deliver to the Appellant a valid and sufficient disposition of the property.

Of the lands so purchased, certain parts, called Craigincate and Kingscat, are contained in the entail of the Blair Adam estate. These lands consist of about four hundred acres, and the proportion of the price corresponding to them was about £3000.

The Appellant having refused to pay this part of the price, on the ground that the entail of the estate of Blair Adam contained a prohibition against *selling*, the Respondent was proceeding to enforce the execution of the contract, when the Appellant presented to the Lords of Council and Session in Scotland, a bill of suspension, in which, after setting forth the terms of the agreement, he professed his readiness to implement all the obligations incumbent upon him, provided he could be assured that the Respondent was in a situation to give him a sufficient title to the lands which he had purchased.

The bill of suspension having been passed, the cause came to be pleaded before Lord Gillies; who ordained the parties to print and to lodge informations, that it might be judged of by the first division of the Court.

The main objection of the Appellant was grounded on the terms of the Blair Adam entail, as importing a prohibition against selling.

The entail was executed by the Respondent in terms of a former deed of entail, executed in the year 1758, by Alexander Littlejohn of Woodstone, and in terms of an act of parliament, by which the Respondent became bound to settle certain lands on the same series of heirs, and under the same conditions [277] and limitations, as those contained in the deed executed by Mr. Littlejohn.

The entail contains the following prohibitory clause: "That it shall be no ways lawful to the grantor and heirs of entail, to *sell*, *alienate*, or *put away* the lands, and others foresaid, or any part or portion thereof, nor to *alter the course of succession* above established, nor to *contract debt* above £500 sterling at one time, nor to *do or commit any fact or deed, civil or criminal*, whereby the said lands and estate, or any part thereof, may be anyways adjudged, evicted, or forfeited from me or them, or may be anyways affected in prejudice and defraud of the subsequent heirs of tailzie and provision successively, according to the order of substitution above specified: neither shall it be lawful for me nor them to *permit the said estate, or any part thereof, to be adjudged*, or affected for any debts or deeds contracted or committed by me or them, before our succession, or by any of our predecessors whom I or they may any way represent, or to which we, as their representatives, may be liable or subject."

Then follows an irritant clause in the following terms: "*All which debts, deeds, and contractions* are hereby declared *void and null* by way exception or reply, and without declarator, in so far as they may burden the said lands and estate."

After this irritant clause the prohibitory clause is resumed in the following terms: "Neither shall it be lawful for me, or the said heirs of tailzie, to permit the said lands and estate, or any part thereof, to be evicted, adjudged, or affected [278] for any debts or deeds contracted or done by the said deceased Andrew Littlejohn, or for the said sum of £500 sterling, wherewith the heirs of tailzie are empowered to burden the lands and estate at one time."

After this there follows a resolute clause specially applicable to this last prohibition. It is expressed in the following terms: "And if I, or the heir in possession, shall not redeem any adjudication that may be led against the said estate, for and upon the debts and *deeds* of the said deceased Alexander Littlejohn, or for the said sum of £500 sterling, within three years of the expiry of the legal [?] term] of such adjudications; then and in that case, I, or such heir, shall, for himself only, lose and forfeit his right to the said lands and estate; and it shall be lawful to the next immediate heir of tailzie, and if he shall neglect, to the next succeeding heir, and so on successively, to redeem the said estate, and use all the forms necessary in the order of redemption, and to enjoy and possess the said estate irredeemably thereafter, free of the debts and deeds of the preceding heir."

The entail afterwards contains a more comprehensive *resolute* clause, which was admitted in every respect to be effectual.

The case was decided by the Court of Session on the 8th of February 1821, when the following interlocutor was pronounced: "Upon the report of the Lord President, in the absence of Lord Gillies, and having advised the informations for the parties, the Lords find, that the deed of tailzie founded on by the suspender does not contain [279] any irritant clause applicable to the sales or alienations of the lands in the said tailzie, and therefore find the letters orderly proceeded, and decern."

The Appellant, conceiving himself to be aggrieved by this interlocutor, presented his appeal.

For the Appellant: The irritant clause is introduced at the end of those parts of the prohibitory clause to which it is applicable, and before the last branch of the prohibitions, because it is to that inapplicable. In order to render an irritant or resolute clause effectual it is not necessary to adopt any precise form of words; either of these clauses may be prefaced by a minute recapitulation of all the different acts which have been previously prohibited, or by a general reference to the previous prohibitory clause in which such enumeration is contained; if a particular recapitulation is attempted, there should be no omission of any one act which is meant to be prohibited, since otherwise the court, consistently with recent authorities, will be disposed to conclude that such omission arises from design, and that the act so omitted is not meant to be comprehended under the irritant and resolute clauses. But an irritant clause, expressed in terms of general reference to the previous prohibitory clause, is equally effectual as if it contained the most minute recapitulation of particulars.

Thus, in the act of parliament 1685, c. 22, by which entails were first declared to be effectual against the creditors of the heir in possession, it was made lawful "to his majesty's subjects to tailzie their [280] lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolute clauses, whereby it shall not be lawful for the heirs of tailzie to sell, nailzie or dispoise the said lands, or any part thereof, or contract debt, or do any other deed, whereby the samen may be apprised, adjudged, or evicted from the other substitute in the tailzie, or the succession frustrate or interrupted, *declaring all such DEEDS to be in themselves void and null*," etc. Here it will be observed, that after the enumeration of several different prohibitions against selling, contracting debt, etc. the statute proposes the form of a general irritant clause, "declaring all such *deeds* to be void and null," and by which general term "*deeds*" is made to comprehend all sales, contractions of debt, alterations of the order of succession, and every other act previously prohibited.

In like manner this mode of expression has been adopted in many of the entails which the Court of Session have had occasion to consider. Thus, in the entail of the estate of Roxburgh, the prohibitory and irritant clauses were in the following terms: "And sicklike it is expressly provided, that it shall not be lawful to the persons before designit and the heirs male of their bodies, nor to the other heirs of

of tailzie above written, to make or grant any alienation, disposition, or other right in security whatsoever, of the lands, lordship, baronies, estate, and leiving above specified, nor of no part thereof, nather zit to contract debts, nor do ony [281] *deeds* quairby the samen may be apprizit, adjudgit, or evicht frae them, nor zit to do ony other thing in hurt or prejudice of thir prests and of the foresaid tailzie and succession in hail or in part, *all quhilk* *deeds* sua to be done by them, are by thir prunts declared to be null and of nane avail, force, or effect."

So in the entail of the estate of Tillycountry, which was under the consideration of the Court of Session in 1799, there was a prohibition against selling, altering the order of succession, contracting debt, or doing any other fact or deed, "civil or criminal, by which the lands might be evicted;" and the irritant clause following these prohibitions was in these general terms: "All which *deeds* are not only declared void and null *ipso facto* by way of exception, or reply without declarator, or in so far as the same may burden and affect the foresaid estate, but also," etc. An objection was taken to the resolute clause of that entail, but the parties did not question the irritant clause. On the contrary, it was distinctly admitted, that the irritant clause expressed in these terms of general reference to the prohibitory clause was perfectly sufficient.

For the Respondent: An entail with prohibitory and resolute clauses is not effectual against the onerous deeds of the heir in possession, if it contains no irritant clause declaring such deeds to be null and void.

This was settled by the decisions of *Baillie* against *Carmichael* (11 July 1731), and *Gardiner*, etc. against *the Heirs of entail of Dunnipace* (27 January 1744). It has ever since been held to be fixed law, and is not disputed by the Appellant.

[282] The irritant clause in the present entail is not a general one, applicable to all the prohibitions, but specially and exclusively directed against the debts and deeds which are specified in the particular branch of the prohibitory clause which immediately precedes it; and therefore it has no relation to sales and alienations.

The prohibitory clause in the present entail consists of three distinct branches or members, each of which is introduced by the words, "It shall no ways be lawful," or "Neither shall it be lawful" to me or the heirs of entail. The first branch prohibits the heirs from selling, from altering the order of succession, and from contracting debt; the three restrictions which are essential to a strict entail. The prohibition to contract debt is not an absolute one, but is qualified in favour of the heirs in possession, and that by words so ambiguous in their meaning as to give room for different interpretations. This branch contains also another clause, prohibiting the heirs "to do or to commit any fact or *deed*, civil or criminal, whereby the said lands and estate, or any part thereof, may be anyways adjudged, evicted, or forfeited;" but the word *deed*, as used in this restriction, which is a common one in entails, has been invariably held to apply solely to feudal delinquencies, and to have no reference to written instruments or conveyances affecting the lands.

The provision as to contracting of debt, inserted in the first member of the clause, seems to have been thought insufficient, as not applicable to those debts which the heirs of entail might have contracted, or become liable for, before their succession to the [283] estate; and it was further foreseen that the lands might be adjudged for debts left by the entailer himself, or those which the entail permitted the heirs to contract.

But the two classes of debts last mentioned stand in very different situations. Those for which the heirs were liable at the time of their succession it was in the entailer's power, by proper prohibitory, irritant, and resolute clauses, to prevent from ever affecting the estate at all; whereas, having no such power with regard to debts which he might contract himself and leave unpaid, or to debts which he had allowed the heirs to contract, it was necessary to guard against them in a different way.

Hence a separate prohibition, or member of the prohibitory clause, is applied to each class of debts. By one of these prohibitions it is declared not lawful for the heirs to permit the estate to be adjudged or affected "for any *debts or deeds contracted or committed* by me, or them, before our succession, or by any of our predecessors, whom I, or they, may anyways represent, or in which we as their representatives, may be liable or subject to." And as it was meant to prevent such

debts or deeds from affecting the estate *at all*, there is added the irritant clause in question: "*All which debts, deeds, and contractions, are hereby declared void and null, by way of exception or reply, and without declarator, in so far as they may burden or affect the said lands and estate.*"

Then follows the third member of the prohibitory clause, declaring it unlawful for the heirs to permit the lands to be adjudged for the debts or deeds of [284] the original entailor, Alexander Littlejohn, or for the sum of £500, with which they are allowed to burden the estate. As no irritant clause similar to that applied to the former class of debts, could have been used here, a special resolute clause is immediately subjoined, declaring, that if the heir in possession did not within a certain time redeem any adjudication which might have been led against the estate for the entailor's debts, or the above £500, he should lose and forfeit his right to the lands.

The irritant and resolute clauses above mentioned, being specially applicable to particular prohibitions, left the entail defective, in so far as regarded the restrictions contained in the first branch of the prohibitory clause. The defect has been partly supplied by the insertion of a general resolute clause applicable to the whole prohibitions. But there is no additional irritant clause, the defect having so far escaped observation.

It is argued that the words "all which debts, deeds, and contractions," in the irritant clause, must be held to apply to all the things which had been previously prohibited, the word "*deeds*" in particular being comprehensive enough to embrace every act of the heir in possession, by which the estate may be alienated, or the order of succession altered: That this word *deeds*, when it has been used generally in an irritant clause, with reference to the prohibitions which have gone before, has always been held to comprehend every prohibited act: That the irritant clauses both of the Roxburghe and Tillicoultry entails were of this kind, and their efficacy would most certainly have been disputed [285] had it been thought possible to raise a question on the point: That in both those cases the word "deed" had been previously used in the prohibitory clause, in a way which showed it to apply merely to feudal delinquencies: That there is no good ground, therefore, for taking it here in a more limited sense, more especially when there can be no doubt of the intention of the entailor that his estate should descend entire in the line of succession pointed out. But the general intention of an entailor to preserve his estate to the series of heirs he has called, as manifested by his making a deed of the present kind, can be no reason for giving to particular words or expressions an interpretation different from their legal sense. Were such a mode of construction admissible, there is not one of the numerous entails which have been found ineffectual by the courts of law which would not have been sustained as effectual. There is not one where the general object of preserving the estate was not obvious, and where there were not words which, if taken in their most comprehensive sense, might not have been held to imply the restriction contended for. But this is not the rule of construction applicable to such cases. On the contrary it is *tritissimè juris* that the words in which restraints and limitations are imposed are to be strictly interpreted, and in no case extended beyond the limited signification, in which, according to the proper style of the deed, they are used.

It is also a rule invariably applied to the construction of such deeds, that the sense in which a word which admits of different meanings is to be [286] taken, must be regulated by the context, and will be affected by the other terms with which it may be coupled in the passage where it is found. Thus a prohibition in which the word "dispose" is coupled with the words "sell and alienate" has been found insufficient to prevent a gratuitous disposition, by which the lands were conveyed away from the heirs of entail: and in the same cases the prohibition to "do" or "to grant any other deed, whereby the lands might be evicted," was found ineffectual to prevent an alteration of the succession, because it was held as restricted to things of the same kind with those previously enumerated.*

Now the word deed, as used in this irritant clause, is not a single or insulated

* 8th July 1789, *Stewart against Home*; and 25th May 1808, *Brown against the Countess of Dalhousie*.

one, as in the Roxburghe or Tillicoultry entails. It is coupled with others, and placed betwixt two, which being specially and exclusively applicable to burdens of the nature of debt, leave no doubt as to the proper sense. The things declared null are "debts, deeds, and contractions." The deeds therefore in view must be such as are of a nature to create a debt or burden. The conveyancer, by adding the word *contractions*, which is nearly if not wholly synonymous with *debts*, shows clearly that the whole expression must be held to denote things of the same kind. Had he conceived the word "debts" to be sufficient to express all burdens of this nature, and used the term "deeds" to denote things of a quite different kind, he could never have thought of adding the word "contractions," which can apply only to those [287] very things which are supposed to have been already dismissed from his mind, as sufficiently designated by the term "debts." As the first and last are clearly of limited signification, the intermediate term, though more flexible in its nature, can only be taken in a sense consistent with that of its adjuncts. The whole forms a complex expression, which cannot be understood to comprehend things of a kind altogether different from those denoted by any one of its terms.

The same inference is no less clearly deducible from the context which immediately precedes the irritant words. These do not, as in the Roxburghe and Tillicoultry cases, form a separate clause coming after all the prohibitions, and having no particular relation to any one. They are added to, and make a part of, the second branch of the prohibitory clause, so as to have a special relation to what is contained there. The words, "all which debts, deeds, and contractions," refer to some debts and deeds which had been previously mentioned; and if there are to be found in the same member of the clause, and in the sentence immediately preceding, the words "debts and deeds," these must, according to every known rule of legal or grammatical construction, be held the proper antecedents of the pronoun "which," and it is not allowable to seek for them elsewhere. When the entailor, after prohibiting his heirs to allow the estate to be evicted "for any *debts or deeds contracted or committed* by me or them before our succession," immediately subjoins "all which debts, deeds, and contractions are hereby declared null," we cannot in sound construction [288] hold the debts and deeds so annulled to be any other than those so contracted or committed by the heirs before their succession.

There occurs, it is true, in the first branch of the prohibitory clause, the words *debts and deeds*. The heirs are there prohibited "to contract *debt* above £500 at one time, or to do or commit any fact or *deed*, civil or criminal, whereby the lands may be adjudged or forfeited." But so far is the occurrence of the words there from being a reason for extending the irritant clause to the whole prohibitions, that it affords the clearest evidence against its extending to any of them.

The entailor, while he was expressly leaving the heirs at liberty to contract debts to the extent of £500 at one time, could never have thought of declaring the whole debts contracted by them to be null and void. This would have been quite inconsistent with the prohibition itself; and had an irritant clause been contemplated, as applicable to this species of debt, it must, it is evident, have been qualified in the same manner as the prohibition. It could only have declared the debts contracted by the heir in possession to be null, in so far as they exceeded the sum of £500 at one time.

The same observation applies to the prohibition to commit facts or deeds, civil or criminal, whereby the lands may be evicted or forfeited; for the entailor could not by any declaration take away the rights of the crown or the superior, in cases of treason or feudal delinquency, though he might resolve the right of the heir who was guilty of them.

[289] But if the irritant clause is not applicable to those restrictions in the first branch of the prohibitory clause in which the words debts and deeds actually occur, still less can it have any reference to the prohibition which respects selling.

A question as to the meaning of the word *deed*, when used in the irritant clause of an entail, was determined by the Court of Session in circumstances much more favourable for an extensive interpretation than the present (*Sir John Dick against Drysdale*) (Fac. Coll. 14 Jan. 1812). But it was taken there in the restricted sense of feudal delinquencies, because this was the sense in which it had been previously used by the entailor.

For the Appellant, Mr. J. P. Grant.

For the Respondent, Mr. Cranston.

The Lord Chancellor: I have fully considered this case, and, independently of the authority cited by Mr. Cranston (*Dick v. Drysdale*), I think the judgment ought to be affirmed.

Judgment affirmed.

[290]

ENGLAND.

(EXCHEQUER CHAMBER.)

HENRY SMITH.—*Plaintiff in Error*: The EARL of JERSEY and others,—
Defendants in Error.

[*Mews' Dig.* x. 1639, 1646. S. C. 2 Br. and Bing. 473: 5 Moo. 332. Discussed and followed in *Doe d. Lord Shrewsbury v. Wilson*, 1822, 5 B. and Ald. 363, *passim*; and see *Doe v. Rutland*, 1837, 2 M. and W. 661; *Douglas v. Lock*, 1835, 2 Ad. and E. 705; *Doe d. Lord Egremont v. Burrough*, 1844, 6 Q. B. 229, 232, and referred to in regard to point of construction (3 Bli. 393) by C. A. in *In re Grainger*, W. N. 1900, 69 L. J. Ch. 789, at p. 796.]

A POWER reserved upon a marriage settlement to Tenants for life to grant or renew leases for lives, provided that a right of re-entry is reserved upon such leases for non-payment of rent, is well executed by a lease for lives providing a re-entry in case the rent remains in arrears fifteen days, and there is no sufficient distresses on the premises.

B. M. being seised, etc. in fee of lands, etc. devised the lands, etc. to his daughter, L. B. for life, with remainders over: with a power to her in consideration of marriage, either before or after marriage, of revocation and appointment. B. M. died seised, without altering his will, leaving his daughter, L. B. seised of the lands, etc. for life, with power, etc.

L. B. intermarried with G. V. V.

Before the marriage, L. B. being seised as aforesaid, by deed, in conformity with the power in the will of B. M. and in consideration of the marriage, revoked the uses and devises contained in the will, and appointed and limited the lands, etc. to F. Earl of G. and C. M. and their heirs, in trust, to hold the same to the uses before limited, until after the marriage, and then to the use of G. V. V. for life, remainder to L. B. (the grantor) for life, remainder to preserve, etc.: and after the decease of the survivor of them to divers other uses for the benefit of their issue: and in default of issue to the use of the will of L. B.: and in the mean time to the use of L. B. her heirs and assigns.

In the deed was contained a leasing power to and for [291] G. V. V. and L. B. from time to time during their respective lives, when and as they should respectively be in possession of the lands, etc. by indenture or indentures, under their respective hands and seals, attested by two or more credible witnesses, to demise such parts of the lands, etc. as now are leased for lives, or for years determinable on lives, in possession or reversion for lives, or for any number of years determinable on lives, so as there be not any greater estate or interest subsisting at any one time than what will wear out or be determinable on the dropping of three lives, and so as on every such lease there be reserved and made payable, during the continuance of the estates and interests thereby to be demised, leased, or granted respectively, *the ancient and accustomed duties and services, or more, or as great or beneficial rents, duties and services, or more, as now are, or at the time of demising or granting the premises so to be demised, leased, or granted respectively, were reserved or made payable* for the same premises respectively, or a just proportion, etc. (except heriots, etc.) all such rents, duties, and services respectively, to be incident to and go along with the reversion and remainder of the same premises expectant on the determination of the respective demises, etc. and so as there be contained in every such lease a power of re-entry for nonpayment of the rent thereby to be reserved, and so as, etc. etc.: and also by indenture under hand and seal,

attested as aforesaid, to demise all or any of the lands, etc. for any term absolute, not exceeding twenty-one years, to take effect in possession, etc. so as upon every such lease there be reserved, during the continuance of such lease, so much or as great and beneficial yearly and other rent, and services proportionably, as now is paid, or the best and most improved yearly rent, etc. without taking any fine, premium, or foregift, etc. : and so as in every such lease for any term of years absolute respectively, *there be contained a clause of re-entry in case the rent or rents thereupon to be reserved be behind or unpaid by the space of twenty-eight days after the times thereby respectively appointed for payment thereof* : and also by indenture under hand and seal, attested as aforesaid, to demise the lands, etc. wherein any mine, etc.

[292] On the 5th September 1803, G. V. V. being seised of the lands for life, by an indenture of lease, in consideration of, etc. let premises, part of the lands, in settlement, which had been and were then under a lease for years determinable on lives, to C. S. and H. S., their executors and administrators, for ninety-nine years, if C. S., H. S. and J. S., or either of them, should so long live, yielding, etc. the yearly rent of £2 at Michaelmas and Lady Day, and one couple of fat capons on, etc.

The indenture contained a covenant by the lessees for the payment of a proportion etc. : and a covenant for the payment of the yearly rent of £2, and for the performance of the duties, etc. And also a proviso : " that if it should happen at any time during the estate thereby granted *that the said yearly rent or sum of £2, and every or any of the duties, services, reservations and payments thereby reserved, or any part thereof, should be behind, unpaid, or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done, or performed as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises*, whereby the same and all arrearages thereof, if any be, may be fully raised, levied and paid, etc. : or if any default should be made in the payment or performance of all or any of the reservations, covenants and agreements therein-before contained, that then and from thenceforth, in all or any or either of the said cases, it should be lawful to and for the said G. V. V., his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises should belong, into the premises, etc. to re-enter, and the same to have, hold, retain, possess and enjoy, as in his and their former estate, etc."

After the death of the tenants for life, upon a trial in ejectment by the grantees c. the devisee under the will of L. M., against the parties holding under this demise, it was found by special verdict, that the rents, duties, reservations, and payments reserved by the indenture, and secured by the render, covenants, and power of re-entry therein contained, at the time of making the indenture, were ancient and accustomed, [233] and then were as great and beneficial as any which at the time of making the deed, or at any time thereafter, were or had been reserved in respect of the premises demised.

And that the usual and accustomed form of leases of the estate, contained in the settlement for lives or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional proviso of re-entry, similar to that in the indenture of demise in question.

Held, affirming a judgment of the King's Bench, and reversing a judgment of the Exchequer Chamber, that the evidence from the former leases was properly admitted and introduced into the special verdict : and that the lease in question, according to the practice of conveyancers, was by implication within the terms of the power, and valid.

George, Earl of Jersey, Edward Ellice, and Alexander Murray, brought an ejectment in the Court of King's Bench in Michaelmas Term 1813, against Henry Smith for the recovery of a tenement, with the appurtenances, called Taly Cuba Lledr, in the parish of Llanisamlet in the county of Glamorgan, then in the possession of Henry Smith. There were two demises laid in the declaration : the first on the 11th July 1813, and the second on the 11th January 1814. Henry Smith defended and pleaded the general issue.

At the Summer Assizes in the year 1815, the cause was tried before Baron Wood, at Hereford, when a special verdict was found, stating in substance as follows :

That the Honourable Bussey Mansel, afterwards the Right honourable Bussey Lord Mansel, Baron Mansel, of Margam, in the county of Glamorgan, being seised in fee of the premises in the declaration [294] mentioned, being a tenement called Tal-y-Coba-Uchaf, made his will, dated the 11th December 1749, by which he devised the said tenement, amongst other things, in remainder, after certain limitations which never took effect, to his daughter, Louisa Barbara, for life, with remainders over ; and a power to her in consideration of marriage, either before or after marriage, of revocation and appointment, as afterwards pursued by her in the deed of settlement hereafter mentioned.

That Lord Mansel died on the 29th of November 1750, seised as aforesaid, without altering his will as to the said premises, leaving his daughter, Louisa Barbara, his only child him surviving, seised for life of the said premises.

That the said Louisa Barbara, on the 20th July 1757, intermarried with George Venables Vernon, the younger, afterwards the Right honourable George Venables Vernon, Lord Vernon, Baron of Kinderton, in the county of Chester.

That before the said marriage, the said Louisa Barbara being seised as aforesaid, by deed dated the 2d July 1757, in conformity with the said power in the said will of the said Lord Mansel, and in consideration of the said marriage, revoked the uses and devises contained in the said will concerning the said premises, and appointed and limited the same to Francis Earl of Guildford and Charles Montague, and their heirs, in trust, to hold the same to the same uses as before limited until after the said marriage, and then to the uses of the said George Venables Vernon for life, without impeachment-[295]-ment of waste, remainder to the said Louisa Barbara for life, without impeachment of waste, and in the mean time to one said Francis Earl of Guildford and Charles Montague, and their heirs, to preserve contingent remainders ; and to permit the said George during his life, and afterwards the said Louisa Barbara during her life, to take the rents, etc. ; and after the decease of the survivor of them, to divers other uses for the benefit of their issue ; and in default of issue, to the use of the will of the said Louisa Barbara, and subject to the powers and limitations to be thereby directed and appointed ; and in the mean time to the use of the said Louisa Barbara, her heirs and assigns, for ever.

In the said deed was contained a leasing power in these words : “ Provided always, and it is hereby further declared and agreed, by and between the said parties to these presents, that it shall and may be lawful to and for the said George Venables Vernon the younger, and Louisa Barbara Mansel, his intended wife, from time to time, during their respective lives, when and as they shall respectively be in possession of or entitled to the perception of the rents and profits of the manors, messuages, lands, hereditaments and premises, so limited to them for their respective lives as aforesaid, by indenture or indentures, under their respective hands and seals, attested by two or more credible witnesses, to demise, lease, or grant such part or parts of the said manors, messuages, lands, tenements and hereditaments, or parts or shares of manors, messuages, lands, tenements, heredita-[296]-ments and premises, whereof they shall be so respectively in possession or entitled to the perception of the rents and profits as aforesaid, as now are leased for life or lives, or for years determinable on the dropping of a life or lives, to any person or persons, in possession or reversion, for one, two, or three lives, or for any number of years determinable on the dropping of one, two, or three lives, so as there be not on any part or parcel of the same premises to be demised, leased, or granted respectively, for a life or lives, or for years determinable on the dropping of a life or lives as before mentioned, any greater estate or interest subsisting at any one time than what will wear out or be determinable on the dropping of three lives, and so as on every such respective lease, demise, or grant for a life or lives, or for years determinable on the dropping of a life or lives, there be reserved and made payable during the continuance of the estates and interests thereby to be demised, leased, or granted respectively, the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial rents, duties and services, or more, as now are, or at the time of demising or granting the premises so to be demised, leased, or granted respectively, were reserved or made payable for or in respect of the same premises respectively, or a just proportion of such ancient or the present reserved rents, duties, and services, or more, according to the value of the premises so to be

demised, leased or granted respectively (except heriots, which shall [297] or may be varied, or altered or compounded for, according to the will and pleasure of the said George Venables Vernon the younger, and Louisa Barbara Mansel), all such rents, duties, and services respectively, to be incident to and go along with the reversion and remainder of the same premises, expectant on the determination of the said respective demises, leases, and grants thereof, and so as there be contained in every such lease a *power of re-entry for nonpayment of the rent* thereby to be reserved; and so as the respective lessees to whom such lease or leases shall be made as aforesaid be not, by any express clause to be contained in any such leases respectively, freed from impeachment of waste; and so as the said respective lessee or lessees, to whom any such lease or leases shall be made respectively as aforesaid, doth and do seal and deliver a counterpart or counterparts of such lease or leases respectively; and also by indenture or indentures under their respective hands and seals, attested as aforesaid, to demise, lease, or grant all or any of the said manors, messuages, lands, hereditaments and premises, and parts and shares of manors, messuages, lands, hereditaments and premises, or any of them, so limited to them the said George Venables Vernon the younger and Louisa Barbara Mansel, his intended wife, for their respective lives as aforesaid, for any term or number of years absolute, not exceeding twenty-one years, to take effect in possession, and not in reversion, or by way of future interest, so as upon every such [298] lease for an absolute term not exceeding twenty-one years there be reserved and made payable, during the continuance of such lease or leases, so much or as great and beneficial yearly and other rent and rents, and other services proportionably, as now is and are therefore paid and yielded, or the best and most improved yearly rent and rents that can be reasonably had or obtained for the same, without taking any fine, premium, or foregift, or any thing in the nature or in lieu thereof, to be incident to and go along with the reversion and remainder of the same premises expectant on the determination of the said respective leases; and so as the respective lessees, to whom such lease or leases shall be made, be not, by any express clause to be contained in any of such leases respectively, freed from impeachment of waste; and so as the said respective lessee and lessees, to whom any lease or leases shall be made respectively as aforesaid, doth and do seal and deliver a counterpart or counterparts of such lease or leases respectively; and so as in every such lease for any term of years absolute respectively there be contained a clause of re-entry, in case the rent or rents thereupon to be reserved, be behind or unpaid by the space of twenty-eight days after the times thereby respectively appointed for payment thereof; And also by indenture or indentures under their respective hands and seals, attested as aforesaid, to demise, lease, and grant all or any part of the lands, hereditaments and premises so limited to them the said George Venables Vernon the younger, and [299] Louisa Barbara Mansel, his intended wife, for their respective lives as aforesaid, wherein or whereupon any mine or mines now is or are open, or wherein or whereon any person or persons shall be willing to open any mine or mines, sough or soughs, or other thing or things whatsoever, which may be requisite and necessary for the digging and getting of lead or copper ore, or any metal or mineral whatsoever, unto any person or persons, for any term or number of years not exceeding thirty-one years, to take effect in possession and not in reversion, or by way of future interest; and so as upon every such lease for an absolute term, not exceeding thirty-one years, there be reserved and made payable, during the continuance of such lease or leases, such part or share of the lead, copper ore, coal, and other produce to be gotten from the said mines, or such yearly rent or income in respect thereof, as can reasonably be had or obtainable for the same, without taking any fine, premium or foregift, or any thing in the nature or in lieu thereof, to be incident to and go along with the reversion and remainder of the same premises expectant, on the determination of the said respective leases; and so as the respective lessees to whom such lease or leases shall be made, be not, by any express clause to be contained in any of such leases respectively, freed from impeachment of waste, other than in the necessary and reasonable winning or working thereof; and so as the said respective lessee and lessees, to whom any lease or leases shall be made respectively as aforesaid, doth and [300] do seal and deliver a counterpart or counterparts of such lease or leases respectively; and so as there be also inserted such proper and usual covenants for the effectually winning and working the said mines and smelting the ore, and doing all other proper and necessary acts, as are usually inserted in leases of the like nature."

The said George Venables Vernon after the said marriage became seised for life of the said premises, and entitled to the receipt of the rents, etc.

Before the making the said deed of settlement, and until the surrender hereafter mentioned, the said premises were under lease for a term of years determinable on the lives of three persons, who died before the 11th day of July mentioned in the declaration.

On the 5th September 1803, the said George Venables Vernon being seised of the said premises as aforesaid, and entitled to and in receipt of the rents, etc. by an indenture of lease between him (then Lord Vernon) of the one part, and Charles Smith (since deceased), and the said Henry Smith of the other part, in consideration of the surrender of the said former lease, and of £105 paid to the said Lord Vernon by the said Charles and Henry Smith, and of other matters in the said indenture specified, let the said premises called Tal-y-Coba-Uchaf to the said Charles Smith and Henry Smith, their executors and administrators, for ninety-nine years from the date of the said indenture, if the said Charles Smith, Henry Smith, and John Smith, son of the said Charles, or either of [301] them, should so long live, yielding therefore to the said Lord Vernon, etc. the yearly rent of £2 at Michaelmas and Lady Day, and one couple of fat capons on the first of January yearly, during the term, or 1s. 6d. in lieu, at the election of Lord Vernon, etc., also the heriots and services in the said indenture specified.

The said indenture contains a covenant by the said lessees for the payment of a proportion of the said reserved rent, in case the term should determine between any of the days of payment by the death of the persons named in the said lease; also a covenant by the said lessees for the payment of the said yearly rent of £2, and for the performance of the duties, heriots, suits, services, etc. at the times and in the manner limited and appointed in the said lease. And the said lease contains a proviso in these words: " Provided always, that if it shall happen at any time during the said estate hereby granted, that *the said yearly rent or sum of £2 and every or any of the duties, services, reservations and payments hereby reserved, or any part thereof, shall be behind, unpaid, or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done, or performed as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises*, whereby the same and all arrearages thereof, if any be, may be fully raised, levied, and paid, or if the said Charles Smith and Henry Smith, their executors, [302] administrators or assigns, or undertenants, or any of them, shall suffer and leave the said premises, or any part thereof, to continue in decay or unrepaid, by the space of six calendar months next after such view had, and notice given or left as aforesaid, or shall do or commit, or cause or suffer to be committed or done, any wilful waste, spoil, or destruction in or upon the said premises, or any part thereof, or shall at any time during the said term grind any part of their corn or grain at any other mill than such mill so to be appointed by the said George Lord Vernon, his heirs or assigns, or such person or persons to whom the freehold or inheritance of the premises shall as aforesaid belong (the same being in repair and order to grind such corn and grain,) or if the said Charles Smith and Henry Smith, their executors and administrators, or any or either of them, shall at any time during the estate hereby granted give, grant, bargain, sell, assign, or otherwise depart with this present demise and lease, or with their or either of their estate or interest herein, without the license and consent of the said George Lord Vernon, his heirs or assigns, or of the person or persons to whom the freehold or inheritance of the premises shall as aforesaid belong, in writing, under his or their hands thereunto first had and obtained, or if any default shall be by them, the said Charles Smith and Henry Smith, their executors, administrators or assigns, made in the payment or performance of all or any of the reservations, covenants, and agreements hereinbefore [303] on their parts contained, that then and from thenceforth, in all or any or either of the said cases, it shall and may be lawful to and for the said George Lord Vernon, his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises shall as aforesaid belong, into and upon the said premises hereby demised, and into every part and parcel thereof, wholly to re-enter, and the same to have, hold, retain, possess, and enjoy, as in his and their former and proper estate, against the said Charles

Smith and Henry Smith, their executors, administrators or assigns, these presents, or any thing herein contained to the contrary thereof in anywise notwithstanding."

The said lease does not contain any other than the above-recited power of re-entry for non-payment of the rent reserved. The said Charles Smith and Henry Smith executed and delivered a counterpart of the said lease.

The rents, duties, reservations and payments reserved by the said indenture, and secured by the render, covenants, and power of re-entry therein contained, at the time of making the said indenture, were ancient and accustomed, and then were as great and beneficial as any which at the time of making the deed of 2d July 1757, or at any time thereafter, previous to making the said indenture of 5th September 1803, were or had been reserved, in respect of the said premises demised by the said indenture.

The premises demised by the said indenture, and [304] the premises mentioned in the said declaration, are the same.

The usual and accustomed form of leases of the estate, contained in the said settlement of 2d July 1757, for lives, or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional proviso of re-entry, similar to that in the said indenture of 5th September 1803.

All the rents, duties and services reserved by the said indenture, which accrued in the lifetime of Lord Vernon, have been discharged and performed; and the said Henry Smith has been ready to pay and perform all things that would have accrued to this time, supposing the said indenture to have continued in force and undetermined.

The said Charles Smith died on the 1st January 1813; the said Henry Smith and John Smith are still living.

The said Louisa Barbara, by virtue of the said powers to her granted, made her will, dated 5th August 1783, duly attested, signed and published, and thereby devised the said premises, subject to the estate for life of her said husband therein, unto Thomas Earl of Clarendon for life, remainder to William Augustus Henry Villiers, afterwards William Augustus Henry Villiers Mansel, second son of George Bussey Villiers Earl of Jersey, and his heirs.

The said Louisa Barbara died on the 1st January 1786 without issue, and without altering her said will as to the said devise of the said premises.

The said Earl of Clarendon died on the 1st January 1787, whereupon the said William Augustus [305] Henry Villiers was seised in fee of the said remainder, subject to the said life-estate of the said Lord Vernon.

By indentures of lease and release, the former bearing date the 4th January 1812, and the latter the 6th January 1812, the said William Augustus Henry Villiers, being so seised of the said remainder as aforesaid, conveyed the same to George Earl of Jersey, Edward Ellice, and Alexander Murray, who thereupon were seised of the said last-mentioned remainders.

Lord Vernon afterwards, and before the 11th of July, the day mentioned in the declaration, died, whereupon the said George Earl of Jersey, Edward Ellice, and Alexander Murray, were seised in fee of the said premises.

The special verdict then finds the leases by the said George Earl of Jersey, Edward Ellice, and Alexander Murray, the lessors of the plaintiff, in support of the several demises in the first and second counts of the declaration mentioned, also the entries and ousters as in the declaration mentioned, and concludes in the usual form, referring the matters to the court.

This special verdict was argued before the judges of the Court of King's Bench, at Serjeant's Inn, at the sittings holden there before Michaelmas Term 1816, and in the ensuing term the Court pronounced their judgment for the defendant (5 Maule and Selwyn, p. 167.)

From this judgment the plaintiffs brought their writ of error into the Exchequer Chamber, where [306] the case was twice argued, and four of the Judges of that court being of opinion for a reversal, and three for an affirmance of the judgment of the Court of King's Bench, that judgment was reversed accordingly (1 Burr. and Brod. p. 97; 3 Moore, p. 339.) From that judgment of reversal the original defendant brought a writ of error returnable in parliament, praying that the judgment of reversal might be reversed.

For the plaintiff in error: 1st. The intention of the donor of a power is to be

collected from the whole of the deed whereby that power is created; from the plan and design of it as well as the words, and also from the circumstances of the property which is by him subjected to the operations of that power; and in the construction of the particular instrument executed under such power, the law will expound it with an inclination to preserve rather than to destroy the instrument, "*ut res magis valeat quam pereat*;" "It is the office of a judge to preserve, not to destroy an estate" (See *Cotter v. Merrick*, Hardr. 93, per Parker, Baron.)

2d. The only objection raised to the lease under which the plaintiff in error holds is, that the proviso for re-entry therein contained is not such as is required by the leasing power under which it was granted by Lord Vernon, as not being absolute, unconditional, and capable of being enforced *instantly* upon every default of payment of rent, on the very day on which such default takes place; but the words [307] of the power do not require a proviso for re-entry absolute, unconditional, and capable of being enforced *instantly*, such words being only "so as there be contained, in every such lease a power of re-entry for nonpayment of rent." It is undoubtedly a condition precedent to the due execution of the leasing power, that there should be reserved in all leases granted under such power "a power of re-entry for nonpayment of rent;" but in what terms that power of re-entry is to be reserved the settlement is wholly silent, and the argument for the Defendant in error is, that from the non-expression of any terms in which that proviso is to be framed, it necessarily results that the comprehensive expression, "a power of re-entry" (which comprehends and includes every proviso of re-entry adapted to the object for which it is required,) must be narrowed to one particular proviso for re-entry, absolute, unconditional, and capable of being enforced *instantly* upon every default. But the expression "a power of re-entry" is no description of the particular form, though it is of the general object of the condition to be introduced into the lease, and the language of the leasing power is fully satisfied by a proviso for re-entry such as is contained in the lease now sought to be set aside by Lord Jersey, which, though not an absolute, unconditional proviso, and capable of being enforced *instantly* upon every default, is nevertheless "a power of re-entry," sufficient for the object for which it was required, such as was in use upon the estate to which the leasing power applies at the time when it was created, and such as the general term used in the leasing power, [308] so far from either expressly or impliedly disapproving, seems advisedly to sanction, especially when it is recollected that in a subsequent part of the same leasing power, as applicable to the rack-rent estates, the donor of the power omits the general and larger term, "a power of re-entry for non-payment of rent," and specifically chalks out the very power to be introduced into such leases, viz. "a clause of re-entry, in case the rent to be reserved be behind or unpaid by the space of twenty-eight days after the times thereby respectively appointed for payment thereof." Thus, in this latter case, where large rents were to be secured, defining the extent of indulgence to the tenant, and furnishing the very clause to be introduced, as contra-distinguished from the more general and comprehensive expression previously used, viz. "a power of re-entry for nonpayment of rent." Can it be successfully contended that this expression conveys a perfect idea to the mind of the nature and form of the power of re-entry required? It points out, indeed, distinctly the wish of those who framed the settlement that there should be some power of re-entry in all leases of this description, but not the precise terms in which such power shall be reserved. Had the power required a covenant on the part of the lessee to build a house upon the premises, it would still have been a question what house, and a lease stipulating for the building a house of given dimensions, and within a prescribed time, must have been judged of by the law as a reasonable or unreasonable compliance with the condition.

3d. If the language of the leasing power has been [309] literally attended to in the lease executed under such power, the next consideration will be, whether the spirit also is preserved; or whether there be any thing in the plan and design of such leasing power, and the circumstances of the property to be leased, which, by disclosing a different intention in the donor of the power from that which occurs on the mere reading of the words themselves, thereby imposes a different construction upon such words. The leases under the power are of three sorts. First, leases for lives, or determinable on lives, which are renewable on fines, and where the rents reserved are nominal: secondly, leases for years, where a rack-rent is reserved:

and thirdly, mining-leases, in which no reservation of a power of re-entry is required. The lease in question is of the first sort, and the proviso therefore for re-entry rather introduced with a view of enforcing regular acknowledgment of the tenancy, than of securing a succession of large payments at stated periods. It is not improbable, therefore, with such an object, that some discretion should be left to the person by whom the power was to be executed as to the form of the proviso. If the words of the leasing power allow such discretion, is there any reason on which its exclusion can be founded? Is the security of the nominal rents endangered by it? Are the acknowledgments of a subsisting tenancy less likely to be regular in a case where the property of the tenant, if hazarded by irregularity, is hazarded to so great an extent as that of the loss of a valuable lease for lives held under a nominal rent, than where it consists only of a short term at a rack-rent? On the contrary, considering that two objects [310] must have been present to the mind of the framer of the leasing power: first, the securing the rents to those who were to benefit by them; second, the preservation of the estate in good condition when the lease determined: has not the language of the power been designedly varied, when directing the reservation of the right of re-entry in the two sets of leases? In the leases for lives, where a small proportion of the annual value is to be paid in the shape of rent, and where a distress might be resorted to without injury to the estate, a mere reservation of the right of re-entry is required, in such manner and form as should be found discreet and beneficial, and adapted to the object in view; but in the rack-rent leases a precise and well defined clause of re-entry is pointed out, because the interest of both tenant for life and remainder-man is materially consulted in the reserved power of re-possessing themselves of land for which the lessee is not able to pay the rack-rent within twenty-eight days from the time of its becoming due, and where a distress taken for such rent, if resorted to, would probably not secure the rent, but certainly injure the cultivation of the estate.

4th. If the literal language of the condition be not violated, and there be nothing in the spirit of the leasing power giving a meaning beyond the words used, the principle which has hitherto governed in cases of this kind must govern in this case, which is, that where a special clause of re-entry is prescribed by the power, that clause cannot be departed from, even in trivial circumstances, without defeating the lease made under the power; the donor of the power being in this respect the legislator, and having a [311] right to impose any condition precedent he pleases, provided it be not inconsistent with law, and which, when once plainly expressed by him, is not subject to any examination of its reasonableness or unreasonableness. But if no special clause be furnished by him, but merely a direction given that certain leases shall contain "a power of re-entry," then if a clause reserving the right of re-entry be inserted, the will and direction of the legislator is complied with, unless the power be executed in a fraudulent or illusory manner, which neither law nor equity would hold to be any compliance at all. Such is the true result of *Core v. Day* (13 East, 118), explained as that case is by the subsequent decision in this case, when in the Court of King's Bench, of two of the same learned Judges who signed the certificate in *Core v. Day*; for in that case the power having prescribed a particular clause, that is, in the event of the rent being behind a specified number of days, those learned Judges held a proviso for re-entry, which added terms not used in the particular clause prescribed by the power to have vitiated the lease. But in this case the settlement only requiring "a power of re-entry for non-payment of rent," and the lease containing the clause of re-entry in question, they considered the words of the power to have been complied with, such compliance being not only literal, but not impeachable on the ground of any fraud or contrivance, and, on the contrary, fair and reasonable.

5th. In considering whether the lease be bad on the ground of any excess in the indulgence given to [312] the tenant, where the power, as in this case, prescribes no precise clause of re-entry, it is most material to ascertain what was the indulgence granted in leases of this estate prior and subsequent to the settlement creating this power. No such inquiry, it may be safely conceded, can be admitted where the precise clause is prescribed by the power; but where the power is silent as to the particular nature of the condition, if it follows from thence that some discretion is to

be exercised by him who executes the power in framing the condition, the discretion heretofore sanctioned by the donor of the power, who if she had spoken, must have been obeyed, is fit evidence to guide the judgment where she has been silent. It seems difficult to maintain by argument, that where, by the terms of the condition, reference is made to prior leases impliedly, as where "ancient" or "accustomed rents, or rents as beneficial as the ancient rents," are spoken of, such evidence is not admissible to ascertain either the propriety of the new rents as compared with the old rents in amount, or the propriety of the mode in which they are reserved or secured as compared with the ancient mode of reserving or securing them. But it is said, there is no implied reference in the very words directing the reservation of the power of re-entry. If however the words "a power of re-entry for non-payment of rent" embrace every power of re-entry, properly so called, then some assistance is necessary to ascertain what particular power of re-entry should be introduced, and none better can be had than that which the leases prior and subsequent to the settlement furnish, as directing [313] the will of her whose will alone is to be consulted on the occasion: and though it is clear that her will of to-day cannot be contradicted by her will of yesterday or to-morrow, yet it is equally clear that those who contend that such will must be the sole guide, must be content to find it elsewhere if they cannot find it in the power itself. For however general the power in its terms, it seems not more repugnant to reason to contend that the execution thereof is thereby left absolutely to the tenant for life, since that would destroy the condition altogether, than to contend that the very generality of the words confines its execution to one, and one only form of proviso for re-entry, and that of the narrowest and most limited form. But upon sound reasoning it must be conceded, that in such case the limit to the exercise of discretion by the tenant for life must be sought for, either in the arbitrary rules of law, or in such facts as are fit to regulate the decision of the law: and as in the same power, for a different object, viz. the reservation of the rent, the settler has himself impliedly referred to former leases, why may he not be considered also, in this particular, as referring to former leases, and therefore framing the power in general terms? Either that must be the conclusion, or some more unsatisfactory source of evidence must be introduced, or there must be no limit to the discretion of the tenant for life, or the power must be narrowed to something less than its terms by some supposed will of the settler, not evidenced either by his words or his acts. The evidence therefore admitted at the trial was properly admitted, [314] and the result drawn by the jury a matter of much weight in the consideration of this case.

6th. If the terms of the power be such as to leave the terms of the proviso unfettered by positive direction, there seems little reason to quarrel with the extent of the indulgence, in point of time, granted to the lessee: and such has been the concession throughout the argument of this case. Much more fault has been found with the latter qualification of the proviso, by those who have argued for the defendant in error, viz. with that part which restrains the right of re-entry to the case where no sufficient distress or distresses may be had or taken upon the premises. The reasonableness of this qualification, as applied to the particular rents reserved in these leases, and the nature of the property leased, has been already pointed out: in addition however it is to be observed, that the statute law has not only spoken the same language, but it may be doubted whether it has not restricted all lessors from exercising any right of re-entry not guarded by this reasonable qualification. The 4th Geo. II. ch. 28, s. 2, provides, that as often as it shall happen "that one half year's rent shall be in arrear," the lessor "*shall and may*" without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the premises: and in case of judgment against the casual ejector, if it shall be made appear to the court that half a year's rent was due before the declaration was served, "and that no sufficient distress was to be found on the demised premises," and that the lessor had power to re-enter, then he [315] shall be entitled to judgment and possession. It then proceeds to bar all relief against such judgments, except on payment of such rent and arrears, together with full costs, within six months. The interests of the lessor and the lessee are by this statute equally provided for: the former is relieved from the formalities of the old common-law entry: the latter is protected against the forfeiture of his interest, in case there be sufficient to satisfy the rent by way of distress upon the premises. The Legislature

has thus recognized the reasonableness of a provision preventing forfeiture, where there is a sufficient distress, and so far affords a strong argument in favour of the clause for re-entry contained in the lease now under consideration. But has it not gone farther? Do not the words speak imperatively that no re-entry shall be enforced where there is such sufficiency of distress? The language of the 8th and 9th W. III., respecting the breaches to be assigned upon bonds, is not so strong; for there the Legislature only says the plaintiff "may" assign as many breaches as he shall think fit upon the bond, giving the defendant the opportunity of paying the money into court after judgment and before execution. But the courts of law have construed this statute as imperative upon the plaintiff to do what he is there told he "may" do; whereas in the 4 Geo. II., the language is "*shall and may*:" and as in both statutes the object is the same, viz. to relieve the subject from the necessity of seeking the aid of a court of equity against the technical difficulties of the common law, why should not this equitable provision in [316] each statute be construed to be a compulsory provision, and especially in the statute of Geo. II. where it is introduced with the words "shall and may?" If it be a compulsory provision, applicable to all cases of re-entry, and not confined to cases of re-entry under that statute, then the clause in question conforms itself to the law, and no more: if it be applicable only to cases under the statute, then, by analogy thereto, this leasing power is reasonably executed, being qualified in its execution by what the law of the land has deemed reasonable, and being from the terms in which it is penned open to such qualification.

For the Defendants in Error: 1st. The leasing power in the marriage settlement of 1757 (a power granted by a person having the absolute dominion of the fee to a purchaser of a life-estate), expressly requires that the leases shall contain "a power of re-entry for non-payment of the rent thereby to be reserved," which makes it necessary, that the right to re-enter should attach immediately on the rent being unpaid; whereas the lease under which the Defendant in the ejectment claims, postpones the right of re-entry for fifteen days after the day of payment, thus depriving the reversioner of a part of that benefit which by the condition annexed to the leasing power was intended to be secured to him. If such postponement be allowed for 15 days, why may it not be allowed for 30, 40, 100 or any other number of days so great as to make the power of re-entry nearly or quite unavailing? Where is the line to be [317] drawn? If it be allowable to deprive the reversioner of any part of that right of re-entry which the creator of the leasing power says he shall have, of what part may he be deprived? Only two lines can be drawn, either the tenant for life is obliged to reserve the whole right of re-entry, or no part of it. And as the latter rule cannot be supported, it follows, that the right of re-entry in the lease should be fully commensurate with that required by the leasing power, and that this lease is void as an execution of that power.

2d. The lease in question is liable to the further objection, that the leasing power requires that the lease shall contain "*a power of re-entry for non-payment of the rent thereby to be reserved*," whereas the lease contains no such power, but only gives the lord a right to re-enter for the absence of distress for rent unpaid. The meaning of the words of the leasing power is perfectly plain and unequivocal: "a power of re-entry," means something enabling a man to re-enter, and "a power of re-entry for the non-payment of the rent" signifies something enabling a man to re-enter on the occasion, or for the cause of non-payment of rent: now the lease in question certainly does not enable the reversioner to re-enter on such occasion, or for such cause; inasmuch as the whole rent for any number of years may be unpaid, and yet he may not be enabled to re-enter. In the case of *Croft v. Day* (13 East, 118), this point was expressly decided.

3d. It is said, in support of the lease, that the [318] creator of the power has used very general language, that a power is required, without saying what power; and that the power of re-entry in this lease is sufficient, because it is a reasonable power, and was usual on the estate. It is true, the language of the leasing power is general, so general, that only one quality is specified, which the power of re-entry is required to have, *that it should be for non-payment of rent*, but the creator of the power having exacted this one condition only, is certainly no reason why a compliance with that condition should be dispensed with. The leasing power requires that the power

of re-entry should be *for non-payment of rent*, and it does not require that it should be usual or reasonable; why then should the leasing power be so construed as to dispense with the former condition, which by its terms is annexed to its execution, and to exact a compliance with the latter which is not so annexed. Besides, it is not found that this conditional clause of re-entry is reasonable, or that it is usual generally: it is only found to be usual on the estate, which is not only not the same thing as usual generally or reasonable, but may be the direct contrary. The generality of the word *a*, (relied on in support of the lease) must certainly exclude a reference to any particular class of clauses of re-entry, such as those on this estate, as nothing can be more opposite to a general word than a word of reference. If this leasing power be construed to require the power of re-entry usual in cases of the lands comprehended in the settlement, although in this particular case this construction will operate to the advantage of the lessee, yet [319] it may in other cases be productive of the greatest inconvenience to him. Suppose a lease under a power, in the terms of this leasing power, to be on the face of it conformable to the power, yet if this construction prevail, the reversioner will have a right to avoid the lease, if he can show that the clause of re-entry is different from that which is usual on the estate comprehended in the leasing power. The inconvenience to both parties will be extreme, if a lessee cannot be sure that he has a valid lease, by comparing his lease with the power, without inspecting all the leases formerly granted of lands within the same estate. It is submitted, that what the creator of a power has required, must be done for this one reason, of itself sufficient, that it is required, and that it is a much safer rule to adhere to that condition which is expressly annexed to the execution of a power by one who has all the circumstances of the property before him, and who has the right to enlarge or narrow the power to any degree, than to substitute for what he has exacted something which it may be conjectured he ought to have exacted, but has not.

4th. The power of re-entry in the lease is not only different from that required by the leasing power, but much less beneficial to the reversioner. Under an absolute power of re-entry, the reversioner would be entitled to succeed in an ejectment, on proving the rent in arrear, a demand made, and the execution of the counterpart of the lease by the Defendant. Under a power to re-enter on failure of distress, it would be necessary for him to prove that he had searched every part of the premises demised, [320] and that no distress was to be found (*Rees v. King*, Forrester Exch. 19), a matter of extreme difficulty where the rent is small and the premises extensive. A conditional clause of re-entry, which may be an adequate remedy in the case of high rents and lands of small extent, becomes quite insufficient when the rent is small, as is usually the case with ancient rents, and the lands demised of considerable extent. And as the absolute power of re-entry becomes the more necessary for the lord, in case of small rents for large property, so it becomes the less inconvenient for the tenant, who might have some difficulty, and expect some indulgence to raise a large sum, but can have none in being ready with a small one. It is indeed universally true, that in order to secure a small demand, the remedy should be more summary and less expensive than is requisite to enforce a large one.

5th. The finding of the Jury, that the usual and accustomed form of leases of the estate contained in the marriage settlement was with a conditional proviso of re-entry, ought not to be taken into consideration in deciding this case. The words of the leasing power are "a power of re-entry for non-payment of the rent thereby to be reserved;" they contain no reference to the former practice of leasing the estate, nor is there any fact stated on the special verdict which raises any ambiguity in them; and a provision contained in a written instrument may not be explained or construed by any extrinsic matter, except in two cases; first, when the provision refers to extrinsic matter; secondly, when its terms contain a latent ambiguity, that is, [321] when, in consequence of some matter of fact shown by evidence, it appears that the language of the instrument has more meanings than one, neither of which is the case with the clause in question.

6th. Even supposing the former practice on the estate might legally be taken into consideration, it is far from affording any inference favourable to the lease in question. It is not found that the former leases were granted under similar powers. There is nothing to show that the creator of the power was not dissatisfied with the

former clauses of re-entry, and did not insert the provision in question for the very purpose of introducing a new one, which might well be, for the reasons stated above. And this is the more probable, because the leasing power, in several instances, expressly refers to the former practice on the estate, where it was intended that the tenant for life should be guided by it; there is no such reference in the clause relating to powers of re-entry; the inference is, that the practice was not intended to prevail with respect to powers of re-entry.

For the Plaintiffs in Error, the Attorney General and Mr. Puller.

For the Defendants in Error, Mr. Jervis and Mr. Maule*.

In the course of the argument the Lord Chancellor observed, that if the settlement had said there should be "a reasonable power of re-entry," some [322] body must have judged, in the first instance, what was reasonable in that respect; and he added, that in his experience he had never seen a settlement which directed any thing as to the number of days allowed for rent to be left in arrear; and that as to leases granted under powers in such settlements he had never seen any which did not contain some allowance of days.

After the argument, the Lord Chancellor proposed the following question for the opinion of the Judges:

Whether, having due regard to the true intent and meaning of the indenture of the 2d July 1757, according to the legal construction of the several parts of that indenture as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th September 1803, as the same is stated in the special verdict, is for any and what reasons invalid?

There being a difference of opinion, the twelve Judges, in answering this question, delivered their opinions *seriatim*.

Richardson, J. After having shortly stated the case, the proceedings, and the question put to the Judges, proceeded thus:

I am of opinion that the lease of 1803 is invalid, because I think it is not made in conformity with the leasing power contained in the indenture of 1757.

The leasing power for that class of leases, of which the lease in question is one, requires that "there be contained in every such lease a power of [323] re-entry for non-payment of the rent thereby to be reserved;" and the question resolves itself into this,—what is the true construction of these words?

In order to decide this, I must first consider, whether the words themselves import and convey any distinct meaning: and I think they do; I think they mean, that the lessor should have power to re-enter if the rent reserved should not be paid according to the reservation.

One test, and, I think, a fair one, whether such meaning is conveyed by the words of this power, would be to insert in a lease a proviso for re-entry, expressed as nearly as possible in the very words of the power itself, and then to consider what construction a proviso so expressed would require, and whether the meaning would be sufficiently distinct to be capable of being enforced by a court of justice.

Suppose, then, in the lease of 1803, it had been provided, that it should be lawful for the lessor or person entitled to the rent, "to re-enter for non-payment of the rent hereby reserved." In that case would the person entitled to the rent have been empowered to re-enter if the rent had not been paid on the days of reservation? It seems to me, that he would have been so empowered; and *that* without any delay or condition other than the previous demand required by the common law: for all that he would be bound to prove, in order to justify and enforce his re-entry, would be, that there was a *non-payment* on demand of the rent reserved by the lease.

If this be so, it seems to me to prove that the necessity of waiting fifteen days, and the necessity [324] of proving a deficiency of distress on the premises imposed by the proviso actually contained in the lease of 1803, are conditions not warranted by the leasing power.

It has been said, that the leasing power requires only "a power of re-entry

* The arguments and authorities cited are all noticed in the opinions delivered by the Judges and the Lords in moving judgment. The argument in detail is therefore omitted.

much stress having been laid on the indefinite effect of the article "a;" and it has been further said, that, though such power of re-entry is to be "for non-payment of the rent," yet, that the words "for non-payment" are not equivalent to "on non-payment," but only point at the purpose or object of the power of re-entry, namely, that of securing the payment of the rent.

It appears to my mind, however, that, although the article "a" be indefinite, yet it cannot, in just construction, extend an indefinite meaning to the subsequent words, if they sufficiently import (as I think I have shown they do) a distinct and definite meaning. In this sentence, the word "a" seems to me neither to add to nor to qualify the meaning: but, that the meaning would have been the same, if that word had been wholly omitted, and the sentence had stood thus, "so as there be contained in every such lease power of re-entry for non-payment of the rent thereby to be reserved." And, as to the observations made on the meaning of the words "for non-payment of the rent;" although it is true, that the word "for" does often import the purpose or object, (and so it might here, if the words had been "a power of re-entry for payment of the rent:") yet the same word "for," as often imports the cause or occasion of that which is predicated; [325] and such I think is its import here, where the words are "a power of re-entry for non-payment of the rent," meaning on occasion of the non-payment.

If the words of this leasing power import, as I conceive they do, by themselves, a distinct and definite meaning, I think it follows, that the fact stated in the special verdict respecting the usual and accustomed form of leases of the estate mentioned in the marriage settlement can have no legal effect on the construction to be put on these words. Such evidence, I conceive, is never admissible in the construction of a written instrument, unless the words of the instrument itself import a reference to something extrinsic, or unless the words involve some latent ambiguity, that is, an ambiguity not appearing on perusal of the instrument itself, but which becomes apparent on applying its provisions to the subject matter. The words of this leasing power, in that part which respects the clause of re-entry, seem to me to involve no latent ambiguity, nor to import any reference to any thing extrinsic: although some former parts of the same leasing power do import such reference, namely when it is required, that the lands to be leased for lives should be such lands as were in lease for lives at the time of making the settlement, and that the rents to be reserved should be the ancient rents, or rents as great and beneficial.

I admit that a court is bound to look at every part of a written instrument, in order to ascertain the meaning of the parties in a particular part. But I think it by no means follows, because this settle-[326]-ment, in respect of the rack-rent leases, expresses that the tenant is to be allowed twenty-eight days for payment, that therefore it was intended, in respect of the leases for lives, to give a similar or any allowance of time, which is not only not expressed, but which appears to me to be at variance with what is expressed.

Supposing, however, it were possible on this ground to get rid of the objection made against the lease of 1803, in respect of the allowance of fifteen days; another and still more decisive objection remains, namely, that this lease fetters and confines the power of re-entry to such cases only where there is a want of sufficient distress: a condition which appears to me, to be equally inconsistent with the power applicable to leases for rack-rent, and to that which is applicable to leases for lives.

The case of *Core v. Day* (13 East, 118), which I think was rightly decided, appears to me to be in point, and I cannot draw any distinction which is satisfactory to my own mind from the circumstance that the leasing power *there* allowed a period of twenty-one days for payment: whereas the leasing power *now* under consideration as to the leases for lives, expresses no such allowance. It is true, that in *Core v. Day*, the case of *Holley v. Scot* (Lofft, 316, S.C. Mr. Butler's MS., see note (a), p. 331), does not appear to have been cited: and it seems that in the last-mentioned case a similar objection taken to a lease granted under a power was over-ruled by the Court [327] of King's Bench: on what ground (see the arguments and judgment, *post*, p. 332, *et seq.*) the Court proceeded we are not apprized, and being obliged now to make an election between the two authorities I must express my concurrence with that of *Core v. Day*.

It has been suggested, that the statute of 4 G. 2. c. 28, though professedly made

for the benefit of landlords, does in effect take away their right of re-entry at common law, and confine them in all cases to the statutable remedy thereby given, which remedy can never be exercised without proof that no sufficient distress was to be found on the demised premises countervailing the arrears then due. And I think it must be admitted, that such a construction of the statute, if it be the true construction, furnishes a sufficient answer to the second objection made to the lease of 1803; for in that case the lease has only expressed that which, whether expressed in the lease or not, the statute law has provided.

But I cannot think that this is the true construction of the statute. The object of the statute, as appears to me, both from the recital and the enactments, was to relieve landlords from certain inconveniences to which they were subject by the law as it then stood, and to give them certain remedies to which they were not before entitled; but not to deprive them of any remedies or rights to which they were already entitled by law. It contains no negative or prohibitory words, which I think would obviously have been inserted if the intention had been to deny to the landlord the future exercise of any ancient right; and it would, as it strikes me, be [328] a strange construction to hold, that the words apparently intended for the landlord's benefit do, from their generality, operate to extinguish any of his ancient rights; when if such had been the intention it would have been so easy and so obvious to express it. That such however was not the intention I think manifestly appears from this, that whenever the new mode of proceeding in ejectment given by the statute is pursued, the statute declares that "then and in every such case the lessor in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made." It refers to the legal demand and re-entry as a still subsisting mode of proceeding, not repealed or affected by the statute; and thereby shows that the old mode of proceeding was intended to be left as it was, although the new one, if adopted, is declared to be equivalent for the purpose of obtaining a valid judgment and execution. This, I believe, has always been considered as the intent and effect of the statute; and although I am not able to point out any case where it has been expressly decided that the statute does not take away the landlord's remedy at common law, several cases have occurred where landlords have so proceeded without objection on that ground, and it has been taken for granted that they were well entitled to do so. *Doc dem. Forster v. Wandlass* (7 T.R. 117) and *Doc dem. West v. Davis* (7 East, 363), are cases to this effect, and so is 1 Wm. Saund, 2:6, No. 16.

[329] It has been said, that if the lease of 1803 be invalidated the decision will shake many titles. I have no means of knowing whether this observation is well founded, or to what extent. If such should be the consequence I shall regret it; but I cannot feel that such an apprehension can afford a legitimate ground for deciding the present case, otherwise than as the words and legal effect of the instruments now under consideration seem to me to require. Upon the whole, therefore, I am bound, for the reasons before given, to answer the question in the affirmative.

Best, J. The words of the power are, "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." The terms in which it is expressed are general and indefinite. Instruments in such terms are not to be abstractedly and absolutely considered, but with reference to the nature of the subject to which they relate. They are in law taken to contain such qualifications as are manifestly just and reasonable, and such as according to practice, have before been introduced in similar cases, and which, not being expressly excluded, must be understood to be within the intent of the parties. This rule of construction is universal; it cannot be departed from without destroying the excellence of the law, which consists in its bearing a just relation to the state of things on which it is to operate. Thus, under contracts to sell goods, in which nothing is said as to the time of delivery, the vendor is not bound to deliver them the instant that the contract is made. Under a contract to perform [330] a particular service the contractor is not bound to begin his work immediately. In both these cases the law allows a reasonable time for the performance of the contract. Under a contract for service for a year the law will not compel the servant to serve every hour of the year; but excepts such a portion of time as is necessary for refreshment and relaxation. So, if there be an established usage, regulating the manner

in which a thing contracted to be done, is to be done, as the time and circumstances of delivering articles sold, or the payment of the price, or the time for paying a bill of exchange. Such usage is by law incorporated into the contract without any words of reference to it.

Our books do not furnish many cases on this subject. There are enough, however, to satisfy us that according to the practice that has long prevailed among conveyancers, the proviso for re-entry in this lease is a sufficient execution of the power. The existence of this practice, and its being considered reasonable, account for there being no more decisions of courts on the subject. From the few cases that are to be found, the balance of authority seems to me to incline much in favour of the validity of this lease. But the authority of the cases in favour of the lease is much strengthened by the practice of that branch of the Profession of the law who have been accustomed to prepare powers, and leases under powers.

The first case is that of *Jones dem. Bromfield v. Verney* (Willes, 169). Sir John Cowper had been enabled [331] by act of parliament to grant building leases for any term not exceeding sixty-one years, "so as in every such lease there be contained a condition of re-entry for non-payment of rent." The clauses of re-entry in the leases granted by Sir John were for non-payment of the rent *in forty-two days after the days of payment*. An ejectment was brought in the Common Pleas to turn a tenant out of possession who held under one of these leases; but no objection was made (although it was stated in the judgment that the case was fully argued) on the ground of the qualification introduced into the lease, by the words "forty-two days after the day of payment." This is but negative authority; but considering the great learning and industry employed in the discussion of this case, an objection must have been raised if the law had not been considered to be settled; and if it had not been thought that the lease was sanctioned by a practice which no argument could overturn.

The next case is *Hotley v. Scot*.* The words [332] of the power were, that if the

* *Michaelmas Term, 14th George III. B. R.* This case is reported in Lofft 316, under the name of *Hotley v. Scott*.

In a manuscript note taken by Mr. Butler (of which a copy is subjoined) it is given under the name of *Lord Tankerville v. Wingfield and Pritchard*. Upon ejectment; the case was as follows. Upon the marriage of Sir John Astley, his lady's estate was settled upon Sir John for life, with several remainders over, which never took effect; remainder to the lady's right heirs. A power of leasing was given to Sir John, such leases to be made for any number of years, at the accustomed rent, to take effect immediately in possession, and not by way of future or reversionary interest; and on every such lease there was to be inserted a clause of re-entry if the rent should be behind for twenty-one days; the rent to be made payable, and the re-entry to be incident to and go along with the reversion or remainder. In the same settlement there was also a power of revoking all the uses thereby declared, and appointing new.

Some time after the marriage, Sir John Astley and his lady revoked all the uses of the settlement that were subsequent to Sir John's life-estate, and the powers incident thereto, and declared new uses. There was also a fine levied to the same effect.

September 21, 1766, Sir John made two several leases of this date to the two defendants, Wingfield and Pritchard, for twenty-one years, conformable to the power he had by the said settlement, and the other deeds and the fine, except that previous to the entry distress was to be made, and it was nearly in the following words: "That if the rent should be behind or unpaid by the space of twenty-one days, and no sufficient distress or distresses could be had, or if the lessee should assign over the leased premises, (except as therein is excepted) then it should be lawful to Sir John Astley, his heirs and assigns, to enter."

Sir John Astley and his lady being both deceased, the estates are descended upon Lord Tankerville, the Plaintiff, etc.

Dunning, for the Plaintiff: The Court always takes a difference between powers when exercised by a man upon his own estate, and the exercise of powers by a man upon another's estate, or which he holds in another's right. The first are always con-

rent should be behind or unpaid for twenty-one days the lessor should have [333] power to re-enter. The condition in the lease was, if the rent should be behind and unpaid for twenty-[334]one days, *and no sufficient distress could be had*, then it should be lawful for the lessor to re-enter. [335] Lord Mansfield in giving judgment, said, "The clause of re-entry is short with words of course, and does not preclude the operation of law—a re-entry is to enforce the payment of rent—by statute it cannot be without distress." The report of this decision is very short. It is probable that it does not give us the very words of Lord Mansfield, but we learn with certainty from it that the Court decided the very point now before your Lordships in favour of the lease: for the power does not contain a syllable about a sufficient distress: this qualification is introduced into the proviso for re-entry, and yet the Court upheld the lease. It is clear, also, that Lord Mansfield must have referred to some form of drawing up these powers and clauses of re-entry which were then in use, and have expressed himself, that the power and clause in that case were agreeable to usual form. He is made to say, "The clause of re-entry is short with words of course." It is most probable that he said the *power* was short with words of course: the obvious meaning of which is, that the power was expressed in the terms commonly used in such cases, and imported that sort of clause of re-entry which it was then the practice to introduce into leases made under

strued favourably to the persons making use of this power: the second are taken in a strict light: here it was certainly the second. It was a power to be exercised on the wife's estates, and, in some respect, in prejudice of his wife; and therefore to be taken strictly.

1st objection, that the settlement declares that the power of re-entry should be reserved and made incident to the inheritance of the estate: and by the lease it is reserved to Sir John Astley, his heirs and assigns. 2d objection, the settlement directs the re-entry so to be reserved as above, to be made immediately, if the rent should be behind by twenty-one days. By the lease it is to be preceded by demand and distress.

These are strong, plain, and conclusive objections.

Beaumont, for the defendants: The remainder-man, Lord Tankerville, has, substantially, all the powers he ought to have, or can have. As to the first objection, the rent cannot be made payable but to those in remainder or reversion, to which it is inseparably incident. The heirs and assigns of Sir John Astley mean those who are heirs and assigns to the estate under the settlement by which Sir John claims the estate. See *Cotter v. Merrick* (Hard. 89). Tenant in tail died seised, his son entered, and made a lease for twenty-one years, rendering rent during the term to the lessor, his heirs and assigns, and died.

It was unanimously adjudged to be a good lease, and within the 32 H. 8.; the opinion of the Court being, that the word heirs being a comprehensive word, it ought to be construed *secundum subjectam materiam*, and to have that construction which the nature of the deed requires. This is much the stronger in the present case, as Sir John Astley having joined with his wife in the deeds which raised the limitations, those who take by virtue of those limitations may, in some respect, be said to be the heirs and assigns of Sir John Astley. As to the second objection, that the re-entry, which is directed by the power in the settlement to be reserved immediately on the rent being behind twenty-one days after it is due, is by the lease to be preceded by distress and by demand. The words in the settlement are short and loose, and seem to be no more than a general direction that in every lease to be made under this power there should be a clause of re-entry. It is not a formal description what kind of re-entry should be reserved, or of any particular clause of re-entry; it is a direction that the power of re-entry, usually inserted in leases, should be inserted in the leases to be made under this power in the usual manner. This, I apprehend, is a sufficient answer to the objections raised against these leases: each is a verbal objection, and I have given each a verbal answer.

Mr. Dunning, in reply: The distinction I set out with, and the consequence of that distinction, that these leases are to be considered in a strict light, is not denied. And besides this claim to the favour of the Court, Lord Tankerville has that of being the heir at law of the owner of the estate on which this power has been exercised

powers: that the only object of the power being to secure the payment [336] of the rent reserved, such qualifications as the law considered reasonable and consistent with this object were not excluded:—as the Legislature had thought the landlord ought not to have any greater facility for recovering possession of the estate than he had at the common law, when there was a sufficient distress on the demised premises, the introduction of such a condition into the clause of re-entry was but a reasonable qualification. This decision is an authority to show that reasonable qualifications may be introduced into clauses of re-entry when the terms of the power are general; and also, that the qualification most objected to in this lease is reasonable.

That a power expressed in general terms is well executed by a lease containing a proviso with legal qualifications, is further proved by *Dormer's case* (5 Co. 40. b.). "By special consent of the parties a re-entry may be for default of payment of rent without demand of it. And divers other cases were put where the consent of the

Lord Tankerville is neither the heir nor the assignee of Sir John Astley: he claims by a title paramount to Sir John's. The rent is directed by the settlement to be incident to the inheritance, that is to say, to be to the several limitées of the settlement when respectively in possession. The reservation is to the heirs and assigns of Sir John Astley. They are not limitées. This is therefore not a proper execution of the power. The case quoted, and the act of parliament (32 Hen. 8) only show that if a tenant in tail make a lease according to the statute, and reserves rent to himself and his heirs, the words "heirs and assigns" may be construed to be such heirs as may succeed by force of the entail. This construction can never in the present case take in Lord Tankerville, who cannot, in any sense or meaning whatever, be deemed the heir of Sir John Astley or his assign. It is sufficient to say, that in pleading he could never be described as such. As to the words being loose, and directing what should be done, and not describing *how* it is to be done, this seems a frivolous distinction. The settlement directs a clause of re-entry to be inserted in the lease: the lease says it shall not be lawful for Sir John Astley to enter as long as there is a sufficient distress or distresses to be taken. Till then it is postponed. This is contrary to the words of the settlement, and is not, certainly, a proper execution of the power.

Lord Mansfield: The two objections to these leases are, 1st. That by the settlement the re-entry is to be made incident to the rent; but by the lease it is reserved to Sir John Astley, his heirs and assigns. And in the event it has not followed the rent, but gone to the heirs of the lessor, Sir John Astley, while Lord Tankerville is in the lawful possession and receipt of the rents. The second objection is that the clause of re-entry, which by the settlement ought to be immediate, is by the lease fettered, being on a previous demand * and previous distress. As to the first, by the nature of the power it must go with the reversion and inheritance. The person who is in the reversion and inheritance is he that is to enter on the forfeiture of the lease, and no one can enter but he to whom the rent is payable: for as Littleton says, no stranger can enter for forfeiture, for a stranger cannot be in by his former estate. If the rent had been reserved for the term, as in the case cited from *Hardres*, still it goes with the inheritance. Heirs and assigns can only mean those who have the reversion and inheritance; otherwise, as is said, 2 *Saund.* (370), they would be words of surplusage. The clause of re-entry must go with the inheritance the same as the rent, for it cannot be reserved to any body but to him who is seised of the inheritance. It was said, that it ought to have been worded, to the person next in the reversion or remainder. The words heirs and assigns are general words, and are as good as and quite tantamount to particular words. As to the second, the clause of re-entry is short with words of course, and does not preclude the operation of law. A re-entry is to enforce the payment of rent; it is an immediate forfeiture of the estate by common law. By statute it cannot be without a want of distress. Therefore in both points we agree to support the leases. So the verdict must be entered for the Defendants.

* This does not appear by the clause as set forth, *ante* p. 332.

parties shall alter the form and course of the law." Although a clause of re-entry was absolute for nonpayment of rent, yet the common law superadded the qualification to that clause, that the rent be demanded on the estate demised on the last hour of the day when it was payable; and according to Dormer's case, the demand of the rent can only be dispensed with by special consent, or, (as it is expressed in Newdigate's case (Dyer, 68), "that it shall be lawful without *further demand* to re-enter."

If at common law a landlord could not recover possession against a tenant holding under a lease, [337] containing a general clause of re-entry for nonpayment of the rent without a demand of the rent, surely, when the Legislature has relieved the landlord from making a demand of the rent, and substituted in the place of that demand the condition, that there be not a sufficient distress on the premises, the law will not allow the tenant to lose his estate if there be a sufficient distress on it to satisfy the rent due. It will require the same express consent to exclude the condition of there being no sufficient distress since the statute of George the 2d., as was required to exclude the necessity of a demand of the rent at common law.

I do not mean to say that since the statute of George the 2d. a man may not proceed at common law. My argument is, that the law annexed the condition of demand of rent before the statute, and as the statute has now dispensed with a demand of the rent when there is not a sufficient distress, the law will annex the condition of there not being a sufficient distress to a power expressed in general terms: and therefore a clause of re-entry containing this condition is not inconsistent with such a power: otherwise the tenant would not have the protection which according to the spirit of the law he ought to have; for by an omission to pay the nominal rent on the day it became due, he might, without notice, and with abundance of property on the land to satisfy the rent, be dispossessed of an estate for which he had paid a large rent in advance under the name of a fine. This would be making that remedy which was intended only as a security for the rent a forfeit-trap.

[338] The decision in the court of King's Bench in *Care v. Day* is supposed to establish a contrary doctrine. Lord Ellenborough, during the argument of that case, seems to have intimated an opinion inconsistent with that which I have offered to your Lordships. But it is not dealing fairly with that great Judge to hold him to what he threw out whilst he was forming his opinion, particularly when it is contrary to what he afterwards decided, when the case now before your Lordships was in the King's Bench. The wisest of men could not escape the charge of inconsistency, if expressions, which are dropped while the mind is struggling with the different considerations presented by conflicting arguments, are to be recorded. I know not on what ground the Court agreed to the certificate which was sent to the Court of Chancery: but I cannot admit that this certificate is an express authority on the point now under consideration, when the case presents a ground, on which, with the opinion that I entertain on this case, I should have signed that certificate. The power in *Care v. Day* was in these words, "so as in every such lease there be contained a condition of re-entry for the nonpayment of the rent reserved by the space of twenty-one days." The words of the proviso were, "if the rent should be in arrear for twenty days—*being lawfully demanded*." The words "being lawfully demanded" weakened the landlord's security for his rent by imposing on him the necessity of demanding it on the last hour of the day on which it became due, a thing always found to be attended with difficulty, and often impracticable, and from [339] which landlords are relieved by the statute of George the Second. Such a proviso could not be sufficient under such a power.

If authority be doubtful we must recur to principle. When property in lands is divided into estates for life and estates in remainder, it becomes our object to secure to the possessor all the advantages which belong to his estate. The mode of doing this is by giving to the tenant for life a power to grant leases for certain terms not determinable with his life. Unless he has this power the estate will not be cultivated as it ought to be; much less will it be improved: and not only tenants for life but the public would suffer from the want of such powers. In the granting these powers care must be taken that in granting their leases tenants for life do not prejudice the estate of the remainder man: possession of the lands must be secured

to the tenant, and the rent to the landlord. Considering this as being the object of these powers, Judges in the construction of them will only have to consider—What did the maker of the power consider sufficient to attain this object? Can any one doubt that the maker of this power would have considered the clause of re-entry in this lease abundantly sufficient to secure the rent? But for the respect which I feel for those learned Judges from whom I differ on this subject, I should have said, without doubt or hesitation, “a clause of re-entry” means in law what these words would in common conversation, viz. such a clause of re-entry as is generally inserted in leases. That this clause answers that description will not, I think, be disputed.

[340] That the principle on which I found my opinion is a sound legal principle is evident from the following cases: In *Holtley v. Scot*, Lord Mansfield says, “a re-entry is to enforce the payment of rent.” In *Wadman v. Calcraft* (10. Ves. jun. 69), Sir William Grant says, “there is no doubt equity will relieve against the forfeiture; considering the purpose of the clause of re-entry to be only to secure the payment of rent; and that when the rent is paid the end is obtained.” In *Opey v. Thomasius and others* (Sir T. Raym. 134), Twissden, J. says, “powers are to be expressed according to the intent of the parties.” In *Gouldtiff v. Funnican* (Doug. 573), Lord Mansfield says, “powers are now a common modification of property in land, and as such are to be carried into effect according to the intention of those who create them.”

I shall not advert to some facts which are found by this special verdict, and on which arguments might be offered in favour of this particular case. My opinion is formed on these general grounds: Where the power is expressed in general terms, as it is in this case, reasonable qualifications are not excluded, but may be introduced into the clause of re-entry; and the qualifications introduced into this clause have been acknowledged by the Legislature and the course of law to be reasonable. “A clause of re-entry” means the usual clause of re-entry, and the clause of re-entry in this lease is such as is usually inserted in such leases. [341] I believe that it has been so much the general practice of conveyancers to insert such clauses, that if your Lordships were to declare this lease invalid you would destroy the titles of a very large proportion of the landholders in the kingdom. Much of the property in the West is held by leases granted by tenants for life: I know that in other parts of England actions are already brought to turn tenants out of possession of those estates on the same objections as are made to this lease. Some of these actions have been brought to trial before me, and now await the judgment in this case.

I have heard the learned Judges say that they would never allow a practice to be set aside on which the titles to many estates depended, however much they might disapprove of such a practice. If you set aside this lease you will turn a large proportion of the tenantry of England out of estates for which they or their ancestors have paid large sums of money, and which have been continued in their families by a successive renewal of leases for as great a length of time as any of your Lordships families have held their estates. The personal property of tenants for life, the fund out of which provision is to be made for the younger branches of families, will be drained to make compensation to the leaseholder for the loss that he has sustained by being deprived of his lease: and where these funds fail the families of the leaseholders will be ruined.

I have only further to say, that I see no reason to hold the lease stated in the special verdict invalid.

Garrow, B.:—The settlement made upon the marriage of Lord Vernon with Lady Louisa Barbara [342] his wife, of the 2d July 1757, on which this question arises, gives a power of leasing, requiring, with respect to property of the nature in question, that there shall be contained in the lease a power of re-entry for non-payment of rent. In this leasing power no time is specified, by way of indulgence to the tenant, as to the payment after the day on which it shall fall due, nor are any other terms required than that the person who from time to time shall be in possession of the estate shall insert in the lease a power to resume the possession for nonpayment of the rent.

The lease granted by Lord Vernon to the defendant and another, contains a clause for re-entry if the rent shall be in arrear for the term of fifteen days, and if there shall be no sufficient distress upon the premises to satisfy the rent; and the question is, whether this is a good execution of the power, or in other words, whether this is such a power of re-entry as was required by the creator of the settlement!

It is observable, that the creator of the power, or those who advised her, knew how to make distinctions as to powers of re-entry applicable to different estates: and in the case where the rent reserved is of the most valuable description, there the creator of the power only requires of those who shall come in succession into the possession of the estate, as tenants for life, that they shall, for the preservation of the estate, in the most beneficial form and extent, for those who shall be from time to time interested as reversioners, insert a provision, that if the valuable rent reserved on leases for years absolute shall not be paid for twenty-eight days, then there shall [343] be a right to enter at the expiration of these twenty-eight days.

In the case of the render of £2 a year, and a couple of fat capons, or 18d. at the option of the lessor, it is insisted that the power of re-entry should be altogether absolute and unconditional; and that at the first moment when the day has expired on which the money is demandable, the power of re-entry is to attach, and enable the reversioner at that moment to turn the person out, who upon a valuable lease for years determinable upon lives should have permitted the day to expire before he had paid his sum of £2. I admit that if the maker of the settlement had in express terms said, "the power shall be to re-enter the moment at which the rent is due, and not paid or tendered," a court of law could not alter, but must execute such power so expressed. We must see whether the power has been complied with or not.

Now the terms of the condition in the settlement are, that there shall be contained in the leases a power of re-entry on non-payment of the rent. Is there not in the lease granted to the defendant a power of re-entry on non-payment of the rent? There is; but it has been urged with great force that it is not such a compliance with the power as the reversioner had a right to expect the lessor should have made; for he has clogged the clause of re-entry with a delay of fifteen days, and with the necessity of seeing that there is no sufficient distress upon the premises. The answer to this appears to me to be, that according to our experience such an event is so improbable, that it probably did not occur to [344] the maker of the power to guard against it; and not having in express terms required any particular form or terms of the clause for re-entry, I think the power is satisfied by that which has been inserted in the lease in question, and consequently that the lease is not invalid.

Burrough, J.: After the fullest deliberation, I am of opinion that the demise of the 5th September 1803, is invalid; that it was valid only during the life of the lessor, and that his death determined the estate of the lessee.

The statute of the 4 Geo. 2, c. 28, was relied on in the Exchequer Chamber, and in the argument here, as bearing on the subject. In my view of this case it has no application to the subject before the House. That statute, as I conceive, applies only to leases which before the statute might and must have been avoided by entry; to cases where the cause of avoidance might have been waived. Such leases were valid till a strict legal entry was made, and before such entry they were capable of confirmation by suitable acts done by him in whom the right of re-entry was. But a lease by a tenant for life having a special power to demise, if not made conformable to the power, is the lease of a mere tenant for life, and has validity only during his life, and not a moment longer.

I cannot see that any well-grounded argument from a provision made by an act of parliament, in the case of demises of a description wholly different from the demise in question, can be urged in support of that demise. In forming our judgments on the [345] questions submitted to us we must consider that we are required to give our opinion on the construction of a deed. There are certain rules of the common law which must govern us on such an occasion. One rule is, that the construction must be made on the whole deed. The principle of the common law is, that *Ex antecedentibus et consequentibus est optima interpretatio* (Shep. Touch, c. 5, rule 1, fo. 87). There is another rule which also strongly applies to the case in question, and that is, *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*. Acting on these rules, I contend that there is no ambiguity in the words of the power, and that it is manifest, from the various parts of the deed of the 2d July 1757, that it was the intention of the parties to have these words understood as they are written, and without addition.

The clause of re-entry in the demise ought, I contend, to have corresponded with the *reddendum*, which is to this effect, "yielding and paying the yearly rent of £2 at

Michaelmas and Lady-day, by equal portions :” and not so corresponding I am of opinion the lease is invalid. First, because there can be no re-entry unless the rent is behind and unpaid for fifteen days from Michaelmas and Lady-day, which is an extension of the time beyond that in the *reddendum*. Secondly, because the re-entry for the non-payment of the rent cannot, by the express terms of the demise, be made if there is sufficient distress to be had on the premises. The general scope of the deed is too well known to require repetition. It has heretofore been considered [346] that there are three distinct powers in this deed. I conceive that, correctly speaking, there is only one power, consisting of three distinct parts. I say this, because the enabling words “that it shall and may be lawful, etc.” are placed at the head of the whole, and are not afterwards repeated; and the other parts are introduced by the words “and also.” It appears to me, from this mode of looking at the deed, that it may be fairly collected that the framers of it must have had their minds directed to the different *parts* of the power: and must have designedly and deliberately introduced an additional restriction on that part of the power which relates to leases for years, and references in other parts to extrinsic matters, and designedly and deliberately omitted any such additional restriction in the part of the power in question, and also all words of reference to extrinsic matter or former leases.

The first part of the power is that which relates immediately to the demise in question: by this Mr. Vernon and his wife (who by the deed took successive estates for life) are enabled to grant leases for life, or years determinable on the death of a life or lives, of such lands as at the time of the deed were leased for life, or years determinable on the dropping of a life or lives: so as the ancient and accustomed yearly rents, dues, and services, or more or as great and beneficial rents, etc. be reserved or made payable, and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved. Now, what is the rent thereby to be reserved but the *reddendum*?—the power of re-entry is to be for the non-payment of [347] that rent. If that rent was not paid at Michaelmas-day or Lady-day, I contend that it is plain by the very terms of the deed that the right of re-entry ought to be complete.

It is not to be doubted that former leases were admissible in evidence for two purposes: first, to show what lands were, at the time of the demise, leased for life or years, as described in the deed: secondly, to show what the ancient and accustomed rents were: for former leases are for these purposes necessarily referred to. But, it appears to me to be free from doubt that, as to the power of re-entry prescribed by the deed, there is no reference to former leases or to prior circumstances, but to the *reddendum* only, ascertaining not only the rent itself, but also the mode and time of payment. This power of re-entry prescribed by the deed is framed in plain terms: it contains a clear proposition in itself, and therefore I contend, that the maxim that *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*, is precisely applicable to the point. Thus to decide is to avoid the vicious mode of interpretation which is reproached by a maxim to be found in Lord Bacon’s Tracts (67). *Divinatio, non interpretatio est quae omnino recedit a litera*. If you stir beyond what the deed expressly prescribes then commences the *divinatio*, and the *interpretatio* is at an end.

Next follows in the deed what, I say, is more properly a second part of the same power than a distinct and separate power. The general enabling words being at the beginning of the whole: this part [348] is connected with the former part by the words “and also.” “And also, by indenture, to demise any of the lands in the settlement for any term not exceeding twenty-one years in possession, so as there be reserved as much or as great and beneficial yearly and other rents as were then yielded, or the best and most improved yearly rent or rents as can be reasonably had or obtained, and so as in every such lease for an absolute term of years.—(thus distinguishing them from the former leases.)—there be contained a clause of re-entry in case the rent or rents thereupon to be reserved be behind or unpaid for the space of twenty-eight days after the time thereby respectively appointed for payment thereof.” This part of the power, which is, as it were, uttered in the same breath with the former part, under the same enabling words, and united to them by the words “and also,” affords very important observations. First, the rents to be reserved in these leases are to be as much or as great and beneficial as were then yielded: here, then, is a plain

reference to the then existing state of rents. To prove this the former leases were good evidence. Or, secondly, the rents are to be the best and most improved that can be reasonably gotten: this admits, too, of reference to extrinsic matters. The third observation is as to the clause of re-entry prescribed by this part of the power, in case the rent be behind or unpaid for twenty-eight days. With great deference to the judgment of those who entertain a different opinion, I cannot refrain from expressing my strong opinion on this part of the deed. In my mind, it affords an argument of irresistible weight, that the parties [349] to this deed intentionally omitted an extension of the time of payment in the first part of the power under which the demise in question is contended to be valid: and that they intentionally inserted the extension of twenty-eight days in the second part: and I confess I feel myself alarmed at the fate of men's deeds, if it shall be holden that the demise in question is valid which contains an extension of the time of payment to fifteen additional days, not hinted at in the power itself, and inconsistent with the *reddendum*: and which also contains a provision which deprives the reversioner of his re-entry if on any part of the premises there may chance to be sufficient distress. That the clause of distress imposes a difficulty on the reversioner is proved by the case of *Rees on dem. Powell v. King and Morris*, tried before Mr. Justice Heath in the summer of 1800, at Hereford, whose opinion was ratified by the opinion of the Judges of the Court of Exchequer in the following term. It was there held, that a clause of forfeiture in a lease, in case no sufficient distress was to be found on the premises, must be pursued strictly, and every part of the premises must be searched.

The third part of the power is introduced in the same manner as the second part: this is the part which empowers the leasing mines then open, or lands wherein persons may be willing to open mines. Annexed to this there are several restrictions running in this language: "So as in every such lease there be reserved or made payable such parts of the lead, copper ore, coal, and other produce to be gotten from the said mines, or such other yearly rent or [350] income in respect thereof, as can be reasonably had or gotten for the same, without taking any fine, etc., and so as the lessees execute counter-parts: and so as there be inserted such proper and usual covenants for the effectually working the mines, etc., and doing all proper and necessary acts as are usually inserted in leases of the like nature. It is to be observed, that with respect to these leases there are special restrictions peculiarly applicable to them. The parties to the deed had all the parts of this power before them, and have cautiously introduced restrictions applicable to each part: and can a court of law add to these restrictions? The rents of the mines, or the parts of the produce to be reserved, are to be such as can be reasonably gotten: the covenants are to be the usual covenants for effectually working them and doing all necessary acts.

In the second and third parts the word "reasonably" is introduced: but it is wholly omitted in the first part. Is a court of law authorised to transplant the word "reasonable" to the first part, when the parties have introduced it in the second and third parts, and omitted it in the first part? This cannot be done if it varies the construction of the words as the parties have penned them. We are required to state our respective opinions, whether, having regard to the due intent and meaning of the indenture of July 1757, according to the legal construction of the several parts of it, and having due regard to the legal effect of the facts and circumstances found by the verdict, the demise is for any and what reasons invalid? I feel that if I depart from the plain meaning of plain words, made (if it were possible) more [351] plain by the context, that I shall be at sea without a compass. If the demise in question had contained a power of re-entry framed in words literally corresponding with the words in the settlement, I conceive it would have been good. I have heard no valid objection to such a power of re-entry, notwithstanding the most earnest attention to the subject before and since the arguments in the Exchequer Chamber, and here. I have not been able to raise in my mind a doubt of the fitness of such a clause, or of its being that which the parties intended.

For the reasons I have stated, I am of opinion, first, that the former leases were not admissible in evidence to show that they contain clauses similar to those to be found in the demise in question, respecting the extension of the time of payment, and respecting the distress. Secondly, I am of opinion, for the reasons I have given, that the demise in question is invalid. The House has been told at the bar, that a decision, that this demise is invalid, will have the effect of destroying other leases made under

similar powers. I cannot take notice of such a statement, first, because it is an assertion of a fact, of which, as a Judge, in a court of law, I can have no knowledge; secondly, if it were fit that it should weigh with us, ought we not to see the settlements and the leases, in order to know that the *antecedentia et consequentia* are the same as in this case. A variation in the words and context matter might vary the grounds of our judgments. Thirdly, if there were other leases made under circumstances precisely similar it would not vary the opinion [352] I have formed. I cannot accommodate my opinion to the convenience of lessees under powers; their estates must stand or fall by the authority under which they are made. It is a maxim of our law, that it is better to suffer a mischief than an inconvenience: the mischief (if it be any) we can see the extent of; it will be, that certain demises, in consequence of the carelessness or ignorance of those who drew them, will be invalid, and they who were intended to take, in the event of there being no good subsisting leases, will take. On the other hand, no one can foresee the end of inconveniences which would arise from the relaxation of the rules of law in the construction of these deeds.

As to the cases of *Holley v. Scot*, and *Cove v. Day*, from the report of the first case I cannot discover what was decided, it is to me unintelligible; but supposing it to be applicable, we have the later case of *Cove v. Day*. The decision of the four learned men on the second question has great weight with me, and I cannot see why it ought not to guide our judgment on the present occasion. It is well known that the late learned Lord Chief Justice of the Common Pleas, Sir Vicary Gibbs, thought that decision right, and was of opinion that the present lease was invalid: he was in office when the present case found its way into the Exchequer Chamber.

Holroyd J.: I think that, having due regard to the true intent and meaning of the indenture of the 2d day of July, 1757, according to the legal construction of the several parts of that indenture, as [353] stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th of September, 1803, as the same is stated in the special verdict, is invalid.

By the death of Lord Vernon, the lessor, who had an estate in him for life only, that demise became invalid, unless it were made in conformity to one of the powers of leasing contained in the above-mentioned indenture of the 2d of July, 1757. That indenture contains three powers of leasing: one, for a life or lives, or for a term determinable on a life or lives; another, for years not exceeding twenty-one; and the third, for working mines or ore for years not exceeding thirty-one. Each of these powers is clogged with qualifications of two descriptions; one class of which is comparative, or with reference either to the existing or previous state of things, or to usage or custom, or to what can reasonably be had or obtained; the other class is direct and absolute, without any reference or regard either to the existing or previous state of things, or to usage or custom, or to what can be reasonably had or obtained, or to any matter whatever; these last qualifications are superadded by the creatrix of the power, to be complied with at all events, as I think, without reference or regard to any matter, and not to be varied, changed, or altered by, or at all to depend upon, any usage, custom, or state of things, or any matter whatever.

The first of the above powers of leasing is that upon which the present question depends, the power of leasing for a life or lives, or for years determinable [354] upon a life or lives. The qualifications with which that power is clogged, are, as to the reservation of the rents, duties, and services, that they be such as were the ancient and accustomed, or more or as great or beneficial as at the time of the demising were payable, or as much as a just proportion thereof amounts to, according to the value of the premises demised, or more, with the exception of heriots. These qualifications are comparative, or with reference, expressly, to the things there expressed; and must be such as, on such comparison or reference, shall be found conformable thereto, and are wholly dependent thereupon. But the other class of qualifications superadded to this power is direct and absolute, and without reference to and wholly independent, as it seems to me, upon any other matter except what the law requires, and to be complied with at all events, whatever may be or may have been any usage, custom, or state of things whatever.—These other qualifications are, that the rents, duties, and services be incident to and go along with the reversion and remainder; that the leases contain a power of re-entry for non-payment of the

rent reserved, and not contain any express clause freeing the lessees from impeachment of waste, and that the lessees seal and deliver a counterpart of the lease. It is upon one of these direct, absolute, and independent qualifications of that power that the present question has arisen. That qualification is in the following words: "So as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." This qualification being expressed in words that are direct [355] and absolute, and without reference to any former leases, or to any prior or then existing state of things, or former management or disposition of the property, the fact found by the jury, with respect to the former leases, cannot, I think, vary the legal construction to be given to this qualification. There is in the words no latent ambiguity which those former leases either raise or remove. If the words be not clear and explicit in themselves, their ambiguity, if any, is upon the face of the deed itself, and they cannot, I think, by law be allowed to crave in aid any former usage to vary or alter their construction: and this more especially in the case of such a deed as the present, wherein the parties expressly direct, that a reference to the then existing or former usages should be had recourse to, where they intend that either of them should be called in aid on the subject matter of these qualifications. Besides, it has been held by the Court of King's Bench, in *Iggulden v. May* (7 East, 237), as well as by the Lord Chancellor in the same case (9 Ves. jun. 329), ratifying a similar doctrine that had before been held by Lord Alvanley and Sir William Grant, when Masters of the Rolls, on covenants for renewal of leases, that the construction of deeds cannot be varied by the acts of the parties: and therefore, various other leases, that had before been successively made by the owners of the inheritances for the time being, could not be taken in aid to construe the meaning of a covenant for renewal. The instability and uncertainty introduced into rights of property created by deed, by [356] letting in such extrinsic evidence, and the mischief arising therefrom, would apply equally, as it seems to me, to the present case.

The present question arises in a case where the exercise of the power is by a person (namely, Lord Vernon) who, previous to the creation of the power, was a stranger to the estate; and in a case, where this qualification of the power given to him by his wife must be taken to have been inserted as well for the benefit of herself, as of the several other persons in remainder, in derogation of whose rights his exercise of the power would operate so long as the lease should continue valid after the extinction of his life-estate. It would operate in derogation of her and their rights, by depriving them, successively, of the actual occupation and enjoyment of the demised premises themselves, which they would otherwise be entitled to have, and giving them, successively, in lieu thereof, a rent or rents such as the power required, however inadequate the same might be.

The power given to the tenant for life to lease for a term that may last beyond his own life, is, agreeable to what is said by Lord Ellenborough in *Cox v. Day* (13 East, 127), for the benefit of the tenant for life; the qualifications only, as he there also says, are for the benefit of those in remainder; and, in this case, those in remainder, who are to be protected by these qualifications (except the creatrix of the power herself), are not parties or privies, but are strangers to the deed; and therefore as to them, [357] the words of the deed are to have their full operation for their protection against the tenant for life, who executed the power, and against whose act, which would or might be to their detriment, they were to be protected by this qualification. The very intent of prescribing these requisites is to protect the several remaindermen from the discretion of the tenant for life in the exercise of this power of leasing given to him. The object of the qualification is to secure to them the rent itself, and not to give them any substitute whatever in lieu thereof, other than and except the land itself for which the rent was to be paid. For this purpose this qualification looks to and specifies some occasion or event, and that a simple unqualified one, namely, the nonpayment of rent, not under any particular circumstances only, but generally whenever there is a nonpayment of rent, that is to say, it looks to and specifies the default of the lessees by the nonpayment of the rent as the occasion or event on which those entitled to the rent to be paid for the land shall, for want of the rent, have the land itself, the *quid pro quo* the rent was to be paid. Whenever that event or default arises the case then exists, I think, on which the land was to be had for that default.

without any other matter being to be superadded thereupon, except what the general rules of law, independently of particular terms of contract, would require, such as those requiring in a particular manner and form a demand of the rent due.

The words applying to the power of re-entry required to be contained in the lease are "a power of re-entry for nonpayment of the rent thereby [358] to be reserved;" that is, as I think, such a power as will authorize the party, whenever there is a nonpayment of the reserved rent, to re-enter. That is the express cause on account of which he is to be at liberty to re-enter, which liberty must, I think, be co-extensive and co-existent with that cause; and that cause, which is nonpayment of rent, (such I mean as will authorize a re-entry) exists from the very instant that there is such a default of payment as the law requires to authorize a re-entry; and that default of payment equally exists from the moment of such a demand as the law requires being made of the rent due and nonpayment thereon, without any subsequent definite period of time having elapsed; and whether there be or be not distrainable goods on the premises sufficient to pay the arrears of the rent, and by the sale of which the remainder-man may, *at his own trouble and risk*, pay himself those arrears. The words "for nonpayment," must in this case, I think, be taken to mean the same as either, "because of"—"by reason of"—"on account of," or "in case of nonpayment;" that is to say, when that event occurs, and the same therefore as if the words were *on* nonpayment of rent. That appears to me to be the proper sense and meaning of the words; and it is also, as I think, agreeable to the object of the qualification, which is, that the party shall have the land whenever the lessee fails to pay the rent for it. The lessee's failure or default in the performance of a duty which it is incumbent on him to perform, is the sole ground and consideration for entitling the party to re-enter and have again the land, without regard to [359] any possibility or power which the rent-owner may have to obtain the rent by any other means or exertions of his own.

But it has been argued that this qualification in requiring a power of re-entry is silent as to the time when it should be carried into effect; and therefore that it may be considered to require only that there should be some reasonable power of re-entry for nonpayment of the rent, and that the power of re-entry reserved upon the lease in question is a reasonable power of re-entry for nonpayment of the rent, and therefore as much as the creatrix of the power has required. To this, besides observing that the word "reasonable" is not here used in the deed, though it is used in two other instances in giving those powers where a discretion was intended to be given, I answer, that this qualification in my opinion is not to be so considered, if upon the due and proper construction of this leasing power, this leasing power, if fully executed, would have authorized a re-entry for nonpayment of rent in any case in which such entry would not be authorized for nonpayment of rent upon the lease in question. And I say that there are cases in which, if the power of leasing had been fully executed, a re-entry might lawfully be made for the nonpayment of rent, in which it could not lawfully be made under this lease.

To try whether this be so or not, suppose the right of re-entry reserved by this lease, instead of its being in its present form, had used the very words of qualification used in the deed creating the power of leasing. Suppose the lease had been, "Provided that it shall be lawful for the lessors, etc. [360] to re-enter" (or, "that they shall have power of re-entry,") "for non-payment of the rent hereby reserved." That is an easy and obvious way of framing the proviso, and most likely to be adopted, as I should think, by a person having recourse to and looking at the leasing power, as he ought to do who is anxious to be secure; and that clearly, I think, would have been a due execution of the power, and under such an execution of the power, by using those words in the lease, whenever there was a default of payment, whether fifteen days had elapsed or not since the rent became due, or whether a sufficient distress was on the demised premises or not, the right of re-entry would have arisen in case the landlord had made such a demand of the rent as the law for that purpose requires: so that the same construction would be given to those words where used in the lease, as if the words had been *on* nonpayment of rent; whereas according to the right of re-entry actually reserved the landlord has no such right of re-entry (though the rent is due and has been so demanded,) for fifteen days, during which he would have such a right, under such a due execution of the power of leasing

as I have above supposed, nor would he have such right of re-entry at any period of time when there was a sufficient distress on the premises on which he might levy for his rent, though upon the goods of innocent third persons; which right of re-entry he would have during all that period in the other case, and without the painful necessity of being driven, in any case, to his remedy by distress upon the goods of innocent strangers. So that he has not that right and [361] specific remedy in lieu of his rent in those cases, under the lease in question, which he would have had under it on such a due execution of the leasing power as I have above supposed; but a different one, and such as in some of such cases at least some conscientious persons would not resort to or enforce, such as enforcing the power of distress upon the goods of innocent third persons. The construction of the words in question, therefore, if used in a lease instead of being used in the leasing power, taken according to the proper and ordinary sense and meaning of the words used, would, as it appears to me, have given a right of re-entry immediately on non-payment of the rent. They cannot, therefore, I think, be properly deemed to have a different import and signification when used in the leasing power, from what they would have in a lease made in conformity to that power, or that they would have if they were used in any lease whatever. There is not only no right of re-entry given for nonpayment of the rent until a default of payment for fifteen days, but even on such default the right given by the proviso is not a right of re-entry to possess or enjoy the land, but a right only of distress in case there be a sufficient distress upon the premises. In the forms of leases contained in *Horseman's Conveyancing*, in the edition that I have, I have been able to find only one that is clogged with the insufficiency of distress, all the others appear to be without it. Those leases appear to have been between the times of the statutes of William and Mary and Geo. 2, and several of the conveyances there for securing annuities give, first a power of distress, in [362] case the annuity be in arrear for a given number of days, and a right of entry and enjoyment till satisfaction, in case it be in arrear for a larger number of days, without regard to whether there be or be not any sufficient distress upon the premises. I think too that it affords an argument in favour of the above construction, and that nothing else can legally be deemed to have been in the contemplation or intention of the creatrix of the leasing power when she used the words in question, than a mere simple nonpayment, or default of payment of rent *generally*, unaccompanied with any other fact or circumstance, except that which the general rule of law requires, viz. a demand. It is manifest, that where she meant any other fact or circumstance should accompany that nonpayment before the right of re-entry should be given, she has expressly mentioned it, for in the second leasing power she enables leases to be granted, though the right of re-entry be not reserved except upon a lapse of nonpayment for twenty-eight days after the time appointed for payment of the rent. And I do not see how the lease in question can be held to be valid except upon principles of law that would have rendered it also valid, in case the creatrix of the leasing powers had also expressly added in the second leasing power another ingredient besides that lapse of twenty-eight days, namely, the want of a sufficient distress upon the premises, without both which, in addition to the mere nonpayment of rent, a right of re-entry need not, in that case, have been reserved under the second leasing power.

But, in truth, the reserved right of re-entry which [363] is now in question (whether it is to be deemed reasonable or unreasonable) is not a right of re-entry for nonpayment of rent, but it is in truth a right of re-entry for a different thing which may never exist, notwithstanding there is a default of payment of rent, namely, for an aggregate, consisting in part indeed of that default, but of two other things besides, namely, a certain lapse of time and a want of sufficient distress. It is, in reality, not a right of re-entry for nonpayment of rent, but a right of re-entry for want of a sufficient distress in case of such nonpayment. Instead of giving a right of re-entry for nonpayment of rent it refers the remainder man to the right of distress on that event, a right which he would have by the general law even without such reference; and it gives him the right of re-entry only at a later time for a different thing, and on a further event, viz. the want of sufficient distress.

It is not, therefore, in reality a right of re-entry for the same thing as the creatrix of the leasing power required it should be for (and which right, as I have

said before, must I think be co-extensive with the existence of the thing, or event, or default for which it was given); but it is a right of re-entry for a combination of things, all of which must exist before the right of re-entry can be exercised. And how reasonable soever it may be thought that this qualification of this leasing power might have been given by its creatrix for the securing of the rent instead of the qualification she has actually given to it, it cannot I think be substituted for the qualification which she has actually given and required.

[364] But it has been argued that all this is immaterial, because of the general clause of re-entry that follows for default of the performance of any of the reservations, covenants, etc. But it is so completely settled, both on the maxims and authorities of law, that the general clause of re-entry can extend only to cases not before specially provided for, more especially when it would otherwise contradict and defeat the prior express provision, that I shall say no more upon this point.

But then it has further been objected that this leasing power being given and executed since the statute 1 Geo. II. (c. 28, s. 2), the insertion of the want of a sufficient distress on the demised premises in the leases, in order to give the right of re-entry, has become immaterial; because it has been urged, that since that statute no right of re-entry for nonpayment of rent can be rendered effectual so as to regain the actual possession, unless where there is no sufficient distress to be found on the demised premises countervailing the arrears of rent due. But that statute does not appear to make any difference in the present case. That statute applies only to cases where the landlord has omitted to make such a demand of the rent as would entitle him to the forfeiture, and substitutes for his relief other things to be done in lieu, and then gives him the benefit of a forfeiture (to which he would not be otherwise entitled), and gives him that benefit only in certain cases, amongst which is the want of a sufficient distress, and on certain terms. But notwithstanding [365] that statute, where a due demand of the rent has been made, a right of re-entry may be given, and may be effectually enforced, though a sufficient distress be upon the demised premises. That statute too applies only to cases where a half year's rent is in arrear, and not to cases where a less arrear of rent is due, as may be on the lease in question by a part payment, although the rent is reserved not quarterly but half-yearly.

But it has been further urged, that not only the above statute of the 1th Geo. II., but also the cases both at law and in equity show that the object of a power of re-entry is only to secure the payment of the rent. It was then contended, that this payment of the rent is as effectually and as beneficially secured by the power of re-entry actually reserved in the present case, as if that power had been reserved in the words used in the leasing power, inasmuch as it is said that it reserves the right of re-entry in all cases where the landlord cannot himself by a distress obtain the payment of the rent. This, it was argued, appears by the necessity there is (even after entry) of obtaining judgment and execution in an action of ejectment before possession can be obtained; and by the relief which the courts both of law and equity, but more particularly the latter, give, independently of the provisions of that statute, in cases of forfeiture for nonpayment of rent. But let us see how the case as to this point stands: If the right of re-entry reserved had been merely for nonpayment of the rent, in the terms of the right of re-entry required by the leasing power, it is clear, I take it, that on a due demand of the rent being made (and by [366] the statute 4th Geo. II., even without such demand, where half a year's rent remains due), the landlord would have been entitled either to have the rent itself actually paid to him, or to have the land. No other act in that case need be done, or any trouble or risk undergone by him with regard to the rent; but without further act, trouble or risk on his part, he might immediately enter into the land, or immediately proceed to recover the possession thereof by an action of ejectment, against which the tenant could not gain relief without his paying the rent itself, with costs; and unless he thus gets such relief, the landlord would be entitled to recover all the mesne profits from the time of the default by the nonpayment of rent. The right of re-entry actually reserved in the present case gives him no power to re-enter, or to proceed by ejectment, until the expiration of fifteen days, nor at any period of time, unless there is the want of a sufficient distress upon the premises, nor any right to recover the mesne profits farther back than not only the expiration of fifteen days, but

also the time when there can be proved to be or when there was such want of distress; and so long as there continues such a distress the only remedy the landlord has for the rent is by action for it, or by distress: so that instead of having the rent by the payment and act of the lessee himself, or, in default thereof, an immediate right to enter or recover possession of the land itself, the remainder-man is driven to the necessity of incurring not only the trouble and expense of ascertaining whether there is or is not a sufficient legal distress upon the premises,—whether of the [367] property of the tenant, or of third persons,—of waiting, where the distress is of standing corn, until it is ripe and cut (for till then it cannot by the statute be appraised or sold for payment of the rent,) but also of incurring the trouble, delay and risk attending the making the distress in such manner as is in no respect illegal, either by reason of the manner of making or disposing thereof, or by reason of the distrained property being privileged from distress by the same being in the way to market, or by reason of trade or otherwise. Not only is the remainder-man driven to this trouble, but the tenant may also deprive him of the power of sale by a replevy of the distress; and it may happen at the end of the replevin-suit, that by the eloignement of the distrained property the insufficiency of the pledges in replevin, and the insolvency, or death without sufficient assets unadministered of the sheriff and the tenant, his remedy by distress may finally fail, with the additional loss and costs both of the distress and of the replevin-suit; and if this does not happen, he may still be without his rent unless he take upon himself the trouble and expense of prosecuting execution *pro retorno habendo*, or for his debts and costs, and the trouble and risk of prosecuting some further action or actions against the sheriff or the bail in replevin in case such execution shall prove ineffectual: and his remedy by ejectment would be in that case delayed until these results of the replevin-suit shall have been ascertained, even if an action of ejectment would then lie for the nonpayment of that rent which had been before distrained for. So that after the termination of the distress [368] and replevin-suit it may happen that the remainder-man may lose his rent, with the addition of costs. The payment of the rent is not, therefore, I think, as effectually and beneficially secured by the right of re-entry actually reserved as if that right had been reserved in the words of or according to the leasing power.

I have considered the question as above, independently of the disputed authorities of *Core v. Day* (13 East, 118), and *Doe dem. Vaughan v. Meyler* (2 M. and S. 276), both which cases I think were rightly decided, notwithstanding the prior case of *Holley v. Scot*. I have considered the question, too, as if in the lease the rent reserved had been a money-rent only, because it has been so treated in the arguments here, and in the courts below. But it is to be observed that this is the case, not of a lease for a money-rent only, but also for a rent of another nature, although certainly a very small one, namely, the additional rent of a couple of fat capons, or money, at the election, not of the tenant, but of the lessor or remainder-man, who would therefore be entitled, if he pleased, to have that rent in kind instead of money. It has been considered on all sides as the case of a lease for a money-rent only. I presume on this ground that the special right of re-entry depending on the want of a sufficient distress does not apply to this additional rent or reservation, but to the money rent only, and that the right of re-entry applicable to this additional rent is the general right of re-entry subsequently given by the lease, in case of default in payment or performance of any of the reservations, covenants, [369] etc.; and this may be the case if the statute 2 W. and M. (C. 5) which is the statute giving the power of sale of a distress for rent, be deemed to be confined to money-rents only. But if the default or payment of this additional rent be within the special rights of re-entry depending on the want of a sufficient distress, more especially if this kind of rent be also not within the above statute of William and Mary, so that the distress could not be sold under that statute for the purpose of raising or paying that rent, though if it could be sold for that purpose it would not raise the rent in kind agreeable to the landlord's right of election, but in money only, at least not without additional trouble and expense to the landlord of purchasing the rent in kind with the money raised by the sale, that is, either by doing it himself or procuring another to do it, I say that in such case the question proposed to us by your Lordships, as it appears to me, would embrace still further considerations arising from those circumstances, as the d's

treasure for that small rent in kind, viz. the two capons, would in that case, that is to say if it could not be sold under the statute, remain only a dry, unprofitable, chargeable pledge for that rent, in lieu of the productive security and enjoyment of the land. This however it is unnecessary for me to consider, inasmuch as whether the additional rent in kind would embrace further considerations as to the law of the case or not, I think, for the reasons which I have before stated, that having due regard to every thing alluded to in the question proposed to us by your Lordships, the lease in question is invalid.

[370] Park, J.—The objections to this lease are two: viz. that it does not pursue the power, inasmuch as a clause is required to be in every lease in these words: "So as there be contained in every such lease a power of re-entry for nonpayment of the rent thereby to be reserved," and nothing more: whereas it is said this lease contains a power of re-entry, not *generally*, but clogged with two conditions,—"*Provided the rent, etc. shall be behind and unpaid, etc. for fifteen days*, and no sufficient distress can or may be had or taken upon the premises." And these two objections fall under very different considerations: but it must be admitted that if either of them prevail the lease is invalid. As to the general rules which govern the courts in the construction of leasing powers they are all now well understood, and have been so fully explained and commented upon by some of my learned brothers who have preceded me, that it would be a silly parade of learning, and a useless waste of the time of the House to enter upon them: it being sufficient to state that the intention of the parties, which is to be collected from the instrument, is to be the governing principle in the construction.

The words of the power having been read to your Lordships, "So as there be contained a power of re-entry for nonpayment of the rent thereby to be reserved," it has been asked, "if a plain man were asked how he would execute such a power, what would he say?" I answer distinctly that he would say, "insert a clause in the very words of the power, that the lessor shall have a power to re-enter for nonpayment of the rent thereby reserved." I am—[371]—swear that such a plain man, in my conception, would be grievously surprised to find two conditions, which he will in vain look for in the power, but which materially alter the rights of the remainder-man. The power to make leases is to be construed so as to lean neither to the one party nor the other, for the maker of the power certainly intended that they should operate for the benefit of both, of the one, by giving him the enjoyment during his life of an estate well cultivated, of the other (viz. the remainder-man), by preventing him from coming to an impoverished one.

It seems to me that to contend for what is insisted on by the Plaintiff in error is to say, that "absolute" and "conditional" mean the same thing; or, that a power clogged with two conditions is the same thing as an unclogged and unconditional power. When this case was before the Exchequer Chamber I stated, that if the only objection to this lease were the time given, before the lapse of which he could not re-enter for nonpayment of the rent, as then advised, I should think the objection fatal. I have heard nothing since to remove my doubt. It is said indeed that the indefinite article *a* being used, namely, *a* power, *any* power that is reasonable may be inserted. But what right have we to do this for the grantor of the power? Who has a right to insert this word? Who, if inserted, is to construe it? The court or the jury? If fifteen days be reasonable, why not twenty, twenty-five, and thirty? That this was never contemplated I think quite clear: for whenever time is meant to be given it is expressed, and therefore she must be presumed to [372] have known that where she meant to give time it ought to be expressed, lest the giving it in one case should be construed, as it is by me, that it was not intended to be given in the other. But I have said, and I repeat it, what right have we to insert the word "reasonable" into this power? If this word "reasonable" never found its way into powers, it might perhaps more fairly be argued that it was inherent in all. But looking at precedents and adjudged cases we do find the words "usual" and "reasonable" sometimes jointly introduced, sometimes separately: and these words when introduced compel the courts to consider what are usual—what are reasonable covenants—under such powers. If then it is not unusual to insert such words, why are the courts to introduce them where the creator of the power has not: and why by omitting them must be taken to have intended that they should not be

inserted? But I am staggered by what is said in a book of great authority, and to which I think the Professional Public are much indebted (Sugden on Powers), that if this objection were to prevail it would invalidate nine tenths of all the leases in the kingdom granted under powers. I can only say such a consequence is to be deeply deplored; but it is entirely owing to this, that those who have prepared such leases have chosen to follow their own new-fangled conceits, instead of using the exact words of the power conferring the right to lease upon certain terms, and upon certain terms only. This argument, that many leases will be invalidated, may be a very good one to your Lordships in your legislative capacity, [373] on account of the hardship of the case, but cannot, and ought not, to influence you when your province is *jus dicere, non dare*. However, if this were the only objection to the lease in question, on account of the long practice which has prevailed, as it is alleged, I might be inclined to pause before I presumed to offer my humble advice to your Lordships, that on this ground alone the lease would be void.

But the second objection seems to me to be impossible to be got over. I have thought much about it, both before I gave my judgment in the Exchequer Chamber, and since. I have turned it in every point of view; I have heard all that learning and ability at the bar could suggest; I have of course been present at all the conferences with my learned brethren; I have been most desirous to be convinced if my opinion be erroneous; but after all I cannot raise in my mind a probable doubt; and though if the decision of your Lordships should be ultimately in favour of the lease it will be my duty to conform to that opinion, I am at present bound to state my entire concurrence in this point with my learned brothers, Richardson, Burrough, and Holroyd, who have preceded me. Their luminous exposition of the argument, and my own judgment in the Exchequer Chamber, which is very accurately reported, both by Messrs. Broderip and Bingham, and by Mr. Moore, and which is in the possession of some of your Lordships, render it unnecessary for me to do more on this head than to make an observation or two on the cases that have been quoted.

The main reliance on the other side is on the case of *Hothly v. Scot*, Loft, 346. Of that reporter [374] I shall say no more than this (without forming any judgment of my own), that during a long professional life of forty years, and Loft's reports embracing a period of that great man's life who then presided in the Court of King's Bench, during which, as to this part of them, there is no other reporter (not the reports of the very learned person now at your Lordships table (Henry Cowper, Esq.) did not commence till 1771, nearly two years after Mr. Loft's), I never heard them quoted three times in my life. But without any observations of this kind, it is quite clear from that report that none of the learned counsel then at the bar, neither Mr. Dunning nor Mr. Bearecroft, neither my Lord Mansfield nor any of the Judges, appear to have taken the least notice of the condition as to the want of a sufficient distress, which is the very point now under consideration, and which from the terms of the power and lease in that case might have arisen. But it is said there is a note of that case by Mr. Butler, taken by himself, in which it appears to have been mentioned; I have not seen that note, and therefore I can say nothing to it. I entertain great respect for that gentleman, and I do not wish to depreciate the labours of the young; but unless he be much more advanced in life than, for the sake of the public I wish him to be, he must forty-eight years ago have been a very young man. But admitting the point to have been mentioned, it cannot have formed a prominent feature either in the argument at the bar or in the consideration of the court, for if it had it is impossible that Mr. Loft, or any other man, in a report [375] of four pages should have omitted it. Can such a case for a moment be put in competition with *Cove v. Day* (13 East, 118), where this clause was the main objection to the lease, a case most ably argued at the bar by the now Chief Justice of that Court, and receiving the deliberate certificate of four very eminent Judges, Lord Ellenborough, Justices Grose, Le Blanc and Bayley? In the course of that argument Lord Ellenborough said, "There can be no doubt that it is more beneficial to the owner of the estate to have a power of re-entry *at once* upon the tenant, upon nonpayment of the rent within a certain time, than to have such a power only *in case* there shall be no sufficient distress upon the premises." And in another place, when Mr. Abbott was strongly pressing on the Court that such a clause secured the landlord, namely, satisfying his rent more speedily than in any other way, Lord Ellenborough

said, in answer, "In the one case it is to be secured from time to time by successive suits, with the risk of sureties if the distress be replevied; in the other, it is secured once for all by the landlord's re-possessing himself of the land out of which the rent is derived." Can any one say, my Lords, that the one remedy is not more easy, more direct, and less circuitous than the other? And that great man, Lord Ellenborough, again says, "Surely the direct power is more beneficial to the landlord." And the certificate of all the learned Judges is in direct conformity with these *dicta* of Lord Ellenborough; for it is said, "We are of opinion that the power of re-entry reserved in and by the [376] said lease for nonpayment of the rent is not made in conformity to the power in the settlement for granting leases of the freehold part of the said premises, and that the lease is void on that ground." Not having seen any report of the judgment of the Court of King's Bench upon this case of *Doe dem. Earl Jersey v. Smith*, I cannot tell whether this case of *Core v. Day* was recalled to their attention; but I am quite sure it is impossible to reconcile the one with the other. This was so strongly felt by two very learned Judges in the court below, that at once they doubted the propriety of that decision; and one of them says, "it is not law, for it is diametrically opposite to reason and common sense" (*ante*, vol. I, 195). I am sorry to say I think directly the contrary; but I, for one, seriously object to this mode of getting rid of decisions, because they militate against our own notions. I agree with the pointed manner in which this was expressed lately in this House by the Lord Chief Justice of the Court of Common Pleas, and I hope I shall be excused for using his language. "If the law so settled is now to be considered unsettled, I know not on what foundation, in point of law, any decision can stand" (*Rowe v. Young*, Bl. 273).

But the case of *Core v. Day* is not a solitary case, for the question again, in about three years after, came under the consideration of three of the same Judges who decided *Core v. Day*, namely, Lord Ellenborough, Judges Le Blanc and Bayley, with the addition of another learned person now no more (Mr. Justice Dampier), and who could not [377] have decided as they did without determining that such a clause as we are now considering rendered a lease void where the power did not authorize it. The case I allude to is *Doe dem. Vaughan v. Meyler* (2 M. and S. 276). The case was tried before the latter Judge at Hereford, who thought the objection, such as we have here, was one that went to the whole lease, though it was partly of lands of which the lessor was seised in fee, and partly of lands in which he had only an estate for life with a leasing power, provided there was a clause of re-entry for nonpayment of rent for fifteen days. The lease was not executed according to this power, for it added, "and if there be no sufficient distress;" but the Court held, though the lease was void, because not executed according to the power, yet it was good as to the land of which the lessor was seised in fee, and the Court apportioned the rent; which was an erroneous judgment, if the objection to the present lease be not a good one.

The case of *Rees on the demise of Powell v. King* (Forrest, 19), I formerly thought, and still think, sets this point at rest, by showing that such a clause as this throws a burden upon the right of re-entry which the maker of the power never contemplated. That case has been so often mentioned that it is enough to say of it that it has decided, that before a plaintiff in ejectment can recover upon a clause of re-entry in a lease, in case there be no sufficient distress on the premises, he must show that every part of the premises has been searched, else he cannot say there was no sufficient distress. The Judge who first [378] decided this was well known to some of your Lordships, and no man will decry the knowledge of the late Mr. Justice Heath, and his opinion was confirmed by the Court of Exchequer. If the Courts of Westminster Hall were to overturn that decision it would go a great way to shake my present opinion; but I do not learn that any of my brethren are prepared to do so; and if, therefore, I feel myself bound, as I shall feel, to call upon any plaintiff in ejectment on the circuit, who has such a clog on his clause of re-entry as this, to prove that he has made a full search for a distress before I permit such a plaintiff to recover, I cannot conscientiously advise your Lordships that this lease is valid; most sincerely, however, wishing that consistently with my honest opinion I could do so.

Of one other point I must take notice, namely, that as this lease contains a general clause of re-entry it must necessarily control the special clause. To that position, I, for one, at present cannot agree; for I find the contrary doctrine maintained, from

Altham's case (8 Co. 154. b.) down to the present day. In Altham's case we find this position or rather this maxim adopted. In the first part of the argument, putting every point that can possibly occur, his Lordship says, "*Quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentanea, interpretanda est carta secundum verba specialia.*" But he goes on to add, there is another rule or principle of law, viz. "*generalis clausula non porrigitur ad ea, quæ antea specialiter sunt comprehensa.*" [379] Therefore, I say, this point for which I am now arguing being first specially defined cannot be enlarged by a subsequent general clause, which can only apply to cases not before specified or defined. So in Sheppard's touchstone (which is supposed to be the work of no less a man than Mr. Justice Doddridge) on the exposition of deeds (Ch. 5. p. 88. fo. 7), in confirmation of the above doctrine, that writer says, "If there be two clauses or parts of the deed repugnant to one another, the first part shall be received and the latter rejected, unless there be some special reason to the contrary." If we descend to more modern times, we find the same rule universally adopted and confirmed by Judges on particular cases depending before them. In *Cotter v. Merrick* (Hardr. 89), Mr. Baron Nicholas, quoting the Year-Books in support of his opinion, says (Hardr. 94), "When there are two clauses in a deed of which the latter is contradictory to the former, there the former shall stand." And not to multiply authorities upon a point on which Lord Ellenborough intimated a strong opinion, when he expressed himself against the validity of an argument founded upon such a point, I shall only quote one more from what Lord Chief Justice Holt and two of his brethren said in *Thomas v. Howell* (4 Mod. 69), that "in deeds it was admitted that subsequent clauses which are general shall be governed by precedent clauses which are more particular." I therefore think that this ground does not, in any way, strengthen the argument as to the validity of the lease.

[380] The point upon the statute of 1 Geo. 2, has been so luminously explained by my learned brother Holroyd, that I shall not trouble your Lordships on that point, except to say I entirely concur with him.

The next point is, whether the other leases should be admitted as evidence? I am willing to admit that if this deed upon the clause in question contains any latent ambiguity raised by extrinsic evidence, parol evidence or extrinsic evidence may be admitted to explain it, or to render it unambiguous. But I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to contradict, vary, or add to the terms of a deed. It would be of most dangerous consequence to admit such testimony; for then, parties dealing in matters on writing made upon advice and consideration would be subjected either to the uncertain testimony of vague and precarious memory, or, as in the case at bar, to matter, of which at the time of contracting they might have no knowledge, and never intended to be under its control. The written instrument, therefore, except in cases of fraud, or other excepted cases, of which I insist this is not one, must be considered as speaking the sense of the parties to that deed or instrument. Upon this ground it was, I conceive, that the case of *Cooke v. Booth* (Cowp. 849) met with such a decided opinion against it in *Baynam v. Guy's Hospital* (3 Ves. jun. 298), by Lord Alvanley when Master of the Rolls, who not only states his own opinion, but that of Mr. Justice Wilson, who had argued the case of *Cooke v. Booth*, (who, Lord [381] Alvanley says, was astonished at the decision) as well as that of Lord Thurlow. The Master of the Rolls says, "I protest against the argument of the learned Judges as to construing a legal instrument by the equivocal acts of the parties, and their understanding upon it." The case of *Tritton v. Foote* (2 Bro. C. C. 636) seems directly at variance with *Cooke v. Booth*. In *Iggulden v. May* * the Court of Exchequer Chamber, unanimously affirming a judgment of the Court of King's Bench, held, that a covenant in a lease to grant a new lease, with all covenants, grants, and articles as in the said indenture is contained, does not bind the lessor to insert a covenant of renewal in the renewed lease, although it was alleged in the pleadings that the covenant required had been introduced in various other cases before then successively made and executed on renewals from time to time granted. Lord Chief Justice Mansfield, stopping the then Mr. Abbott, who was to have argued against the construction contended for on the other side, said, that the case of *Cooke v. Booth* was

* 2 N. R. 449. See the original case and pleadings, 7 East, 237.

the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of a deed: and in another part of his judgment his Lordship says that case had been impeached upon all occasions, and that the Court of King's Bench were misled by the renewals stated in the case sent by the Court of Chancery. Now what is asked for in the present case but to assist the construction of an unambiguous deed by the prior acts of the parties? In the case which I argued as [382] counsel (*Doe, d. Allen v. Calvert*, 2 East, 376), though the lease there was according to the custom of the country as to the times of holding, yet the lease, dated 29th March, was held not to be a lease in possession, within a power to grant in possession, and not in reversion, because the days of holding were as to the tillage from 13th February past, the pasture ground from 5th April next, and the residue of premises from 12th May next.

But, my Lords, in my opinion no cases are wanting to prove that no evidence can be admitted to explain a deed which is plain and perspicuous in its terms, containing no ambiguity, much less to add clogs and conditions to it. I am asked then, is this a deed of that description? I answer, that in my opinion it is. I see no ambiguity: it is precise and definite in the powers granted; every person of plain and common understanding, much more every person with a legal mind, can give it a clear and satisfactory solution. But I am told the case of *Fonnercau v. Poyntz* (1 Bro. C. C. 472), before Lord Chancellor Thurlow, is against my opinion. Upon the best attention I can pay that case I do not think so. The case was a bequest of the sum of £500 stock in long annuities, and similar bequests of smaller sums in the same stock. The question was, whether this was a bequest of £500 a year long annuities, or only £500 in the long annuities. This case was very powerfully argued by one of your Lordships: I own I should have thought there was no difficulty in the construction: and Lord Thurlow seemed at first to be of that opinion, but afterwards admitted evidence [383] to show the extent of the property of the testatrix, to see whether she could possibly mean £500 a year, when she had no such stock. But though his Lordship admitted this, he states the clear principle of law to be, that for the wisest reasons it will not admit of an instrument being construed *aliunde*. And in the close of that case his Lordship says, what I quote to your Lordships as strong in my favour, because he only lets in the evidence to explain what is uncertain, "There is no doubt, if the word *stock* had been left out, but the meaning would be that the sum of £500 was to be disposed of in long annuities, and to make a produce, and that produce to accumulate until the legatee should attain twenty-one. This being the doubtful interpretation upon the face of the will, the question arises whether the state of the testatrix's fortune is not applicable to the construction of the will. It appears by some other parts of the will that she was extremely anxious to make an ample provision for the family of the *Fonnercaus*; considering then the situation of her fortune, it is perfectly inconsistent to say that she could mean to give ten times more than she was worth in legacies. My opinion therefore is that the judgment must be reversed, and that I can let in the evidence of the value of the estate, not to control the bequests, which the testatrix has made in words themselves distinct, nor to control the bequest which she had made of a subject which she had accurately described, but because the words she has used in the description are upon the whole of the context uncertain." "The peculiarity of this will furnishes sufficient doubt to warrant the [384] admission of collateral evidence to explain it: and if so, the statement of the testatrix's fortune is applicable to the purpose of such an explanation." His Lordship, whether right or wrong in his notion, clearly admits evidence *aliunde* on the ground of uncertainty and ambiguity only, and leaves the principle wholly untouched, that parol evidence, or evidence *aliunde*, cannot be admitted to contradict, add to, or vary the terms of a deed, will, or other written instrument. Now here the terms of this power are clear and express, without limitation, clog, or condition, nothing being doubtful or ambiguous: and the evidence sought to be admitted is not to explain that which is doubtful, but to add two clauses or two conditions to that which is absolute and unconditional: in short, to make a new deed in this respect.

The decision I am humbly recommending steers clear of all vagueness and uncertainty: leaving nothing to the variety of conflicting opinions. For who is to decide what is reasonable? If the Judges, as I should be inclined to think,—(but worse, if the jury) are,—what can lead to such contrariety of decision? We all

know, in every transaction of human life, what is held reasonable or unreasonable depends upon the reasoning and feeling of every individual man who has to consider the question.

I heard it said this will unsettle many leases. I lament that it is so. The Legislature may interpose; but if my mode of construing powers had been always adhered to no such evil could have ensued. The hardship of the individual case is represented; and if there be hardship, I also, as an [385] individual, lament it; and this statement of hardship, and the consequences of what I should propose, have made me, again and again, examine this point with all the ability in my power; but after all this consideration, feeling that it is my sworn and therefore bounden duty to declare what I believe the law to be now, not to say what it ought to be, I think that to decide in favour of the lease would be to make a power differing substantially from that which was made, and making conditions which the creator of it never intended. This would be my opinion if I stood alone; but I am happy not to be singular in my judgment on this important question, although I am opposed to others whose ability I respect, and whom I reverence.

Bayley, J.: I am of opinion that the lease in this case is conformable to the leasing power, and that it is valid. Nor do I think that that opinion will trench on the case of *Core v. Day*. The settlement in this case requires "a power of re-entry for non-payment of the rent;" and the first question I propose to consider is, whether this lease does or does not contain "a power of re-entry for non-payment of the rent?" It provides, that if the rent be behind for the space of fifteen days, and no sufficient distress can be had upon the premises, the person entitled to the freehold and inheritance may re-enter. Is this then, or is it not, "a power to re-enter for non-payment of the rent?" Does it give any power to the landlord? Undoubtedly.—To do what? To re-enter.—For what cause? For non-payment of rent. It is then a power of re-entry for non-pay-[386]ment of the rent. I admit it is not an immediate power of re-entry; I admit it is not an unconditional power; but still it is a power of re-entry. In referring to Littleton, s. 325, I find instance, of powers of re-entry if the rent be behind a week, or a month, or half a year; and as far back as the year-books* it is established, that under such powers the time to demand the rent to warrant a re-entry is at the end of such week, month, or half year, and not on the preceding rent-day; so that it is consistent with a power of re-entry that it should not be immediate, but postponed till some given time after the rent should have accrued; and in Godbolt (110, pl. 130) I find the instance of a power of re-entry if the rent be behind, and there be no sufficient distress upon the land; and from these instances I infer that a power of re-entry, if the rent shall be behind fifteen days, and there is no sufficient distress upon the premises, is "a power of re-entry for non-payment of rent." It may not be the most beneficial species of power; it may be clogged with what in some cases may, by possibility, produce an inconvenience, but still it is a power. And if it be a power of re-entry for non-payment of the rent, this lease does contain what (in the words of the settlement) is "a power of re-entry for non-payment of rent;" and persons who impeach the lease are then driven to the argument, that though it be a power, yet it is not such a power as, having due regard to the intent and meaning of the indenture of the 2d July 1757, that indenture according to legal construction [387] requires. Now this argument assumes that the words are capable of more than one meaning, if they are not so clear and precise and definite as to admit but of one sense; and it was to point out this assumption that I have been troubling your Lordships upon what might otherwise have appeared nearly a self-evident proposition. The words are "a power of re-entry for non-payment of the rent." The law knows of many such powers, some more beneficial, some less so; some qualified, some not; some to hold the land till the rent is satisfied out of the profits; some to hold till the rent is satisfied *aliunde* (Co. Litt. 203, a.); some, as here, to restore the reversioner to his former estate; and some with the conditions I have already noticed, viz. postponement of time, and absence of distress upon the land; and some (though very few) with neither of these conditions. And which of these powers, having due regard to the intent and meaning of the indenture of 2d July 1757, does the indenture

* 20 H. 6. 30, 31. 6 H. 7. 3. Brooke, *entre congnable*, pl. 90.

ture, according to legal construction, require? The intent and meaning of that indenture is to be collected either from that indenture, without looking out of it or beyond it, or from that indenture, combined with the consideration of the state of the property at the time when that indenture was made, if the evidence of the then existing leases, and of the powers therein contained (which I shall by-and-by consider), be admissible. The intent and meaning of that indenture (*per se*, and without looking beyond it or out of it) was, as it seems to me, that the reversioner should have such of those powers as would give him a proper and reasonable security for his rent by way of re-entry; and that if nothing short of a right of immediate re-entry, and of re-entry whether there were or not a sufficient distress upon the land, would give him that security, I should say he was entitled to such a power in the lease as would give him those rights; but if any of the other powers would give him a proper and reasonable security, it seems to me that giving him any of those other powers would be all the indenture of 1757, according to legal construction, requires. The rent is not a rack-rent. It is only £2 ls. 6d. per annum, payable half-yearly; and for a lease for three lives the lessees surrendered a subsisting lease, upon which at least one life was *in esse*, and paid £105. A half-year's rent therefore would be £1 0s. 9d. only; and for such a rent a delay of fifteen days was not likely to occasion the reversioner much probability of loss; it was not likely the premises would ever be so completely deserted as to have no sufficient distress upon them; nor was the rent such as could be any inducement to the tenant to replevy. For such a rent the power in question to re-enter at the end of fifteen days, if there were no sufficient distress upon the premises, appears to me an adequate and reasonable security; and I should be disposed to think that for such a rent, a clause without giving any days of grace would be unreasonable; because I think the immediate exercise of such a right would be oppressive. Nor do I think it unreasonable to deny the reversioner the power of re-entry where there is a sufficient distress upon the premises, because the Legislature did not think it unreasonable to deny the [389] landlord the benefit of 4 Geo. 2 c. 28, where there was such a distress; and because a landlord can have no difficulty in ascertaining whether there be such a distress or not. He has a right to enter with his bailiff upon the premises, to see whether there be such a distress; and according to Godbolt (110), if there be nothing that he can see upon the premises to distrain he is warranted in concluding that there is no distress there. Godbolt's words are, "It was holden by all the justices that if a man make a lease, rendering rent upon condition that if the rent be behind, and no sufficient distress upon the land, the lessor may re-enter: if the rent be behind, and there be a piece of lead or other thing hidden in the land, and no other thing there to be distrained, the lessor may re-enter; for the distress ought to be open and to be come-by." I am therefore of opinion that, without looking beyond the indenture of July 1757, the power in question is within the true intent and meaning of that indenture and the legal construction thereof as large and beneficial a power of re-entry as that indenture required.

But I apprehend that in judging of the true intent and meaning of the indenture of July 1757, in this respect, we are at liberty to look at the state of the property at the time that indenture was made, and see to what restrictions it was then subject, and what rights the settler then had. The settler has used the indefinite words, "a power of re-entry." By showing, as I do, that there are many such powers, I show that there is an ambiguity in those [390] words, either latent or patent; and may I not refer to the existing state of the property at the time these words were used, to see what was the intention of the settler, and in what sense she used those words? This is the first time I have ever known it doubted whether the estate and interest and powers of the settler over the estate he was settling was admissible in proof. I am not offering declarations of what the party said she meant; I am not construing a legal instrument by the acts of the parties, or by their understanding upon it (as in *Cooke v. Booth*) (Cowp. 819); but by showing the circumstances and situation of the party, and the estates and interest she had at the time, I am enabling the House to judge what in legal construction was her meaning. And I am not aware that there is any legal authority to exclude the evidence of such circumstances and situation. *Doe v. Calvert* (2 East, 376) certainly is not. That case only decided that a lease of 29th March of tillage-land from 13th February preceding, of pasture-land from 5th April, and of the residue from 12th May,

reserving the rent in April, was substantially a lease from April, and therefore a lease not in possession but in reversion; and the custom of the country, that these were the ordinary periods of letting, was admitted without objection, and argued upon without objection, but was held not to contract the power so as to warrant a lease before April. If a man makes any deed or will, have I not a right to know what estate he had at the time he made such deed or will? and does not the construction vary in some cases according to the estate? If I grant a [391] man an estate for life, without saying whether for his life or for mine, is not evidence admissible to show what interest I had in the premises? For if I was tenant in fee he will take an estate for his own life; if I was tenant in tail, or for life only, he will take for mine (1 Shepp. Touch. 88). If a man bequeath me £10,000 3 per cent consols, it will be a specific legacy if he have that stock at the time; not specific, if he have it not, *Selwood v. Mildmay* (per M. R. 1797. 3 Ves. 310). Evidence is therefore admissible in such case to show what was the state of his property at the time he made his will, and the construction upon the will is one way or the other, according to the result. In *Masters v. Masters* (1 P. Wms. 421), where a lady by her will gave £5 to each of two hospitals in Canterbury, and by her codicil gave £5 per annum to "all and every the hospitals," the latter legacy would have been void for uncertainty; but it appearing (which must have been by extrinsic evidence) that the testatrix lived at Canterbury for many years, and died there, and that she took notice by her will of two Canterbury hospitals, the general words "the hospitals" were limited and considered as intended for "all the hospitals in Canterbury." But the case to which I wish to call your Lordships particular attention is *Fonnereau v. Poyntz* (1 Bro. C. C. 472). The testatrix there gave to Mary Poyntz the sum of £500 stock in long annuities; to Mary Hays the sum of £500 stock in long annuities; to Miss J. L. Barbauld the sum of £200 stock in long annuities; the interest thereof to accumulate till she attain twenty-one; the sum of [392] £100 stock in long annuities to Miss H. Dawson in like manner; and the residue of her estate both real and personal to her two nephews. Parol evidence was given that the testatrix had only £120 per annum long annuities; but Lord Thurlow doubted at first whether he could admit that evidence to explain the words; and he afterwards decreed against receiving it, because he thought it would produce a construction against the direct and natural meaning of the words. But upon a re-hearing he admitted the evidence, and acted upon it; and the ground of his decision was, that upon the face of the will itself it was doubtful whether the testatrix meant to give legacies of £1300 per annum, or only a gross sum of £1300; and he considered the state of the testatrix's fortune applicable to the construction. The situation of the fortune made him conclude she never could have meant to give in legacies ten times more than she was worth; and he let in the evidence, not to control a bequest which was distinctly and accurately described, but because upon the whole context it was uncertain whether she meant so much per annum, or so much as a gross sum. He thought the peculiarity of the will furnished sufficient doubt to warrant the admission of collateral evidence to explain it; and that the statement of the testatrix's fortune was applicable to that explanation. Lord Thurlow decided that therefore as a case of ambiguity; as a case in which, from the use of the doubtful expression "sum of £500 stock," and the "interest thereof," he might let in the extrinsic evidence of the circumstances of the testatrix to explain what was her [393] meaning. In noticing this case (3 Ves. 320) Lord Alvanley says, Lord Thurlow's only doubt was whether parol evidence was admissible to ascertain whether the testatrix did not mean capital, but *he had no doubt he must know all the circumstances of her affairs*. Apply that case to this. The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinctly and accurately described; but because there is an ambiguity upon the face of the instrument; because an indefinite expression is used capable of being satisfied in more ways than one; and I look to the state of the property at the time, to the estate and interest the settler had, and the situation in which she stood with regard to the property she was settling, to see whether that estate, or interest or situation, would assist us in judging what was her meaning by that indefinite expression. And then the case will stand thus: Lady Louisa Barbara Vernon being tenant for life with power of appointment in fee, of a very considerable estate, part of which was then out upon leases for lives at small rents, payable partly in money and partly

at her election in fat capons, subject to powers of re-entry if those rents should be behind fifteen days, and there should be no sufficient distress upon the premises, settled that estate with powers to make life-leases of that part of the estate at the ancient rents, so as those leases should contain a power of re-entry for non-payment of the rent thereby reserved; and with power to make leases at rack-rent of the other parts of the estate, so as those leases [394] should contain clauses of re-entry if the rent were in arrear twenty-eight days; and then the question is, whether by requiring upon the life-leases generally "a power of re-entry" she required more than that description of power which the then life-leases had. She must be taken to have known what that power was; and had she been dissatisfied with it, or required any alteration, can it be supposed she would have contented herself with the indefinite expression "a power of re-entry!" When she is providing for the rack-rent leases, where the right of distress is much more important, she gives the tenant twenty-eight days; and can it be believed that she intended to be less indulgent where the rent bore scarcely any relation to the value of the property? I cannot believe she did; and for these reasons, because the settler has not said what particular species of power she required, and this is a reasonable power, and the very power in force upon this estate at the time this settlement was made. I submit to your Lordships that this lease was warranted by the power, and that the judgment of the King's Bench ought to be affirmed.

Wood, B.: I am of opinion that the power contained in the marriage settlement is well executed. That power applies to lands "leased for lives, or for years determinable on lives, to any person or persons in possession or reversion;" and one of the conditions of such letting is in these words, "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." There is another power [395] of re-entry which applies to leases for years absolute, not exceeding twenty-one years, to take effect in possession, and to be made at as beneficial yearly rent as was then paid, or the most improved rent, without fine or foregift; and there it is provided that there be contained a clause of re-entry in case the rent or rents thereupon to be reserved be behind or unpaid by the space of twenty-eight days after the time appointed for payment.

The lease in question is under the first power, which provides re-entry on non-payment of the rent generally, without prescribing any time of re-entry at all, or any special terms whatsoever. The proviso in the lease in question is, if the yearly rent of £2 or any of the duties, services, reservations, and payments thereby reserved shall be behind, unpaid, or undone in part or in all, by the space of fifteen days after any of the times of payment or performance, and no sufficient distress or distresses can be had or taken whereby the same and all arrearages may be raised. It is contended on the part of the Defendant in error that this proviso of re-entry in the lease is not such a one as is required by the settlement, inasmuch as it has limited a time for re-entry, which the power has not; and inasmuch as it is clogged with a condition, that there be no sufficient distress, which the settlement does not mention.

The clause requires no more than a power of re-entry for non-payment of rent, giving it no qualification or modification at all. There is a clause of re-entry, and that is a literal compliance. But though the power is general, I admit it must be executed, not in a fraudulent or illusory manner, but in a reasonable manner, such as the law will deem reasonable. In the clause of re-entry for the rack-rent the time is limited, viz. twenty-eight days. I admit that cannot be departed from. Why was no time limited in this!—Because the settlement meant to leave it to the discretion of the tenant for life to insert such a reasonable power of re-entry as might secure the rent to the reversioner. The object of re-entry is merely to secure the rent, and has been always so considered in law and equity; and when I see that object is secured reasonably and fairly, and we are not tied down to any specific terms, I think the power is well executed, being according to the intention of the parties. I think we ought to consider the deeds and acts, *ut res magis valeat quam pereat*. In *Cather v. Merrick* (Hardr. 89) in the Exchequer, on a special verdict, the question was whether the lease was a good lease within the statute 32 H. 8. c. 28. That statute is to enable tenants in tail to make leases to bind as if they were tenants in fee simple. The second section is, provided such leases be not for more than twenty-one years, and provided that upon every such lease there be reserved, payable to the lessors, their heirs and successors, to whom the said lands should have come after the deaths of

the lessors if no such lease had been thereof made, and to whom the reversion thereof shall appertain, according to their estates and interest, so much yearly term or rent, or more, as had been accustomed paid. The lease was made reserving the rent to the heirs and assigns of the [397] lessor, who were not the heirs in tail entitled to the rent, yet it was held a good lease. Will. B. says, "In the exposition of statutes, the Judges must make such a construction as to advance and not to frustrate the intention of the makers." Parker, B. says, "It is the office of a Judge to preserve and not to destroy an estate." In this case the Judges gave their rational construction to the lease, which gave it effect. So, here, in this case before your Lordships, I conceive we ought to do the same, taking the true interpretation of the power to be to leave the mode of re-entry to the direction of the lessor. Has that been fairly and *bonâ fide* and reasonably executed? Is the period of fifteen days a reasonable time to allow for re-entry? In the case of rack-rent twenty-eight days is expressly given: if the parties have thought that a reasonable time, surely the fifteen days must be: it is the usual time as found by the jury: the law will judge what is a reasonable time.

The last objection, which was mostly if not entirely relied on, was the clogging the right of re-entry with the condition of there being no sufficient distress. Is that reasonable with reference to the law as it stood when the lease was made? I conceive it is. The 2d July 1757, was the date of the deed of settlement which gives the power of leasing, and which was subsequent to the statute of the 1th Geo. II. c. 28, which was in the year 1731, which regulates the powers of re-entry for the non-payment of rent. Before the making of this statute, the carrying into execution a power of re-entry was attended with great difficulty and nicety. There must have [398] been a demand of the rent upon the land: if there were a house, it must have been demanded at the fore door: and it must have been demanded at a convenient time before the sun-setting of the last day of payment, so as that money might be numbered and received. The landlord then had to make an actual entry and bring an ejectment. If all these circumstances were not critically and exactly performed he lost the right of re-entry for that time, and was forced to wait till other rent accrued, and then had to make fresh demand and re-entry for the subsequent rent. If he had complied with these formalities, and brought his ejectment, it was the uniform practice of a court of equity to relieve against a forfeiture upon payment of the rent and costs, considering the clause of re-entry as a mere security for payment of rent. What is the alteration made by the statute? It has dispensed with the formalities attending re-entries by the common law, and said that when the landlord has a right to re-enter, and half a year's rent is in arrear, he shall and may at once bring his ejectment and recover possession, provided there is no sufficient distress to be found on the premises to countervail the arrears then due. The tenant also may pay or tender the rent and costs to the landlord or his attorney, or pay the same into court before trial, and all proceedings shall cease. The policy of this law is to prevent forfeiture for non-payment of rent, and to facilitate the landlord's remedy for the recovery of it: and at the same time the legislature has thought it right to impose this condition: — you shall not eject the tenant if there be a sufficient distress to secure the [399] rent; you may have an action or a distress as soon as the rent is due, without waiting fifteen days. It is said, "still the statute leaves the common law remedy open to a landlord if he will comply with the formalities of demand at the last hour of the day, and make re-entry; and in that case the necessity of distress is not imposed on him." What then? Why the tenant will be relieved against the forfeiture in a court of equity; yet it does not seem clear even in that case, that the statute does not shut the door against proceedings by re-entry at the common law: but upon that I do not found my opinion. The words of the statute are, "that the landlord shall and may bring ejectment;" and *shall* is imperative. Under the statute of 8. and 9 W. 3. c. 11, an act for the better preventing frivolous and vexatious suits in actions for penalties for nonperformance of covenants, the plaintiff *may* assign as many breaches as he shall think fit. It was at first contended that the statute was not compulsory on the plaintiff to assign breaches, for that the statute was made for his benefit, and therefore he might waive it, and leave the defendant to his remedy in equity; but all the courts in Westminster Hall held it to be compulsory on the plaintiff to assign breaches and a *sc. ad. dam.*, and the defendant shall not be put to seek relief in equity. This is the fair con-

struction to be put on the statute of the 4th Geo. II. where the words are stronger, being "shall and may;" and, upon the same principle, if this be the true construction of the statute, and there is no decision to the contrary, then there is an end of the question, for the lease will then have expressed [400] no more than that condition which the statute requires. It might not be necessary to express the condition, because the law imposes it. But I will suppose it to be left open to the landlord to proceed in the old way, as before the statute, and a reasonable clause of re-entry is all that the power required, can the adoption of the same condition which the Legislature has adopted in similar cases be considered as unreasonable? The case of *Core v. Day* (13 East, 118) has been cited as an authority of the Court of King's Bench that the inserting a condition of re-entry in a lease made under a power in these words, "in case no sufficient distress can be taken on the premises," they not being in the power, was not a good execution of that power. I doubt very much the propriety of that decision; but be that case as it may, it is different in one material feature from the present case. The re-entry required was for non-payment of the rent reserved by the space of twenty-one days, so that there was a specification of a particular mode, and therefore it perhaps might be inferred no other qualification would be warranted. Here no time is limited: a power of re-entry *generally* is all that is required; and therefore I think reasonable qualifications may be made.

In this present case, which was only a few years afterwards, the same court thought this power well executed. They must have thought their former decision was wrong, or that this case was distinguishable from it: Lord Ellenborough and Mr. Justice Bayley sat upon both those cases. But whatever may be the construction upon the statute [401] of the 1 Geo. 2, I do not rest my opinion upon that. My opinion is founded upon this, that the power of leasing leaves it to the discretion of the lessor to make a reasonable clause; and that the power of re-entry which is contained in this lease is a reasonable one; and therefore I think that the lease is not invalid.

Graham, B.: In my opinion the demise of the 5th September 1803 is valid. All the directions are strictly observed in the lease, yet how the penner of the lease was enabled to be correct in those reservations but by the aid of the then subsisting or former leases, I cannot readily conceive. But it seems he is mistaken, though with the same guides, in the clause of re-entry for non-payment of rent; for it is said he has unwarrantably and without authority or power, given 15 days respite, and annexed a qualification that no sufficient distress can or may be had on the premises, whereby the arrearages of this £1 half-yearly rent may be fully raised, levied, and paid.

And the question is, whether this lease, with a clause of re-entry so qualified, is a proper and valid execution of the power created by the settlement? Whether it be so or not must depend on these considerations, viz. whether it is substantially conformable to the intention of the creator of the power, suitable and adequate to its object and purpose, and not injurious or inconvenient to the person next in remainder or succession.

I will not trouble your Lordships with cases to show that powers of this kind should receive a liberal [402] construction. I ask only the construction of plain common sense: but as these powers pervade the settlements of all the great and potent families of the kingdom, it is important that the execution of them should not be avoided on slight or immaterial departures, even from a prescribed form, still less where no specific form, but a general direction is given. A prudent father, tenant for life, with such a power, makes his leases with the fairest intention: he provides for his wife and younger children by his savings and personal estate: his eldest son succeeds him, and upon an objection of this kind avoids his leases, and the personal estate of the father is exhausted to indemnify the lessees. This consideration would, I may presume, dispose your Lordships not to be rigid in the construction of the execution of these powers, but to give effect to them when they are fairly and honestly executed, and without injury or sensible inconvenience to the remainder-man.

What then did the maker of this power mean by the words, "so as there be contained in every such lease a power of re-entry for non-payment of the rent?" The maker does not say what power—he prescribes no form of the clause. What is it but a general direction to insert a clause of re-entry because of non-payment of rent, that is, where the rent is not duly paid? This general direction was never intended to be inserted verbally in the future lease; it left the verbal exposition and

specific form of the clause to further care and provision: no conveyancer would think of transcribing the terms of this general direction. Besides, "a power of re-entry" for non-[403] payment of rent necessarily implies a selection of one out of several. It might be a power of re-entry at common law, or under the statute, or what is likeliest of all, a power such as had been inserted in all former leases of the same subject, and in the very lease which was surrendered to make way for the present. I repeat it therefore, that this general direction necessarily calls for the exercise of judgment in preparing the clause. I speak not of a definitive judgment, that must ultimately rest with a court of law or equity, but of a judgment of the person who executes the power, or his conveyancer, as to what power is meant; the answer to which to me appears obvious, clear, and necessary—a power fit, suited, and adequate to the occasion. Then what is the object and occasion? The coercive means of enforcing the payment of rent: for my error, if it be an error, is this, that clauses of re-entry are intended for that purpose only, and that courts of equity would at no time suffer them to be used for any other purpose; and that if the clause of re-entry in this lease had been unqualified, as it is contended it ought to have been, a court of equity would have enjoined the landlord, on payment of the rent in arrears and costs; so that the remainder-man would not have been at all the better for the unqualified clause. Looking therefore at this general direction as referring to the exercise of some judgment or discretion to be used in the formal execution of this power, let me consider in what manner a tenant for life most anxious to execute it with scrupulous fidelity would act. He would consult his man of the [404] law. The lawyer reads this general direction, he finds he must look into former or subsisting leases, to know first what lauds were formerly letten for leases: secondly, what the rents were before and at the then moment; thirdly, what heriots had been heretofore reserved, what duties, what other reservations were to be made and secured. Could he forbear, or would he be bound to forbear, to look into the clause for non-payment of these nominal rents? Were he so bound, I should much regret that the law had established a rule which excluded the very best information he could obtain. But suppose that he must shut his eyes to those clauses in former leases, and in the very subsisting lease of the same lands, he must, in the first instance, consider what is a fit and proper clause for the purpose. He would naturally say, I cannot pen this clause in the language of the settlement; and if I make it without any qualification by a more obvious and easy means of obtaining the rent, I make it a re-entry at common law, with all the inconveniences attending it, and its ultimate control in a court of equity. He would therefore conclude that he had better take the statute of the 4th Geo. II, c. 2, for his guide, and pen the clause in the manner which that statute seems to have pointed out on a view of the law and equity applicable to that subject. I cannot be supposed to mean that this first exercise of judgment in preparing a proper clause could ultimately weigh, if in the execution of the power the lawyer had misconstrued its meaning and the intention of the maker; nor can I be supposed to mean that the [405] validity of the execution of the power could properly be left to a jury;—the decision on that point could only be by a court of law or equity.

I have said that the clauses for re-entry in the former and subsisting leases were a proper guide to the exercise of discretion in preparing those clauses; but I say it subject to the doubt which some may entertain; and if I am not allowed to use that evidence I do not feel that the argument in support of my view of this question is much impaired: though with that evidence the point is decided. But I take this to be a case very different from *Cooke v. Booth*, which I know has been overruled by many subsequent approved decisions. In that case the Court of King's Bench were called upon to put a construction on a written and explicit covenant of no ambiguity, or if any, of a patent ambiguity; it was a covenant to grant a new lease on the dropping of one of three lives, for the lives of the two remaining, and the third life under the same rents and covenants. But this is not a question on the language of a written instrument; it is impossible to contend that it should be literally transcribed into the clause; it must have some modification; and if you admit any you admit the exercise of common sense, and the consideration of the fitness and propriety of the power; and to my apprehension you admit inquiry as to what clause of re-entry the settler meant. She has

bid you look to former leases as to the lands so usually letten, the usual rents, heriots, services, and covenants for their recovery, and for doing suit at the mill; has she not therefore bid you look for what was the usual [406] and proper clause of re-entry for non-payment of those nominal rents? This extrinsic evidence is not resorted to for the purpose of explaining the written and unfolded language of an instrument, but as a guide how to unfold and prepare a future instrument under a general direction, to observe in all particulars what had theretofore been done. That is the substance of all the restrictions: "do as has been done heretofore." But I do not wish to involve the case in this discussion; though for my own part I think the facts found by this special verdict and rightly admitted in evidence decide the question.

As to the question arising on the assumption that the giver of the power meant that the clause of re-entry should be simple and absolute, it is said, with great impression on many, that there is a manifest distinction between a simple power of re-entry, and a power clogged, as it is said, with a condition or troublesome qualification: but the question is not on a difference in terms, but on a difference in substance and effect: a difference which may sensibly injure the remainder-man, not on a difference which leaves him effectually in the same situation, or, as I think, in a situation which may be proved to be better. To judge of this, let me suppose that a clause, such as has been suggested, had been inserted in the present lease: how would it have availed the remainder-man? He must have begun by a demand of his rent of £1 at proper time and place. It is hardly necessary to quote Lord Coke's Commentary on Littleton (153 a, 154 a, 201 and 202) to show with what punctilious and expensive accuracy this must be done: the preamble of 4th Geo. 2, sufficiently shows how much those niceties were felt as impediments. He must then with much trouble and expense serve his ejectment, and for a rent arrear of £1, and he is immediately met, first by the disgrace of such a proceeding, and then by a bill in equity, with a tender of his £1 and costs. I may presume that it was the knowledge and prevalence of this equity that gave occasion to the statute 4th Geo. 2, which empowered the courts of law to exercise the equitable jurisdiction, and provided, on the one hand, an easier remedy for the landlord to enforce the payment of his rent; and to the tenant a more prompt and less expensive relief, when powers of re-entry were abused. I do not contend that this statute has taken from the landlord his right of reserving to himself a power of re-entry absolute; but it excludes him from all benefit under the statute if he does not pursue the steps which it points out: and when a question arises, as here, of a fit and proper power of re-entry for non-payment of rent, what better guide presents itself for the judgment of a man who is to prepare the clause, than the directions of a statute framed on the view of all the legal rights of the landlord, and the equitable relief of the tenant? And we may remember that when this power was created the statute of 4 Geo. 2, had passed many years, and its operation was known and prevalent.

I have said, that the giver of this power meant by the words used a power fit, and suited, and adequate to the occasion, that is, to its proper and allowable use, the security and enforce-ment of the payment of the rent: and I take it for a clear principle of equity that the landlord shall use it for no other purpose. But two inconveniences are pointed out as affecting the remainder-man: first, that of proving that there was no sufficient distress on the premises; secondly, the delay and expense of a replevin. The first is applied to an estate for lives, where the rent is merely nominal, and intended only to preserve the relation of landlord and tenant, and the right to future fines. It is almost impossible to suppose property of that kind so dismantled as that the landlord should be put to any difficulty to find a cow, or horse, or piece of furniture, to pay a rent of £1, and, with respect to the second difficulty, the same may be said of the improbability of any replevin for so small a rent. But the best answer is, that if the clause of re-entry stand ever so absolute, the tenant, though he would not be heard in equity to say that there was a sufficient distress on the premises, could stay the proceedings at law on payment of the rent and costs; for I take it that it was always and originally in the jurisdiction of a court of equity to relieve against clauses of re-entry for non-payment of rent, where the tenant was ready to pay the rent, or to give better security if required, for the punctual payment of it, whatever doubts the court of equity might

entertain of clauses of re-entry for breaches of other covenants, where it might not be so easy to place the landlord in that situation with regard to his property, which he had a right by all means to secure to himself.

With respect to the cases cited I shall con-[409]-fine myself to a very few observations on only two, those of *Core v. Day*, and *Hotley v. Scot*. With respect to the former, I am reported to have expressed myself too strongly, by saying that it was contrary to law and common sense; and those expressions have been justly animadverted on by one of my learned brethren. I do not recollect to have used such expressions as applied to that case; but if in the warmth of argument any such expressions did escape me, I have only to regret that I have been so faithfully reported. This, however, I may say, that from my manner of introducing my own opinion I could not fairly be understood to mean an attack on that authority so unbecoming. I certainly mentioned that case as standing in the way of the present decision, and opposed to it the contrary decision of *Hotley v. Scot*, that in that equipoise of authorities I might more fairly exercise my own judgment; and I said upon that occasion, what I now repeat, that notwithstanding the imperfect printed report of *Hotley v. Scot*, it is impossible to read Mr. Butler's note, (whatever may be said of his then youth and inexperience), and not to see, that the point or the effect of a qualification similar to the present was distinctly made, argued upon, and overruled, Lord Mansfield saying, as I apprehend, with perfect accuracy and truth, that the clause was a reasonable one and conformable to the statute of Geo. 2; and that clauses of re-entry for non-payment of rent were in equity considered only as the means of enforcing the payment of it. But, perhaps your Lordships may think the case of *Core v. Day* distinguishable from the present. The ob-[410]-servation of my learned brother, who first delivered his opinion, is material, and in that case there was no reference, nor necessity of reference, to former leases as to what lands should be letten, what ancient rents, what heriots, *suits*, duties, or services should be secured. It was a power to lease *any* of the lands, with the single qualification, that the leases should reserve the best and most improved rents.

The decision of the Court of King's Bench in the present case may be thought to throw some doubt on *Core v. Day*; and, all the cases considered, the present is open to your Lordships decision. I humbly offer my opinion, that the lease in question is not, for any reason that I can suggest, an invalid execution of the power.

Richards, C. B. The question arises upon a deed of settlement made on the marriage of Lady Vernon, by which her Ladyship was made tenant for life, with remainder to Lord Vernon, her intended husband, for life, with powers of leasing, which were given to each of them as they should happen to be in possession of the premises. One power is to lease the mineral lands, in which there is no clause of re-entry at all; the power mentioned secondly in the settlement is to grant leases at a rack-rent, with a proviso for re-entry in case the rent be in arrear for twenty-eight days: in that case there is a power of re-entry required in the lease to be granted for non-payment of the rent; but there is an extension of the time from the days fixed for the payment of the rent to twenty-eight days. The clause is to be [411] introduced into a lease in which the rent and the occupation run together, and are considered as of the same value, the rent is paid and payable for the year during which the enjoyment of the premises has been had; yet by the power in that case there is expressly an extension of twenty-eight days given for the payment of the rent. The power now in question authorizes Lord and Lady Vernon, as each of them shall come into possession of the premises, to grant leases of such parts of the land as were then leased for life or lives, so as there be reserved the ancient and accustomed yearly rents, duties and services.

It seems to me impossible to ascertain what lands were then leased for life or lives without looking into the leases and other instruments which were produced at the trial; and the production of the same instruments is equally necessary to shew what the ancient and accustomed yearly rents were. In this view of the case, as it seems to me to be impossible to consider the effect of these powers without looking to the instruments to which I refer, it follows, that in my judgment they were properly admitted in evidence at the trial. Then come the words of the clause in question, viz. "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." A more general power can never be expressed: It is not clogged with any qualification; it requires only a

clause of re-entry "for nonpayment of the rent," not *on* nonpayment of the rent. There is no allusion to an immediate entry *for* or *on* nonpayment of [412] the rent, but a clause of re-entry generally for non-payment of the rent.

Now in this last case, which is the case before your Lordships, the lessee pays the fine contracted for to the tenant for life, the lessor, at once, in the very commencement of the term. The tenant for life receives at that time the whole value of the lease and of the premises demised, except the nominal rent of £2 per annum, and the small duties: and it can hardly be supposed that it could be the intention of the parties to the settlement, in a case where the lessee paid all the value at the first instant, that he should be in a worse condition than the lessee under the other power, paying rack-rent, who was not to pay any rent until he had enjoyed the possession of the premises, and to whom an extension of twenty-eight days beyond the time fixed for the payment of his rent was given.

Now Lord Vernon, intending to execute this power, executed the lease in question, containing a power of re-entry for nonpayment of rent, with this proviso, "that if it shall happen at any time during the said estate hereby granted, that the said yearly rent or sum of £2, and every or any of the duties, services, reservations and payments hereby reserved, or any part thereof shall be behind, unpaid or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done or performed as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same and all [413] arrearages thereof, if any be, may be fully raised, levied and paid," it shall and may be lawful to and for Lord Vernon, or the person to whom the freehold or inheritance shall belong, to re-enter: and the question before your Lordships is, whether this proviso is agreeable to the power, which directs that in the lease there should be a power of re-entry for nonpayment of rent.

There are two objections stated: the first is, that in the lease the time for the payment of the rent is extended to fifteen days, whereas it is insisted that the re-entry ought to have been immediate, and at the time when the rent was reserved to be payable. The second objection is that the re-entry is given in reference to a want of a sufficient distress.

It is clearly established that the construction of powers is to be governed by the intention of the parties who make them, that intention to be ascertained by a fair interpretation of the language in which the power is worded: in this case, Lord and Lady Vernon, uniting in marriage, may be considered under their settlement as owners of the estates, though before marriage it was her Ladyship's property. By this settlement they propose to grant leases to all who choose to take them upon the terms mentioned in the powers: one of which, relating to the property under consideration, is, that the lease should contain a condition of re-entry for non-payment of rent. It has been considered, and has been ruled in many cases, that in the construction of powers the courts ought to be as liberal as may be: and more liberal in favour of a lessee where the power is executed by the person out of whose [414] inheritance the estate issues than when executed by a third person, a stranger. It has been contended, that in this case, the estate moving originally from Lady Vernon, Lord Vernon was to be considered as a stranger, and that there ought therefore to be a greater strictness applied with regard to the lessee than if he was originally the owner of the estate: but I beg of your Lordships to observe, that in this case Lord and Lady Vernon had each of them, when in possession, the same power to grant leases: the words of the power are precisely the same as applied to each of them, and must be construed as much to apply to a lease made by Lady Vernon, as to this lease made by Lord Vernon: and therefore they must be construed with the same attention to the meaning as if the words were applied to a lease by one or the other, and we are bound to consider, in construction, the lease in question as if made by Lady Vernon, from whom the estate originally moved, and who may fairly be considered as in a situation similar to the case which I am about to mention, and upon which some of your Lordships can have no doubt. Suppose a landlord seised in fee simple enters into an agreement in writing with a man to grant him a lease for a number of years, with a right of re-entry for non-payment of rent at the time specified: Suppose a bill filed in a court of equity by one or the other of the

parties for a specific performance of the agreement, the Court would refer it to a master to settle the terms of the lease; and any gentleman who has ever sat in a court of equity must admit, that the Court will, if applied to, direct the insertion of a power of re-[415]entry upon reasonable and usual terms, and unquestionably extend the time of re-entry to a reasonable time beyond the time fixed for payment of the rent; referring at the same time to a sufficiency or deficiency of distress, as in the present lease. I mention this case of an agreement, because it seems to me to apply very closely to the case before your Lordships. Courts of equity adopt the same principle and practice in hundreds of instances, such as leases by guardians of infants, committees of lunatics, and the like. The Court so acts because it executes the intention of the parties; and a court of law in construing powers, is equally bound to adopt the intention of the parties creating the power; and there is no difference in the construction of words in a power, and of words in any other instrument. Suppose Lord Vernon had agreed to grant a lease pursuant to his power, and had not granted it, and there was a bill in equity filed to compel him, or by him, to compel the person who had agreed, to execute the lease according to the power, the court would, I doubt not, direct a lease to be executed with a power of re-entry upon the usual and reasonable terms, which would be according to its construction, according to the intentions of the parties creating the power; and, I presume, the lease to be executed under the orders of the court would be similar to that which has been executed in this case. I am more willing to refer to the proceedings of a court of equity, because I am speaking in the presence of those who have, perhaps, more knowledge and experience than any persons of the present or any former times.

[416] I understand from extensive information, and my own experience, such as it is, justifies me in believing that the practice of all conveyancers has been consistent with what I have stated now, so far as the extension of the time is concerned; and if it be so it certainly must be considered as founded upon the intention which is ascribed to the party making the power, for it is obvious that if the power, as it is contended, required a right of re-entry at the moment the rent was due, the enlargement of the time would be in some degree unjust to the reversioner, as it would cause a postponement of the day of payment: but the practice has been, I believe, so general that it must be strong evidence of the intention ascribed; and so inveterate, that it would be very highly dangerous to affect it: and I have always understood that the Judges have always considered an universal or very general practice amongst conveyancers a sufficient ground for their decisions, though they did not entirely approve of the principles on which the practice had proceeded.

On this point, viz. the extension of the time, I have been always inclined to support the lease, and I am of opinion that the objection ought not to prevail.

With respect to the other objection to the lease, viz. that a re-entry cannot be had unless no sufficient distress can be had upon the premises, I do not find, from the best inquiry that I have made, that any very general practice or understanding upon the subject, namely, with respect to the execution of powers, has prevailed among conveyancers; and I have not been able to find that any decision has [417] yet taken place by which I am in a judicial point of view bound to abide. I must confess that I was for some time convinced by the reasoning so strongly pressed by some of my learned brothers; and that I formed an opinion on this part of the case agreeable to theirs from whom I am now under the necessity of dissenting; but your Lordships commands have obliged me to re-consider the case, and I feel great consolation in having had the opportunity, as I hope that I have been able, to take a more correct view of the subject.

The objection to the part of the lease with which I am now troubling your Lordships is certainly greatly supported by the inconveniences imposed on the reversioner; but if I am right in deeming the lease good, notwithstanding the extension of the time for the payment of the rent, it must be because it is agreeable to the true intent and meaning of the power, though there are no words that expressly allow that extension. If so, it may be right to presume that the words used in the power meant more than is expressed, and that any right of re-entry on reasonable and usual terms, so far as the extension of the time is concerned, is good. If so, what prevents us from inquiring whether the other terms are reasonable and usual. I mean with respect to the distress; and from holding that if they are usual and reasonable they are within the power? It cannot, I think, be said that the circum-

stance of the want of a sufficient distress can be considered as imposing any condition either not reasonable or not usual. Every one's experience shows that in leases in general it is not only usual but most general, and [418] it cannot be supposed to be otherwise than reasonable; and the leases produced in evidence, which I think were properly received, prove the existence of this clause in all of them as applied to the power.

It is observable, however, that the power now under consideration is the first in the settlement; it requires in very general terms that in every lease pursuant to it there should be a power of re-entry for nonpayment of rent, or because the rent is not paid; it does not specify any qualification or condition, and only requires that clause of re-entry without more, excepting for non-performance of the covenants. Now it is clear that the clause does contain a power of re-entry for the nonpayment of rent, than which nothing in the world can be more general and unrestricted; and under words so general I humbly conceive that there is in the lease a clause of re-entry on reasonable and usual terms. In a condition of re-entry all that the law requires is to secure the payment of the rent, and re-entry is, as it were, penal; and therefore the clause in this lease under the general words of the power is nothing more than what the law would enforce and require, and therefore the clause is exactly agreeable to the power, as it is reasonable and usual.

That the real object of the power of re-entry is to secure the payment of rent is quite obvious; for a Court of Equity acting on reasonable grounds has always prevented a re-entry from taking place if the rent is paid, though the time of re-entry has arrived; because it was considered merely as a security for the payment of the rent. The maker of it cannot be supposed in directing the clause of re-entry to [419] have intended really to destroy the interest given to the lessee, but to secure the re-payment of the rent reserved to the reversioner: and now by the 2d Geo. II. the Legislature has given a sanction to the clause which is used here, and directed the effect of it in general. Surely it is very difficult to imagine it is not a reasonable clause, since the Legislature has authorized it in an Act of Parliament made expressly for the purpose of assisting landlords; and I apprehend that the clause must be considered as agreeable to a power which requires only a clause of re-entry for nonpayment of rents.

I beg here to request your Lordships attention to the observations which I have made on the proceedings of Courts of Equity, which apply to this head as well as to the former; for I conceive that those courts would direct a clause similar to that which is now in question.

Now suppose this was a lease by Lady Vernon, it seems to me that according to the argument itself used at the bar, there would be very great difficulty in maintaining that the lease was not according to the power, as the estate moved from her ladyship, and therefore the construction of the power would be more favourable to the lessee; and if the words were the same in the lease she might have made as they are in this lease which Lord Vernon has made, the lease would I think be considered as valid; and there can be no different construction of the same words, for the construction in both cases must be on the intention ascribed to the parties who used them in the settlement.

[420] The lessees are purchasers for valuable consideration under the settlement, and upon the faith of the power in the settlement, they have paid the value of the estate for the term demised to them, except the small rent and duties. I am persuaded that every court must feel very desirous of supporting the lease executed. The clause objected to is reasonable, and perfectly calculated to secure the rent. It is inserted in all general leases—it is sanctioned by Parliament—it is, as I conceive, agreeable to the proceedings in Courts of Equity, which act on the intention of parties, collected from the instruments executed by them; it is consistent with all the other leases in the family made under similar powers.

Under these circumstances I confess it appears to me, on the best consideration I have been able to give the case, that this lease is warranted by the words of the power in the settlement, and that the lease is valid.

Dallas, C. J. I am of opinion that the lease in question is bad, as not being a good execution of the power.

Two objections arise. The first, as to the fifteen days: the second, to the clause providing as to distress: and the case has been argued at the bar, and considered

by the learned Judges on the double ground of authority and principle; to each of which I shall separately advert.

And first, as to the fifteen days. The single case cited is of a negative nature; that is, one in which, though other objections were taken, this was [421] not. And on this case I think a great deal too much stress has been put; for without saying at present whether the objection be well or ill founded, good or bad, intrinsically considered, I will only observe, that when it is seen how it weighs with many learned persons, now that it *is* taken, it seems to me it is going a great way indeed to assume that if it *had been* taken formerly it could not have succeeded; and, much too far to infer, that its not having been taken is to be considered as proof that by common consent it was treated as not fit to take. The more natural and rational supposition I should apprehend to be that it was not adverted to at the time, at least this is the opinion I should form, for I know not on what legitimate ground of reasoning we can assume that what appears to be so important *now*, was considered and rejected as unfounded *then*. Still, however, let this case weigh as much as it fairly ought it is admitted to be but negative authority; and the question now occurring, and requiring positive decision, it must be examined and determined on authority, if there be authority; and if there be no authority then on principle. Such then is the only case relied upon with respect to the objection applying to the fifteen days.

I come next to the provision as to there being no sufficient distress. And here again, in support of the validity of the lease one case only has been cited, viz. *Holley v. Scot*, as bearing directly on the point. On this I shall not waste time by dwelling longer than, in this last stage of the discussion, I feel to be necessary; and therefore, as to the imperfection of the report, the character of the re-[422]-porter as such, the insufficiency and invalidity of the reasoning as reported, and the other grounds of objection made by some of the learned Judges, with whom I agree in opinion, to these I shall merely refer, repeating only for myself what I said upon a former occasion, and am not disposed on reflection to retract, namely, that though the particular point now under consideration was not adverted to then, in the decision, reported as it is, still, as it must have been different if the objection then and now made had been deemed valid, I think that in fairness I must take it, such as it is, to be a case adverse to the opinion I entertain. Taking it then as such, and trying it as authority, the only ground to which at present I am addressing my observations, the first objection to it is that it is a single case, not professing to be grounded on any that had preceded, nor appearing to have been supported by any that had followed it, but on the contrary the only similar case, *Care v. Day*, standing in opposition to it; for as such I consider it, and for reasons which I shall presently give. I need scarcely add that such a case, dissented from as it now is by so many of the learned Judges, admitted to be inconsistent with the decision in *Care v. Day*, and at all events confessedly at variance with the observations and reasoning of Lord Ellenborough throughout the whole of that case, can scarcely, as mere authority, be considered of much avail. In opposition to it, I have said, appears to me to be the case of *Care v. Day*. But here again I wish to deal correctly with the subject of authority; and though to a certain degree (and to what degree I shall examine) *Care v. [423] Day* must be permitted to operate, still I think it is not to be relied on strictly as mere authority, even in favour of my view of the subject; first, because if *Holley v. Scot* was rightly decided, *Care v. Day* would be in opposition to it, and thus we should only have case against case; and further, that with respect to *Care v. Day*, of the learned Judges who now support the judgment of the King's Bench, it is disapproved of by one, as to the grounds on which it stands, and expressly and in terms dissented from by the other; and lastly, because being a decision by the same court by which this case was in the first instance decided, if to be distinguished, as it is contended it is to be, then it does not apply; if not to be distinguished, nothing of authority can result from two cases decided by the same court in opposition to each other.

To dispose, therefore, of the whole subject of authority, it appears to me that though these cases as cited have afforded much matter for observation and argument, they furnish nothing like authority when correctly considered, and in a judicial sense. A word or two only, before quitting this part of the subject, on what has been much relied on as applied to the objection of the fifteen days, namely, the general prevalence of such leases to be taken as extending, it is said, the sense of the Profession, and the mischief that will result from now holding the objection good. I allow to

these topics their weight, and much weight undoubtedly belongs to them; but if, when strictly examined, the practice proves to have crept in against principle, and is not pretended to depend upon any positive authority, I can only say, that being bound [424] to look at the objection now that it is made, I must decide upon principle; and if principle and practice are at variance practice must give way; and in this case, as in others, if the mischief be extensive, the proper remedy, if such there be, must be sought for and applied elsewhere. This however at most confines itself to the objection as to the fifteen days; for with respect to the clause of distress, it is not pretended to have any usage or practice in its favour; and the only decided case is directly the other way. And with respect to practice, the extension as to the fifteen days operating, I admit, in proportion to length of time and number of leases, becomes for this very reason, and in the same proportion, stronger against the clause as to distress, inasmuch as in all such leases no such clause is to be found; and my brother Holroyd, to whose labour of research and solidity of learning we are all of us, at all times, so much indebted, has informed your Lordships, that on an accurate research he has not been able to find in the books of precedents beyond one instance of such a lease, and that not appearing to be adopted in common use. Practice is therefore not only wanting in its favour, but practice is the other way; and in this respect practice and decision go hand in hand.

I come now to consider the case on principle. And first, I admit, that if the power is to be deemed indefinite as to time, and therefore to be exercised in a reasonable manner, leaving it to the discretion of the party by whom it is to be executed to decide what is reasonable, it does not appear to me that the giving fifteen days in the way in which they are [425] given can be considered as unreasonable. In truth, I deem it quite immaterial to any real interest of the parties, or as to any substantial effect, whether 20s. are to be paid by the one and received by the other fifteen days sooner or later; and so I apprehend the party might have thought had his attention been drawn to the point. But when I am told of what the party really intended, as of an independent and substantive intention, collateral to the instrument itself, pre-existent, and having caused the power to be framed precisely as it is, I can only say I take the probability to be, if we could look to the mere matter of fact, that the party himself never entertained a precise intention of any sort on the occasion. The substantial purposes were to be accomplished; the detail of execution was of course left to others; and this may account for the difficulty that has arisen. Drawn as the power is, it was probably supposed by professional persons that the former leases might be looked at, and the clause in question being found there was adopted, and I agree reasonably adopted, if such leases were to govern or might govern; but whether so or not is one of the questions in this cause, and which, if decided in the affirmative, would support the lease as far as this objection goes, though, decided the other way, the case will still depend on the other general grounds, and the lease may notwithstanding be valid. Fifteen days therefore, if time might be given, I should consider as not unreasonably given.

In like manner as to the clause of distress, I see no actual injury as likely to result from it in this particular case. I agree with several of the learned [426] Judges that it is not likely that 20s. of half-yearly rent would be suffered, if demanded, to remain in arrear; or if in arrear, that in the case of leases upon fines a distress to the value of 20s. would not be found. But this is a way of trying the question precluded by the very nature of the question itself. The providing for a particular event not only pre-supposes the possibility but even the actual occurrence of such event; it pre-supposes to provide for it; it anticipates and adapts itself to it.

The question therefore arises on what the parties have said and done, not on the reasonableness of doing it, or on the sufficiency or insufficiency, the weight and value, which we are not at liberty to consider; and therefore without looking out of the instrument, but to the instrument, and searching in it for the intent to be collected from what is there expressed, if sufficiently expressed, in other words, treating the question as your Lordships desire us to treat it, that is, as a question of construction arising on the instrument such as it is,—what is the legal effect of the lease compared with the power?

And first, to look to the power, (agreeing, as I do, that the intention of the party must govern,) as to be collected from the whole instrument. It directs a clause of re-entry for nonpayment of rent, and this merely; nothing is said as to time, nothing

as to distress: nothing as to reasonable, nothing as to usual: nothing that refers to any former lease or leases in any way whatever, so as to furnish a rule, though reasonable and usual, ancient and accustomed, are terms to be found as words of reference in several parts of the instrument, directly connecting [427] themselves with former leases and for various objects and purposes.

First then as to time. That time may be as properly fixed by the occurrence of an event as by the express specification of time can scarcely be denied: and when rent is made payable on a particular day, connected with a clause of re-entry for rent not paid, I can only understand not paid on the day when payable. In this there is nothing ambiguous, nothing deficient, nothing to be implied to complete what is expressed. Nor has it been argued, that if the lease had been drawn in the very terms of the power it would not have been a proper execution of the power. But it is said in the same instrument twenty-eight days are given for payment on the leases at rack-rent, being a substantial and heavy rent, before forfeiture can attach for non-payment: and it is argued,—Could the party intend a provision so preposterous and harsh as that forfeiture should become the immediate consequence of a half-yearly rent of 20s. falling into arrear! To which I answer, that this suggestion of harshness appears to me to be imagination, and nothing more: for what of real harshness is there in making an estate liable to forfeiture upon nonpayment of a sum so small, as from its very smallness not to require time to be given to pay it! Fifteen days were scarcely necessary to put a party into condition to pay 20s.! And further why the party to receive could not judge if time were to be given as to the fifteen days as well as to the twenty-eight, I am altogether at a loss to conceive. If at liberty, therefore, to conjecture as to intent, independent of the words made [428] use of, my conjecture would be, that the party himself meant nothing as to the fifteen days beyond what he has said: that he meant only what he has said, and still less, if possible. Can I suppose that he actually meant time to be given, intentionally avoiding to decide what that time should be, and this merely to leave it open to the discretion of another to decide for him what he could just as well have decided for himself! In the particular case time may be of no moment any way: but as applying to future cases, and involving principles applicable to the construction of all instruments, it becomes of real magnitude and importance. It is not in the operation of the clause, as it applies to the lease, treated as a valid lease, that any difficulty arises, but in the application of the lease to the power, with a view to the validity of the lease.

But I go farther, and will suppose the question to be, whether the power should not be so construed as to imply a reasonable discretion to have been intended as to time. In such event, it has been asked who is to construe what would be reasonable time! Now, passing by all the difficulties that may arise in this respect, I am willing to answer— the competent tribunal according to the nature of the case. But which, according to the case, is the competent tribunal! This becomes a question. On the trial of this ejectment was it the Jury or the Judge! and though, in the result, which of the two might be ascertained, yet the result could only be got at through, as now, a doubtful controversy: and this uncertainty as to tribunal, with the additional uncertainty as to result, that result depending on the un- [429] certainty of opinion, which may be different with different men, and of which these proceedings have in every stage afforded ample proof, and, this day in particular, a striking instance, are all inconveniences introduced by holding the power to be indefinite, and would have been avoided by framing the lease in the words of the power. One way it would be certain: the other opens at least to question: and it is this substitution of uncertainty for certainty, this rule of discretion, which throws open the gate to litigation, that would otherwise be closed and fastened against it, that constitutes my fundamental objection so to understand and so to construe this power. If therefore the question be, whether reasonable or not should be implied, I should hold that it ought not to be implied, even if we were at liberty to imply it framed as the power is.

I come now to the second objection: and though in one light it is the most material, yet it will not be necessary in this late stage of the proceedings to discuss it at any length: I mean restraining the right to re-enter to there being no sufficient distress to be found on the premises. And with respect to this, all I have hitherto said as to time applies with increase of force. It is a further clog, not warranted by the

original power, and it is one which, as to possible injury, does not rest in speculation merely. The case so often referred to in the Exchequer forms a practical comment. When resorted to as a remedy it shows the wrong which may result. The lessor of the plaintiff failed because some obscure corner of the premises had not been searched. That case is this: and in a similar proceeding the effect would [430] have been or would be the same. To the validity of this objection *Core v. Day* is in point. It is so, I conceive, in the decision; it is so beyond all doubt, as I apprehend, from what is said by Lord Ellenborough throughout the whole case. Whether to be fairly distinguished or not, in any respect, I have already examined, and will not repeat. The argument drawn from the statute, and the general nature of such a clause considered as a mere security for rent, was brought forward then, as now, but was mentioned only to be over-ruled, the point not appearing to the Court to be sufficiently tenable to admit of discussion.

To one or two other points I shall now barely advert. I can scarcely think that the question can be reduced to one of mere verbal consideration. But if so, I cannot myself feel the difference between "on" and "for;" "*for* nonpayment of rent," I consider to be equivalent to "*on* nonpayment of rent;" though I have no hesitation in admitting that "on" and "for" may be sometimes different and sometimes synonymous, and this depending on the context and the subject-matter. But looking at the subject-matter, and taking the whole of this instrument into consideration, I think there is no reason for distinguishing on the present occasion. In like manner, as to the term "beneficial," I conceive it to refer to the lessor or the remainder-man, and not to the lessee; and so understood, if there be any weight in the observations I have hitherto made, such a reservation would be less beneficial to the lessor than the direct clause unlogged with any conditions as to time or distress. [431] Taking, further, the words of the power to apply to former reservations, and that with this view former leases might be looked at, it seems to me the argument turns the other way. The power directs that there be reserved the ancient and accustomed rents, or as great or beneficial rents, duties, and services, thereby letting in, I admit, the former leases as evidence of what rent was ancient and accustomed; and so as to duties and services; but following up these general words with special and particular words, showing the powers were not intended to include the clause as to re-entry, particular words specially providing for this right, and in terms directing how it shall be reserved: and having mentioned former leases as admissible in these respects, I will only further say I think they were not admissible, except for the purposes as to which they expressly, or by necessary implication, refer. This is indeed a necessary consequence of all I have already said, and without therefore going at large into the wide field which the argument in this respect has occupied, but referring generally to the opinions and reasoning of those who think as I do, I will merely state the broad ground of my opinion, which is, that there being no ambiguity of any kind, nor any words of reference to any other or former leases as connected with this subject, nor any generality of expression, so as to let in extrinsic evidence to restrain or qualify or to exclude, but a clear, specific, and definite sense and meaning, such evidence is not admissible. This conclusion, it will be admitted, must follow if the premises are well founded, but whether so or not [432] depends, as far as my opinion goes, on the validity of the general grounds on which that opinion rests, and of which it is for your Lordships to judge.

Abbott, C. J. I am of opinion that the demise of the 5th September 1803, is not invalid.

The objection upon which it is now sought to avoid the lease is, that the clause of re-entry for nonpayment of the rent is not such as is required by the settlement: and this for two reasons. First, because it allows to the tenant fifteen days for payment beyond the days mentioned in the lease: and secondly, because it is restricted to instances wherein no sufficient distress or distresses can or may be had or taken upon the premises, whereby the same, and all arrearages thereof, if any be, may be fully raised, levied, and paid.

This objection is *strictissimi juris*, and as such is by no means to be favoured: though if the *strictissimum jus* be found upon due consideration to be with the objector a court of law is bound to yield to his objection. As I have already intimated I think the right is not with the objector.

In the course of the argument your Lordships attention was called to a supposed distinction in the construction of powers, between such as are created by the owner of the inheritance limiting a partial estate to himself, and to be exercised by himself as owner of such partial estate, and such as are created by the owner of the inheritance to be exercised by a stranger, to whom he may have limited a partial estate, or to whom he may have given the power as [433] a naked power, unconnected with any estate in the land. Such a distinction appears inapplicable to the present case, because the owner of the inheritance has here limited a partial estate, first to a stranger, and secondly to herself; and the words of the power must have the same meaning, whether the question had arisen upon an execution thereof by the stranger or by herself.

It was also argued, that the power of leasing being for the benefit of the tenant for life, the qualifications and restrictions imposed upon the exercise of the power are for the benefit of the remainder-man; and therefore that the clauses of qualification and restriction are to be construed most beneficially for the latter. This point also appears to have little weight in the present case; because, advertng to the amount of the fine paid upon the surrender of an existing lease, and to the amount of the rent reserved, I think it cannot be supposed that the purchaser of the present lease would have given one farthing less if the clause of re-entry had been strictly confined to nonpayment of the rent at the very day; or that the estate of the remainder-man would now be worth one farthing more if the lease in question had contained a clause to that effect, instead of the clause upon which these objections have arisen.

And being of opinion that the tenant for life could derive no benefit, and that the remainder-man sustains no prejudice as to the value of his interest, from the form in which the clause of re-entry is found in this lease, I think a court of law may reasonably regard the interest of the tenant, *the purchaser of the lease*, and put such a reasonable and liberal con-[434]-struction upon the words of the power in the settlement as will give effect to the lease, rather than yield to critical forms and subtle objections adduced for the purpose of defeating it. And this becomes the more important, if it be true, as has been suggested, that very many leases are in existence containing clauses similar to the present, and demised from powers expressed in language similar to that of the power from which this lease was derived. Considerations of this nature certainly ought not to control or vary the sense of plain and unambiguous words; but they may be reasonably entertained for the construction of words of doubtful import: not merely by reason of the consequences of a decision in a particular case affecting numerous other cases of the like nature, but because the fact suggested is evidence of the general opinion entertained by professional men upon the meaning of the words of a legal instrument.

These words, in the present case, are "a power of re-entry for nonpayment of the rent to be thereby reserved." And the first question is, whether these words may be understood to mean a reasonable power, or must be confined to a power which the landlord may exercise if the rent be not paid at the very day, and without regard to any property to be found on the demised premises, upon which he may levy his rent, and thereby compensate himself at his tenant's expense for his tenant's neglect.

If the words may be understood to mean a reasonable power, the only remaining question will be, whether the power of re-entry contained in this [435] lease be a reasonable power. I shall proceed in the first place to show, that in my opinion the words in question may be understood to mean a reasonable power. Nonpayment is a mere neglect or default, and if the words "a power of re-entry for nonpayment of the rent" are to be taken strictly and *ad litteram*, they will import a power of re-entry for the mere neglect or default of the tenant; but this cannot possibly be their legal import or effect, because by the common law of England a landlord never could enter for the mere neglect or default of his tenant in this respect under any power or clause in whatsoever language expressed. Some act is always required to be done by the landlord in order to entitle himself to exercise his power, and this is required to prevent the tenant from being surprized or injured. This act at the common law was an actual demand of the rent on the part of the landlord. And the common law required this demand to be in a most precise and peculiar manner. It was to be made just at the close of the last day of payment (allowing the tenant the whole

day to prepare his money) at the time when so much day-light remained as might be sufficient to view and count the money, and no more. It was to be made at the door of the demised messuage, if any on the premises, and if none, then at such usual and notorious place of resort where the tenant might reasonably be expected to be found, if he was not altogether absent; and it was to be of the precise sum then accruing due, not including any former arrears, all of which, although due and recoverable by distress or action, were considered as waived by the landlord [436] on a question of forfeiture by his prior neglect to demand or enter for them.

Then if the words of the power, or rather of the qualification of the power contained in the settlement, cannot receive a literal construction, and be held to apply to a case of neglect or default only according to their literal purport, they must receive some other and different construction, which must in my opinion be a reasonable construction, and a construction properly suited to the object and purpose in view; that is, to secure and enforce the payment of the rent, so that on the one hand the tenant may not hold the land without payment to the prejudice of the landlord, nor on the other hand, be dispossessed of it, if either himself or the land, which is emphatically said to be debtor for rent, presents payment, or the means of payment, without unreasonable delay or prejudice to the landlord.

It has been objected however, that if the literal or strict meaning of the words be not adopted no other meaning can be, because, as it was said, courts of law cannot say what is a reasonable power or clause of re-entry. But I conceive that in this as in all other cases courts of law can find out what is reasonable, and that in some cases they are absolutely required to do so. In many cases of a general nature or prevailing usage the Judges may be able to decide the point of themselves: in others, which may depend upon particular facts and circumstances, the assistance of a jury may be requisite, and wherever such assistance is requisite there are ready modes of obtaining it. I will mention one instance in which courts of law are required by the Legislature [437] to discover and decide, if the point be litigated, a question upon the reasonable execution of a power. By the general inclosure act (41 Geo. III. c. 109, s. 38) a rector or vicar is enabled to lease his allotment under certain restrictions mentioned in the act, and among others, so that there be inserted in the lease, "power of re-entry on non-payment of the rent or rents to be thereby reserved within a reasonable time to be therein limited after the same shall become due." A lease of such an allotment must therefore provide, that if the rent be unpaid for some specified number of days or weeks after the day of reservation, the rector or vicar may re-enter; and if any question should arise, whether the number of days specified in a particular lease be or be not a reasonable time, the courts of law must necessarily find some mode of deciding the question.

For these reasons I am of opinion that the words of the clause in question may and ought to be understood to mean a reasonable power of re-entry. And taking this to be the legitimate meaning of the words, I proceed to show that in my opinion the power of re-entry contained in the particular instance of the lease in question is a reasonable power. Usage is of great weight in considering what is reasonable; and it cannot be denied that the power of re-entry, as expressed in this lease, is in form and substance such as was frequently found in leases before the execution of the settlement by Louisa Barbara Mansel, which was in 1757. This is a fact which must be in the knowledge of some of your Lordships, without recurring to the special verdict [438] for information as to the leases of this particular estate. If any space of time could be allowed beyond the days of payment prescribed in the reservation, the space of fifteen days, which is the period allowed in the present lease, will not I am persuaded be thought an unreasonable space of time. Indeed, although this objection was pointed out, it was not so much insisted upon, nor could be in the construction of a settlement allowing twenty-eight days for payment in leases to be made at a rack-rent. The main stress of the argument was applied to that part of the clause in the lease which narrows the power of re-entry to cases wherein no sufficient distress can or may be had and taken upon the premises, whereby the rents and services, and all arrearsages thereof, may be fully raised, levied, and paid.

Upon this part of the argument the case of *Core v. Day* (13 East, 118) was quoted and relied upon. It has however been discovered that the decision in that case is contrary to a prior decision of the Court of King's Bench in a case of *Hotley v. Scot*,

reported in Lofft, and of which a more correct manuscript note was also cited. This earlier case was unknown to the counsel by whom *Care v. Day* was argued, and probably to the Court also; so that the decision of *Care v. Day* is not wholly free from question as to its own particular circumstances. It was certainly not thought applicable to the present case by the two surviving Judges of the Court when the present case was before them; and it is distinguishable from this by the difference of the language of the clause [439] upon which it arose. For in that case the words of the clause were not general, as in the present, "a power of re-entry for nonpayment of the rent," but special, "a power of re-entry, if the rent be behind for the space of twenty-one days," which words do not so easily admit the introduction of any other qualification or matter as the general words of the present clause; so that upon the whole the case of *Care v. Day* does not appear to contain a decision precisely in point to the present case. And therefore in respect of authority the question still appears to be left open,—whether in the absence of any words denoting a contrary intention in the mind of the framer of the clause, a restriction of the right or power of re-entry to the absence of a sufficient distress be a reasonable restriction in a lease like the present; for if it be, then a right or power so restrained is a reasonable right or power of re-entry, and the introduction of such a right or power into the present lease is a good execution of the leasing power contained in the settlement.

Such a restriction of the right had prevailed in practice before the execution of this settlement in 1757. It was known and in use, though probably less general or frequent before passing the statute 4 Geo. II. (C. 28, s. 2) in 1731. If the effect of that statute be (as at least one very learned person has thought) to alter entirely the common law, and to take away the right of re-entry under any circumstances of demand and refusal of the rent, where a sufficient distress can be found, then certainly the express introduction of the words of restriction cannot invalidate the lease, [440] because it is only an expression of a matter tacitly contained and implied by operation of law. But supposing the statute not to have this effect, still in my opinion the restriction is reasonable in itself in a case like the present. The instances of proceeding at the common law by demand of the rent since the statute was passed are very few: the proceeding is in itself troublesome and difficult, as will appear by the circumstances required, which I have already mentioned: it was indeed so troublesome and difficult, and found to be attended with so little benefit to landlords, that the statute was passed for their relief, substituting the absence of distress in the place of demand. Can it then be said that the reversioner is unreasonably restrained or prejudiced by the introduction of a matter which the Legislature has thought generally beneficial to landlords, and which in all probability he himself would have adopted, even if the terms of the lease had been such as to have allowed him to act otherwise? I say that in all probability he would have adopted it, because I presume his only wish, like that of every other reasonable person, must be to obtain the payment of his rent in the most easy and speedy manner. And whatever difficulty there may be in viewing a messuage or farm, so as to ascertain whether sufficient be found upon it to answer the arrears of a rent, bearing, as in this case, a very small proportion to the annual value of the tenement, still I have the authority of the Legislature, and of the experience upon which the statute was founded, for saying that this difficulty is less in practice than the difficulty of making such a demand as would authorize a reentry [441] at the common law. If any thing more be desired by the reversioner than a speedy and easy mode of securing and enforcing the payment of the reserved rent, I should say that he desires more than the framer of the settlement intended to give, and more than the law ought reasonably to allow. The power of re-entry, in whatever words it be expressed, can be exercised only in one of two modes: that is, either by making a demand at the common law, without regarding the value of distrainable goods on the premises, or by ascertaining that no sufficient goods are to be found on the premises, without regarding a demand of payment. For the reasons already given I think the latter must be considered as the most effectual and beneficial mode, and therefore, speaking generally of cases of this nature, I can discover no reason for resorting to the former, except a hope (certainly not entertained in this particular case) that the tenant, being taken by surprise, and not expecting a demand, may not be prepared for immediate payment of money, and a desire to

take advantage of his want of preparation and deprive him of the residue of his term or harass him with a law-suit. To such a motive a court of law will never lend its aid. And a construction calculated to give effect to such a motive would be contrary to the general principles of the law. And it ought not to be omitted that the present question arises upon the construction of that part of a leasing power which is intended to create a forfeiture of the lease executed under the power. It is said in our books that forfeitures are odious in the law, and this is the reason assigned for requiring so much formality and [442] precision in the demand of the rent at the common law. And for the same reason, in addition to all others, I think such a construction ought to be put upon the words of the settlement as will tend rather to the exclusion than to the introduction of forfeitures of the leases to be granted under it.

For these reasons I am of opinion that the demise of the 5th September, 1803, is not invalid.

The Lord Chancellor. The question which is now brought before your Lordships for decision is undoubtedly a question of very great importance to the parties. We have to determine upon the validity of a particular lease, which is stated in the special verdict. The decision upon that lease however will not only give validity or invalidity with respect to the lease in question, but, as we have been informed upon the argument at the bar, will give validity or invalidity to the leases of a very considerable property. The plaintiff therefore has a great interest in your decision. The tenants of course have a very considerable interest in your decision; but the interest in your decision is not confined to the landlord and the tenants in this case, because I apprehend that if these leases are invalid, the tenants in this case, probably, as in a case from another part of the united kingdom, I mean the case of the Queensberry leases [5 Dow 293], will have a title to recover against the assets of the deceased lessor the value of the interest in the lease, if the decision should be against the validity; but however great the interest of any of these parties may be, it is most for the [443] public interest that you should take care to decide rightly.

If I could foresee that by asking for further time I might alter that opinion which it is my duty to inform you I have long entertained upon the question now before you, or if I could, consistently with my other important engagements and duties, hope to find time to lay down the statements which I am now about to make with more method, I should certainly wish your Lordships to delay hearing what I have to say on this subject. If I could hope to relieve myself from the pain which I do most sincerely feel in maintaining an opinion upon this subject different from that which has been expressed by persons for whose learning and abilities I entertain the greatest respect, I should for that reason also endeavour to press your Lordships to delay hearing what I have to offer.

I must confess, that, from the habits of my professional life, I felt at first considerable surprise indeed how it could be that upon some of the questions agitated in this House there could be any difference of opinion any where. With respect to the authorities, you have heard observations which are perhaps much more apt than any I could presume to offer to your attention upon the conflicting cases of *Hotley v. Scot* and *Core v. Day*, and the negative authority of the case before L. C. J. Willes, who I believe was a very great lawyer. Those authorities, I hope I shall not be thought to treat with any disrespect, which certainly I do not mean, when I avail myself of what has fallen from the two learned Chief Justices in their observations on [444] *Core v. Day*. If *Core v. Day* is an authority one way, *Hotley v. Scot* is an authority the other way; and the judgment of two of the Judges in the court below on this very case conflicts with the case of *Core v. Day*. But such have been the habits of my professional life that I cannot think that we have attended to all the authority which deserves consideration. That the practice of conveyancers amounts to a very considerable authority on this subject I am justified in saying, by the opinions of the greatest lawyers in Westminster Hall, who I am persuaded, in many instances, would have come to a different decision from that which they thought proper to adopt, if they had not taken notice of the practice of conveyancers. But upon this subject I take the liberty, with very great respect, to intimate an opinion, that upon cases of this nature it might not be much amiss if courts of law would inquire a little more what has been done in courts of equity, for the purpose of knowing how far Judges who have sat in courts of equity have determined the

legal point before they have applied themselves to those directions, and decrees, and orders which they are daily in the habit of pronouncing. Between the year 1772 and a period approaching the year 1780, I spent many of the most profitable years of my life in the office of a conveyancer, and I was led at that time to a knowledge not only of the practice, but of what were the sentiments of the great conveyancers of those days; and I am sure it never would have occurred to any one of them, if there was a leasing power in any marriage settlement requiring such a power as this, [445] that to give the time of fifteen or twenty days was making the execution of the power invalid. I am sure all practice was the other way, and practice in this respect is evidence of what is reasonable.

But it does not rest there, because you have to consider the question as applied to marriage-settlements which are framed in different ways. You have marriage-settlements where an estate for life is granted to A, with remainder to the wife for her life, with an interposition of trustees to preserve contingent remainders before the limitations to the issue. In some settlements there is a power to the tenant for life to make leases, which is given not only for the benefit of the tenant for life, but it is a power which you are permitted to insert in the settlement for the purpose of the due cultivation and management of that estate which they are first to enjoy, and others after them; but that power of leasing in a well-framed settlement is not merely given to the tenants for life, but frequently to the trustees, while there are infants who do not as yet take an interest entitled to the benefit of it, but who are not capable of managing the estate. Suppose the father and the mother to die, and then there being trustees to preserve contingent remainders, it becomes necessary to make leases. Or suppose that a settlement is made, in which the legal estate of inheritance, the legal fee, is entirely vested in the trustees; where therefore a legal lease cannot be made by the equitable tenant for life, nor the remainder-man, nor the issue, but during the infancy, it may be made by the trustees. In both those cases it frequently happens that the trustees in the one case to preserve contingent remainders, in the other [446] case the trustees of the inheritance are called on to make leases, and in most of those settlements there is no mention of the period of forbearance which shall be given; some do, but there is an infinite majority which do not mention any days at all. I venture to say this as matter of my own knowledge. The practice as to leases made by such trustees would, I say, of itself form a weighty consideration here; but in leases of that kind, made under such powers by the authority of the Court of Chancery, you must permit me, for my predecessors and successors, though not for myself, to say, in every one of those cases there is an authority of law that that is a due execution of the power, because the Chancellor has no right to direct such a lease to be made, if when it is executed it is not according to the power; he is a judge of law and equity, and when he has determined as a judge of law that such is a due execution of the power, then and then only has he authority, according to the constitution of this country, to direct any such trustees to make such leases. I should be glad then to know whether the constant practice of that court is not to be looked at as a practice fixing what is the legal construction of such a power to lease.

It does not rest there; for in the case put by one learned Judge, suppose the tenant for life here had agreed with this occupying tenant to make him a lease, with a power of re-entry giving such an extension of time, and then the tenant had filed a bill in equity to compel him to make a lease according to the agreement. No Chancellor could possibly have directed a lease to be made with fifteen days time in case of a nonpayment of rent, unless he was satisfied [447] according to law that would be a due execution of the power; he could not have done it in the numerous cases in which there have been such decrees made. I disclaim, for those who have gone before me, and those who are to come after me, the charge that it was not done upon the authority of cases which have at least as much, if not a great deal more, authority than those which have been stated.

Suppose the case where commons are divided under the General Inclosure Act (11 Geo. 3, c. 109, sec. 38). There are certain persons having a portion of those commons, who though perhaps seised of a large property yet only have an enjoyment for lives, I mean parsons and vicars. A parson or vicar under the inclosure act is authorized to make leases in which there must be a power of reentry within a reasonable time. We have acted under that general inclosure act ever since it

passed. Parsons and vicars have been making leases ever since; and I believe you will find that the universal practice has been to give days in the manner days are given in this lease. It is truly said, that is within reasonable time which is authorized. But I should be very glad to know what difficulty there can be in courts of justice deciding what forms reasonable time, when the Legislature has expressly said all these leases shall be made with allowance of a reasonable time. In the very parish in which parson and vicar have this sort of power there may be fifty tenants for life for successive estates in land. In such a case the course of proceeding is, that the allotments are to be enjoyed [448] according to the limitations of the settlement of that land in respect of which they are made. What is the consequence? The consequence is, that the power of leasing in the settlements under which those respective persons (lay persons, not ecclesiastical persons) are made tenants for life, apply themselves to the whole of the lands after the allotment is made; and a most singular thing it would be to say that fourteen or fifteen days is a reasonable time for a power of re-entry for a parson or vicar, but a direct breach of all that is reasonable with respect to the tenant for life claiming under a settlement, which settlement has a new object to operate upon in the allotment made under that very act of inclosure. I say therefore, as to this case, that if it does not stand on peculiarities in this settlement, there is a weighty authority to be found in practice of long endurance, which I will venture to say would make your decision one of the most mischievous that ever was pronounced in this House, if you were to decide against such practice.

But I think we may lay out of the question the authority of practice. I proceed to comment upon the terms of this settlement, taking it for granted that it is understood on all sides that this special verdict completely finds every thing that ought to be found. I put that upon the understanding of the parties. We have had in the course of argument at the bar a great deal of discussion upon the admissibility of extrinsic evidence. Now, with reference to extrinsic evidence, my humble opinion is, that this is a case in which you must admit some extrinsic evidence; you ought not to admit [449] any extrinsic evidence which falls within the range of the principle, which says that you must construe instruments by what is to be found within the four corners of them, generally speaking; but it is impossible, in my judgment, in this case, for the reasons I have stated, that you can come to a conclusion without looking at a great deal more than the lease itself; because, when you are considering the question whether the lease is conformable to a power in another instrument, you must look into that instrument which contains the power, and if you must look into that instrument which contains the power, then, in order to get at the true construction of the power itself, you must look at every part of that instrument; and if the instrument which contains the power be referred to by the instrument which is the execution of the power; if the instrument which contains the power also refers you to other instruments, which you must look at, as appears upon the face of the instrument which contains the power, for the construction of the power, you must then look at other instruments to see the meaning of the power.

I think in this case you might state it thus:—Here were leases made prior to 1757: the settlement refers to existing leases at the time when the new instrument is made, it refers in that part of it which gives the power of making future leases to the existing leases. I do not carry it so far as to say you shall go back to a great length of time to see what were the habits of leasing prior to those existing leases, but I say you must go to those existing leases, or it is impossible to collect [450] what the meaning of that power is. I say also, that if the instrument in which the power is contained shows what was the nature of the estates that the persons had who were making that settlement in which the power of leasing is contained, you cannot shut your eyes against that part of the instrument which shows what was the nature of the estates.

With these general observations I call your attention to what this case is. A lady, named Louisa Barbara Mansel, afterwards Louisa Barbara Vernon, was tenant for life of the estates, with several remainders over. The will under which she claimed as tenant contained a power to her in consideration of marriage, either before or after marriage, of revocation and appointment, as afterwards pursued by her in the deed of settlement. The special

verdict states, that upon the 20th of July 1757 she intermarried with Mr. Vernon; that before the marriage, upon the 2d of July 1757, she by her deed revoked the uses and devises contained in the said will concerning the said premises, and appointed and limited the same to Francis Earl of Guildford, and Charles Montague, and their heirs, in trust, to hold the same to the same uses as before limited, until after the said marriage, and then to the uses of the said George Venables Vernon for life, without impeachment of waste, remainder to the said Louisa Barbara for life, without impeachment of waste, and in the mean time to the said Francis Earl of Guildford, and Charles Montague, and their heirs, to preserve contingent remainders, and to permit the said George, during his life, and afterwards the said Louisa Barbara, during her life, to [451] take the rents, etc. and after the decease of the survivor of them, to divers other uses for the benefit of their issue, and in default of issue to the use of the will of the said Louisa Barbara, and subject to the powers and limitations to be thereby directed and appointed, and in the mean time to the use of the said Louisa Barbara, her heirs and assigns for ever. And then follows the clause upon which this question principally arises.

Before I state that clause I will mention another head of authority, which I confess has disturbed me a good deal with respect to these fifteen days. By a statute (43 Geo. 3, c. 75, sec. 3 and 4) made some years ago the Legislature empowered the committees of lunatics, by authority of the Court of Chancery, where those lunatics were tenants for life, with powers of leasing, to make such leases as the tenants would have made if they had been of sane mind; and I never had the least doubt, in consequence of the habits of my professional life, in directing them to make leases with this ordinary reservation of fourteen or fifteen days, with respect to the time of forfeiting the estate. I certainly did, however, think it right, in deference to the opinions which I understood had been stated in the Exchequer Chamber, to check myself in that practice, and to take care that that habit should no longer be acted on. So, if a parson or vicar should be a lunatic, who had an allotment under an inclosure act, and it should become necessary for the Court to act, I should have directed the execution of the power in a similar manner.

Where a power of this sort is given in a marriage-settlement it is part of the contract which all the parties in the marriage-settlement are understood to enter into with respect to each other; it is for that reason to be construed in questions between the parties to the settlement and those taking under it according to the intention of the parties. In a question, between a landlord for the time being and a tenant, I apprehend the landlord for the time being is to be considered, in an instrument of this kind, as acting on the behalf of all the parties who have interest in the inheritance of the estate; and that therefore there must be that *bona fides* on his part with respect to the tenants which would be required in other cases, and upon a question of forfeiture, if the parties really are dealing *bona fide* according to what they conceive to be the intention of the parties, (not misconceiving that intention, which would vitiate the lease;) but if a fair construction will authorize you to say they have not misconceived it, you are not to look *astutely* to defeat it.

In this case there were three species of estates of which leases were to be made: one of these estates, as I understand, usually demised for lives upon payment of a fine, which payment of a fine is in truth a great portion of the consideration which is paid for such leases; and the small annual rents and other services, though of some value positively speaking, are of little value compared with that other part of the consideration; they are a sort of rental, which is rather from time to time calculating a small sum of money off the value, than paying any part of the value of the estate. The next species of lands are lands to [453] be let at rack-rent for years absolute, and with reference to them it is very easy to reserve a power of re-entry; and the third is of mines; with regard to which, unless conveyancers are more able at this time of day than some of the old ones used to be in the last century, it would be difficult to find out what sort of power of re-entry you could apply to it; they are therefore in general obliged to content themselves with alluding to proper and reasonable modes of working the mines.

The condition to which we are particularly to attend is this; "and so as there be contained in every such respective lease, demise, or grant; and so as on every such respective lease, demise, or grant for a life or lives, or for

years determinable on the dropping of a life or lives, there be reserved and made payable, during the continuance of the estates and interests thereby to be demised, leased or granted respectively, the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial rents, duties, and services, or more, as now are, or at the time of demising or granting the premises so to be demised, leased, or granted respectively, were reserved or made payable for or in respect of the same premises respectively, or a just proportion of such ancient or the present reserved rents, duties, and services, or more, according to the value of the premises so to be demised, leased, or granted respectively;" and then come the exceptions with respect to the heriots, and the usual clause, that these were to be for the benefit of the persons entitled from time to time. [454] Now, let us suppose ourselves sitting down to make a new lease of these premises after the year 1757, of premises which in the year 1757 were held under a then existing lease, addressing ourselves to the execution of that power. Is it possible to deny, that in order to see how the power is to be executed you must look at that existing lease which is the lease immediately preceding that which you are to execute? I do not carry it farther; I do not enter into the question whether you are to go back into the more remote periods of time and see what was the habit in all times past; but I say you are bound to receive the evidence to which the language of the power refers you; and you are bound to receive the evidence of the deed containing the power. If you mean to demise the lands according to the ancient and accustomed rent you must go to former leases to know what it is; so as to the duties and services. It is not necessary they should be the same yearly rents, duties, and services, or more, but they may be as great *or* beneficial rents. I have no difficulty in saying, that under this clause you might reserve as *great* a rent, or as *beneficial* rents. I have a right to look at this word "*or*" as being of some signification. I find in other parts of the lease as great *and* beneficial. This is to be as great *or* beneficial; and I cannot help expressing the opinion, that I entertain a very considerable doubt whether, if this clause as to the distress had not been contained in the new lease, the new lease for that reason would not have been bad.

If it be argued, that demising for a rent of £2, [455] and instead of reserving a power of re-entry for the nonpayment of the rent, in the sense which has been put on the words, reserving a power of re-entry on nonpayment of the rent for fifteen days, that you thereby affect, though in a small degree (and I agree entirely with what the Lord Chief Justice says, that it is not the degree, if you affect) the principle on which you ought to act; I answer if this power authorizes me to make a lease, provided the rent is as beneficial, if I demise upon the same rent, in the same way, do not I reserve as beneficial a rent as formerly. The stress laid on these words would go a great way to convince those who consider what the case would have been if there had been no such words; the former leases having that power of re-entry for nonpayment of rent, would not this power have been the same in construction whether those words formed part of the instrument or not, because without that power of re-entry the rent would not be so beneficial as under the former leases.

Then, come these words, and let us suppose that they are necessary: "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved;" and this occurs in an instrument, where with respect to property upon which the best and most improved yearly rent was to be reserved, and where, with respect to that rent which was to be so reserved a rent which was *de anno in annum*, and from half year to half year, rendering to the landlord the value of the enjoyment for those periods by the [456] tenant, the authors of this settlement say that in such a case as that there shall be nonpayment allowed for twenty-eight days.

I take it now upon the first objection as to the fifteen days; and I should be very glad to ask whether a power of re-entry for nonpayment of rent in fifteen days is not a power of re-entry for nonpayment of rent? No man can deny to me that it is a power of re-entry; no man can deny that it is a power of re-entry for nonpayment of rent. It is not the same power as it would be if it was twenty days, or twenty-five days, but still it is a power of re-entry for non-payment of rent; and where are the words on which the parties insist there shall be an unconditional power of re-entry for non-payment of rent. They have said no such thing.

Now, to recur again to the impression that old habits make on one's mind, it would have appeared to me, previous to the agitation of this case, one of the most astonishing things, having had a good deal to do with decisions at law, that where powers are so generally expressed as to leave it in the party to say this is a power of re-entry for nonpayment of rent, that these words generally expressed, considering the practice, are to be an actual execution of the power: it would be most astonishing to me, that if there was a lease to be made, the lessor could insist it should be no lease, but a lease giving a power of re-entry at the day. I should say that was contrary to the habit and usage of a Court of Equity. Speaking from that [457] habit and usage, the language of the law, before it made any order or decree, the Court ought to decree in favour of the tenant if he were willing to execute a lease upon a reasonable period of days for the nonpayment of the rent; and I cannot help thinking that from the circumstance of pointing out the twenty-eight days in the other case, you are bound to see a difference between the reservation of a rent which is the actual value from year to year, of the land that is occupied, (as far as a tenant ever pays the actual value;) and where a tenant pays a great fine. It does appear to me that this deed affords sufficient evidence, particularly with reference to the words I have before commented on, that if the rent was as beneficially reserved as in the existing lease, that it is a due execution of the power unquestionably.

But that does not touch the question about distress, I admit, save as it touches the question if the same qualification of distress was in the former lease: because if the same qualification of distress was in the former lease, then the same arguments that you build on giving the period in the former lease applies to giving the distress; but if this means a reasonable power of re-entry, and if that has been the construction usually put on it, it is the same as if the lease was directly conformable to the power. The practice has applied that quality to the reservation of a power; and I know no difference between determining what is reasonable with reference to that object, and what is reasonable as applied to the other objects: when you speak of a reasonable [458] rent, that means the *quantum* of rent; but a reasonable power admits of different considerations.

I might stop there, because though I cannot agree with the learned Judge, who thinks that the statute of 4 Geo. 2 is imperative, yet it is impossible for me to deny that the statute of 4 Geo. 2, and the General Inclosure Act, and all the practice to which I have been alluding, does establish, beyond all question, that it is a reasonable execution of a power even where this clause of distress is put in; and when we are considering these circumstances let us attend to the extreme importance of the question before us in one respect. You are not merely in the execution of a power to consider what is most beneficial as between A, the tenant for life, and B, the remainder-man, but what is most beneficial to both, and to each with reference to the terms on which tenants are to be procured; and though in this case there is very little difference, perhaps, of convenience or inconvenience to the tenant, whether he is to pay on the day it is reserved, or fifteen days afterwards, yet on the one hand, if there be that little inconvenience, I say that is a ground why if the words of the power contained in the settlement will allow you to give those days, you shall not say that it is a forfeiture of the lease; and on the other hand I say, though the *quantum* of convenience be ever so small, yet that the principle in deciding these cases requires you to consider, not merely what is for the benefit of a person having an interest in one parcel of the [459] inheritance, but what is for the benefit of the whole inheritance, and all the persons to take in it.

There is another way of putting it, which is material, if I am not wrong in my notions of the practice, if powers are to be executed for the benefit of all persons having an interest in the inheritance, what will be the situation of persons who have those powers is a most serious consideration; and I cannot agree with those who profess to have paid less attention to the state of titles than they ought, because, unless I mistake, nothing requires more attention; so as to what practice has introduced, and what would be the inconvenience of shaking that practice; and you are to consider, too, that unless you are to adopt the principle, that in a settlement where a power is given as nakedly in the terms of it as here, you are to execute that power in the precise terms; that no tenant for life, no trustee, nobody, in short, who has not an absolute inheritance in the estate, will ever think of executing a power with-

out the direction of the Court to tell him whether it is right or wrong; the inconvenience of which would be infinitely great. But I am of opinion that these words are words of course; in the language of Mr. Justice Bayley, (and the diversity of powers is acknowledged in *Brook*;) that this is an entry for nonpayment of rent; that the words of the settlement do not condemn such a power for re-entry for the nonpayment of rent as is here reserved; and I think the qualifications in this power have had the authority of the Legislature for saying that they are reasonable; and therefore on these grounds I shall offer my opinion that these leases are valid. [460] Whether your Lordships may think proper to adopt that opinion it is not for me to say: it is my duty to express that opinion.

Lord Redesdale: Having attended throughout the discussion of this question, and having from a very early period of life had much converse with that part of the law which enables me more particularly to consider cases of this description, I mean conveyancing, I think it my duty to offer a few words to your consideration.

With respect to what has been said as to general opinions upon the subject, and the practice of conveyancers, I cannot agree with much that has been said, because I do conceive that the law has frequently been decided even in the construction of Acts of Parliament upon what has been the general understanding of lawyers as to the true construction of these Acts of Parliament; and I will instance such a case under the statute of jointure. This House determined in the case of *Drury v. Drury* * that a rent-charge settled on an infant was within the statute (27 H. 8. c. 10. s. 6) of jointure a good bar of dower, not because such was the literal interpretation of the statute, but because such had been the constant practice of conveyancers and others touching the subject, and it was expressly upon that ground that the decision at that time went; and I do conceive that it is of the utmost importance that the House should use its judgment by such a criterion whenever the case occurs, for otherwise all property must be in [461] hazard. It is more especially so with regard to settlements which are ordinarily prepared by those persons who employ their minds in the construction of deeds, and what persons of that description consider to be the law thus acted upon for a length of time, and not disputed in courts of law, should be taken to be the general impression upon the minds of lawyers upon the particular subject, and more particularly it must have reference to that construction which ought to be put upon settlements prepared by persons of that description. How are you to understand the intent of parties in a settlement which really and truly is as much, I may say, the view which the person who prepared it has upon the subject, as the view of the parties; for the parties to a certain degree are ignorant of the words that are used, unless they are advised by the persons they may consult; and therefore the practice of conveyancers upon subjects of this description is, I conceive, a most important consideration, and whenever that has prevailed for a great length of time without impeachment in a court of justice, I take it it ought to be considered as a true exposition of the law.

I have thought it necessary to say so much upon that part of the case, because I think it would be highly dangerous to treat it in the manner in which it has been treated by a learned Judge, and, with great deference, I cannot agree to what the learned Judge said, because I think that practice is most important to the consideration of the case if you wish to preserve property to persons who are in possession, [462] which may be defeated upon the construction of deeds and instruments, unless you give them that construction which lawyers have constantly put on them, though not conformable to the precise rule, supposing the language to be literally understood.

With respect to the case before you, it appears to me that it is necessary only to consider, for the purpose of the final decision of this question, the very words of the instrument. Words used in an instrument of this description must be construed according to the subject to which they are applied. The words here used, and which are in question, are applied to a power over a particular description of property. The power is one power applying to three descriptions of property, and varying according to those three descriptions: First, of property which was under the settlement, let upon leases for life, or lives, or for years determinable upon life or lives: Secondly, of property that consisted of lands not under such

* 3 B. P. C. 492; by the name of the *Earl of Bucks v. Drury*. See Eden's Rep. vol. 2, pp. 39 and 60.

leases, but under rack-rent leases; and thirdly, of mines. Now is not that evidence that the persons who framed this instrument contemplated those three species of property under the different circumstances in which they stood; and what is the manner in which they contemplated that property which was leased for lives, or for years determinable upon lives? what did they mean to give by the power? As to that property they meant to give the same power of enjoyment which the person who had gone before had of the property. By the nature of that property no benefit could be derived from it for a considerable term of years [463] but by renewing the leases from time to time as they dropped, and therefore they gave a power to grant leases of that part, reserving what had been before reserved, in as beneficial a manner in all respects, or more, giving them the power to reserve more, but not to reserve less, not only as to the rent but as to the services. The services in every instance of a particular lease, every thing, was to be reserved exactly in the same manner as it had been reserved by the prior leases. With respect to the second description of property, there the power is to lease at the best and most improved rent, the words are added, "that can be reasonably had or obtained;" does that word reasonably, really, and truly, though perhaps introduced from caution into it, vary the instrument the least in the world? would it not be a sufficient execution of the power if the best and most improved rent had been obtained according to a reasonable estimation of the best and most improved rent? I should consider that, although the rent reserved may not be the very best rent that could be got, yet if it is fairly, and honestly, and reasonably, the best rent that can be reserved, without any fine derived by the person who granted it, that it is a good lease. The word reasonable therefore, though introduced in this part of the instrument, is a word merely of caution, and would not alter in any degree whatever the construction of the power under the settlement.

With respect to the two parts of the property, that which is on leases for lives, or for years determinable on lives, and that at rack-rent, there were introduced [464] words with respect to a power of re-entry on non-payment of rent; the first is expressed in one way, the second in another way; we find different terms used, obviously, as it seems to me, for this reason; with respect to the second description of property, the words are precise; and so as that a clause shall be inserted, containing a power of re-entry for non-payment of the rent for twenty-eight days after it becomes due; the words there are precise; why were they not precise in the other case? for this manifest reason, because the other power referred to existing leases; they referred to that which was the ordinary mode of executing the power with respect to such property; namely, that on the dropping of one life the lease shall be surrendered, and a new lease granted for three lives. The powers which were contained in the former leases of every description were the very powers to which the settlement meant to refer. If in any of the leases that existed there was not a power of re-entry for non-payment of the rent, they meant that such a power should be contained in future, and therefore the words there used are of loose description. I think it is a mistake to suppose the words are precise; the words are not precise; the words are loose; and the great error, as it seems to my mind, in the opinions that have been formed that this lease is invalid, is in the supposition that the words are precise; I repeat they are not precise, they are merely a note or memorandum intimating that a power of re-entry is to be reserved, and if in the former leases such a power has not been reserved, (and probably the person who made the settlement [465] had not an opportunity to look into all the leases, to see the form in which they were made) if such power was not reserved, then there should be such a power reserved, but in any other respect that they should be in conformity to the prior leases. It appears in the case of the lease in question that the power of re-entry was reserved in the former lease, not simply on the non-payment of rent, but it was reserved on the non-performance of the services, a service at the mill, a reservation of a capon. If the engagements were not observed the power of re-entry extended to the whole. Taking it, therefore, that the meaning of the settlement was this, not to give any precise direction with respect to the nature of the power, but to give a general direction in the nature of a memorandum, if I may so express it, that there should be a power of re-entry: is not that the natural construction of the words, and is not the construction which is attempted to be put upon the words a forced construction, an attempt to make them more strict than they really are?

Suppose a contract was entered into between two persons, the one having the pro-

perty, and the other willing to take that property, and that contract was so executed as that it purported there should be in the lease to be granted under that contract a power of re-entry for the non-payment of the rent, how would that contract be executed if it was to be specifically performed under a decree of a court of Equity? would a court of Equity have ever thought they were compelled under the terms of that contract, by those words to require that the power of [466] re-entry should be a power of re-entry absolutely upon the nonpayment of the rent at the day, and without the common and ordinary provision that it should only be in case there was not a sufficient distress? would not those words be construed by what was the common and ordinary practice? The common and ordinary practice certainly is to frame a power of re-entry in the manner in which the power of re-entry in this lease is framed. What then must have been the mind of the person who prepared this settlement, the conveyancer who prepared that settlement, when he inserted in the settlement that a power of re-entry for nonpayment of rent should be reserved, without expressing more? It must have been in his mind, according to the usual habit of persons of that description, and you must take it to have been in the mind of the parties to the settlement, (for it is the mind of the person who prepares the instrument that ought to give the construction of the instrument;) you must take it to have been in the mind of the person who prepared the instrument that this was a species of note or memorandum which would have been more fully expressed in the lease to be executed.

I conceive, therefore, that in this case it must be taken to be the intention of the parties to the instrument not to be precise with respect to the terms in which the power of re-entry was to be reserved, but merely to give a note signifying that a power of re-entry should be reserved for nonpayment of rent, meaning thereby that that power which was contained in the former leases, should be inserted [467] wherever that power did exist in the former lease of the same lands; but where no such power was reserved (if that was the case) then that a power such as would be a reasonable power in such a contract as I have mentioned should be inserted in the lease. If a power of re-entry was before reserved, the words were not necessary, because the rent was to be reserved in as beneficial a manner, and therefore if there was a power of re-entry in the former lease, that same power of re-entry, and no other, could be reserved; and therefore I do conceive that when you come to apply your minds to this particular case there really is no ground of doubt, because all the doubt that has been suggested upon the subject has been founded upon a construction of the words of this instrument, which I submit they do not by any means bear; they were not intended, as it has been supposed they were intended, to express precisely and positively what should be done; they were intended to refer to the leases that had been previously executed of the same property, that the rent should be reserved in as beneficial a manner in every respect as before; and if there was an exception in the former leases of the power of re-entry, that a power should be given, that is, such a power as a Court of Equity would insert in a lease, under a contract, in these loose words directing a power of re-entry to be inserted in the lease. I take it there can be no doubt whatever that upon a contract of that description so would a Court of Equity act.

But suppose this had not been a question before a Court of Equity, but before a Court of Law: [468] suppose the person who entered into that contract had executed a lease, with a power in the terms in which the power is conveyed in this case; or suppose, on the contrary, he had executed it with a power of re-entry upon nonpayment of the rent at the day, and the question had been whether in either of those cases the contract had been properly executed, or not, if the lessee had in one case objected, you have made it too strict, not according to the intention of the parties in the contract; if on the other hand it had been made in the present form, and had been objected to, that the lease was invalid, and the question had come to be agitated in a Court of Law, would a Court of Law have differed from a Court of Equity on the subject, if they had inquired in what manner will a Court of Equity execute such a contract as this? in what manner would a person employed as a conveyancer in the habits of business have framed a lease under such a contract? and then taking it to be a proper or an improper execution of the contract according to that which the habits of men engaged in the business would have led them to consider proper.

Upon the whole, therefore, it appears to me that the lease is a valid lease, because

it is made, as it is found by the special verdict, in conformity to the other leases; and I consider the words of the settlement referring to those leases to have the effect of saying in this particular case,—if in any of the renewals of a lease, where there had been no power of re-entry in any particular case of that description, the question should arise how that power of re-entry was to be reserved, that it was to be reserved according to that which had been the practice of the owner of the estate in letting leases of other parts. Because in a case where the power of re-entry was actually reserved in the former leases, for the purpose of making them conformable to the former leases, which it was evident was the manner intended, it must be made conformable to a former lease, but if there was any lease in which a power of re-entry had been omitted, then it could not have reference to that lease; but the way in which a court ought then to act would have been to see what was the manner in which leases of property of the same description, under the same settlement have been granted, reserving a power of re-entry; and that that would have been deemed a sufficient execution of the power under the settlement; and that the words of the power ought not to be construed as meaning that precise and positive reservation of a power of re-entry which has been contended for in this case.

Therefore it is upon the particular words of this instrument, the settlement of 1757, and not upon any general view of the case, that I conceive that this lease ought to be supported, and that the judgment of the Exchequer Chamber should be reversed, and the judgment of the King's Bench affirmed.

Ordered accordingly.

[470]

IRELAND.*

COURT OF CHANCERY.

CHARLES WARD,—*Appellant*: ROBERT HARTPOLE,—*Respondent*.

[*Mews' Dig.* vii. 236; viii. 863; x. 1650. On point as to execution of power, discussed in *Muskerry v. Chinurry*, 1835, 11b. and *God. t. Sugd.* 185 *passim*. On point as to frauds, see *Edwards v. Meyrick*, 1812, 2 Ha. 60.]

G. H., a tenant for life in a marriage settlement, is thereby empowered to make leases for lives of lands in Ireland, at the best rent, without fine, and a power was also given, with the consent of trustees, to raise any sum of money. The trustees, in pursuance of the power, consent that G. H. should, by mortgaging all or any part of the lands, or in any other manner he should think fit, raise any sum of money not exceeding £5000.

Under this power and consent G. H., in consideration of £300 and a rent, grants to V. W. part of the lands in settlement upon a lease for lives. The grant, and a receipt expressing that the £300 was raised under the power and consent as part of the £5000, were duly registered.

Before, and at the date of this grant, V. W. was the solicitor of G. H., who was involved in litigation, and in distress.

The rent, with the premium calculated at six per cent, were considerably short of the annual value of the lands.

Upon a bill, by a tenant in remainder under the settlement, to set aside the lease, and on appeal, held, that the lease was a good execution of the power to raise money; but void, as obtained by a solicitor from his client, in circumstances of embarrassment, and at an under-value.

William Hartpole, deceased, being seised of lands in Queen's county, under a grant from the Crown on the 5th and 6th of December 1707, mortgaged the

* In this case the lease, having been made by appointment under a power, was disputed on two grounds: first, that it was not conformable to the power; secondly, that it was obtained by the undue influence of an attorney over his client, and at an under-value. The decision was against the validity of the lease, on the latter ground. On the question of conformity to the power the lease was held valid.

premises to Thomas Tilson for £3000, which were already subject to a prior mortgage for £2394 and to other encumbrances to the amount of £7000 and upwards. William Hartpole died in 1713, leaving Martha his widow, and George his only son, an infant.

[471] Martha married Maurice Cuffee, who was appointed guardian to the infant, and resided in the mansion-house, and managed the estate.

In 1731 George Hartpole levied a fine.

On the 11th of March 1731 marriage articles were executed between George Hartpole and Mary Wemys, containing a power reserved for George Hartpole to make leases of the premises, or any part thereof, for any term or number of years, or for one, two, or three lives certain, or renewable for ever, at the best and most improved rent, without fine: such leases to commence in possession and not in reversion; with power also for George Hartpole, with consent of Henry Coddington and James Agar (the trustees) and the survivor of them and their heirs, and of Patrick Wemys, (father of Mary Wemys) during his life, and after his decease, with the consent of his eldest son Henry Wemys, to raise any sum or sums of money for such uses and purposes as he George Hartpole should think fit, so as not to prejudice the jointure thereby agreed to be provided for Mary.

In 1731, shortly after George Hartpole's marriage, Vere Ward, the father of the Appellant, who was a practising attorney of the Court of Exchequer in Ireland, went to live near the residence of Mr. Hartpole. An intimacy commenced between them, and Mr. Hartpole, who was then involved in law-suits instituted against him for debts due from his father, and charged upon his estate, employed Ward, as his agent to defend several of these suits, and to adjust and settle various accounts and demands with his tenants and others: by which means Ward became acquainted with Hartpole's situation, the circumstances and value of his estates, and the extent of his power under the marriage articles.

On the 19th of December 1732, George Hartpole agreed to demise to Vere Ward the lands of Ballyharmer, etc. for three lives (renewable for ever) at £80 per annum.

In the year 1735, George Hartpole applied to Patrick Wemys, his wife's father, and to Henry Coddington, the surviving trustee named in the marriage articles of the 11th of March 1731, (James Agar, the other trustee, being dead) for liberty to raise a sum of money pursuant to the power for that purpose contained in these marriage articles.

Patrick Wemys and Henry Coddington, the surviving trustees in the said marriage articles, on the 29th of November 1735, [472] executed a deed to George Hartpole, whereby, after reciting the marriage articles of George Hartpole and Mary Wemys, and the power and uses therein mentioned, and also reciting that James Agar the said trustee was dead, and that the said Henry Coddington survived him; and that the estate of George Hartpole was much encumbered with debts, which could not be discharged without raising money for that purpose, with the consent of Henry Coddington and Patrick Wemys, they, Henry Coddington and Patrick Wemys, in pursuance of the power reserved to them by the said articles, did at the request of George Hartpole consent that he should and might, by mortgaging all or any part of his lands in the Queen's county, or in any other manner he should think fit, raise any sum or sums of money not exceeding £5000 in the whole, which when raised was to be by him applied towards discharging the debts affecting his estate, and for such other uses and purposes as he should think proper, which deed or instrument was duly registered at Dublin.

Vere Ward in the year 1735, continuing to practise as an attorney, was occasionally employed by Mr. Hartpole; but he had another solicitor who was principally employed by him. About this time Vere Ward was induced by Hartpole to build a house on part of his estate: and the lands of Acregallen (now Hollymount) containing about thirty-three acres, being untenanted, were proposed as an eligible situation.

About the months of February or March 1735, George Hartpole being desirous of raising a sum of £300, part of the £5000, pursuant to his power and the consent of the trustees, he and Vere Ward came to an agreement for a lease of the lands of Acregallen, etc. containing about 250 acres.

On the faith of this agreement Vere Ward proceeded at a great expense to build a dwelling-house and several outhouses, to form a garden, and made many other valuable improvements on the premises.

By deeds of lease and release, bearing date the 12th and 13th days of November 1736, George Hartpole, in consideration of £300 paid by Vere Ward, granted, bargained, released, and confirmed unto Ward, his heirs and assigns, all the before-mentioned lands for the lives of Vere Ward, Lucy Ward his wife, and Nicholas Ward his son, and the survivors and survivor of them, with a covenant of renewal for ever, on the fall of each and every [473] life or lives, at the yearly rent of £42, payable half-yearly, clear of all taxes, quit and crown-rent only excepted. The lease and release were registered in 1736.

George Hartpole on the same 13th of November, gave the following receipt for the sum of £300: "I, George Hartpole, of Shewle, in the Queen's county, esquire, do hereby acknowledge to have received from Vere Ward, of Knockbegg, in the said county, gentleman, the sum of £300 sterling, being the sum mentioned in the said deed of release, by me this day executed to the said Vere Ward, of the lands of Bohernesyre, and other parcels of land therein mentioned, for three lives, with a covenant of renewal for ever, at the yearly rent of £42 sterling; which said sum of £300 I do acknowledge to have been by me raised and taken in part of the sum of £5000, which I am empowered to raise on my estate, by virtue of a power contained and reserved in my articles of marriage, and a consent for that purpose, bearing date the 29th day of November 1735, under the hands and seals of Patrick Wenys, esquire, and Henry Coddington, esquire, trustees in the said articles mentioned," which receipt was registered in the words above stated.

This sum of £300 was the first sum raised by George Hartpole under the power in his marriage articles.

On the 25th of January 1755, Vere Ward conveyed his interest to Robert Birch, in certain leases, dated in 1745 and 1750, which had been substituted for the lease of 1732.

George Hartpole died on the 4th of December 1763, leaving the Respondent, Robert Hartpole, his eldest son and heir, a minor.

Robert Hartpole having attained his age of twenty-one in Hilary term 1765, levied a fine, and suffered a recovery of the lands.

On the 24th of April 1765, Robert Hartpole filed a bill in the Court of Chancery in Ireland, against Vere Ward, Robert Birch, and others, stating among other things the several matters aforesaid, and praying that the several sales therein mentioned to have been made by George Hartpole might be set aside, as not warranted by the power in his marriage articles; and that the leases made to Vere Ward might also be set aside, as having been obtained by fraud and at great under value; and that the other leases therein mentioned to have been made by George Hartpole might also be set aside, as having been obtained by fraud and at under value; and that the deeds of purchase and leases afore-[474]-said might be brought in to be cancelled, or disposed of as the Court should direct; and that Robert Hartpole might be decreed to the mesne rates and profits thereof, severally from the death of George Hartpole, his father.

On the 18th of November 1765, Vere Ward put in an answer, stating among other things, that the fines paid on the leases were applied to discharge encumbrances affecting the estates of the Respondent; that George Hartpole had power to make the leases upon fines; that the rent reserved was the full value; that he had expended large sums in the improvement of the premises, and that the leases were fairly obtained without fraud, misrepresentation, or improper influence.*

Vere Ward on the 30th of May 1771 filed a cross-bill against Robert Hartpole, stating the several matters in the answer to the original bill, and particularly stating that Lucy Ward, one of the lives in the leases, was dead; and that Vere Ward soon after her death had tendered the rent and fine, and a deed for renewal, pursuant to the covenant contained in the lease of 1736, by inserting the life of the Appellant, Charles Ward, instead of Lucy Ward, which Robert Hartpole refused to execute, or to receive the said fine; and further alleging that forcible possession of the lands demised had been taken by the Respondent, and rents improperly received from the under-

* An amended bill and answers to it were filed, relating chiefly to the age of George Hartpole when he executed the articles of settlement, but raising no question material to the points on which the case finally was adjudged. These pleadings are therefore omitted.

tenants : prayed that the Respondent might be obliged to confirm all the leases made by George Hartpole, and deliver up the lands of Bohernesyre, and account with Vere Ward, and pay him the sum of £167 10s., and such other sums as he, Robert Hartpole, had received, or should receive thereout, and execute a renewal of the lease of the 13th of November 1736, and the leases assigned by Vere Ward to Robert Birch. And that in case Robert Hartpole should refuse the same, he might set forth a full account of the personal estate of George Hartpole, and how the same had been disposed of, and whether he died intestate, or made any will, and who acted as executor or administrator : and also what debts affected the real estate of William Hartpole and George Hartpole ; and which of them had been discharged by George Hartpole or his guardians, and what [475] assignments had been executed, and that all proper accounts might be taken.

The Respondent, on the 24th of February 1770, put in his answer to the cross-bill, thereby stating a grant of the premises in question from King Charles the Second to William Hartpole, his grandfather, and his heirs male (*Quære*, heirs male of his body), and that he died in 1713, leaving George Hartpole, his son, an infant, who became seised, and that he died in 1763, leaving him, the said Robert Hartpole, an infant, who became entitled to an estate-tail in the premises. He admitted that George Hartpole, his father, obtained the power before stated from the trustees to raise £5000 by leasing or otherwise ; and that by the instrument of the 19th of December 1732, Vere Ward obtained a demise from George Hartpole, for lives renewable for ever of the lands therein comprised, and admitted the leases of the 13th of March 1745, and 2d of May 1750 : and admitted that the demise of 1732 was surrendered by Vere Ward : on the execution of the leases of 1745 and 1750 : and by such answer admitted that V. Ward had made several valuable improvements, and plantations, as in the cross-bill stated, to a considerable amount : and he also admitted the lease of 1736, and that the lands were not then in an improved state, but were encumbered with briars, thorns, and stumps of trees. He also admitted that on the death of Lucy Ward, Vere Ward had tendered the rent and a deed of renewal, pursuant to the covenant in the said lease, and the fine for renewal. And the Respondent by such answer admitted that Vere Ward did not owe any rent for the lands held by Thady Moore, but that the Respondent had not only received all the rents to May 1767, but also £167 over and above : and thereby admitted he refused to renew Vere Ward's lease : and that his father made his will and appointed executors, who had declined to act, and that no person had administered : that his father left some personal estate : and that his father and his guardians had paid judgment and other debts affecting his real estate : and he set out a schedule of his father's personal estate, and into whose hands it had come, and how it had been disposed of : and admitted that he had to that time administered his assets.

Vere Ward replied to the answer to the cross-bill, and the Respondent replied to Vere Ward's answer to the original and [476] amended bills, and issue being joined in both the causes, witnesses were examined on both sides to the points in issue* ; publication passed in both the causes, and they came on to be heard before the Lord Chancellor of Ireland on the 28th of January 1774, and on several other days ; and on the 25th of February 1774, by decree in the causes, bearing date the same day, it was ordered and decreed, That the Respondent's original bill should be dismissed as to the defendant Robert Birch, without costs, by consent ; and as to so much of the said bill as sought to set aside the lease of the 13th of November 1736, it was decreed that the Respondent was entitled to relief : and that the said lease should be set aside : and that the Respondent was entitled to an account of the profits of such parts of the lands in question as Vere Ward was in possession of from the time of the death of the Respondent's father ; and it was referred to one of the Masters of the said court to take the said account, on the taking of which the parties were to have all just allowances. And it was thereby further ordered and decreed, That an injunction should be awarded in the original cause, to put the Respondent in possession of such part of the lands as were not then already in his possession, but not to issue as to the house, garden, and demesne, until the 1st day of then next Easter Term, or further order, but without prejudice to any remedy which Vere Ward might have

* The depositions are not inserted, because all the material evidence is noticed by Lord Mansfield, in moving judgment.

against the representatives of George Hartpole, or his covenant in the said lease of the 13th of Nov. 1736; and that the Respondent should have his costs in the original cause to be taxed by the Master: And it was thereby further ordered and decreed, That the cross-bill should be dismissed with costs, not only as to that part which sought to have the lease of 13th of Nov. 1736 confirmed, but also that part which sought a renewal thereof; and as to such part of the cross-bill as sought a satisfaction out of the personal assets of George Hartpole, it was ordered that the same should be also dismissed, *no personal representative of George Hartpole appearing before the Court.*

Vere Ward, after the pronouncing of this decree, and on the 1th of April 1774, died intestate, whereby the suit, decree, and all the proceedings, became abated.

[477] Nicholas Ward, the eldest son, and next of kin of Vere Ward, became his administrator.

The suit, decree, and proceedings were revived by an order of the 8th of June 1774. Nicholas Ward, after exhibiting the original appeal, died before the hearing, and the Appellant, Charles Ward, as his heir at law, devisee, and residuary legatee, took administration, with his will annexed, and also administration *de bonis non*; and the appeal of the original testator was revived by the Appellant Ward.

The case was argued for the Appellant by Mr. Wedderburne, (then Solicitor General) and Mr. Dunning, on the following grounds:

1. Because *from* the Respondent's statement in his original and amended bills of the time of his grandfather's death, and the age of his father at that time, it was impossible his father could have been of full age at the time of his entering into the articles of the 11th of March 1731, and therefore he could not be bound by those articles.

Supposing George Hartpole to have been properly bound by the articles made on his marriage, yet as he had thereby a power to let leases of his estates comprised in those articles in the manner therein mentioned, and had also by those articles a power to raise any money thereon, with the consent of the trustees, or the survivor of them, and his wife's father, or if he should be dead, her brother; and as the surviving trustee and his wife's father executed such instrument as above stated, signifying their consent that he might by mortgaging his estate comprised in such articles, or in any other manner he should think fit, raise any sum not exceeding £5000, such lease so made by such deeds of the 12th and 13th of November 1736, in consideration of £300 really paid by Vere Ward, ought to be considered as a good lease, as being a proper execution in part of the power for raising money, so far as to raise £300 in part of the £5000 he was so empowered to raise, and the receipt given by George Hartpole shows that was the intention of taking such sum of £300.

It is objected that as there are two distinct powers contained in the marriage articles,—one for letting leases of estates therein comprised, and the other for raising money on those estates,—it was to be presumed that it was not intended that the power for [478] raising money should be executed by letting leases, the power for letting leases only enabling George Hartpole to let such leases at the best improved rents, without taking any fines. And the lease in question having been made in consideration of £300, would not be a good lease within the power for making leases; and as being a lease it would not be a good execution of the other power for raising money.

But it does not at all follow that because the power of letting leases of the estate was in the common form, they should be leases in possession and not in reversion, and should be let at the most improved rents without taking fines, therefore the other power for raising money, which was general, and only limited as to the mode of executing it, to be with the consent of the trustees or the survivor and the father, or if he should be dead, the brother of the lady, might not with their consent be executed for raising such money, either by letting parts of the estates for terms of years, or selling or mortgaging any part of the estates, or in any other manner whatever; and as the surviving trustee and the lady's father did, by the instrument of the 29th of November 1735, consent that George Hartpole might *by mortgage, or in any other manner he should think fit, raise any sum not exceeding £5000*, it was presumed he had thereby power to raise any part of it by taking a sum of money for letting leases, or in *any other manner he should think proper*; and that therefore the lease in question, made in consideration of £300, being a fair lease, and made

for a fair and valuable consideration, is a good execution of part of that power, and as such, a good and effectual lease.

It is further objected, that the £5000 which George Hartpole was so empowered to raise was all actually raised by mortgage of the estate; and therefore the £300 raised on making such lease is more than he had power to raise.

But it appears by the pleadings in the cause, that the fact of the money having been raised by mortgage was not properly put in issue by such pleadings, and that therefore the evidence to it ought not to have been read; and when such evidence was read, it thereby appeared that the money was not so raised by any such mortgage till the year 1742, which was six years after the lease in question was made; and therefore, if the lease in question was a good lease within the power for raising money at the time of making it, nothing that was or could have been done afterwards by any of the parties could any ways prejudice or invalidate that lease. And the rather that such lease and the receipt for £300, which showed that it was made in pursuance of the power for raising money, were both registered; so that any person afterwards advancing money under that power might see that such sum of £300 had been then already raised in part of such £5000; and there was the more reason to support the lease in question in a court of equity, as the same was really made for a good and valuable consideration. And although the Respondent in his bill charged that it had been obtained by fraud and undue means, and at an undervalue, yet he had not attempted to support such charges by any proof. And it appeared on the contrary, by the most respectable evidence on the part of the Appellant, that the estate at the time of making such lease was in a very bad condition; and that the lease was made for a good and valuable consideration; and that the rent and the consideration paid for such lease was a full and fair value and consideration for such lease. And as the Respondent's grandfather was entitled to the estate comprised in such lease only under a grant from the Crown to him and the heirs male of his body; and he had not at the time of granting such lease, nor for several years afterwards, any son born; so that if he died before he had a son the estate would have reverted to the Crown. He had no other way of raising any money under such power than by granting leases of estates at rents something below the full value, and taking considerations for such leases, as nobody would then have lent any money on a mortgage of such estate under so precarious a title; and it appeared that he did not raise any money on any mortgage of the estate till six years after granting such lease, and after he had issue male.

If the lease in question had not originally been a good lease, yet as the Respondent after the death of George Hartpole his father, and after the Respondent had levied a fine, and suffered a recovery of the estate in question, actually received rent of the premises from Thady Moore, on Vere Ward's account, in the same manner as the Respondent's father had done, and Thady Moore was then tenant of part of the premises to Vere Ward, and paid the rent to the Respondent up to the 1st of May 1767, which is admitted by the Respondent's answer; and also £167 10s., over and besides the rent incurred to that time: the Respondent ought to be considered as having thereby confirmed that lease, and as being thereby barred and estopped from impeaching such lease, and consequently ought to renew the same according to the covenant therein contained.

If the lease in question could not be supported by the powers in the articles of the 11th of March 1731, and the same was on that account to be set aside in a court of equity, yet as the same was not, nor could be set aside on account of any fraud, or as having been granted at any undervalue, Vere Ward ought to have had an allowance for the pecuniary consideration he paid for such lease, and the monies he laid out in buildings and improvements on the premises, for which no provision was made by the decree.

The cross-bill ought not to have been dismissed on account of no personal representative of George Hartpole being before the Court; for as Vere Ward was certainly, in case the lease in question was to be set aside for want of George Hartpole having power to make it, entitled in a court of equity to have satisfaction out of George Hartpole's estate for the money paid by Vere Ward for such lease, and for the money he laid out in buildings and improvements upon the estate; and as it appeared by the Respondent's answer to the cross-bill, that although he was not the legal personal representative of his late father, yet he had actually possessed and administered his

father's personal assets in the same manner as if he had actually been the personal representative; so that such personal representative, if there had been one, would only have been a proper party in point of form for taking the account, which in substance must and could only have been taken against the Respondent, who had alone possessed the assets. The Court might have directed such account to have been taken against the Respondent, giving Vere Ward leave to bring a proper legal representative of George Hartpole before the Master to substantiate the proceedings. Or the Court might have ordered the case to have stood over, with liberty to Vere Ward to have amended his bill, and brought proper parties before the Court, upon his paying the costs of that day's hearing.

For the Respondents, Mr. Thurlow (Attorney-General) and Mr. Skinner. (The case was also signed by Mr. Fearne.)

[481] It is in proof that George Hartpole was of age at the time of entering into his marriage articles in March 1731, and consequently he was bound by them. Under these articles he became only tenant for life of the lands leased by him to Vere Ward in 1736, without any other power of granting leases to exceed his own life than what was reserved to him by these articles. The leasing power reserved to him by these articles was confined to the granting of leases at full and improved rents, reserving no fine, and to commence in possession, and not in reversion. The lease granted to Vere Ward in 1736 had no one of these requisites to give it any validity; it was a lease granted at a considerable undervalue upon a fine of £300, and not to commence in possession, but in reversion, there being prior leases of the same lands then subsisting. And to contend that a lease by a tenant for life, so totally inconsistent with and repugnant to the only power of leasing reserved to him, can be supported against those in remainder, is in effect to maintain that to reserve a leasing power to a tenant for life is nugatory, and that such tenant is neither restrained nor benefited by it, but may grant what leases he pleases without regard to such power or its restrictions.

But it is alleged that the lease in question was not granted in pursuance of the power of leasing reserved to George Hartpole by his marriage articles, but in exercise of the power contained in the same articles for enabling George Hartpole, with the consent of the trustees, to raise money for such purposes as he should think fit: that George Hartpole accordingly obtained the consent of Patrick Wenys and Henry Coddington, by the instrument or deed of the 29th of November 1735, for raising £5000; that the lease to Vere Ward was made in pursuance of this power and consent; and that the fine of £300 taken upon that lease was raised as part of the said £5000. And in support of this, we are referred to a receipt said to have been given by George Hartpole to Vere Ward for the said £300 fine, expressing that the said fine was raised and taken as part of the £5000 mentioned in the said deed of consent; and (what is more extraordinary) this receipt itself appears to have been registered.

It plainly appears that the lease in question was not intended or supposed to be made in pursuance of the power given to George Hartpole for raising £5000, because that power is not at all mentioned or referred to in that lease, nor does the lease [482] itself afford any the most remote suggestion of an intended or supposed execution of that power: an omission which it is impossible to account for, if that lease was really intended as an execution of that power, and to derive its validity from it. As to what is mentioned in the receipt, it appears to have been a contrivance of Vere Ward to give a false colour to the transaction. The unusual artifice of registering a receipt of this nature seems plainly calculated to answer a purpose which a transaction fair and justifiable upon the face of it stands in no need of. And indeed what is stated in the Appellant's answers and cross-bill, that the lease of 1736 was granted in pursuance of an agreement of 1735, seems to put an end to the pretence of this lease being made in execution of the power required by the deed of consent. And there is another very material circumstance, which seems to prove that this fine of £300 taken upon the granting the lease to Vere Ward could not have been taken by George Hartpole himself as any part of the £5000 which he was so empowered to raise, which is, that George Hartpole did actually raise the sum of £5364 in pursuance of that power, by three several sales of different parts of the estates over which such power extended. Now this fact leaves no room at all for any constrained construction to bring the £300 fine taken upon Vere Ward's lease within the descrip-

tion of any part of the £5000 raised by George Hartpole in pursuance of his power. The whole of that sum, and more, having been thus raised accordingly in a manner more direct, and pursuant to that power, than the extraordinary mode of granting leases upon fines.

The power for raising £5000 could not enable George Hartpole to grant the lease in question: the leasing power contained in the marriage articles expressly restrained George Hartpole from granting any leases at an undervalue, or upon fines, or in reversion. Now is it possible to imagine that the power immediately following was intended to reduce the preceding power to a nullity by removing these restrictions, and establishing those very leases which were so expressly provided against in the leasing power? Powers for raising money are usually executed by sale or mortgage of the lands, and are not supposed to impart a leasing power, which is always provided for by a distinct and very different clause. The manner in which the execution of the power is guarded by the different consent of trustees, mani [483]-fests the intention to prevent the issue or those in remainder from being unreasonably or unnecessarily prejudiced by the execution of it. Such intention is answered by the usual mode of raising money by sale or mortgage, because in those cases the value of the estate is diminished no further than to the amount of the sum raised by the execution of the power; but if the power for raising £5000 enabled George Hartpole to do it by leasing the lands upon fines, it is evident that he might, in order to obtain an immediate supply of the £5000, have prejudiced the estate to the amount of £20,000 or upwards, by procuring the desired fines upon leases, without reserving one fourth of the annual rent which the lands were fairly worth, after allowing for the fines paid upon such leases. But it cannot be imagined that a latitude of power which might eventually prove so prejudicial to the issue could ever be consistent with the obvious intention of marriage articles, which were meant to secure a provision for such issue.

It is insisted, that if the lease granted to Vere Ward in 1736, did not pursue either the leasing power, or the power for raising the money, and is therefore to be set aside, yet the Appellant is entitled in equity to be repaid the fine he originally paid for the lease, and also to be allowed for the money he has expended in real improvements on the lands.

Whatever attention might have been paid to a claim of this nature in behalf of a lessee taking lands at a fair and full value, without notice of marriage articles, and entirely innocent of any fraudulent or undue practices in the obtaining his lease, it certainly cannot be urged with any degree of propriety or weight in the present case, where it is in full proof that Vere Ward had notice of the marriage articles at the time of obtaining the lease, and then and for some years before acted in the capacity of law-agent to the lessor, and for part of the time received his rents, and managed his estate, where it appears that he availed himself of the advantages of his confidential situation to impose upon his employer, and prevail upon him, under the pretence of assisting him in his pressing circumstances, to grant him the lease in question at a very considerable undervalue.

At law it is clear the Appellant would be entitled to no compensation or allowance in respect of the insufficiency of a title of which his father had notice at the time of taking the lease. And it must be submitted that for an agent to take advantage of [484] his intimacy and influence with the person employing him, and to avail himself of the opportunities afforded him by his situation, as well as of the necessities of his employer, to obtain from him at a great undervalue a lease of part of the lands intrusted to his agency, appears to be such an abuse of confidence, such a flagrant breach of trust, as can give no claim to the favour, encouragement, or countenance of a Court of Equity.

The case having been argued on the 24th, 25th and 31st of January 1776, the judgment was moved in the House of Lords to the following effect, by

Lord Mansfield*: The Bill upon which this decree was made was brought by the Respondent against the Appellant's father, Vere Ward, to set aside a lease granted to him by the Respondent's father, George Hartpole, of certain lands in the Queen's County in Ireland, in consideration of a fine of £300 and a rent of £12 a year, and the grounds upon which it is sought to set aside the lease, are—

* For this Note of the Judgment I am indebted to Mr. Palmer of Gray's Inn.

"1st, That George Hartpole was only tenant for life of the lands in question under his marriage articles, with power 'to make leases for any term of years, or for one, two, or three lives certain, or renewable for ever, *at the best improved rent without fine*. Such leases to commence in possession, and not in reversion.' That the lease in question was granted on terms contrary to that power, and that therefore it is void.

"2dly, That this lease was obtained by fraud, imposition, and misrepresentation of the value."

The Appellant's father by his answer insists that the lease is good under the power reserved to George Hartpole by the marriage articles, enabling him "*with the consent of the trustees, to raise any sum or sums of money for such uses and purposes as he should think fit*." And the subsequent instrument executed by the trustees by which they consent "that he should raise the sum of £5000 by *mortgaging* all or any part of his estate, *or in any other manner he should think fit*." He says, that the lease was granted at the full value, and denies that he made use of any fraud or misrepresentation in obtaining it.

[485] The first question in this case is, whether the lease now impeached, as having been granted upon a fine, is at all within the substance or meaning of the power for raising money, or can be considered as any execution of it?

Powers, especially those in family settlements, being considered as reservations of so much of the absolute dominion of the estate, are to be construed equitably, and most favourably for the grantee; and therefore, where through mistake or inadvertency the several circumstances required by a power are not strictly and formally complied with, equity will interpose and supply the defect. The power indeed cannot be exceeded; but within the extent and compass of it, a Court of Equity will aid all defects of circumstances, and even where powers have been exceeded the execution is not absolutely void; for the court will correct the excess, and supply the execution as far as the power warrants.

In this case I am strongly inclined to think the decree proceeded chiefly on the ground of the lease not being warranted by the marriage articles. It is certain that the lease is not within because not made according to the power of *leasing*; but, upon the true construction of the power to raise money, and the consent of the trustees, and considering the known and long-established usage in Ireland, I think that this mode of *fining-down* might be one way of raising the money: the articles reserve a power to make leases for any term of years, or for one, two, or three lives certain, or *renewable for ever*; for a notion then prevailed in Ireland that granting leases for lives renewable for ever was a very advantageous manner of letting lands; it has however been found exceedingly detrimental and inconvenient.

The power to raise money enables George Hartpole to raise *any sum* for such uses as he should think fit, with the trustees consent: the trustees give their consent, and authorize him to raise £5000, by mortgage or otherwise, as he should think fit. Now, I am of opinion that by the terms of this power and the trustees consent he was clearly warranted to raise it by fines. The power is very remarkable and very uncommon; he is enabled to raise *any sum of money* for such uses and purposes as he should think fit, with the trustees consent. There is no sum mentioned; no particular mode prescribed for raising it; no restriction whatever as to the execution of the power, but that it should be *with the* [486] *trustees* consent. Now this power operates as an exception, and so far as respects the execution of it, the power of leasing does not extend or interfere. When the power for raising money is satisfied, then indeed all leases afterwards made must be in conformity to the terms of the power of leasing, but those made in execution of the power of raising money cannot be affected by it. The trustees, as I have observed, tie the tenant for life down to no particular mode, but leave it to his discretion to raise it by mortgage, or in any other manner as he should judge proper; fining-down the rents was one of those other ways; selling was another; there was no way of raising money but by mortgaging, fining-down, or selling; he was left at his option. Great part of the lands he sold; they are quietly enjoyed, and no question is made as to the validity of those sales; why then might not money be as well raised by fines? It can make no difference by what means it is raised provided the value is given. I am clearly

of opinion that it might be raised by *finer*, and that so far the lease is a good execution of the power under the trustees consent.

There was an argument made use of that the whole money and more had been raised by *sale* of the lands, and consequently that the £300 paid for the lease could not have been raised as part of the £5000. But this will not hold, for that money was not raised for some years after granting the lease, and the lease takes notice that the £300 was raised as part of the £5000; and if the lease was good at the time of making, nothing done afterwards can invalidate it, if then the lease was within the power.

The next question is, whether there was any collusion or connivance between George Hartpole and the Appellant's father in making this lease, or any practice or fraud made use of by Ward in his relation of agent to the Respondent's father in obtaining it.

If there were any collusion between the tenant for life and the lessee, or any undue practices on the part of the latter to the prejudice of those in remainder, that would afford a sufficient ground for setting aside the lease, but it does not appear there was: there is no proof of it; the fine taken is no secret; it is rected in the body of the deed, and in the receipt it is mentioned to be raised as part of the £5000 under the trustees consent and the [487] power. It is a strong circumstance also that the receipt is registered: for though this is taken notice of on the part of the Respondent as a contrivance to answer some unfair purpose, yet here it was highly proper, in order to show that the sum of £300 had been raised in part of the £5000; there is no evidence of any misrepresentation; and it is not pretended that the Respondent's father was a weak extravagant man, liable to be easily misled or imposed upon, or that he did not apply the money thus raised to a good use; on the contrary, it appears that he very laudably applied it in paying off debts and discharging encumbrances to a very large amount, which descended upon him with the estate.

The last question, therefore, is, whether there was any fraud in this transaction as to the rent reserved by the lease? for if there was, it being to the prejudice of the heir, or person next in remainder under the articles, the lease would not be good as against the Respondent.

Now with respect to the value of the lands there is a good deal of contradictory evidence, and if the decree turned upon that point further inquiry might be ordered to ascertain the value: an issue could be directed. But I am unwilling that the parties should continue any longer in litigation, especially as upon the most attentive consideration of the evidence I am of opinion that sufficient appears to show that the rent reserved upon this lease was not the full value. From the evidence of one of Ward's own witnesses, and by his own accounts, as stated in the Appendix to the Respondent's case (which seems to be accurate,) it appears most clearly that the lands were let at an undervalue.—[Here his Lordship stated the calculation of the value of the lands from the Appendix, observing, that six per cent. should be computed for the interest of the fine of £300, that being the legal interest in Ireland, instead of five per cent, which was only allowed in the calculation.]—The account of Ward himself proves that the lands were worth £80 17s. 8d. a year, whereas the rent reserved by the lease, together with the interest of the fine at six per cent, is only £60, so that either the fine was inadequate, or the rent considerably below the value. If then the lease was not taken at the best improved rent, but at an undervalue, it ought not to stand, especially if any advantage [488] was taken of George Hartpole's situation, of his necessity and distress in obtaining this lease, equity will relieve against it. That such an advantage was taken I am strongly inclined to believe; and what weighs with me is this.—the Respondent's father was a gentleman, like many others, involved in a great number of law-suits and difficulties (see *Kenrick v. Hudson*, in the House of Lords, 1773), and his affairs were exceedingly embarrassed: Ward was his agent and attorney, and consequently well acquainted with his situation, and seems to have been very ready to take advantage of it. This appears from a remarkable letter of Ward to Hartpole, dated the 8th November 1733, which is proved in the cause, and stated in the Appendix to the Respondent's case: in this letter Ward recommends "Fortitude to Mr. Hartpole in the gloomy appearance of his affairs, and vigour in opposing the

various suits and difficulties he was engaged in:"—takes notice of his own conduct, and the expense of the suits, and desires to know "Whether Mr. Hartpole would have the accounts between them appear in the shape of bills of costs, or fix a *certain annual sum* in lieu thereof." What, an attorney requires a *certain annual sum*? Why not his bill? But your Lordships will find he did not forget his bills. In one bill, amounting to £75 11s. is this article, "For attendance and care of several affairs relating to Mr. Stevenson, and other creditors, from 1731 to 1734, £30." And in another bill, the amount of which is £25, there is this charge, "Attendance on Mr. Hartpole's affairs, in general, etc. from July 1731 to May 1736, £15." Such general charges as these most certainly would not be allowed to any attorney here.

We see then the distresses which Mr. Hartpole laboured under, and the disposition of Ward. In this situation the one was very apt to give, and the other too ready to take a good bargain. And if an attorney, knowing his client to be in such circumstances, takes from him any reward, or any security by way of gratuity or reward, pending the suits or business in which he is concerned, though no particular express act of fraud is proved, yet it shall not stand; it would be attended with dangerous consequences, and therefore it shall not be allowed. I remember the case of one Japhet Crook,* a most vile miscreant, who had been engaged in various suits and scrapes, indicted for per-[489]-juries, forgeries and other crimes, and promised his attorney, who had been useful in procuring bail for him, and otherwise, as a compensation above his bill, to leave him £1000 by his will; and he gave the attorney instructions for preparing his will, with such a legacy, which he executed. The attorney afterwards, lest Crook should change his mind, got a bond from Crook, to oblige him to leave the £1000 by his will. They afterwards quarrelled, and Crook made a new will, in which he omitted the legacy, stating as his reason that he had been imposed upon by his attorney; and he soon afterwards died possessed of a considerable fortune. The attorney sued the representative, who filed a bill to set aside the bond. The attorney put in his answer, and the cause came on to be heard before Lord Hardwicke. At first it did not stand a minute; no fraud was proved to have been made use of by the attorney, and the bill was dismissed. I, however, advised a re-hearing, and the cause came on again; and though there was no proof of fraud having been practised in obtaining the bond, yet from the general danger of establishing a precedent of an attorney taking such a security from a client in distress, as well as from the particular circumstances under which the bond was given, Lord Hardwicke reversed his own decree, and referred it to the Master to consider whether the attorney was entitled to any and what allowance.

The lease in question was granted for a consideration grossly inadequate; Hartpole knew it, but his distress compelled him to give way. Ward availed himself of the advantage of his situation, and thus obtained it at an undervalue. I am, therefore, of opinion that upon the ground of undervalue, coupled with the other circumstances which I have stated, the lease is void as to the Respondent, and that it should be set aside. But upon what terms should this be done? It is a maxim, that he who demands equity must render it; and when a man lays out money in lasting and useful improvements, and has not the benefit of them, why should he not be allowed for it? It is surely but just, as the Respondent has the advantage of the improvements made by the Appellant's father on the lands, and the Defendant is prevented from enjoying them, that some compensation should be made to him. Why should not the fine be paid back?

[490] The decree saves a remedy against the personal representatives of George Hartpole on his covenant, and yet dismisses the cross bill for want of a representative being before the Court, although it is clear that the Respondent had possessed and administered his father's assets, and thereby became executor *de son tort*, so that such representative would have been necessary in point of form only, for the account must have been taken against the Respondent, and therefore the bill should not have been dismissed upon this ground. But the account might have been taken against the Respondent, giving the Appellant liberty to bring a legal representative before the Master, or have ordered the cause to stand over, with liberty to amend the bill.

* See *Walmesley v. Booth*, 2 Atk. 25, 27.

and bring the proper parties before the Court. But what I shall propose will render this unnecessary.

There is another circumstance,—the costs. Costs, I take it, were given upon the ground of the lease having been obtained by fraud; but I think in this case each party should bear his own costs. I therefore submit the following variations; viz.

1st. That the lease be set aside upon payment to the Appellant of the fine of £300, and the money laid out in the lasting improvements, with interest from the death of George Hartpole; and that an account be taken of the said £300 and money laid out in improvements.

2dly. That so much of the decree as gives costs in the original or cross-cause, or saves any remedy against the representatives of George Hartpole, or enjoins the Respondent to be put into immediate possession, be reversed.

Which variations were agreed to by the House.*

[491]

SCOTLAND.

COURT OF SESSION.

BOYES.—*Appellant*; BAILLIE.—*Respondent* [23d May 1821].

PROOF of indecent familiarities between a wife and a medical attendant in the family of the husband, held to afford a presumption of adultery, and a sufficient ground for a divorce.

After sentence of divorce in the Commissaries Court, affirmed by the Court of Session, a verdict and judgment subsequently obtained in an action for damages, finding the adultery not proven, is not admissible, upon an appeal, to affect the sentence or the judgment of affirmance. Such subsequent facts may be stated by leave of the House in an additional case.†

This was a proceeding which originated in the Commissaries Court of Edinburgh to obtain a divorce for cause of adultery. The case on the part of the Respondent was supported by evidence of the grossest acts of indecency, affording inferences, short only of ocular demonstration, that a criminal intercourse had existed between the Appellant and a person who visited in the family, partly as an acquaintance, and occasionally as a medical attendant.

[492] Upon the presumptive evidence in the cause the Court of Commissaries, on the 19th of May 1815, pronounced a judgment, finding "facts, circumstances, and qualifications, proved relevant to infer the Defender's guilt of adultery with James Bryson, etc. find her guilty accordingly; therefore divorce, etc."

In the course of the proceeding, before taking proof on the condescendence of the Respondent, a protest, of reprobaters, was instituted by the Appellant against the Respondent's witnesses, on the ground of insanity, immorality, and undue in-

* See the order in the printed cases of 1776, No. 7.

One of the arguments made use of at the Bar, to show that the lease was not within the leasing power, was, that it did not commence in possession; but this was not supported, for the proof offered, viz. memorials of the leases of part of the lands which were subsisting when this lease was made, could not be read, because it did not appear by the register's notes that they were read on the hearing below; and it is a rule that no new evidence can be read on an appeal, except where the refusal of permitting evidence offered to be read on the hearing is complained of by the appeal. But had the evidence been admissible, it would not have affected the decision.

† Other points were decided by the interlocutors in the Court below; viz. that reasons of reprobaters against the Respondent's witnesses on the ground of insanity, immorality, and undue influence, were irrelevant; that objections to the competency of a witness were admissible only to her credibility; and that the costs of an agent in Edinburgh, to conduct the defence of the Appellant, ought to be disallowed.

fluence; and after the proof had been taken for both parties the Appellant was allowed to give in a condescendence of reprobator; upon advising which the Commissaries found the reasons of reprobator as condescended on not relevant: to which judgment they adhered upon a reclaiming petition.

The Appellant thereupon petitioned for leave to present a bill of advocacy to the Court of Session on the question of reprobaters, which was refused.

Objections were also taken by the Appellant to the admissibility of M.W. when brought forward for examination as a witness for the Respondent: her deposition was allowed to be taken, but appointed to be sealed up, and to lie *in retentis*.

On advising the pleadings of the parties as to the admissibility of her evidence, the Commissaries "allowed the depositions of M. W. to be opened, and to form part of the process, reserving to the Court to consider what effect any apparent inconsistency in the depositions of the witness, already in process, may have on her credibility when the [493] merits of the cause come to be advised;" to which judgment they adhered on petition, and refused to permit the Appellant to bring this point under view of the Court of Session by bill of advocacy.

Upon the question of costs, objections having been taken and sustained to the Appellant's account of expenses in conducting her defence, she petitioned the Commissioners that they might be allowed, or at least to remit, the account to the auditor, with directions to allow the expenses of the Appellant's agent in Edinburgh. The prayer of this petition was refused, and thereupon the Appellant presented a bill of advocacy to the Court of Session, praying "a remit with instructions to the Commissioners to alter their interlocutor of the 19th of May 1815, etc. and to allow a proof of the circumstances she has relevantly offered to establish, both in reprobator and as additional evidence, etc. and to find her entitled to full expenses, conform to her agent's accounts, which are not alleged to be improperly stated, but modified in respect she should not have had the aid of an agent, and also to sustain the other charges disallowed." The Lord Ordinary having refused the bill, the Appellant presented a petition to the Lords of the second division of the Court of Session, praying them "to remit to the Lord Ordinary to alter his interlocutor, and to the Commissioners to alter, etc.; and to find that the facts, circumstances, and qualifications proved, do not infer the defender's guilt of adultery; or etc. to allow the defender a proof of the reprobaters, and also of the *alibi* of Mr. Bryson on the night and morning particularly condescended on [494] in the body of the petition." The prayer of this petition having been refused, an appeal to the House of Lords was presented from the several interlocutors of the Commissioners the Lord Ordinary, and the second division of the Court of Session. After the appeal had been presented, and the cases laid on the table of the House, the Appellant obtained leave to print, and accordingly printed and presented an additional case, stating the following facts:

The Respondent, in June 1812, brought his action in the second division of the Court of Session against James Bryson, for reparation and damages in regard to the *alleged adultery*; concluding that the defender, Mr. Bryson, should be decreed to make payment to the Pursuer of the sum of £10,000 of damages, with £500 of expenses of process.

After various proceedings in this action the Court directed an issue therein to be sent to the Jury Court to be tried by a Jury. In consequence of this direction the following issue was settled for the purpose of trying the question between the parties:

"Whether the defender did on the 1st day of January 1808, or at any time between that time and the 1st day of January 1812, seduce and maintain an adulterous connection, and did commit adultery with Mrs. Elizabeth Cross, or Boyes, then the wife of the Pursuer, at the Pursuer's house of Carnbroe, or in the neighbourhood thereof."

A trial was accordingly had upon this issue, before the Jury Court, on the 12th and 13th days of March 1818: when a verdict was given by the jury impanelled to try the said issue, finding "that [495] in respect of the matters of the said issue proven before them, they find the fact of adulterous connection between the 1st of January 1808 and the 1st of January 1812 is not proven."

When this verdict was reported to the Court of the second division, the Pursuer

applied to the Court for a new trial, upon two grounds:—first, that the verdict had been given contrary to the evidence; and secondly, that certain facts which he alleged, and offered to prove, as showing the defender's guilt, had come to his knowledge since the trial. Upon this application the Court directed counsel to be heard in their own presence.

After hearing counsel accordingly, the Court, on the 10th of July 1818, pronounced an interlocutor, refusing the application for a new trial, in so far as the same is founded on the ground of the verdict being contrary to evidence; but before further answer, ordaining the Pursuer to put in a special articulate condescendence of the facts which he alleges to have come to his knowledge since the trial, and which he avers and offers to prove, and also of the circumstances which he avers, and offers to prove, in order to establish that the said facts were *res noviter venientes ad notitiam*, with certification.

In consequence of that interlocutor a condescendence was given in by the Pursuer which was followed with answers, replies, and duplies. The Court thereupon, after hearing counsel on the 2d of February, 1819, pronounced an interlocutor, sustaining the verdict, and refusing the application for a new trial, etc.

The matter of the application for a new trial [496] having been thus disposed of, the Court afterwards, on the 9th of February 1819, pronounced this judgment in the cause:

‘The Lords having advised the verdict of the jury find the fact of adulterous connection between the 1st day of January 1808, and 1st day of January 1812, is *not proven*,’ etc.

Upon the facts appearing in this additional case it was insisted, on behalf of the Appellant,

1st. That in the action against Mr. Bryson the very same point was at issue which was tried in the action of divorce, namely, the alleged adultery between her and Mr. Bryson during the same period of time, and on the same specific facts, attempted to be proved by the same witnesses who had been brought forward in the question of divorce out of which this appeal arises.

2d. That the trial in this action of damages was had in that Court, which is best fitted to investigate and pronounce upon all questions of fact: that the Pursuer in that action examined all such witnesses as he chose to bring forward: and in that trial the Defender obtained a verdict with expenses.

3d. That the application made by the Appellant for a new trial was made in the same division of the Court of Session which previously had under its consideration the question of divorce: and though such application was pressed upon every ground of the verdict being contrary to evidence, and of *res noviter venientes ad notitiam*, the Court rejected such application for a new trial, with expenses in favour of the defender.

[497] For the Respondent:

The presenting an additional case, stating matters which occurred subsequent to the appeal, is contrary to practice and to principle: The action of divorce and the action for damages are distinct processes pending in different Courts. If the Appellant had reason to object, as she did in the action for damages, against the introduction of the case and process in the Consistorial Court, the Respondent has equal reason to exclude the verdict and process in the Jury Court. The verdict of the Jury would have been inadmissible as evidence in the action for divorce. The Jury Court Act virtually excepts Consistorial Cases from its operation. If the verdict itself be excluded, the evidence on which the verdict was given is *à fortiori* excluded.

On the 23d of May 1821, the judgments of the Courts of Commissaries and of Session were affirmed without observation.

[498]

SCOTLAND.

COURT OF FREEHOLDERS AND OF SESSION.

JAMES GIBSON, Esq. of Ingliston,—*Appellant*; Sir WILLIAM FORBES, of Pitsligo, bart.—*Respondent* [1821].

The Scotch statute 1681, c. 24, directing that a roll of freeholders shall be made up according as the same shall be instructed to be, of the holding, extent and valuation in the act specified: and providing that the freeholders shall meet to revise the roll for election, etc. and giving jurisdiction to the Court of Session to determine objections against "any insertion in the roll;" Held in the Court of Freeholders and the Court of Session, and on appeal, that the freeholders have no authority, as to the holding, (although they may as to the extent and valuation,) to look beyond the titles produced to them by the claimant, or to receive evidence from the production of anterior titles, or otherwise, to show that the holding is different from that which is expressed in the *tenendas* clause of the charter, as that it is burgage where it purports to be blench-farm.

By an Act of the Parliament of Scotland, passed in 1681, (c. 21.) reciting that great delay in the despatch of public affairs in Parliament, and Conventions of Estates, was occasioned by the controverted elections of Commissioners of Shires, provides that none shall vote in the election of commissioners of shires or stewartries, which have been in use to be represented in Parliaments and Conventions, but those who at that time shall be publicly infeft in property, or superiority in possession, of a forty-shilling land of old extent, holden of the King or Prince, distinct from the feu-duties in feu-[499]-lands, or where the said old extent appears not, shall be infeft in lands liable in public burdens for his Majesty's supplies for £100 of valued rent, whether Kirk Lands, now holden of the King, or other lands holding feu, waired, or blench, of his Majesty, as king or prince of Scotland. The act directs that "a roll of freeholders shall be made up according as the same shall be instructed to be of the holding and extent or valuation aforesaid;" and provides, "that the freeholders shall meet at the head boroughs of the shires, etc. at the Michaelmas head court yearly; and shall revise the roll for election, and make such alterations therein as have occurred since the last meeting." Minute directions are then given as to the mode of proceeding, and the forms requisite in taking objections.

By another clause jurisdiction is given to the Court of Session. "In case objections be made (against any insert in the said roll) where a Parliament or Convention is not called, a particular diet shall be appointed by the meeting, and intimate to the parties controverting to attend the Lords of Session for their determination, who shall determine the same at the said diet summarily, according to law, upon supplication, without further citation." *

* By the Act 1427, c. 101, the Commissioners are to be elected by the "free tenants,"— "them, that awe comparance in Parliament and Council," out of whose "rentes" the expense of the Commissioner was to be provided by contribution.

The Act 1457, c. 75, provides that "na freeholder that holdis of the king under the sum of twenty pounds be constrained to cum to the Parliament or General Council as for presence, but gif he be ane barroune, or els be specially warned," etc.

The Act 1503, c. 7, is to the same effect.

The Act 1587, c. 111, referring to the Act 1427, as to the election of Commissioners, provides that "Nane have voit in their election bot sic as hes forty shilling land in free tennendey holden of the king," etc.; and that "All freeholders be taxed for the expenses of the Commissioners of the shires passing to Parliament or General Councils, and letters of poynding or horning to be direct for payment of the summes taxt to that effect," etc.

The Act 1661, cap. 35, reciting "That diverse debates have formerly occurred, concerning the persons who ought and should have vote in the election of commissioners,

[500] At the Michaelmas head court, held in October 1816, the Respondent gave in a claim to be enrolled as a freeholder of the county of Edinburgh.

[501] In support of the claim of enrolment there was produced a charter of resignation under the great seal, dated at Edinburgh, 20th December, 1814, containing a grant by way of disposition and assignation from the magistrates and town-council at Edinburgh to the appellant, his heirs and assignees, of the superiority of certain lands described in the following terms:—"Totas et integras illas partes et portiones postea descript. terrarum vulgo vocat. the Burrowmuir, alias the common muir, ad civitatem Edinburgensem pertinen. viz. totam et integram villam et terras de Greenhill uti eadem per demortuum Adamum Fairholm et ejus tenentes possessae fuerunt, novemdecim acrarum plenae mensurae aut eo circa consisten. cum graminosis pratis infra medium dict. acrarum per demortuum Adamum Garden a diversis personis acquisit. et omnes per maceriam lapideam nunc inclusas parva parte ex australi orien. ejusdem jacen. excepta: Ac etiam totam et integram illam parvam partem dict. terrarum extra dict. maceriam cum fabrica ferrea super eandem posita, jacen. ex occidentali parte viae publicae ad locum vulgo vocat. Braidshurn conducentis: Ac etiam maneriei locum cum domibus, aedificiis, hortis, pomariis, columbariis, et omnibus et singulis pertinentiis praedict. terrarum, etc. jacen. infra parochiam de St. Cuthberts et vicecomitatum de Edinburgh."

The *quaequidem* clause describes the lands in question as formerly held of the Crown by and for the use of the town of Edinburgh.

[502] The *tenendus* is in these terms: "Tenend. et habend. dictas terras aliaque cum pertinen. supra script. per dict. Dominum Gulielmum Forbes ejusque praedict. DE NOBIS nostrisque regis successoribus immediatis legitimis superioribus earundem ut sequitur: viz. praedict. partes et portiones lie the Burrow Muir, seu Common Muir, vocat. Greenhill, cum pertinentiis in libera alba firma, etc."

The *reddendo* for the lands of Greenhill is, "Summam unius denarii monetae Scotiae super fundum dict. terrarum de Greenhill apud terminum Pentecostes annuatim nomine albae firmae, si petatur tantum, cum talibus ulterioribus seu alteris divoriis (si tales sint) in cartis in favorem Praepositi, Magistratuum et Communitatis civitatis Edinburgensis content."

An instrument of sasine upon this charter, dated 2d March, 1815, was also produced: and it was shown, That the lands exceeded the sum of £400 Scots; and for

from the several shires of this kingdom, to Parliament, and who are capable to be commissioners to Parliament, and that it is necessary for the good of his service that the same be cleared for the future (the King) doth therefore, with advice and consent of his estates of Parliament, statute, enact, and declare, that beside all heritors who hold a forty shillings land, of the King's majesty *in capite*, that also all heritors, liferenters, and wadsetters holding of the King, and others who held their lands formerly of the bishops or abbots, and now hold of the King, and whose yearly rent doth amount to ten chalders of victual, or one thousand pounds (all feu duties being deducted) shall be, and are, capable to vote in the election of commissioners of Parliaments, and to be elected commissioners to Parliaments; excepting always from this act all noblemen and their vassals. And it being just that those who shall be chosen, and accordingly shall attend his majesty's and the kingdom's service in Parliament, have allowance for their charges, his majesty doth therefore, with advice aforesaid, modify and appoint five pounds Scots of daily allowance to every commissioner from any shire, including the first and last days of Parliament, together with eight days for their coming, and as much for their return, from the farthest shores of Caithness and Sutherland, and proportionably at nearer distances: and that the whole freeholders, heritors, and liferenters holding of the King and prince, shall, according to the proportion of their lands and rents, lying within the shire, be lyable and obliged in the payment of the said allowance, excepting noblemen and their vassals." The act then concludes with a provision for defraying certain extraordinary expences which some commissioners of shires had then incurred, "in providing of foot mantles for the riding of the Parliament."—It was argued on the part of the Respondent that the phraseology of these statutes refers to the present investiture of the estate: and that whatever their ultimate right might be, those "who hold" of the King for the time being could not refuse to sustain their share of the burden imposed for defraying the expenses of the commissioner.

proof thereof the claimant referred to the valuation and cess-books of the county of Edinburgh, and to other competent evidence to be produced to the freeholders. The claim then concludes, "that the said Sir William Forbes" being thus publicly infeft in lands holden immediately of the Crown, and of the valuation required by law, is entitled to be enrolled in the foresaid roll of freeholders of the county of Edinburgh, and hereby claims to be enrolled accordingly.

To the enrolling of the claimant it was objected by Mr. Gibson, of Ingliston (the Appellant) that the lands of Greenhill, composing a large proportion of the lands on which the claim is founded, [503] and described in the claimant's titles as all and whole, those parts and portions of the lands commonly called the Boroughmuir, alias the Common Muir, belonging to the City of Edinburgh, viz. the town and lands of Greenhill, etc., manor-places, houses, etc., lying within the parish of St Cuthbert's and sheriffdom of Edinburgh, have always held burgage.

That, as parts and portions of the common muir, they are contained in the charters of the town of Edinburgh from the most remote periods; and according to the charter of confirmation and novadamus in the town's favour, dated 23d October 1636, which was proposed to the barons as the last investiture of these lands in favour of the resigners, and by which the claimant's signature was revised, they are held, along with the rest of the burgh, of the king, "in libera haereditate et libero burgagio in perpetuum;" with a *reddendo* of 52 merks sterling "tanquam pro antiquo *censu burgali* contenti in dicto infeoffamento dicti burgi concessio per regem Robertum primum ad duos anni terminos, etc. *cum servitio burgi solet. et consuet.*" *

To which it was answered for the Respondent that the charter 1636 did not instruct the borough or common muir of Edinburgh to be of burgage-tenure; that it was a general charter, confirming all the old grants in favour of the city, and some of the lands were no doubt burgage, but a much more considerable part of the subjects in that [504] charter, and the boroughmuir among the rest, are held blench or feu of the Crown; and the lands of Greenhill, in right of which Sir William Forbes claims, have stood separately rated in the valuation-books of the county as far back as any record reaches; and it is proved by the valuation-book that since 1726 Greenhill has paid cess and other county-taxes according to that valuation; while the subaltern rights of property have been uniformly made up after the form of a feu-holding, and the infeftments have been recorded in the county register.

These facts, as the Respondent contended, disproved the allegation that Greenhill was of burgage-tenure; but that it was sufficient to support the enrolment that Sir William Forbes produced a Crown-charter and infeftment in his favour, which were *ex facie* unobjectionable. Under these circumstances it was contended that it was incompetent for the freeholders to entertain any objection which required recourse to the warrants of the charter, and to the other old titles.

Questions were then put by the Appellant to the agent for Sir William Forbes:

"1st. Whether the Crown-charter of 23d October 1636, in favour of the town of Edinburgh, is not the charter on which the claimant's signature (the warrant of his charter) was revised by the Barons of Exchequer.

"2d. Whether the copy of the brief now produced is not a copy of the brief laid before the Barons by the claimant at revising the signature.

[505] The agent considering it to be irregular to put these questions to him declined answering them.

"The meeting having considered the claim, productions, objections, answers and questions, sustained the claim, and enrolled the claimant accordingly."

The objection against the Respondent's enrolment having been overruled in the court of freeholders without a division, the Appellant presented a petition and complaint to the second division of the Court of Session, under the authority of the statute 16th Geo. II. (c. 11), praying the court to find that the freeholders of the county of Edinburgh did wrong in enrolling the Respondent, and therefore to ordain his name to be expunged from the roll.

In this petition and complaint the Appellant contended that the lands of Green-

* The record of this charter, in the register of the great seal, was laid before the freeholders.

bill belonged to the community of the city of Edinburgh and were holden by that community inalienably in free burgage; that consequently these lands were not truly holden by the Respondent in feu, ward, or blench, of his Majesty, in terms of the statute 1681, cap. 21, regulating the election of commissioners for shires: and that the community of the city of Edinburgh could not "by any species of juggle, either legal or political," be permitted to throw its burgage-property into the mass of property holding in feu, ward, or blench, of his Majesty, and thereby extend the territorial basis of county representation, to the injury of the proper freeholders in their constitutional rights. To establish the proposition as to the tenure of the lands in question the Appellant referred to the terms of the Crown-charter, produced and founded [506] on by the Respondent at the meetings of freeholders; but endeavoured to show, by a deduction from the older title-deeds, that the lands in question had previously been held burgage, and were consequently incapable of constituting the basis of a freehold qualification in the county of Edinburgh.

In his answers to the petition and complaint, the Respondent contended that the earlier titles gave no support to the Appellant's objection. That a burgh might, and often did, hold subjects of the Crown in feu-farm or blench-farm, as well as in burgage; and the Respondent referred to the charter granted by king James VI. to the city of Edinburgh, on the 16th of March, 1603, called by way of pre-eminence the "Golden Charter," as well as to the later charter of Charles I. in 1636, to show that there was no reason to presume that the lands in question had ever been held burgage. He referred also to the evidence derived from the county cess-books, and contended, that if the lands in question had been held burgage, it was to be presumed that they would have been liable for town-taxes, and would have been entered in the cess-books of the burgh. For the same reason they would not have appeared in the cess-books of the county. It being admitted, however, that the lands claimed on by the Respondent had at no time been entered in the burgh cess-books, but on the contrary had constantly stood on those of the county, and paid cess to the county-collector, they ought to be represented in the county, of which they had always been considered as a part. But the Respondent rested his answer to the complaint mainly upon the ground, that having produced all the evidence [507] which the law holds to be necessary to establish a claim of enrolment, neither the freeholders, nor the Court of Session, sitting as a court of review on a matter brought before them, by a summary petition and complaint under the statute, could entertain any objections attempted to be supported by an investigation of the older titles.

These pleadings having been followed by replies and duplies, and the Court being of opinion that the Appellant's complaint was incompetent, without giving any opinion on the truth or relevancy of the Appellant's allegations on the import of the older titles, pronounced the following interlocutor: "The Lords having considered this petition and complaint, with the answers, replies, and duplies, and writs produced, and heard the counsel for the parties *viva voce*, find the said complaint not competent, and dismiss the same: find no expenses due, and decern."

Against this interlocutor the Appellant presented a short petition, and afterwards, with the leave of the Court, an additional petition, in which he endeavoured to remove the objection of incompetency, by contending that there was a distinction between questions regarding the right to the estate claimed upon, and questions regarding the nature and quality of the estate itself. In the one case, if the investiture is free from any *ex facie* defect, it is *ius tertii* to the court of freeholders, whether the estate on which the claim is framed may not be ultimately declared in a court of law not to belong to the claimant. If the titles exhibited by the claimant labour under no palpable objection, the freeholders are bound to admit him to the roll, without regard [508] to any right of challenge which may be supposed to exist in favour of any third party. But where the objection arises not upon any ground of competition between different individuals, but upon a defect in the quality of the estate itself, every freeholder has an interest to insist upon such an objection, inasmuch as every fictitious addition to the general mass of freehold property is a virtual subtraction from the value of what is real freehold, and a consequent diminution of the constitutional rights of freeholders. The Appellant contended that the difference of interest in the two classes of objections was sufficient to establish a distinction between them; and he endeavoured to show, as well by a reference to the election

statutes as by a review of the different decisions relative to the competency of objections to claims of enrolment, that there was neither reason nor authority for holding his complaint as incompetent.

In his answers to those petitions the Respondent contended that there was no room for the distinction stated by the Appellant. From a review of the statutes passed for the purpose of regulating the proceedings at meetings of freeholders, he contended that the freeholders were bound to give effect to the existing investiture in all its parts: and that they were no more entitled to proceed upon the supposition that the tenure ought to have been different from that which the investiture bore, than to contend that the investiture ought to have been in favour of another party than the claimant. He contended, that from the whole constitution and powers of the freeholders, as fixed by these statutes, they were as little qualified to investigate matters of tenure as to [509] investigate any other matter of title beyond what appeared *ex facie* of the charter and infeftment produced. Nor was there any room for the distinction founded on the supposition that the freeholders had an interest in the one case which they had not in the other. If the interest of the freeholders to limit the numbers on the roll were held sufficient to authorize their interference, it would manifestly entitle them to investigate all objections tending to show that notwithstanding the subsisting investiture the ultimate right to the estate might be in another person than the claimant. That other person might perhaps be a nobleman, an unmarried woman, or otherwise disqualified from exercising the elective franchise. The Respondent further contended, from a review of the decisions relative to objections against claims of enrolment, that where the charter and sasine produced were *ex facie* liable to no objection, the court had in no instance sustained objections founded on the anterior titles.

Upon consideration of these petitions, with the answers thereto, the Court, on the 16th December 1817, pronounced an interlocutor, refusing both petitions, and adhering to the interlocutor complained of.

Against the interlocutors of the Court of Session, dated 17th May and 16th December 1817, the Appellant entered an appeal.

For the Appellant: * The feudal right, resigned by the magistrates of Edinburgh into the hands of the Barons of the Ex-[510]-chequer, as the King's Commissioners, for the purpose of new infeftment in favour of the Respondent, was the right holden by the resigners in free burgage, subject to the ancient burgal-census services and prestations. The acceptance of a resignation which implied or expressed a change of feudal tenure, or the *reddendo* due to the Crown was illegal and void.

By the statute 1681, c. 21, the freeholders at their head court are to make up and to revise and alter, the roll for election, "according as the estate forming the ground of claim shall be instructed to be of the *holding*, extent, and valuation," required by the act. The Court, therefore, of Freeholders originally, and the Court of Session, by way of appeal, have express authority under the acts (1681, c. 21, and 16 Geo. 2, c. 11) to investigate and ascertain the holding or tenure of the lands in respect of which a freeholder claims to be enrolled; and if it be admitted, that where it appears possible or probable that an opposite claim may be made in respect of the same estate, there is no jurisdiction to inquire where the title is clear on the face of the deeds produced; yet the objection in this case does not proceed on a preferable right in a third party, but upon the allegation that the freehold on which the Respondent claims to be enrolled is non-existent: that his estate lies not in the county but in the borough of Edinburgh. This is a clear ground of distinction, and the authorities show that it is well founded.

But supposing that the freeholders have no authority to inquire as to the tenure, if the title-deeds (however falsely) allege or import a sufficient freehold, yet the real nature of the tenure by which [511] the Respondent holds the estate in question is apparent on the face of the title-deeds produced by him; and the freeholders ought either to have rejected his claim, or required further evidence of his title.

In the charter, the lands are described as "portions of the lands called the Common Muir, belonging to the city of Edinburgh." They are declared to have belonged previously to the corporation, for the use of the community of the city, and

* The argument upon the appeal was in substance the same as in the pleadings in the Court below.

to have been disposed and resigned by the provost and magistrates; and the Respondent is thereby bound to pay a blench-duty of a Scots penny, "together with such further and other duties (if any such there be) as are contained in the charters in favour of the city of Edinburgh."

The presumption is that the lands were held by burgage-tenure; if they were held by any other tenure the Respondent is bound to show it. Collateral Crown-rents and profits of the burgh, to be holden in feu-farm for a fixed annual payment, have been superadded in the grant of some of the old charters, as in that of 1603. But the territory was always held in free burgage, as appears by the whole series of charters, and particularly by the charter of 1636, which is the subsisting and regulating investiture of the royal burgh of Edinburgh, and the immediate warrant of the Respondent's investiture.

For the Respondent: The lands being expressly declared in the clause *tenendas* to be held by the Respondent blench of the Crown, the distinct and unequivocal terms of that clause cannot be affected by any expres-[512]-sions which may occur in other parts of the deed. The *tenendas*, as Mr. Erskine observes, is "that clause in a charter which points out the superior of whom the lands are to be holden, and the particular tenure under which they are to be enjoyed, whether by blench-farm, feu-farm," etc. It is by that clause, therefore, that the proper tenure of the lands is regulated; and any expressions which may occur in any other parts of the charter must either be interpreted in conformity with that clause, or be held to have crept into it by mistake. But the charter in truth contains no expression inconsistent with the explicit terms of the *tenendas*. It no where describes these lands as lying within the city of Edinburgh, as having ever been liable in burgage-prestations, or as having ever been held by a burgage-tenure. It is no doubt true that the lands are described as having once belonged to the city of Edinburgh, and as having been part of the burrough-muir; but that circumstance by no means leads to the conclusion that the lands were held burgage. A burgh may hold lands of the Crown in feu-farm or blench-farm, as well as burgage; and it was accordingly admitted in the petition and complaint that many of the subjects contained in the charters in favour of the town of Edinburgh are held in blench-farm. The circumstance, therefore, of these lands which are situated within the county of Edinburgh having once belonged to the town, can afford no presumption that they are incapable of being held by the tenure so distinctly marked out in the *tenendas*.

Nor does such a presumption arise from the terms [513] of the *reddendo*, which stipulates for the sum of a penny Scots "*nomine althae firmae, si petatur tantum cum talibus ulterioribus seu alteris divoriis (si tales sint) in cartis in favorem praepositi, magistratum, et communitatis civitatis Edinburgensis content.*" Had these other duties been described to be the *census burgalis*, with *burgh-service used and wont*, it might have been contended that there was some inconsistency between the *tenendas* and the *reddendo*. But no allusion whatever is made to the payment of burgh-cess, to watching and warding, or to any other prestations which are peculiar to burgage-holding. There is not therefore any reason to presume that the other duties here referred to are at all inconsistent with the tenure described in the *tenendas*.

The Respondent having laid before the meeting of freeholders a charter and sasine *ex facie* liable to no objection, the freeholders did right in giving effect to that charter; and they were neither bound nor entitled to inquire into objections of any kind attempted to be established from the anterior progress of titles. The Appellant seems to admit the general rule, as laid down in Mr. Wight's treatise on elections, to be, "that the freeholders have no right to call for the warrants of the charter on which the infetment proceeds, or to object that it is not conform to the signature, or to enter into a discussion of a claimant's progress. His own charter and infetment are all that they are concerned with; and if these are *ex facie* formal he must be enrolled." The Appellant however contends that this rule, though applicable to all [514] questions respecting a claimant's title, as in competition with other parties, does not apply to the evidence of the tenure by which the lands are held; but neither in the statutes which regulate the constitution and powers of the court of freeholders, nor in the decisions pronounced with reference to the jurisdiction of the freeholders thus established, is there any room for the distinction attempted by the Appellant.

As to the argument, that by the clause in the Act 1681, directing the freeholders of each shire or stewartry to "make up a roll of all the freeholders within the same," "according as the same shall be instructed to be of the holding, extent, or valuation foresaid," the freeholders are empowered to investigate fully the question, Whether or not the lands claimed on are truly of the holding required by law. The clause requires, not that the lands shall be of any particular holding, but that the freeholders to be enrolled shall be of that holding. If it could be contended that the holding of lands was to be instructed in any other manner than by the existing investiture, there can be no doubt that a freeholder is of the holding in which he is infeft. When the freeholders are spoken of, the holding intended must be the holding by the existing investiture. When the act directs the freeholders to be enrolled according as the same shall be instructed to be of the holding, etc. it merely requires that they shall be *de presenti* infeft under the King in feu, ward, or blench.

This clause must be interpreted in conformity with the previous clause, which defines the qualifications [515] necessary for enrolment, and which it has already been shown looks no farther than the existing investiture. It is absurd to suppose that the statute, in describing the duty of the freeholders in making up the roll, should require them to go beyond the qualification which in the preceding clause that very statute had pointed out as the warrant on which enrolment was to proceed. The provision that the roll should be made up as the qualifications of the claimants should be instructed, can therefore make no change whatever in the nature of that qualification, as being an existing investiture and possession under the King in feu, ward, or blench.

As to the argument founded upon the connection in the clause of the words, holding, extent, and valuation, that, as the freeholders are not limited to any particular instruments as evidence of the latter, they are as little limited with regard to the former; although by the Act 16 Geo. II. cap. 11, it is provided that no one can be enrolled in respect of the old extent of his lands, unless such extent is proved by a retour prior to 16th Sept. 1681, yet it perhaps cannot be contended that such a retour is in itself an instrument constituting the old extent. It may perhaps be regarded merely as evidence, in opposition to which contrary evidence may be received. Were such a retour regarded as an instrument constituting the old extent, the freeholders would unquestionably be limited to that instrument, and would not be at liberty to look beyond it, or to consider what the extent ought to have been. As to valuation, if the actual valuation is established by a decree of the commissioners of supply, which is [516] liable to no *ex facie* objection, the freeholders are bound to give effect to that decree, and are not entitled to refuse enrolment on the ground that the lands claimed on ought to have been differently valued. So also in relation to the holding, the Respondent has already shown that it is constituted by the charter and infeftment. The freeholders, therefore, cannot look beyond the instruments by which the holding is constituted, or enter into the question, What it ought to have been.

For the Appellant: Mr. J. P. Grant, Mr. W. Adam.

The following authorities were cited: *Dunbar v. Budge*, Dict. 8844, Elch. M. P. No. 36. *Scott v. Sutherland*, Dict. 8627. *Kames v. 3, p. 49*, Fac. Dec. v. 1, p. 108. Elch. Dec. v. 2, p. 277. *Campbell v. Mure*, Dict. 7783. *Stewart v. Dalrymple*, Dict. 8579. *Abercrombie v. Alwood*, Fac. Coll. 17, June 1777. *Pirie v. Hay*, July 1777. *Sibbald v. Douglas*, Dict. 8857. *Carnegy v. Scott*, Id. 8858. *Wight*, 222. *Bell on Elect.* 238.

For the Respondent: The Attorney General and Mr. Wetherell.

The authorities were principally the same as those cited for the Appellant: and also *Burn v. Adam*, Dict. 8852. *Adam v. Farquhar*, 4 July 1809. *Kibble v. Stewart*, 16 June 1811. *Montgomerie v. Ainslie*, May 23, 1821.

Judgment affirmed.

SCOTLAND.

COURT OF SESSION.

SIR WILLIAM FORBES, of Pitsligo, baronet.—*Appellant*: JAMES GIBSON, of Inglistone, esq.—*Respondent* [23 May, 1821].

A SUMMONS in an action at the suit of a freeholder, praying that a charter and infeftment may be reduced (absolutely), on the ground that the tenure has been unwarrantably changed from burgage to blench, for the purpose of giving persons qualification, cannot without limitation be sustained. *Semb.* that such freeholder has no title to sue unless the conclusion of the summons can be limited to the question of enrolment.

Whether the Court of Session has power to qualify the conclusion of the summons, and limit the reduction of the charter, etc. to the effect of excluding the party claiming under it from the roll of freeholders. *Quære.*

Supposing the reduction to be capable of being, and to be in fact so limited, whether the case does not fall under the provisions of the statute 16 Geo. 2, c. 11, s. 4, by which the period of bringing complaints is limited to four months. *Quære.*

Whether an action at common law to reduce the charter generally, or as conferring a freehold qualification, is competent after the lapse of four months from the time of enrolment. *Quære.*

As soon as the interlocutors, dismissing the summary complaint mentioned in the preceding case, had become final in the Court of Session, the Respondent raised two actions of reduction against the Appellant, for the purpose of setting aside his charter and infeftment. In one of these actions, Mr. Gibson, with certain other persons, pursue, in the character of a burghess of the City of Edinburgh, and as thus having a title and an inte-[518]-rest to prevent an alienation of property belonging to the burgh.

The other action was brought by Mr. Gibson in the character of a freeholder of the county.

The summons in this action, which is dated December 18, 1817, purports to be brought at the instance of "James Gibson of Inglistown, esq. one of the freeholders, electors of a commissioner to represent and serve in Parliament for the county of Edinburgh or Mid Lothian, and as such standing upon the roll of the said freeholders, and so having a substantial interest to prevent all persons not possessing the qualifications required by law, from being enrolled on the said roll of freeholders, to whose great hurt and prejudice the writings hereinafter called for to be reduced, are made, granted, and expedite; and, therefore, having good and undoubted right and title to raise, intent, follow forth, and pursue the action of reduction underwritten." The summons then calls for production of the Crown charter in favour of the Appellant, dated 20th December 1814, and the instrument of sasine following thereon; and then sets forth the grounds and reasons of reduction.

The first reason of reduction sets forth in general terms, that the deeds sought to be reduced are false, improbate, and invalid. The second ground of reduction is, that although the lands of Greenhill are described in the charter and instrument of sasine as lying within the county of Edinburgh, they are truly situated within and are a part of the royal burgh of Edinburgh; and in support of this assertion, reference is made to the [519] charter granted by Charles I. dated 23d of October 1636. The third ground of reduction is, that the holding in the charter and sasine sought to be reduced has been unwarrantably altered from burgage to blench. And the fourth ground is, "that such an alteration of the holding is contrary to the Act 6th of Queen Ann. chap. 26, intituled, 'An Act for settling and establishing a Court of Exchequer in the north part of Great Britain, called Scotland,' and by the former commissions, and former law and practice therein referred to and recognized, it is not lawful or warrantable for the Barons of our Exchequer to receive resignations, or to pass signatures, unless according to the form and tenor of the former infeftments, and for payment to us and our royal successors of the rents and services therein expressed: as the said Act of Parliament, and said commissions therein referred to, more fully purport. Whereas the said charter, and the signature whereon it appears to have been expedite, are altogether and essentially disconform to the tenor of the

former infeftments, whereon the pretended resignation of the said lands of Greenhill proceeded, and the same must have been obtained by the defender *per obreptionem*, of us and our said barons, contrary to and in express violation of the powers and instructions under which alone they act in the discharge of that branch of their official trust and duty."

The conclusion of the summons is in the following terms: "And therefore, and for other reasons to be proponed at discussing, the said charter called for, [520] with the signature and precept on which the same proceeded, and infeftment thereon, with all that has followed or may follow upon the same, ought and should be reduced, rescinded, retreated, cassed, annulled, decerned, and declared by decret of our Lords of Council and Session to have been from the beginning, to be now, and in all time coming, *void and null, and of no avail, strength, force, or effect in judgment*, or outwith the same in time coming."

By the statute 16 Geo. II. chap. 11, sect. 4, the term for bringing complaints against the enrolment of freeholders is limited to four months. And the same statute farther provides, "that if no such complaint shall be exhibited within the time aforesaid, the freeholder enrolled shall stand and continue upon the roll until an alteration of his circumstances shall be allowed by the freeholders at a subsequent Michaelmas meeting, or meeting for election, as a sufficient cause for striking or leaving him out of the roll." The Appellant contended, that as it was the object of this action to defeat his right of enrolment, it was not competent, as not having been brought within the four months prescribed by the statute, and farther, that, independently of this objection, the pursuer, as one of the freeholders standing upon the roll, had no proper title and interest to insist in an action for reducing and setting aside the charter and infeftment called for; that such an action, at the instance merely of a freeholder, was unprecedented; and, were a precedent for it to be now established, every freeholder would be exposed to be called upon to [521] produce the whole progress of his title deeds, and to lay open his charter-chest, at the pleasure of any other freeholder who might choose to institute an action of reduction. He farther maintained that the action was groundless upon the merits.

The Lord Ordinary having heard parties' procurators on the preliminary defence that the pursuer has no sufficient title to insist in the present action of reduction of the defender's charter and sasine, and having considered the process, and seen the proceedings in the former petition and complaint, and attended to the interlocutors of the court, by whom the complaint was dismissed as not competent on the 29th of May 1818, repelled the objection to the pursuer's title to insist in this action of reduction.

Against this interlocutor the Appellant gave in a short representation which the Lord Ordinary refused, and adhered to the interlocutors represented against.

The Appellant then presented a full representation; and, upon advising the same with answers, the Lord Ordinary pronounced the following interlocutor: "The Lord Ordinary having considered this representation, with the answers thereto, and whole process, finds that the pursuer has a sufficient title to insist in the present action for reducing the defender's title, in so far as the pursuer is interested as one of the freeholders, standing on the roll of freeholders of the county of Mid Lothian as libelled, to reduce the defender's said titles; and with this explanation refuses the desire of the representation and adheres to the interlocutor represented against."

[522] Against these interlocutors of the Lord Ordinary the Appellant presented a reclaiming petition to the second division of the court. When the petition came to be advised, with answers, the Judges being unanimously of opinion, that the question of title was one of great importance, appointed a hearing of counsel to take place in their presence.

After this hearing had taken place, the Judges of the second division of the court delivered opinions to the effect of sustaining the title to pursue, and accordingly pronounced an interlocutor, refusing the petition, and adhered to the interlocutors complained of, reserving all questions as to expenses.

These judgments being supposed to be interlocutory in their nature, the Appellant obtained leave* to appeal; and accordingly appealed against them.

* By the Act 13d Geo. III. c. 151, intituled, "An Act concerning the administra-

For the Appellant: The action is in substance to remove the Respondent from the roll of freeholders, and not having been commenced within four months from the enrolment, it is by the provisions of the 15 Geo. II. c. 11, s. 4, rendered incompetent; and [523] the Court of Session has no ordinary or common-law jurisdiction upon the subject.

On this first defence there is no express finding in the interlocutors. But as no party can have a title to insist in an incompetent action, the interlocutors sustaining the title to pursue, do in effect overrule the objection to the competency.

The statute 16 Geo. II. c. 11, s. 4, while it confers upon any freeholder standing on the roll the right of complaining against any enrolment "within four calendar months" after it takes place, provides, on the other hand, "that if no such complaint shall be exhibited within the time aforesaid, the freeholder enrolled shall stand and continue upon the roll, until an alteration of his circumstances be allowed by the freeholders at a subsequent Michaelmas meeting," etc. Supposing the action to be directed (as it has been represented by the Respondent, and regarded in the interlocutor of the Lord Ordinary) merely against the Appellant's enrolment, or his right to continue upon the roll, the question is, whether such action can be competently brought, after the statutory period for agitating complaints relative to enrolment has expired.

The statutory period had elapsed before the present action was brought. The Appellant's enrolment took place on the 1st of October 1816. But the present action was not raised until December, 1817.

The Court of Session has no original jurisdiction in questions of enrolment. When the right or duty of freeholders was that of attending parlia-[524]-ment in person, it does not appear that there was any ordinary or original jurisdiction in any court, excepting parliament itself, by which any person could be compelled to exercise, or be restrained from exercising, that right or duty.

The statute declares, "that no other objection shall be competent in parliament or convention, but what shall be contained in the instruments taken as thereby provided. And in case objections be made when a parliament or convention is not called, a particular diet shall be appointed by the meeting, and intimate to the parties controverting, to attend the Lords of Session for their determination; who shall determine the same at the said diet summarily according to law, upon supplication, without further citation."

This statute, then, so far from recognizing any ordinary jurisdiction in the Court of Session as to the political right of voting for a representative in Parliament, constitutes only a very special and limited authority in that court—an authority meant to be exercised only "in case objections be made when a parliament or convention is not called."

The act 16 Geo. II. chap. 11, makes no allusion to any such ordinary jurisdiction. The only check which it provides against improper enrolments, is the summary complaint to be brought within four months after the date thereof; and the same statute declares that in the event of no complaint being brought within that period, the freeholder enrolled shall have a right to remain upon the roll, until an alteration of his circumstances shall take place.

The avowed object of the action is to obtain a [525] judgment that the appellant ought not to stand upon the roll: or, in other words, to obtain a warrant for expunging his name from the roll. But no alteration whatever has taken place in the circumstances of the Appellant; and, therefore, no proceeding can be competent, of which the sole purpose is to prevent the Appellant from continuing on the roll. Such a proceeding as the present is incompetent, not only because there is no authority for an action of this sort in the Court of Session at all, *i.e.* an original ordinary action

tion of justice in Scotland, and concerning appeals to the House of Lords," it is, *inter alia*, enacted, (sect. 15.) "that hereafter no appeal shall be allowed to the House of Lords from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the division of the Judges pronouncing such interlocutory judgments; or except in cases where there is difference of opinion among the Judges of the said division."

of reduction or declarator relative directly to the right of a freeholder continuing on the roll; but because, at any rate, if it be supposed that, by equitable interpretation, an action might be admitted in a form not precisely warranted by the statutes, this at least must not be so done, as to defeat so important a regulation as the limitation of four months, and the security given to persons who have remained on the roll without challenge during that period.

This limitation would be altogether nugatory, were it found competent to institute after the lapse of the four months, a summons of reduction instead of a summary complaint. Were such actions found competent, all those parties who in times past have neglected to complain within the four months, would be empowered to bring forward their challenge in the form of an action of reduction.

As this is the first attempt to challenge directly the right of a freeholder to remain upon the roll through the medium of an ordinary action, the Appellant cannot refer to any previous judgment pronounced in such an action. But the decision in [526] the case of *Anstruther Easter* *, though it related to burgh politics, strongly supports the principle that a statutory limitation with regard to the time within which the challenge of a vote is competent, cannot be evaded by the device of bringing that challenge in the form of an action of reduction.

Assuming that the decision of the Court of Session in the summary question is well founded, the effect must be that the Appellant has a right to continue upon the roll until there shall occur such an "alteration of his circumstances," as the law holds sufficient for striking him off.

The question is, whether such alteration of circumstances can be effected in the manner here attempted by the Respondent. If the Appellant had conveyed away so much of the lands upon which he is enrolled as to reduce the valuation of the remainder below the legal standard, or the officers of the Crown had reduced the charter and infeftment thereon, on the ground that the Crown had been illegally deprived of its just rights by an improper change of the holding, or otherwise, an alteration of circumstances would have occurred, entitling the respondent, or any other freeholder, to insist that the Appellant should be struck off the roll. In like manner, if a reduction had been successfully brought by the corporation of the city of Edinburgh, on the ground of the conveyance in the Appellant's favour having been fraudulently obtained; or even at the instance of any individual who considered his own right to the subjects conveyed preferable to that of the Appellant; any freeholder upon the roll would [527] be at liberty to produce the decree in such reduction as a warrant for striking the Appellant off the roll, in respect of an alteration in his circumstances. Such alteration cannot be produced by an action of reduction, the purpose of which is to investigate the anterior titles of the freeholder, who has produced at the freeholders court an investiture *ex facie* valid.

The Respondent's present attempt is unprecedented, and repugnant to those principles which have always hitherto been held to regulate the title to pursue reductions of a feudal investiture, and beyond those limits within which the power of investigation as to disputed enrolments is by law confined.

It is impossible to interpret the expressions of the summons as concluding for any thing short of a total reduction of the feudal investiture by which the Appellant holds his estate. It does not very clearly appear what is meant to be the effect of the qualified judgment of the Lord Ordinary. But it is impossible to find the charter and infeftment partly null and partly valid. So long as the charter subsists to the effect of enabling the Appellant to hold the lands therein contained, it must also enable him to maintain his place upon the roll. So long as the charter remains, the tenure in that charter must remain also. It is in vain to contend that the tenure ought to have been different from that which the charter contains. The charter does not merely afford evidence as to the nature of the holding. It in fact constitutes that holding; and it is impossible to find that the tenure is different from that which the charter sets forth. So long, therefore, as the charter remains [528] unreduced, the lands in question must be held blench of the Crown; and, while that holding continues, it is in vain to contend that the Appellant, who has in all other respects the qualification required by law, shall be expunged from the roll. So long as the charter and infeftment subsist, the Appellant has the qualifications required

* D. P. 1767. *Wight on Election*, vol. 1, p. 338, *et seq.*

by the statute 1681, chap. 21. He in particular has the qualification of a public infeftment in lands, "holding feu, ward, or blench of His Majesty;" and to ordain him to be turned off the roll, while that qualification continues, would be to act directly in the face of the provisions of that statute.

Even supposing that the conclusions of the present action could be modified, it cannot be proceeded in without laying open the whole progress of the title-deeds, at least so far back as the charter 1603. Supposing the investigation demanded by the Respondent to take place, it is only by a laborious search into the titles, so far back as they can be traced, that there is any chance of ascertaining what has all along been the holding of the lands in question. But the law does not on slight grounds allow a charter-chest to be laid open. A party who challenges the subsisting investiture of an estate, is bound to show that the effect of setting aside that investiture will be to vest the estate in himself, or in those for whom he acts. A reduction on the head of death-bed can proceed only at the instance of the heir at law, because he would succeed in the event of the death-bed deed being set aside. If a conveyance has been granted on the eve of bankruptcy to the prejudice of the creditors on a sequestrated [529] estate, the trustee on that estate can alone challenge it by reduction; because he alone, in the event of obtaining decree of reduction, has the title to recover the subject fraudulently conveyed away, and to make it available as a fund of division among the creditors. In like manner, in almost every other case where a challenge is brought, the title to pursue must be founded on a service general or special, according to the situation of the subject in dispute, or upon the right of apparenay; so as to satisfy the Court, in the first instance, that the effect of the reduction being successful will be to vest the subject of it in the pursuer. Even where a challenge is brought by a remote substitute in an entail, the same principle is not lost sight of. If the object of the action is to recover lands alienated in defraudation of the entail, the effect of it is to vest these lands in the heirs of entail, of whom the pursuer is one, and whose interests, therefore, he is entitled to protect; and if the action infers an irritancy, so as to put the estate past the present possessor, the effect of the challenge clearly is to bring the succession nearer to the pursuer than it would otherwise be.

But no freeholder is entitled, merely in that capacity, to demand inspection of the warrants on which a charter proceeds. In all the statutes, from 1427, c. 101, downwards, the qualification of persons claiming enrolment is made to depend on the present possession and investiture of the feudal estate. The act 1681 confers the privilege particularly on those "who at that time shall be publicly infeft" in lands "holding feu, ward, or blench of his [530] Majesty." Every freeholder is entitled to require that the actual investiture shall be ascertained; but (that investiture being constituted by charter and infeftment) the production of these, and the mid-couples, if any, necessary to show the claimant's connection with them, are all that any freeholder can require.

If it be admitted, that a freeholder cannot interfere so far as relates to the dispositive clause in a charter, on what principle can he be entitled to interfere with regard to the clause *tenendas*, or the clause *reddendo*? These clauses are just as essential to the charter and infeftment as the dispositive clause.

There is no foundation for the distinction taken by the Respondent between the power to investigate the titles of individuals upon a competition or adverse claim, and the power to investigate the nature of the tenure. In either case the freeholders cannot look beyond the subsisting investiture.

If it were so, burgage holding does not, or at least did not, constitute a separate manner of holding, but was a species of ward holding; with this only difference, that in a proper ward holding, the vassal is a single person, whereas in a burgage tenure it is a community (Craig, lib. 1, dieg. 10, s. 31 and 36. Erskine, book 2, tit. 4, s. 8). The objection therefore is, not against the quality of the estate itself; for lands held ward of the Crown are of the tenure required by the act 1681; but the objection is, that the real vassal is disqualified from voting in county elections, and that the estate claimed on is represented by the member for the burgh. It is an [531] objection precisely of the same kind, as the objection that the estate claimed on truly belongs to a peer, and therefore cannot be made the basis of county representation. But in both cases the answer is insuperable, that the freeholders

are entitled to look only to the actual investiture, and have no right to attempt to penetrate into the anterior titles.

Nor is the case without remedy, for supposing the *tenendas* and *reddendo* in the charter to have been improperly altered, the Crown would have a title and interest to institute a reduction. The Commissions of Exchequer prior to the union contain instructions under which the Barons of the Exchequer are still bound to act, in granting new donations and dispositions. One clause in the commissions directs that lands, to be given out from the Crown in future, should continue to be held "*secundum formam et tenorem antiquorum infeofamentorum, ac solvendo census et prestando alias conditiones inibi expressas.*" So if the corporation has been illegally deprived of an estate formerly belonging to it, the corporation may bring a reduction, in order to set aside the conveyance, by which it has been aggrieved; or it is even possible that an individual burgess may be entitled to complain, provided he can show that his interests have been affected by means of an illegal act.

As to the argument that this is a question of public law which requires that the holding in a charter shall not be changed, how is it more a matter of public law, than that an estate held under a strict entail shall not be alienated, or that [532] property belonging to a peer shall not confer a right to vote in county elections?

It has been alleged, that those laws which prohibit salmon-fishing at certain times of the year, or with machinery of a certain description, were intended for the benefit of the community; and it was further said, that upon the same principle on which an upper heritor in a river may challenge such illegal modes of fishing, the Respondent may institute a reduction of the Appellant's charter and infeftment. But the principle on which an upper heritor in a river is allowed to interfere, is, that his own private rights in the salmon of that river are directly invaded, and that he would thus have a title and interest to pursue, even although the public interest was not at all affected.

There is no authority for holding, that where the title to pursue is called in question, it can derive the smallest support from the circumstance that the act challenged is alleged to have been done in violation of the public law. No party, not having otherwise a proper title and interest to state the objection, can proceed on the ground that the public law has been violated. (*Lord Galloway v. Burgesses of Wighton*, Feb. 10, 1631. Dict. 7835. *Colt and others v. Town of Musselburgh*, 9th Jan. 1756. Dict. 7782.)

The case supposed, that by a false description in the charter, a person, whose estate is situated in one county, might claim enrolment in another, is different. The freeholders have always the means, by [533] reference to the valuation-roll, of ascertaining whether or not the lands are within the county. It is incumbent on the claimant to show that the lands claimed upon are rated in the valuation and cess-books of the county to which the claim applies. Unless the claimant can point out the lands claimed on in the valuation-books of the county, the freeholders are entitled to refuse enrolment, or to apply by petition and complaint to the Court of Session, in order that the claimant, who may have been admitted under such circumstances, may be struck off the roll. Accordingly, in the case of *Abercromby v. Alwood* (June 17, 1777), the Court of Session, upon a summary complaint, ordered the claimant's name to be expunged, upon this ground, *inter alia*, that the lands claimed upon had always paid cess to the burgh of Banff, and did not appear at all in the valuation or cess books of the county.

It is true, that where a claim of enrolment is founded upon the old extent as ascertained by a retour prior to 1681, the freeholders are entitled to look into the anterior progress. But in that case the anterior titles may be examined, not for the purpose of cutting down the subsisting investiture, but merely in order to ascertain whether the lands vested in the claimant are truly the lands to which the retour applies. By the act 16 Geo. 2, c. 11, the only evidence of the old extent which can be admitted is a retour dated prior to the 16th of September 1681. It is incumbent on the claimant to establish the identity of the lands contained in his charter with those contained in the [534] retour. The identity of the description will in general be sufficient for that purpose; but if any objecting freeholder is able to trace from the record any part of the lands in the retour into the possession of other parties than those through whom the claimant has received his right, it will then be necessary

for the claimant to obviate that objection, by tracing that part of the lands back again into his own person or that of his authors.

The latitude which has been allowed to freeholders in challenging decrees of commissioners of supply in dividing *cumulo* valuations, has no connection with the question of feudal investiture.

If the title of the Respondent to insist in this action were to be ultimately sustained, there is scarcely any estate in Scotland of which the title deeds may not be laid open, upon pretences similar to those upon which the present action proceeds.

For the Respondent: The single point under discussion is the title of the Respondent to reduce, by an ordinary action at law, the deeds by which the Appellant has obtained admission to the roll of freeholders for the county of Edinburgh.

Lands held burgage afford no qualification for a vote in the election of a member for a Scottish county. According to the statute 1681, none can vote at such elections but those who are infeft in property and superiority, and in possession of a forty-shilling land of old extent, or infeft in and "liable in public burdens for his Majesty's supplies, for £400 of valued rent, whether kirk-lands now holden of the King, or other lands holden feu, [535] ward or blench of his Majesty, as King or Prince of Scotland."

The Respondent undertakes to establish in the action of reduction, 1st, That the lands in question were burgage-lands; 2d, That the tenure was changed from burgage to blench, by the charter of resignation forming part of the Appellant's titles; and, *lastly*, That such change was incompetent and unlawful: so that the lands are still in every question regarding elective franchise, to be considered as burgage, and as forming no part of the property in the county of Edinburgh entitled to vote at county elections.

According to Wight (Law of Elect. p. 209) "It has become a pretty common practice for the royal burghs to allow part of their burgage-lands to be held feu of themselves. But even although, after doing so, they were, by connivance, to convey the superiority to a purchaser, so as to make way for his obtaining a charter from the Crown, that would not confer upon him a right to vote, or entitle him to be enrolled as a freeholder. The lands still remain truly burgage, and their owners are represented by the member for the burgh."

According to Bell (Law of Elect. p. 72), "Where a burgh has feued out part of the common property of the burgh, to be held of the burgh in feu: and where, afterwards, in order to give a freehold qualification to the feuar, the steps necessary for acquiring a Crown holding have been connived at, still the right thus constituted over burgage property is incapable of holding a freehold qualification: for [536] this plain reason that the subject is truly burgage, and is already represented in Parliament."

According to these opinions, the measure by which the tenure of the lands in question has been apparently changed from burgage to blench, constitute a fraud, by which lands, incapable of affording a freehold qualification, have been converted into property *ex facie* conferring that franchise: and by which, as affording such apparent title, a person has been admitted to the roll who is as destitute of qualification as if his property were situate in another country.

The title of a freeholder to reduce these deeds is unquestionable. The requisites for sustaining a legal and complete qualification may be classed under two general heads; 1st, Titles of property *ex facie* valid, that is an unobjectionable charter and sasine; and, 2d, That the lands contained in the charter and sasine are of the value, situation, and character capable of legally conferring the elective franchise. Thus, although a person is vested with certain lands, by an unobjectionable charter and sasine, it is absolutely necessary, in addition, that the lands so vested should be of the valuation required by law, and should be situate within the county. Now, under the last head of requisites, the Respondent maintains, and indeed the Appellant seems to admit, must be included the tenure under which the lands are held, as being feu, ward, or blench of the King. And it seems to follow, by necessary consequence, that a freeholder must have a title to set aside deeds, by which this last-men-[537]-tioned requisite, the proper tenure has been attached to lands which he undertakes to prove are incapable of receiving it: by which, lands held burgage have been converted into blench or feu, contrary, as he maintains, to their inherent and legal

ineapacity of admitting such a change of character. Every freeholder is intrusted by law with the guardianship of the purity of the roll, and is, of course, entitled to challenge and prevent every attempt to attach that right of admission, which the law exclusively limits to estates of a particular class and extent, to one defective in either requisite. In a certain class of cases, where the matter falls strictly within the cognizance of the court of freeholders, and where the injury arises from the erroneous decision of that court upon points properly within their cognizance, the interest is protected, and the freeholder's title exercised in the form of a summary petition and complaint to the Court of Session. But it is perfectly well known, that, from the most obvious considerations of expediency, the court of freeholders is only vested with a limited jurisdiction, or rather with a limited power of inquiry; and, where the wrong done either lies beyond their jurisdiction, or demands an investigation, which their power of taking proof does not reach, any freeholder has an interest, and a legal title, to obtain redress, by instituting an action at common law, in the form proper for that purpose. Accordingly, the title of a freeholder to institute such actions has been frequently recognized in cases exactly analogous to the present. It has been already mentioned, as one of the [538] requisites for sustaining the freehold qualification, that the lands should be of the valuation fixed by law. In the court of freeholders, the only evidence which can be demanded, and which they are bound to receive, is that afforded by the cess-books of the county, and the decreets of division pronounced by the commissioners of supply, in cases where the division of property has rendered necessary a new apportionment of the valued rent. It is quite undeniable, that, in the court of freeholders, and in the Court of Session, sitting in review of their judgments, by petition and complaint, decreets of division by the commissioners of supply are held *probatum probata* of valuation, against which no objection can be received. But although this evidence is beyond the reach of challenge of the court of freeholders, it is now fixed law, that any individual freeholder may bring an ordinary action at law for setting aside those decreets, and may, by thus establishing the defects of the evidence of valuation, ultimately procure the expulsion of the claimant from the roll. This point was decided in the cases of *Ross v. Mackenzie* (March 10, 1774), and *Earl of Fife v. Duke of Gordon* (June 16, 1774); which decisions have generally been understood as removing all doubts as to the freeholder's title to reduce. According to Wight (Wight, p. 185), it has been doubted whether an action of this sort be "competent to a freeholder who has no interest in challenging a decision but to support objections to the enrolment of others. But when that point came to be warmly debated, and deliberately [539] considered, in a question from the county of Inverness, the Court of Session sustained the title, and repelled the objection. A similar judgment was pronounced in a question between the Duke of Gordon and the Earl of Fife. It is true, that, in that case, one of the pursuers had an undoubted right to challenge the decision, being himself immediately affected by it." But the court sustained the title of the pursuers in general, although the rest had no such interest. And, since that period, reductions of decreets of division of valuation, at the instance of a freeholder, having no other interest, have become common, and the title is now universally allowed to be unchallengeable.

The same inference may be drawn from another decision in the case of the *Earl of Fife v. Gordon* (Morison, 8850. July 8, 1774), where the title of an individual freeholder was sustained, to establish, in an ordinary action at law, an objection against a freehold qualification, which did not fall within the jurisdiction of the court of freeholders.

The judgment in that case is decisive of the present question. The sasines there in dispute were *ex facie* complete and valid; and the date of registration appearing upon them was as much beyond challenge in the court of freeholders as the description of the tenure in the present case; yet there the title of a freeholder to insist in an action of declarator, that the apparent date was not the true date, was sustained; and was sustained, although the claimants had been rejected, for the [540] purpose of enabling the opposing freeholder to support what would otherwise have been untenable, the rejection of those claims of enrolment.

From these numerous cases, the Respondent is entitled to assume, that the legal title of a freeholder is not limited to that which he may exercise by petition and complaint; but that, on the contrary, he has, at common law, a legal title and

interest to maintain and prosecute actions for obtaining redress against invasions of the purity of the roll, which neither the freeholders sitting as a court, nor the Court of Session, sitting in review of their proceedings, could possibly take cognizance of. Indeed so far from this latter circumstance excluding his interest, it is precisely the incompetency of applying for redress by petition and complaint, which, in the case of decret of revision, and others of the same kind, establishes his undoubted legal interest to insist at common law in actions of reduction. When a freeholder may legally state an objection either to the title or valuation of a claimant in the court of freeholders, or in a petition and complaint to the Court of Session, it might be maintained that he had no legal interest to insist in actions of reduction, which were not necessary to defend the purity of the roll, and which might affect the interest of his adversary in matters totally unconnected with his claim of enrolment. But when an objection lies beyond the reach of the court of freeholders, when they, sitting as a court, are bound to receive as evidence, either of tenure or valuation, documents which however *ex facie* satisfactory, are really and substantially defective, it [541] seems quite clear that the title of a freeholder must be sufficient to entitle him to establish those defects in the ordinary course of law.

That the court of freeholders, and every individual freeholder appealing from their judgment, by petition and complaint, is limited to the actual existing investiture, and cannot inquire into the preceding titles, may be admitted. But that limitation cannot apply to cases where the object of the freeholder is to ascertain, by an action at common law, that the actual existing investiture, though apparently conferring a qualification, is not really entitled to that effect. Although the court of freeholders may be bound to hold the charter and sasine presented to them, as *probatio probata* of the tenure, just as they were bound to admit a decret of division as *probatio probata* of valuation; and they may no more be entitled to investigate the anterior titles in the one case than they are entitled to investigate the anterior rates or valuations of the different portions of land upon which the decret of division rests, yet if, in the latter case, there is a power in an action of reduction at common law to reach these anterior calculations, and to rectify the error thus proved to exist, the Respondent, holding precisely the same interest, must have a title to correct an error equally fatal, being the substitution of a tenure which the lands were incapable of receiving; and to prove the existence of that error, from the anterior titles, just as the error of the decret of division is proved, by the reference to what was equally beyond the cognizance of the freeholders, [542] the apportionment of the valuations and calculations upon which the decret of division rested.

Where attempts have been made to challenge titles of enrolment, on the ground that they were acquired from persons holding under entails, or otherwise under inability to convey, the plea of *jus tertii* has been sustained.

But the objection here is totally irrelevant; and the subject of reduction does not at all fall within the class of cases where *jus tertii* can be pleaded. The Respondent does not deny the Appellant's right to the lands, or the efficacy of the conveyance by which he acquired it. But, to warrant enrolment, evidence is necessary, not only of the claimant's right, but proof that the lands are of the situation, value and legal character required by law. It is their defect in this last quality, which it is the object of the present reduction to establish. The Respondent does not deny the right of the Appellant to those lands; but he maintains that their tenure is *burgage*, and the object of the reduction is to set aside the deeds by which they appear to be held *blench*. Here, then, the injury which it is the object of the action to redress, is, that, by the deeds sought to be reduced, a freehold qualification has been attached to lands, which, from their nature, are incapable of affording it; and it seems in vain to maintain, that such an objection as this comes under the objection of *jus tertii*, any more than an objection founded on the lands being beyond the county, or not possessing the valuation required by law. In all these cases, the objector challenges not the right of the [543] claimant to the lands, but the capacity of the lands to afford a vote; and, accordingly, where such cases have occurred, the title of the objector to reduce the deeds by which an apparent qualification has been attached to the lands, has been uniformly sustained.

If it be true, as contended by the Appellant, that lands held *burgage* are under

no inherent disability of being changed into feu or blench holding; and that their incapacity of affording a vote arises only from the disqualification of the burgh that holds them, and ceases upon their transference to persons not so disqualified, as in the illustration offered by the Appellant; the Respondent might have no interest to prosecute the action, because these suppositions tend to prove that the action itself is unfounded. But, in trying the question of title, the Respondent undertakes to make out that these propositions are false. He maintains, that lands held burgage are legally disqualified from affording a freehold qualification. That this does not arise merely from the disqualification of the burgh; but, to use the words of Mr. Wight, that "though royal burghs were, by connivance, to convey the superiority to a purchaser, so as to make way for his obtaining a charter from the Crown, that would not confer upon him a right to vote, or entitle him to be enrolled as a freeholder. The lands still remain truly burgage, and their owners are represented by the member for the burgh." In trying the question of title, then, it must be assumed that the grounds of the action may be established; and it is a violation of the rule of pleading to attempt to question the [544] title by denying the grounds of the action. The objections thus urged by the Appellant, may, if ultimately ascertained to be well founded, sustain the Appellant's defence; but he cannot now plead them in bar of the Respondent's title. To render the case of the lands held by a Peer, or lands held under an entail analogous to the present, the supposition ought to be made, that lands once held by a Peer, or once subjected to the fetters of an entail, should, by public law, be rendered incapable of ever affording a freehold qualification: on which supposition there cannot be a doubt, that any freeholder would have a legal title to reduce the deeds, by which their inherent disability was disguised, and by which they received the semblance of lands capable of affording the elective franchise.

The supposed danger of disclosing a title is imaginary. Such cases must necessarily be few, where any attempt is made to convert lands, properly burgage, into lands held feu of the Crown. Such a change can only be attempted to serve political purposes: and when it is attempted, its detection cannot justly be made the subject of complaint. As to the alleged hardship of extinguishing the rights of property held by the Appellant, upon a mere objection urged by a freeholder to its sufficiency as affording a vote, it seems to be guarded against by the qualification contained in the Lord Ordinary's interlocutor, "That the Pursuer has a sufficient title to insist in the present action for reducing the Defender's title, in so far as the Pursuer is interested as one of the freeholders, standing on the roll of freeholders of the county of Mid-Lothian, as libelled, to re-[545]-duce the Defender's said title." But even if this qualification were ineffectual, and if the consequence of the reduction were the extinction of the Appellant's feudal title, it could afford no objection to the Respondent's legal interest to prosecute this reduction. As the Appellant has chosen to make these rights the ground of a claim of enrolment, they must be exposed to the risk of challenge, upon any ground competently urged by a freeholder against their effect; and the right of such freeholder cannot be impaired or excluded by the consideration, that his reduction may operate more extensively than his interest to reduce. It is obvious, that as the amount of a proprietor's valued rent ascertains a great many important rights, besides that of admission to the freeholders roll, the reduction of decrees of division of valuation, may lead to much more extensive consequences than mere expulsion from that roll; yet the title of a freeholder to reduce such decrees is undoubted. Again, it is obvious, that in the case of the *Earl of Fife v. Gordon*, the declarator, brought for the purpose of ascertaining that certain sasines were not registered on the day on which they bore to be registered, led to various important consequences, and might have extinguished the completed feudal title of the parties holding them; but that possibility was not held to exclude the Pursuer from urging the point, in prosecution of the object which, in the character of freeholder, he had in view.

As to the objection founded on the lapse of four months from this enrolment, the procedure at common law is not only independent of the statute, but [546] its object is one which could not competently have been attained by the statutory procedure by petition and complaint. The Respondent objected to the enrolment of the Appellant, on the ground that his titles contained lands which were held burgage,

and which were therefore inherently incapable of affording a freehold qualification. This objection the Appellant maintained to be, and the Court of Session held to be, incompetent, as urged either in the court of freeholders, or before them, as sitting in review of the judgment of the freeholders. If this be the law, upon what reasonable grounds can it be maintained, that the Respondent is bound by the limitations of a statute of which he has been found not to have the benefit? If he shall be found to have a legal title and interest to prosecute the action of reduction, there is no authority for maintaining the incompetency of prosecuting it, after the expiry of the period fixed only for procedure, which by the argument of the other party, and by the judgment of the Court of Session, cannot possibly apply to his case.

Neither will it be found that this view can lead to any evasion of the statute. The statute might possibly be evaded, if, after the expiry of four months, actions of reduction or declarator were sustained for making good objections, which might competently have been urged in the form of petition and complaint. But there can be no evasion of the act, in disregarding the limitation of the four months, in actions for substantiating objections, which, like the present, have been held not to form a competent subject of petition and complaint: and to which, therefore, by the conditions of the argument, the act does not apply at all. Besides, it will be found, that the effect of the present action upon the rights of the Appellant as a freeholder admitted to the roll, is perfectly authorized by the terms of the statute alluded to. The statute merely provides, that if no petition and complaint shall be lodged within four months, "the freeholder enrolled shall stand and continue upon the roll until an alteration in his circumstances be allowed by the freeholders, at a subsequent Michaelmas meeting, or meeting for election, as a sufficient cause for striking or leaving him out of the roll." When the claim of any party to be enrolled is complete in all those points, to which exclusively the jurisdiction of the court of freeholders and the Court of Session, judging on petition and complaint, is limited, these points form the circumstances of the freeholder upon which he obtains an enrolment. If he has a charter and sasine *ex facie* good, and the evidence of valuation attested by a decree of the Commissioners of Supply, he possesses those requisites which the freeholders and the Court of Session, in the procedure by petition and complaint, must admit as the constituent parts of a freehold qualification. But if there exists in any of those constituent parts an error, which a freeholder is found to have a legal interest to correct, it is quite clear that the freeholder who corrects that error effects an alteration of circumstances, which may at any period extinguish the freehold qualification, even after the lapse of the four months. In short, such action is not a complaint against an en-[548]-rolment, but is an action to alter those circumstances which the freeholders were originally bound to receive as sufficient.

This principle (Bell on Election Law, p. 402) has been repeatedly recognised in the analogous case of reduction of divisions of valuation, which reduction it has been found competent to bring after the lapse of the four months. In a question betwixt the Earl of Fife and the Duke of Gordon, a reduction of the valuation of certain freeholders was opposed, on the ground that these freeholders had stood for more than four months on the roll, and "as, therefore no effect could be produced on these freeholds by such reduction, the reduction was incompetent. The Court (August 1774.) repelled the objections to the Pursuer's title, and found him entitled to carry on the action." "This is a judgment on the relevancy, and, consequently, proves that a decree of valuation being reduced, the reduction would be held to be a change of circumstances, which, after the four months, would entitle the freeholders to turn the person off the roll whose valuation had been by such means thrown loose." Upon this there is the following note: "In this question the following cases were referred to as precedents. A case where Mr. Pulteney having purchased the estate of Cromarty, disposed certain parcels of superiority to Mr. Rose and others, who were enrolled, and a reduction of the decree of valuation being raised after the expiry of the four months from these enrolments, it came to be argued, whether [549] such an action was competent, in respect of the lapse of four months, the pursuers having no interest in the action, but in the character of freeholders, the Court (5th July 1768.) found the action competent for reducing the decree of valuation, and sustained the Pursuer's title to insist in the action."

In another case from Lindlithgowshire, a similar judgment was given. Mr. Bruce applied to be enrolled, and no objection was stated to the decree of valuation on which he claimed: but as the Court was of opinion that the objection did not appear *ex facie* of the decree, the objection to his enrolment was repelled. After Mr. Bruce had stood more than four months on the Roll, a reduction of the decree of division was brought, and the decree reduced; and on this an objection was lodged to his remaining on the Roll, when the freeholders struck him off."

Even if a reduction were not in general competent after the lapse of four months, its competency in the present case is protected, by the dependence of the original petition and complaint, which was brought within four months. For though that application was rejected, on the ground of its incompetency by the Court of Session, their judgment is the subject of an appeal. But as the procedure raised within the statutory period is therefore, in one sense, in dependence, there can be no doubt of the competency of the present action, raised for the subsidiary purpose of established directly certain points, bearing upon the point at issue in that petition and [550] complaint. The Appellant will hardly deny that the present action would have been quite competent if raised during the dependence before the Court of Session of the proceedings in the petition and complaint; and that the complaint once instituted within the statutory period, of course warranted the raising of any action necessary or expedient for ascertaining any of the points involved in it. But there is no distinction between that and the present case, where the proceedings by petition and complaint are still in dependence before the House; and where, consequently, the Respondent must have, upon the very same grounds, a right to institute actions of a subsidiary nature, in support of the pleas which may ultimately warrant a judgment on the petition and complaint, ordering the Appellant to be expunged from the Roll.

The statute only limited the period within which it was competent to bring the judgment of the freeholders under the review of the Court in a summary form; but did not deprive a freeholder of his right at common law to obtain relief by an ordinary action at any time, against the injury sustained by an undue admission of an unqualified person to the rolls. As every freeholder was intrusted by law with the guardianship of the purity of the roll, he was entitled to challenge and prevent every attempt to attach that right of admission (which the law limits to estates of a particular class and extent) to one defective in any requisite. There is one class of cases in which he has a right so to do in a summary form. There is another class which demands investigation, and cannot be considered by [551] the court of freeholders; but this does not deprive a freeholder of his interest, and title to obtain redress. It is of no importance that the effect of reduction may be more extensive than his interest demands.

In the course of the argument the Lord Chancellor observed, that unless the Respondent could limit the conclusions of his summons to the enrolment of the Appellant he had no interest to reduce the charter; that the summons asked for a total reduction; and the utmost the Respondent could obtain by the action was, that the Appellant should be taken off the roll of freeholders: how that was to be done, by the Court of Session, did not appear:—That the judgment in the former cause was, that the freeholders had no right to inquire; and now the Appellant, who had obtained that judgment, contended that they ought to have inquired:—That the freeholders, at all events, could not inquire beyond the immediate title:—That, consistently with the judgment, a freeholder might proceed in reducing the title:—That the Judges in the court below were of opinion, that if neither the Crown nor the city interfere, a wrong may be done without a remedy; but that no remedy could be given upon a summons not stating the grievances really intended to be complained of:—That as the Court of Session had given leave to appeal before the conclusion of the cause, it must be supposed that, in their opinion, notwithstanding the form of the summons, some final judgment might be given:—[552] That the Respondent probably would contend, that the charter should be reduced so far as it gives a right of voting; and that at the next Michaelmas Court, on the ground of a change of circumstances, the Appellant should be put off the roll: That he gave no opinion on the question, whether any thing could be done under the summons in its present form, or whether it could be restricted by the Court; but that the

House could do nothing on those questions until they had been decided by the Court of Session:—That the cause ought to be remitted to the Court of Session to consider the terms of the summons, and to find what remedy they are entitled to give under it, supposing the judgment under appeal to stand.

Lord Redesdale observed, that in the ordinary cases of title, the question was, to which of two individuals the property belonged: That in the case under appeal the doubt was, whether it belonged to any one, as giving a title to vote in respect of a freehold in the county: That the assessment showed, *primâ facie*, that the lands were in the county; but that there were further questions, whether the lands were of the proper tenure? whether the charter could alter the tenure? and whether an additional voter could thus be introduced upon the county: That the competency or incompetency of the action depended upon what the Court could do; if the Court could do nothing, the freeholder could not sue to the effect of the prayer of the bill.

[553] 23 May, 1821. “Ordered, that the cause be remitted to the Court of Session to review the interlocutors generally and especially, having regard to the summons and the prayer thereof; and to what the Court, having such regard, can or cannot, according to law, further do in this cause.”

[554] WILLIAM ARBUTHNOTT, Esq.—*Appellant*: JAMES GIBSON, Esq. of Ingliston.—*Respondent* [23 May 1821].

Whether a summons at the suit of a freeholder, praying an unlimited reduction of a charter, etc. can be limited by the Court to a partial reduction, so far as they constitute a freehold qualification.—*Quære*.

Whether upon such a summons (if it may be so limited) judgment can be given in a case where no application had been made to be put on the roll of freeholders, at the time when the action was commenced; but where the party became a freeholder pending the action.—*Quære*.

The question in this case was similar, in all essential particulars, to that depending between the Respondent and Sir William Forbes, the Appellant in the preceding case.

The lands contained in the deeds forming the title of the Appellant were part of the common muir or burgh muir of Edinburgh. The *reddendo* in the charter was the sum of fifty-two merks sterling, ‘*tantum pro antiquo censu burgali*,’ etc. ‘*cum servitio burgi, solito et consueto*,’

In the year 1816 a signature was passed in the Exchequer, and a new charter granted, of certain parts of the common muir of Edinburgh, there specially described. In this charter the *reddendo* was the sum of 6s. Scots of *feu-duty*.

The parts of the burgh muir contained in this charter were conveyed away in five different portions, each sufficient to afford a freehold qualification. Of these one was granted, at the price of [555] £960, to the Appellant, being then the Lord Provost of Edinburgh. The lands contained in this disposition are thus described in the charter: ‘*Totas et integras illas terras et acras de lie burgh muir de Edinburgh, acquisit per demortuum Archibaldum Brown de Greenbank, etc.: Item, Totas et integras terras de Mayfield alias Newlands, cum domibus, etc.: Item, Totas et integras illas terras partes communis morae de Edinburgh, communiter vocat. lie common vel Cameron Myre, cum pertinen. earund. extenden. in tota ad quinquaginta duas acras terrae*,’ etc. And the disposition was granted by the Appellant to the Appellant himself, ‘as Lord Provost aforesaid, Kincaid Mackenzie, John Young, Alexander Smellie, and John Manderston, esquires, bailies; Robert Johnston, esquire, dean of guild; and John Waugh, esquire, treasurer of the said city, all for the time being; and also the then remanent members of council, for themselves, and as representing the community of the same.’ Upon the precept of sasine contained in this charter, which was assigned in this disposition, infeftment was taken by the Appellant on the 24th July 1816, who thus obtained an apparent title to claim enrolment as a freeholder in the county of Edinburgh.

Before the Appellant's claim for enrolment was made, the Court of Session had decided in the case of Sir William Forbes, that the objection of the change of tenure could not be stated with effect in the Court of Freeholders, or in a petition and complaint against their decision. The Respondent, therefore, commenced an action of reduction against [556] the Appellant, for setting aside the titles by which these lands were made to afford a freehold qualification.

Against this action the Appellant gave in defences, denying the petitioner's title or interest to insist, and the Lord Ordinary, by interlocutor dated February 6, 1818, sustained the objection stated by the defender to the pursuer's title to insist in the present action.*

In pronouncing this interlocutor, rejecting the title of the Respondent, the Lord Ordinary was influenced by the specialty, that the Appellant had not claimed enrolment on the titles sought to be reduced. The Respondent presented two short representations against the interlocutor pronounced by the Lord Ordinary in the present action, which were refused without answers.

The Respondent then presented a petition to the Second Division of the Court, which was remitted to the Lord Ordinary, in respect that no full representation had been laid before him, with power to do as he should see cause.

In consequence of this remit, answers to the petition were ordered; upon considering which, the Lord Ordinary refused the desire of the petition, and adhered to the interlocutor reclaimed against.

[557] The Respondent then presented a second petition to the Court: but before this petition was given in, on the 29th June, two days after the last interlocutor of the Lord Ordinary, the Appellant had presented a claim of enrolment to the freeholders of the county of Edinburgh, and that claim had been admitted. Upon considering the petition, therefore, the Second Division of the Court of Session again remitted the case to the Lord Ordinary, to hear the parties further, and to do as he shall see cause. The Lord Ordinary having considered this petition, with the answers of the Appellant, pronounced the following interlocutor: 'In respect the defender has, since the date of the Lord Ordinary's last interlocutor, claimed enrolment in the roll of freeholders, and has been enrolled in virtue of the titles which have been brought under reduction by the pursuer: alters the interlocutor reclaimed against, and sustains the pursuer's title to insist in the present action for reducing the defender's said titles, in so far as the pursuer is interested, as one of the freeholders standing upon the roll of freeholders of the county of Mid-Lothian, as libelled, to reduce the defender's said titles, and assigns

for satisfying the production.'

Two representations against this interlocutor for the Appellants were refused, without answers.

The Appellant then presented a petition to the Second Division of the Court, which was followed with answers for the Respondent; after considering which, and hearing counsel in their presence, the Court pronounced an interlocutor, refusing the desire of the petition, and adhering to [558] the interlocutor complained of, reserving all questions as to expenses.

Against these interlocutors, which had been pronounced since the enrolment of the Appellant, the appeal was presented.

For the Appellant, The Attorney General.

For the Respondent, Mr. J. P. Grant and Mr. W. Adam.

The cause was argued on grounds similar to those stated in the two preceding cases †.

* In a note subjoined to this interlocutor the Lord Ordinary observed, that "... difficulty occurred from the decisions sustaining the title of freeholders to reduce a division of valuation, when the party has not been admitted on the roll, etc. But still the Lord Ordinary thinks that the decision in the case of the *Earl of Fife v. Gordon*, 8th July 1771, and the principle upon which that case was decided, ought to regulate the present case. The point now under discussion does not appear to have been argued in the cases referred to, in which the title to reduce divisions of valuation was sustained."

† There was in this case the additional circumstance, that the judgment was pronounced upon an event which happened after the commencement of the action.

At the conclusion of the three preceding cases, the Lord Chancellor observed, that the House could not decide upon the competency or incompetency of the action, as it confessedly could not go to the extent prayed for in the summons, viz. the reduction of the charter and sasine *in toto*; and as the Court of Session had given no opinion on the question, whether they could restrict the summons, and how, so as to give relief at all, the House could not decide, in the first instance, what that relief should be. If it should appear that nothing could be done under the terms of the summons, there could be no competency to sue.

23d May 1821. Ordered and adjudged, That the cause be remitted to the Court of Session to review the interlocutors appealed [559] from generally and especially, having regard to the summons and the prayer thereof; and to what the Court, having such regard, can or cannot, according to law, further do in this cause; and having also especial regard to the period at which the Appellant was enrolled in the roll of freeholders.

Upon the order above reported, the Respondent having petitioned the Court of Session to carry it into effect, after various proceedings the Lords of the Second Division, on the 18th of May 1824, by a very small majority, pronounced an interlocutor; remitted the cause to the Lord Ordinary that he might assign a day to the defender (Forbes) to satisfy the production; and, after such production satisfied, to make great avizandum therewith to the Court, reserving all objections to the pursuer's title, etc. The Appellant thereupon intimated his intention to appeal against the interlocutor enjoining production; but the Lord Ordinary, notwithstanding this intimation, by interlocutor dated the 29th of June 1824, assigned the 9th of July then next "for satisfying the production in the reduction libelled, with certification;" and by interlocutor dated the 10th of July, reciting that the defender (Appellant) had failed to satisfy the production, "grants certification *contra non producta*, and reduces and decerns and declares conform to the conclusions of the libel, etc." In consequence of this interlocutor the Appellant produced the charter and sasine called for in the summons of reduction, and at the same time presented a petition against the interlocutor of the Lord Ordinary above stated, praying that further procedure in the cause might be stayed until after the meeting of Parliament. Upon this petition the Lords of the Second Division, by interlocutor of the 12th of November 1824, reciting that the production had been satisfied, recalled the interlocutor, and allowed the cause to proceed. Against these interlocutors of the Lord Ordinary and the Court, Sir W. Forbes appealed to the House of Lords, and the appeal was pending until it came in its course to be near the hearing, when the matter was compromised and the appeal withdrawn.

In the other action a similar course was pursued, and, upon considering the order of remit, the Lords of Session (Second Division) [560] by interlocutor of the 18th May 1824, reciting the proceedings and the order of remit, "repelled the preliminary defence that the action was instituted prior to the period of the defender (Arbuthnott) being put on the roll of freeholders; remit, etc. to the Lord Ordinary to assign a day for satisfying the production," etc. After the pronouncing of this interlocutor the same proceedings took place (*mutatis mutandis*) as in the action against Forbes, and a similar appeal was entered, and pending until it was nearly in course of hearing, when the matter was compromised, and that appeal also withdrawn.

[561]

ENGLAND.

COURT OF KING'S BENCH.

JOHN HENRY DEFFELL.—*Plaintiff in Error*; THOMAS BROCKLEBANK,—*Defendant in Error* [25th May 1821].

[*Mews' Dig.* xi. 915; xiii. 268, 287. See *Glabon v. Hays*, 1841, 2 Man. and G. 257, 262 n.

By mutual covenants in a charter-party of affreightment it was agreed on the

part of the ship-owner, that he should provide a ship, which should proceed to Jamaica, and receive on board, from the agents of the shipper, a cargo to be provided by him, according to his covenant after mentioned, and should sail with the June convoy, etc. provided the ship arrived out, and was ready to load sixty-five running days before the sailing of the convoy, which were to be accounted from the day of arrival, and being reported ready to receive goods, etc.; and on the part of the shipper, that he would provide 650 casks of produce in time for the ship to load the same, and join the June convoy, provided she arrived out and was ready to load, and notice thereof given by the agents of the shipper sixty-five running days before the sailing of the convoy, etc. and should pay, etc.

It was further provided by the charter, that if any hurricane, insurrection or invasion should happen, etc. that upon notice, the obligation of the shipper under the charter-party should cease, etc.

In an action of covenant brought by the ship-owner upon this charter-party, the declaration, after reciting the substance of the indenture, stated that the ship arrived at Jamaica, on the 27th of April, etc. and upon her arrival was seaworthy, etc. and ready to receive a cargo of, etc. according to the charter-party, whereof notice was given to the agents of the freighter, and that the ship did at, etc. receive such cargo as his agents thought fit to load on board, etc. and delivered such cargo, etc. according to the charter-party. The declaration then assigned, as a breach, that although no hurricane, etc. prevented, etc. the freighter did not [562] provide 650 casks of produce, etc. but, etc. a much smaller quantity; that is to say, etc. being a very insufficient cargo, etc. contrary to the covenant, etc. whereby the ship-owner was prevented earning profit to the amount of £2500.

The declaration then assigned, as a further breach, that although no hurricane, etc. and although the ship arrived, etc. and was ready, etc. and notice, etc. sixty-five running days before the sailing of the June convoy, etc. the freighter did not provide a sufficient cargo to be laden, etc. in time sufficient for the ship to join the June convoy, etc. but detained the ship thirty days after the sailing, etc. whereby the (shipowner) lost the use, etc. was put to expense, etc. and prevented earning freight, etc. to a large amount, to wit, £2500.

To this declaration the Defendant pleaded eleven pleas, the substance of which, as applicable to the first breach, was, that the ship did not arrive, or was not ready, or reported ready, to receive a cargo sixty-five running days before the June convoy was appointed to sail, or did actually sail, and that therefore the charter-party was void; and further, that the Defendant sailed of his own accord with an insufficient cargo.

As applicable to the second breach, the substance of the eighth and eleventh pleas was, that the Defendant did not detain the ship for any time after the sailing of the June convoy, in manner and form alleged.

To all the pleas, but the first, seventh, and ninth, the Plaintiff demurred generally. On the first plea of *non est factum*, the Plaintiff joined issue. The replication to the seventh plea was, that the ship was reported ready to load sixty-five days before the sailing of the June convoy. To the ninth plea, that the master sailed of his own accord with the short cargo, the Plaintiff replied, that after notice of the ship being ready to load, a reasonable time elapsed to deliver 650 casks of produce, etc. On the replications to the seventh and ninth pleas, the Defendant joined issue.

Held that the provision as to the sixty-five running days was not a condition precedent to the obligation of the freighter to furnish a cargo of 650 casks of produce, but applied only to the obligation of the ship-owner, that the vessel in such case should sail with the June [563] convoy; therefore that it was not necessary, in the assignment of the first breach, to aver that the ship arrived out, and was ready to load sixty-five days before the sailing of the June convoy. Held also, that the substance of the assignment of the second breach was the failure to produce a cargo, and not the detention of the ship; and that the plea, by taking issue on an immaterial part of the plea, admitted the material part.

This was an action of covenant brought in the court of King's Bench. The declaration stated, by a certain charter-party of affreightment, made on the 13th of January 1812, between the Defendant in error, therein described as part and managing owner of the ship *Balfour*, of the one part, and the Plaintiff in error of the other part; it was witnessed, that the Defendant in error had let, and the Plaintiff in error had taken and hired the said ship to freight for the voyage, and upon the terms and conditions therein contained, whereupon the Defendant in error did thereby covenant, promise, and agree to and with the Plaintiff in error, that the said ship should proceed from Whitehaven (with liberty to call at Cork if required) to Montego Bay, and upon arrival there she should be made tight, staunch, strong, and in all respects sea-worthy, and be well manned, victualled, equipped, provided, and furnished with all things needful and customary for such a vessel and her intended voyage thereafter mentioned, and should thereupon take and receive on board from the agents or assigns of the said Plaintiff in error, in Montego Bay aforesaid, from and out of the usual barquadiers, with the assistance of the ship's boats and people, and at the ship's ex-[564]pense and risk, the quantity of 450 casks of sugar and 200 puncheons of rum, and such a quantity of wood as might be requisite to stow the cargo (provided the agents of the said Plaintiff in error gave to the master notice of such their intention within ten days after his arrival) for which the master of the said ship should and would sign the accustomed bills of lading, and the said ship being therewith despatched, should set sail with the convoy that should depart from Jamaica for England in the month of June then next; provided the ship arrived out and was ready to load sixty-five running days previous to the sailing of such convoy, which days were to be accounted from the day of her arrival at Montego Bay aforesaid, and being reported ready to receive goods, and proceed under sailing instructions from the said convoy back to the port of London, and upon her arrival there deliver the said cargo in the West India Docks, agreeable to bills of lading and to the custom of the said Docks, and thereupon the said intended voyage was to end (the act of God, enemies, restraint of princes and rulers, fire, and all and every other the dangers and accidents of the seas, rivers, and of navigation, of what nature or kind soever, excepted), in consideration whereof the said Plaintiff in error did thereby covenant, promise and agree to and with the said Defendant, not only to provide 650 casks of produce as above stated, for the said ship *Balfour*, to be laden at the usual barquadiers in Montego Bay as aforesaid, and such a quantity of wood as might be requisite to stow the cargo for the port of London, and in time for her to load the same and [565] join the June convoy for England, provided she arrived out and was ready to load, and notice thereof was given to the agents of the Plaintiff in error sixty-five running days previous to the sailing of the said convoy, and on her arrival in the West India Docks, London, receive the said cargo out of her, agreeable to the bills of lading, and according to the custom of the port of London, but also well and truly to pay or cause to be paid unto the Defendant in error, or his order, in full, for the freight of the said cargo, the same freight and primage as should be given to other vessels that should load at Montego Bay for London at the same time as the said ship, to be paid at and in the usual and customary time and manner of paying such freights in the West India trade, and general average to be as customary should any accrue; provided always, and it was thereby agreed and understood by and between the said parties, that if any hurricane, insurrection, or invasion by an enemy should happen in the said island of Jamaica, so as to interfere with or prevent the intention and undertaking of Plaintiff in error, his agent or assigns should not be bound or obliged to give said ship the before-mentioned quantity of goods, but, on the contrary, it should be lawful for him or them in that event to cancel and annul the said charter-party, upon giving notice in writing to the master of the said ship of the determination so to do within ten current days after the said ship's arrival at Montego Bay, in the said island, upon which said notice the said charter-party, and every thing thereinbefore contained, should cease and be utterly void as if the same had never been made or [566] entered into, and the Defendant in error should have no claim whatsoever for freight in respect of same.

The declaration then stated, that on the 30th January 1812, the ship did sail and proceed from Whitehaven aforesaid upon her said voyage to Montego Bay, and arrived there on the 26th April 1812, and upon her arrival there was made tight, staunch,

strong, and in all respects sea-worthy, and was well manned, victualled, equipped, provided, and furnished with all things needful and customary for such a vessel and for the said voyage, and was also ready to receive, and take, and load on board, from the agents or assigns of the Plaintiff in error in Montego Bay aforesaid, a cargo of sugar, and of rum, and of wood, to stow the said cargo according to the meaning and effect of the said charterparty, whereof notice was given to the agents of the said freighter; that the said ship did, at Montego Bay aforesaid, receive and take, and load on board, such a cargo of sugar, and rum, and of wood, to stow the said cargo, as the agents or assigns of the Plaintiff in error thought fit to load on board of her, for which the master of the said ship signed the accustomed bills of lading, and the said ship being therewith despatched, afterwards set sail and departed therewith from Montego Bay aforesaid, back to the said port of London, where the said ship afterwards arrived and delivered such cargo as had been so laden on board her in the West India Docks, agreeably to bills of lading and to the custom of the said Docks, and upon such delivery ended and terminated her said voyage, according to the intent and meaning of the charterparty.

[567] The declaration then assigned a breach, that, although no hurricane, insurrection, or invasion by an enemy happened in the said island of Jamaica, so as to interfere with or prevent the intention and undertaking of the Plaintiff in error to load the said ship, in the charterparty mentioned, with a sufficient cargo, according to the terms and stipulations thereof, yet the Plaintiff in error did not provide, or cause to be provided, the said 650 casks of produce, as and for the cargo of the said ship, to be laden on board thereof at the usual barquadiers in Montego Bay aforesaid, and such a quantity of wood as was requisite to stow the said cargo for the port of London, but, on the contrary, loaded on board the said ship a much smaller quantity of produce, that is to say, 156 hogsheads of sugar, and twenty-four puncheons of rum, the same being a very insufficient and incomplete cargo for the said ship, and contrary to the true intent and meaning of the said charterparty, and of the said covenant of the Plaintiff in error, so by him in that behalf made as aforesaid, whereby the Defendant in error was prevented from earning and recovering so much freight and primage as he otherwise might and would have done to a large amount, to wit, to the amount of £2500.

The declaration then assigned as a further breach, that although the Plaintiff in error was not prevented from loading the said ship in manner above agreed upon, and although the said ship arrived out at Montego Bay, and was ready to load there, and notice thereof was given to the agent of the Plaintiff in error sixty-five running days previous to [568] the sailing of the June convoy from Jamaica for England, in the said charterparty mentioned, yet the Plaintiff in error did not provide, or cause to be provided, a sufficient cargo of produce to be laden on board the said ship at the usual Barquadiers in Montego Bay aforesaid, in time sufficient for the said ship to join the said June convoy from Jamaica to England on her homeward-bound voyage to the port of London aforesaid; but the Plaintiff in error detained the said ship for a long space of time, to wit, the further space of thirty days after the sailing of the said June convoy, contrary to the form and effect of the said charterparty, and of the covenant of the Plaintiff in error in that behalf, whereby the Defendant in error during all that time not only lost the use and benefit of the said ship or vessel, but was also put to greater expense in and about the maintaining and paying the crew thereof, and was likewise prevented from earning and recovering so much freight and primage as he otherwise might and ought to have done to a large amount, to wit, to the amount of £2500.

And the Defendant in error laid his damages at £3000.

To this declaration the Plaintiff in error pleaded 1st, *non est factum*.

2d. That the ship upon her arrival at Montego Bay was loaded with a cargo of coals, which was not discharged from the ship for a long space of time after her arrival; and that there did not elapse sixty-five running days from the time the ship discharged the said cargo of coals, and was ready to receive a cargo of sugar and rum, to the time [569] of the sailing of the June convoy from Jamaica for England.

3d. That at the time when the ship was reported ready to receive goods, to wit, on the 27th of April in the year aforesaid, the June convoy stood appointed to sail

on the 20th June following; and inasmuch as sixty-five running days could not elapse between the 27th April and 20th June, the charterparty became void.

4th. That the ship was reported ready on the 27th April in the year aforesaid, and that such ships and vessels of the June convoy as departed and sailed from Montego Bay for England departed from thence on the 29th June, and within the period of sixty-five days from the day when the ship was reported ready, whereby Plaintiff in error was discharged from his covenant in that behalf.

5th. That the ship was not reported ready sixty-five running days before the June convoy was appointed to sail and depart.

6th. That the ship was not reported ready sixty-five running days before the ships of the June convoy at Montego Bay departed and sailed from thence.

7th. That the ship was not reported ready to receive goods sixty-five days before the convoy was appointed to sail, or actually did sail; and that the master of the Balfour voluntarily remained at Montego Bay after the sailing of the convoy.

8th. After protesting that the ship did not arrive out, and was not ready to load, sixty-five running days previous to the sailing of the June convoy, avers that Plaintiff in error did not detain the said ship at Montego Bay for any time whatever after the [570] sailing of the said June convoy in manner and form alleged.

9th. That the master, after receiving on board the ship the goods mentioned in the declaration, before the residue of the cargo could be procured, of his own accord sailed with the part cargo.

10th. That the Plaintiff in error was not bound to provide the cargo for the said ship in time for her to load the same and join the June convoy, unless the ship should arrive at Montego Bay, and be there reported ready to load in sufficient time before the sailing of the said convoy, to be and remain in Montego Bay for the purpose of loading there sixty-five running days before the ship should be obliged to leave in order to join the June convoy. That the ship did not arrive, and was not reported ready to load in sufficient time before the sailing of the June convoy to have enabled the said ship to be and remain in Montego Bay sixty-five running days, for the purpose of loading there, in case the ship had joined and sailed with the June convoy.

11th. That the Plaintiff in error did not detain the ship for any space of time after the sailing of the June convoy as alleged in the declaration.

To the 2d, 3d, 4th, 5th, 6th, 8th, 10th, and 11th pleas, the Defendant in error demurred generally, and the Plaintiff in error joined in demurrer. The demurrers came on for argument in the Court of King's Bench in Easter Term 1814, and were allowed.

Upon the 1st plea the Defendant joined issue. As to the 7th, he replied that the ship was reported ready to receive goods sixty-five days before the [571] June convoy actually did sail. As to the 9th plea, he replied, that after the ship was ready to receive a cargo, and notice thereof given, a reasonable time elapsed to deliver 650 casks of produce, etc.; and that before the ship sailed the Plaintiff in error did not deliver 650 casks, etc. but refused, etc.

On the replications to the 7th and 9th pleas the Plaintiff in error joined issue. The issues were tried at the Sittings after Michaelmas Term 1814, when a verdict was given for the Defendant in error, and general damages assessed upon both breaches.

In Easter Term 1817, the judgment of the Court of King's Bench upon a writ of error, sued out by the Plaintiff in error, was affirmed in the Exchequer Chamber.

Upon these judgments a writ of error, returnable in Dom. Proc. was sued out in May 1817.

For the Plaintiff in Error: The Solicitor General and Mr. Bickersteth.

The covenant to load the ship with 650 casks of produce, etc. is discharged by the circumstance of sixty-five days not having elapsed between the time when the ship was ready to receive that cargo and the sailing of the June convoy from Jamaica, or between the time when the ship was reported ready to receive that cargo and the time when the June convoy was appointed to sail, and the Plaintiff in error was at liberty to send his produce by any other vessel: The judgments are erroneous, because it is not averred in the assignment of the first breach that the ship arrived out, and was ready to load sixty-five [572] running days previous to

the sailing of the June convoy, which, according to the fair construction of the charterparty, was a condition upon which the obligation of the freighter to load the ship depended, there being no covenant to load her for any other than the June convoy. The second breach being confined to the detention of the ship is answered by the 8th and last pleas, which are admitted by the demurrer. And because the damages being general upon the whole declaration, if any one breach is bad, or is sufficiently answered by the plea, the judgment for the Defendant in error is erroneous.

If this be a condition precedent, the declaration is bad because it is not set forth (*Shadworth v. Higgin*, 3 Campbell, p. 383). The condition is material and important, as preventing the necessity of stipulation and questions in respect of demurrage. With respect to the goods actually put on board, it was under a new agreement, upon which freight might be recovered. The assignment of the second breach, if not bad for duplicity, as being precisely the same as the first, is qualified by the circumstance of time. It must be proved as qualified, and is limited by the qualification (*Harris v. Mantle*, 3 T. R. 307). In the last plea issue is taken upon the fact of the detention, as qualified in the breach. If the breach is not assigned in the terms of the covenant, it is sufficient for the Defendant by his plea to traverse it as laid. It is said that it is laid under a *videlicet*, but that applies only to the number of days, not to the main fact of detention.

[573] For the Defendant in error, The Attorney General and Serjeant Bosanquet.

It was not a condition precedent to the obligation on the Plaintiff in error to load the ship with 650 casks of produce, that there should be sixty-five days between the ship being ready, or reported ready, to take in the cargo, and the time of the June convoy sailing, or being appointed to sail from Jamaica, and he was not thereby discharged from his covenant, but only excused for not doing so in time to enable the ship to sail with the convoy.

The proviso has reference merely to the sailing with the convoy in case the ship arrived and was ready sixty-five running days before that time, which appears as well from the construction of that part of the contract, as from the covenant on the part of the shipper. In certain events he is excused from the payment of freight; but no provision is made for avoiding the contract in case the ship should not sail with the convoy, or not arrive and be prepared in time to do so sixty-five running days before the sailing of the convoy. It is a general rule that a covenant is not to be construed as a condition precedent unless it goes to the whole of the consideration. Where it extends only to part, it gives merely a right of action. As to the objection in point of form, the second breach consists of parts; that the cargo was not provided; that it was not provided in time; and that the ship was detained. The plea, by taking issue on the latter part, admits the former. The detention is immaterial, as being under a *videlicet*, and issue cannot be taken on a fact so pleaded, [574] the matters therefore alleged in the pleas as to the detention of the ship are no answer to the breach, the substance of which is the not providing a sufficient cargo.

26th March 1821. The Lord Chancellor, on mentioning the cases which stood over for judgment, observed as to the case of *Deffell v. Brocklebank*, that it had been stated that the twelve Judges had agreed in their judgment upon the questions raised in the case; but as he had doubts upon the subject, it was necessary that he should consider the case fully before he could advise the House to affirm the judgment.

The case was afterwards mentioned by the Lord Chancellor, and notwithstanding the doubt expressed on the former mention of the case, it was affirmed without any material observation.

25th May 1821. Ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutors therein complained of be affirmed.

[575]

SCOTLAND.

COURT OF SESSION.

SAMUEL STIRLING, and others, accepting and acting Trustees of John Mackenzie, deceased,—*Appellants*: ROBERT FORRESTER, Treasurer to the Governor and Company of the Bank of Scotland.—*Respondent* [13th June 1821].

[*Mews' Dig.* xi. 1292; 3 *Scots R. R.* 639. Discussed in *Duncan, For and Co. v. North and South Wales Bank*, 1880, 6 A. C. 1 at p. 19; *Ward v. National Bank of New Zealand*, 1883, 8 A. C. 755 at p. 765; *Steel v. Dixon*, 1881, 17 Ch. D. 825; *Bacon v. Camphansen*, 1888, 58 L. T. 852; *Ruabon Steamship Co. v. London Assurance*, 1900, 9 Asp. Mar. Law, Cas. 2, at p. 4.]

THE Bank of Scotland having discounted bills to the amount of £8000 which were dishonoured, the acceptors becoming bankrupts, agree with the drawers to retain the dishonoured bills, and receive the dividends which might become payable from the bankrupt estates; and, as additional security, to take four promissory notes, indorsed by four sureties, for £2000 each, to guarantee the unsatisfied bills, or any balance upon them which might remain unpaid, to the extent of £2000 each. This agreement having been carried into effect; when the notes were nearly due, upon the application of the original debtors for delay of payment, the Bank of Scotland gave up one of the promissory notes, and accepted a new one from the surety who had indorsed it; renewed notes were also given by two other of the sureties, and with the fourth surety, a treaty was carried on, respecting a renewal, pending which he died. The dishonoured bills had also been delivered over by the Bank to the original debtors, upon the treaty for the renewal of the notes.

Held, (reversing *pro tanto* the judgment of the Court below,) that the fourth surety and his estate, by the legal effect of the transaction, was discharged as to three-fourths, and liable only as to one fourth, of the balance due upon the dishonoured bills, after giving credit for all monies [576] received or receivable from any of the parties upon the bills, or their estates; and that, on payment of such fourth part of such balance, the Bank were responsible to the estate of the fourth surety for all future dividends upon the dishonoured bills.

A Company conducting business at Dunfermline, under the firm of James and George Spence, employed Mr. Paterson, banker in Edinburgh, as their money-broker and banker, lodging in his hands the bills which by the usage of their trade they obtained from their customers at long dates. In return, Paterson and his agents in London, Robertson and Stein, and Tod and Company, accepted bills drawn by Messrs. Spence, which were discounted with Mr. Hunt, the agent for the Bank of Scotland at Dunfermline. Mr. Hunt, and his cautioners in the bond granted, in consideration of his official trust, were liable to the Bank for these discounted bills, and all consequent loss.

In the autumn of 1810, Mr. Paterson and his agents failed, leaving unretired with the Bank of Scotland acceptances of bills drawn by Messrs. Spence to the extent of £8200. Being liable for these acceptances, Messrs. Spence proposed that the Bank should retain the acceptances by Mr. Paterson and his agents, and draw the dividends which might be due from the bankrupt estates; and for additional security, that four gentlemen should guarantee the unsatisfied bills, or *any balance* upon them that might remain unpaid, to the extent of £2000 each. This proposal was accepted by the directors of the Bank; and accordingly Mr. Mackenzie, the Appellants constituent, indorsed to Mr. [577] Hunt a promissory note for £2000 at eighteen months, granted by Messrs. Spence, and bearing date December 1st 1810. Similar notes of the same date and currency were indorsed to Mr. Hunt, one by Mr. John Spence, another by Mr. Beatson, and a third by Mr. Haig. All these notes were then indorsed by Mr. Hunt to Mr. Forrester, treasurer of the Bank of Scotland, the Respondent; and the unsatisfied bills were also placed in his hands.

The form of the obligation was a promissory note by James and George Spence to Mr. Mackenzie, dated 1st December 1810, and payable eighteen months after date, indorsed by Mr. Mackenzie to Mr. Hunt, and by Mr. Hunt to the Respondent, as treasurer of the Bank.

When the promissory notes thus obtained became nearly due, Messrs. Spence again applied to the directors of the Bank for further delay of payment, requesting at the same time that their note indorsed by Mr. John Spence might be given up.

In answer to this application, by a letter from the accountant of the Bank, dated the 27th of April 1812, after stating the balance due on the discounted bills, and the manner in which the payment of that balance was collaterally secured, Messrs. Spence are informed that the directors agree to the liquidation of the balance by a bill or note from Messrs. Spence, jointly and severally with Messrs. Beatson, Haig, Mackenzie, and Hunt, payable three months after date. By another letter of the same date, Messrs. Spence are informed that "the directors have ordered their new promissory [578] note, indorsed to them by Mr. John Spence, for a balance of £1997 4s. 2d. due on the bills specified in the letter, and according to an account therein stated, to be discounted, and applied in payment of the balance on the dishonoured bills before specified, being that part of the dishonoured bills which had been accepted by Robertson and Stein, which were inclosed in the letter, and directed to be given up (unconditionally), together with the original note for £2000 indorsed to them by Mr. John Spence, as guarantee."

Some time after this transaction, but at what time does not appear, the bills were again restored to the Bank; and in the accounts exhibited by the Bank, which were made up to the 5th of October 1813, credit is given for the dividends received upon them.

The directors had taken a renewed promissory note, indorsed by Mr. John Spence, surgeon, Royal Navy, dated 27th April 1812, at three months, for £1997 1s. 2d. in lieu of the original note for £2000; and according to the proposal made by Messrs. Spence, they expected to receive other three notes, each indorsed by one of the three gentlemen whose original notes were to fall due on the 4th June 1812.

On the 8th of May 1812, Mr. Mackenzie wrote to Mr. G. Spence a letter, in which, after noticing that the bill for £2000 which he had accepted was about to fall due, and that a dividend would be paid out of Paterson's estate, he says, "in that case I trust the Bank will not object to renew the bill."

On the 11th May 1812, Mr. George Spence [579] wrote to Mr. Mackenzie, informing him of the new arrangement made with the Bank, that a new note for the whole amount would be forwarded for his indorsement, and if any dividend should be received on the dishonoured bills, it would be placed by the Bank to the credit of the new bills given for their security.

Mr. Mackenzie being unwell when he received this letter, his daughter, Miss Mackenzie, wrote a letter, dated the 13th May 1812, to his agent Mr. Pearson, desiring him to inform Mr. Spence that her father would accept the £2000 bill when sent.

In answer to this letter, Mr. Pearson, on the 14th May 1812, wrote to Miss Mackenzie, to inform her that he should mention to Mr. Spence what she stated as to the £2000 bill.

On the 15th May 1812, Messrs. Spence wrote to Mr. Mackenzie as follows: "I now enclose for your indorsation our note to you for £2000, at three months, from 3d June 1812, which please indorse above Mr. Charles Hunt's name. As this bill is to lie with the bank of Scotland, and to be applied for our account and behoof solely, we hereby oblige ourselves to free and relieve you of the same, when due, and also oblige ourselves to give you any satisfactory line necessary. We omitted to mention above, that this bill is to retire ours for the same amount, indorsed by you, due the 1st-4th June 1812, and that upon lodging this bill with the Bank of Scotland they give up the other one, which we will return you."

Mr. Mackenzie died on the 21st of May without having indorsed the new promissory note.

[580] On the 2d of June 1812, Messrs. Spence wrote a letter to the Bank, enclosing their new promissory notes, informing them that Mr. Mackenzie had died before he could fulfil his promise of indorsement, and suggesting, that as Mr. Mackenzie

had intended and engaged to indorse the note, it would be the same security to the Bank to let the old note lie over for three months. But the directors would not agree to accept of the new note without the indorsement; and Mr. Mackenzie's original note when it fell due was protested "at the instance of Robert Forrester, Esq. treasurer to, and for behoof of, the Bank of Scotland, the holder, against James and George Spence, manufacturers in Dunfermline, the grantors, John Mackenzie, Esq. indorser, and Charles Hunt, late agent for the Bank of Scotland at Dunfermline, also indorser."

This protest was intimated to Mr. Mackenzie's representatives, by an official letter from the Bank, and was also duly recorded in the books of session.

On the 24th May 1813 the directors demanded from Mr. Mackenzie's representatives payment of the sum contained in the promissory note which he had indorsed, which being refused, an action was brought by the Respondent in the name and on the behalf of the Bank of Scotland.

The case having come before Lord Alloway, as Ordinary, his Lordship, after hearing counsel, granted a diligence for recovering writings, and appointed the Appellants to state in a condescendence the grounds of their defence. Such a condescendence having been lodged, and followed by answers, and the documents upon which both parties founded having [581] been produced, the Lord Ordinary pronounced the following interlocutor: "The Lord Ordinary having considered the condescendence for the Defenders, answers thereto for the Pursuer, productions and whole process, finds, that this action proceeds on a bill granted to the late Mr. Mackenzie by Messrs. Spence, and discounted by Mr. Hunt, as the agent for the Bank of Scotland at Dunfermline: Finds, that this bill was indorsed by Mr. Mackenzie, together with other three bills, by Mr. Haig, by Mr. Beatson, and Mr. John Spence, for £2000 each, in order to operate to the Bank of Scotland as a security for a sum exceeding £8000, in which Messrs. Spence then stood indebted to the Bank, arising from the returned bills of David Paterson, Robertson and Stein, and Tod and Company, which Messrs. Spence had negotiated with the Bank: Finds, that when the bills indorsed by Mr. Mackenzie and the three other gentlemen became due, although Mr. Mackenzie was not a joint obligant for the £8000, and could only be liable upon his separate obligation for the £2000, yet, as it appears from Mr. Sandy's letter that the Bank were well acquainted with the nature of the transaction, and that these four obligants had merely interposed their security for Messrs. Spence to the amount of £2000 each, in relief of £8000 due by the Spences to the Bank, so the Bank could only have proceeded against them by giving them a proportionable and equitable relief of the debts which they had been able to recover from the original obligants: Finds, that, although it is alleged that the Bank had given [582] up to Messrs. Spence the bills which they held of Robertson and Stein, which formed part of the £8000, yet this was done merely for the purpose of drawing the dividend from Robertson and Stein; and, this being done, these bills were again restored to the Bank; and credit is given in the accounts exhibited by the Bank for the dividends so drawn: Finds, that when the four bills for £2000 each became due, Messrs. Spence had applied to their friends and to the Bank for a renewal of the same for three months; and *that it is instructed by Miss Mackenzie's letter, written by her father's order, that he had also agreed to renew his obligation for three months*; and Mr. Haig, Mr. Beatson, and Mr. John Spence, having also consented to a renewal of their obligation, new bills upon their part were discounted; but Mr. Mackenzie having died after the bill had been sent to him to be signed, his bill was not renewed, but the former bill was protested, and duly intimated to the representatives: Finds, that in these circumstances the renewal of the other three bills, and Mr. Mackenzie *having previously assented to a renewal*, cannot entitle his representatives to be relieved of the payment of his bill: Finds, that the intimation to his representatives of the dishonour of the bill upon which Mr. Mackenzie stood bound, put in their power to have brought the matter to a close, and to have insisted that the Bank should immediately close the account, and receive their proportion of the loss corresponding to Mr. Mackenzie's obligation of £2000, but so as not to exceed that sum: Finds, that nothing has been stated [583] upon the part of the Defenders to show that the Bank had attempted to give any of the obligants the least preference over the rest; and as it is not disputed that the balance due to the Bank still greatly exceeds the sum of £2000 contained in the promissory note indorsed by Mr. Mac-

kenzie, after giving credit for all the sums which they have been enabled to recover from the other obligants, decerns against the Defenders as Mr. Mackenzie's representatives, for payment of the sum contained in the said promissory-note, with interest thereon since the same became due."

Upon this judgment, the Respondent gave in a representation, in which he prayed the Lord Ordinary to alter the interlocutor, in so far as it connected Mr. Mackenzie's note with the other three promissory-notes, and either at once to decern generally against the Appellants; whereupon the Lord Ordinary superseded advising this representation, until the representation, and additional representation upon the part of Mr. Mackenzie's representatives, came to be advised. And on advising the same, with the representation for the Appellants, he refused the representation, and adhered to the interlocutor complained of.

Two other representations on the part of the Appellants were followed by similar decisions.

Both parties reclaimed by petition to the First Division of the Court; and the petition of the Appellants was disposed of by this interlocutor: "The Lords having heard this petition, they refuse the desire of it, and adhere to the interlocutor reclaimed against;" and, of the same date, their Lordships [584] pronounced as follows, on the petition of the Respondents: "The Lords having resumed consideration of this petition, they refuse it as unnecessary."

The parties again offered petitions against these interlocutors, when the following judgment was pronounced on both: "The Lords having heard this petition, they refuse the desire of it, and adhere to the interlocutor reclaimed against."

The cause having afterwards come to be heard before the Lord Ordinary, on the point of expences, the question was remitted to the auditor, with the instruction, that, in taxing the amount, he shall strike out the expence of the representations and petition for the Bank; and, finally, judgment was pronounced, approving the auditor's report, and assessing the expences to the sum of £80 11s. 11d. for which, and the dues of extracts, decerns.

Against the interlocutors of 24th November 1815, 17th May, 14th June, 4th July, 28th November, and 10th December 1816, and of 22d January 1817, the Appellants entered their appeal. The Respondent also, on his part, took the necessary measures for keeping open the interlocutors in so far as they tended in any degree to limit the foundation of his argument. A cross-appeal was entered for that purpose.

For the Appellants, the Attorney-General, and Mr. C. Warren.

The original proposal, as appears by the letters of Messrs. Spence to the Bank, was to procure security [585] to the amount of £8000*; but this was only to be in aid of the dividends on the returned bills. Each surety was liable till the £8000 was paid; but his responsibility was limited to £2000 and was liable to be further limited by payments on the doubtful notes. It was considered as one joint transaction of suretyship, and so the claim was made for the Respondents, as appears by their accounts, in which the expences as to one are charged against all the sureties†; and the Bank had no right to relieve one of the sureties without the privity of the others. The returned bills were given up absolutely, not for the pretended purpose of obtaining the dividends‡. By giving up those bills to the principal debtors, and taking a new security from one of the sureties, the other sureties were discharged; for then, by that transaction, part of their remedies were lost, and their relative situation was altered.

In any cross-action against J. Spence for contribution, the other sureties could not have had the same remedy; by accepting a new security from J. Spence, they discharged him from the old security. The letter written by Mackenzie's daughter, in answer to the proposal by the Bank, could not bind him, especially as he was not informed of the circumstances. If one of several co-sureties pays more than his share of the debt secured, he has a right of contribution against the others, *Deering v. Lord Winchelsea* (2 Bos. and Pul. 270). By discharging the obligation [586] of the debtor, the creditor discharges the surety; so by any transaction with the co-

* See the letters in the appendix to the Appellant's printed case, pp. 13 and 14.

† See the appendix to the Appellant's printed case, the last item of the account.

‡ Letters, 23 and 27 April 1812. Appx. to A. P. C.

sureties. The situation of the surety was altered by giving up the bills of Robertson and Stein, and he was thereby discharged.

If the creditor has no right to alter the situation of the surety as to the whole debt, the principle applies equally to the case of a part. The acceptances of Robertson and Stein might have been one of the inducements to the contract. By indorsing the new note, John Spence was discharged from the original debt, and consequently from the obligation to contribute. At law it has been doubted whether an *assumpsit* is raised against a surety; and, at the most, the aliquot part only can be recovered. *Cowel v. Edwards* *. But in equity the surety may recover, from a solvent co-surety, the full proportion, according to events.

Independently of all other objections, the delay in prosecuting the remedies against the principal debtors, was sufficient to discharge the sureties.

For the Respondents, Mr. Wetherell and Mr. W. Adam.

The note given by Mr. Mackenzie was distinct and unconnected with the other notes; and by granting indulgence to the other obligants, the Bank did not weaken their right of recourse against Mr. Mackenzie, or his representatives.

The proposal, stated in the correspondence, that each obligant should be bound for the whole sum, [587] was rejected, and the notes were accordingly taken in a separate form. A bill or a promissory note is considered as money; and the doctrine of law as to cautioners is not applicable to the case. *Ersk. B. 3. tit. 2. s. 31. Sharp v. Harvey*, 24 June 1808. *Macdonald v. Foyer*, 13 February 1810.

The bills due by Robertson and Stein were put into the hands of Messrs. Spence, merely in order to enable them to draw, for the Bank's behoof, the dividends due upon them from the bankrupt estate of Robertson and Stein. Messrs. Spence accordingly drew these dividends, which were paid over to the Bank, and were placed to the credit of Messrs. Spence's debt; and, upon this object being effected, the bills were returned, and have ever since remained in the possession of the Bank. The account exhibited by the Bank shows that credit was given for these dividends. The Lord Ordinary was satisfied, that the Respondent's statement on this point was correct, and found accordingly.

The note for £2000, which was indorsed by Mr. John Spence, was not a surrender, but a renewal.

The transaction with regard to John Spence's note was not essentially different from what was done with regard to the other notes, and the whole complaint of the Appellants resolves merely into this:—that the Bank, instead of doing diligence upon these notes, when they fell due, took renewals of them, and, by thus giving indulgence, injured or weakened Mr. Mackenzie's right of relief.

The cautioner is not free, because the creditor allows the principal debtor reasonable indulgence, and abstains from following out immediate diligence. [588] *Erskine* (B. iii. tit. 3. s. 66) lays it down, "That the cautioner continues bound, though the creditor should set the debtor at liberty after he was apprehended by the messenger, but before his actual imprisonment; for, as no creditor can be compelled by a cautioner to use diligence against the debtor, neither can he be compelled by him to consummate an incomplete diligence." Nor is it of any consequence, that, during the delay so granted, one or more of the co-obligants may have become insolvent. The very object of taking a cautionary obligation is, to secure the creditor against insolvency; and, if the obligation does not fall in consequence of delay being granted, the circumstance of insolvency afterwards happening cannot at all weaken its effects. This is implied in the passage quoted from *Erskine* (B. i. tit. 23. s. 44); and Lord Bankton still more directly, after declaring that the creditor is not entitled to discharge any of the obligants, immediately adds, "His suffering the principal debtor to become insolvent will not prejudice him, because the others jointly bound ought to have secured their own relief; so that the same objection of negligence that they make against him, lies against themselves."

By the renewal of these notes, the Bank neither discharged any of the joint obligants, nor surrendered any other collateral security which could have been available to the Appellants, nor weakened their right of relief.

* 2 Bos. and Pul. 268. See the Dict. of Buller, J. in *Toussaint v. Martinant*, 2 T. R. 105; and of Lord Kenyon, in *Erall v. Partridge*, 8 T. R. 310.

And whatever might have been the effect of these renewals under other circumstances, the consent of [589] Mr. Mackenzie must be held to bar all challenge at the instance of his representatives.

If the Appellants had not been willing that the renewals of the notes should take place, it was in their power to have guarded against the consequences of that measure. Upon the intimation of the dishonour of the bill, upon which Mr. Mackenzie stood bound, his representatives might have insisted, that the Bank should immediately close the account, and receive their proportion of the loss, corresponding to Mr. Mackenzie's note for £2000, but so as not to exceed that sum.

In the course of the argument the following observations were made:

The Lord Chancellor: If this were the case of an entire debt, there is no doubt that giving time would discharge the surety. It is clear that, in the circumstances stated, J. Spence could not have been called on for contribution. The transaction with the Bank effected an absolute discharge. It is a new and important question. Suppose the guarantee had been confined to the £2000; was it not discharged by the transaction with J. Spence? Is it not discharged to the amount which J. Spence would have been liable to contribute? If the giving up of the bills does not effect a discharge of the sureties, then the amount of the dividend upon them is to be received for the sureties. But is a surety to be put in the situation of being driven into the account of a bankrupt estate, and the question what it may or may not pay? In another point of view, the bills of Robertson and Stein, [590] provable under the bankruptcy, were considered as part of the original security. The sureties had a right to stand as *cestui que* trust of the proof. The sureties might thus have received more than they could in any other way. The case * before Lord Kenyon is material. Formerly it was thought that the remedy was only in equity (*Toussaint v. Martinant*, 2 T. R. 105); but in that case it was held, that if one in the nature of surety paid a debt, he might bring an action against the parties liable for the debt. Until I became acquainted with that case, I thought the remedy must be in equity.

Lord Redesdale: In the account, credit is given for part of the debt from Robertson and Stein; the Respondents give up the old note, take a new security for a different one from John Spence, and, as part of the transaction, give up to him the bills from Robertson and Stein, and the benefit of the dividends.

The principle established in the case of *Deering v. Lord Winchelsea* is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put [591] the party paying the debt upon the same footing with those who are equally bound. That was the principle of decision in *Deering v. Lord Winchelsea*; and in that case there was no evidence of contract, as in this. So in the case of land descending to coparceners, subject to a debt; if the creditor proceeds against one of the coparceners the others must contribute. If the creditor discharges one of the coparceners, he cannot proceed for the whole debt against the others; at the most they are only bound to pay their proportions.

The Lord Chancellor: This is a question as to transactions between a creditor and a principal debtor and sureties; and, as to the effect of this transaction, upon the liability of co-sureties. The judgment of the Court below cannot stand in all its parts. It will be necessary, in moving judgment here, to state clearly the doctrines on which we proceed. In the mean time the agents must give answers to the following inquiries: 1. What became of the bills drawn by George Spence, and accepted by Paterson? Whether the bills have been proved against the estates of the several parties, and whether any and what dividends have been received? 2. In what state the bills stand, and who is entitled to a dividend, if made? The result of these inquiries may assist those who have to advise the House upon the judgment. The case is extremely important, as it regards the doctrines of equity upon the liability of co-sureties.

* 8 T. R. 310. See the note in Selwyn's at N. P. vol. i. p. 75.

The Lord Chancellor: In this case, it appears that the firm of James and George Spence em-[592]-ployed Mr. Paterson as their money broker and banker. It is represented that the transaction was carried on by their lodging bills in his hands, and, in return, drawing bills on him and his agent in London; which, being accepted by them, were discounted with the agent for the Bank of Scotland. Paterson and his agents having failed, leaving the bills, drawn by Messrs. Spence to a large amount, unsatisfied in the hands of the Bank of Scotland. Upon this event, it was agreed that a security should be taken from four sureties, to guarantee to the Bank the payment of any balance upon the unsatisfied bills, which, after receipt of the dividends from the bankrupt estates, might remain unpaid, to the amount of £2000 each. Four promissory-notes for £2000 were accordingly made by Messrs. Spence, and indorsed to the treasurer of the Bank, in whose hands the unsatisfied bills were also placed for the purpose of receiving the dividends.

It is represented in the printed case, on the part of the Appellants, that although the securities are in form separate, it was in fact one individual transaction. This is a very important part of the question. If the securities were in effect separate, then each surety had nothing to do but with his own; but if it was one transaction of joint suretyship, then, when there has been a dealing with any of them, the others have a right to look to that dealing as affecting them. When the notes were nearly due, it appears that by an arrangement between Messrs. Spence and the Bank, other notes, granted by Messrs. Spence, and indorsed by the sureties, were to be substituted, payable three months after date; and the original note, with the indorsement of one [593] of the sureties (Mr. J. Spence), was to be, and was, in fact, given up before this transaction was completed. Mr. Mackenzie died without having assented to the renewal of the notes, as the Appellants allege. The Respondents contradict that allegation; but I think it appears from the evidence that a treaty was pending, which was not carried into actual agreement.

Under these circumstances, the Bank refused to delay their remedy upon the old note for three months, or to accept of the new note without the indorsement of Mr. Mackenzie; and when the original note fell due, it was protested, and an action was brought upon it against the representatives of Mr. Mackenzie. By the first interlocutor in this action, it is found that the Bank could not have proceeded against the sureties without giving them a proportionable and equitable relief of the debts which they had been able to recover from the original obligants; that the bills of Robertson and Stein had been given up merely for the purpose of drawing the dividend, which, being received, were credited in the account, and the bills returned to the Bank; that Mr. Mackenzie having assented to a renewal, his representatives were not entitled to be relieved from the payment of the original bill; that after the intimation of the dishonour they might have brought the account to a close, and paid their proportion of the loss; that there was no proof that the Bank had given a preference to any of the obligants; and as the balance due to the Bank, after giving credit for the monies recovered from the other obligants, exceeded £2000, that the Pursuer was entitled to recover.

[594] On the part of the Appellants it is contended, in contradiction to the finding of this interlocutor, that the bills of Robertson and Stein were given up, not merely for the purpose alleged, but actually and irrevocably, and that the situation of the sureties by that act was altered, and the obligation of Mackenzie thereby released.

The four promissory-notes may be considered as one transaction of suretyship. They are separate in form; but the effect in equity, as to the obligation of the parties, was such, that the creditors were bound to act as if all the notes formed one transaction of suretyship. The ground of complaint against the interlocutor was fully argued at the bar, and is stated in the cases. It will be necessary, in considering the merits of the appeal, to attend particularly to the matter of the correspondence. An application having been made to the Bank by Messrs. Spence for delay of payment, and the delivery of their note indorsed by Mr. John Spence, by a letter of the 27th of April 1812, Messrs. Spence are informed that the Bank will accept, for the balance stated to be due, a new bill from them, jointly and severally with the former sureties. By another letter of the same date, it appears that the bills of Robertson and Stein are directed to be given up, together with the original note for £2000 indorsed by Mr. John Spence. In consequence of these transactions it is insisted by the Appel-

lants, that the four indorsers of the notes are to be considered as co-sureties, and ought to have in equity all the relief usually given in favour of sureties when the creditor deals with the principal debtor. Their situation is not to be made worse than if no such [595] transaction had taken place. By the Appellants it is contended, that this transaction put an end to the whole demand upon Mackenzie's representatives. The Respondents contend, that at all events the effect was only partial. If the transaction did not put an end to the whole demand, it is necessary to consider what was the effect of the transaction with regard to Mackenzie's representatives, and so far only to relieve them. Under all the circumstances of this case, the latter is the true principle of decision; we cannot go the whole length of the doctrine for which the Appellants contend.*

Lord Redesdale: This is a case of very great importance, as applicable to all questions where one or more persons make themselves debtors for others as sureties. The cross-appeal was waived; it quarrelled with the principle on which the judgment of the Lord Ordinary proceeded: but that principle was perfectly correct. The interlocutor finds that "when the bills became due, although Mr. Mackenzie was not a joint obligant for the £8000, and could only be liable upon his separate obligation for the £2000; yet as the Bank were well acquainted with the nature of the transaction, that the four obligants had interposed their security for Messrs. Spence to the amount of £2000 each, in relief of £8000 due by the Spences to the Bank; so the Bank could only proceed against them by giving a proportionable and equitable relief of the debts which they had been able to recover from the original obligants." That doc-[596]-trine is correct; and that finding should have governed all the subsequent decisions of the Lord Ordinary.

At the bar it was contended, that the rights and obligations of co-sureties are founded upon a supposed contract between them; and that in this transaction they entered into the obligation without communication with each other. The question depends upon equity, not upon contract; and in this case a contract is to be implied. The decision in *Deering v. Lord Winchelsea* (1 Cox, 318; 2 Bos. and Pul. 270) proceeded on a principle of law which must exist in all countries, that where several persons are debtors, all shall be equal. The doctrine is illustrated in that case by the practice in questions of Average, etc. where there is no express contract, but equity distributes the loss equally. On the prisage of wines, it is immaterial whose wines are taken; all must contribute equally; so it is where goods are thrown overboard for the safety of the ship; the owners of the goods saved by that act must contribute proportionally to the loss. The duty of contribution extends to all persons who are within the scope of the equitable obligation.

The next question is, whether the subsequent findings of the Lord Ordinary are founded in fact; the first is, "that the bills of Robertson and Stein were given up to the Bank merely for the purpose of drawing the dividends." That is somewhat disputable; and the fact rather different from what is stated in the finding. It is there found that "Mr. Mackenzie had assented to a renewal of the note." That seems not to be the case, for he died without giving a final consent to the renewal. [597] Under the circumstances of the case the effect of the transaction seems to be, that the Bank, by their conduct, took upon themselves the situation and obligation of the other sureties with respect to Mackenzie; and therefore the Bank can only demand one fourth of the sum secured from his representatives, because Mackenzie was originally liable to no more.

The Bank having given time, without obtaining the final consent of Mackenzie, made an arrangement with the other sureties as to three fourths of the debt. The first part of the finding of the Lord Ordinary is right and just in principle; the latter part is wrong in point of fact.

Die Merc. 13 June 1821. Find, that the Governor and Company of the Bank of Scotland, having accepted the promissory note of James and George Spence to John Spence, and indorsed by him and Charles Hunt, in substitution for the balance due on the bills in the proceedings mentioned, drawn by James and George Spence on, and accepted by, Robertson and Stein; are not entitled to make any demand against the estate of James Mackenzie, deceased, upon the indorsement of

* The Lord Chancellor here read the minutes of the proposed order of the House.

the said John Mackenzie on the promissory-note of James and George Spence, dated the 1st of December 1810, in the proceedings mentioned, in respect of the said bills drawn by James and George Spence on, and accepted by, Robertson and Stein: further find, that, under the circumstances of this case, the said Governor and Company are entitled to demand against the estate of the said John Mackenzie, on the said promissory-note of the 1st of December 1810, one-fourth part only of the balance which shall appear to be due to the said Governor and [598] Company from the said James and George Spence, in respect of the several bills drawn by the said James and George Spence on, and accepted by, D. Paterson, Todd and Company, in the proceedings mentioned, after giving credit for all the sums of money received by the said Governor and Company, or which might have been received by them, from all or any of the parties to such bills respectively, or their respective estates, towards discharge of the debt due to the said Governor and Company upon such bills: and it is therefore ordered and adjudged, that the several interlocutors complained of in the said original appeal, so far as they are inconsistent with these findings, be, and the same are hereby reversed: further ordered, that the cause be remitted back to the Court of Session in Scotland, to ascertain the balance due from the estate of the said John Mackenzie to the said Governor and Company according to such findings: and the Lords further find, that upon payment of such fourth part of such balance, the said Governor and Company are bound to answer to the estate of the said John Mackenzie one-fourth part of any future dividends, which, after the adjustment of the said account between the said Governor and Company and the estate of the said John Mackenzie, according to the findings aforesaid, may become payable to the said Governor and Company from the several parties to the said bills, drawn by James and George Spence on, and accepted by, D. Paterson and Todd and Company, in respect of such bills respectively: and it is further ordered and adjudged, that the said cross-appeal be dismissed this House, and that the said interlocutors, so far as they are therein complained of, be affirmed.*

* See *Rees v. Berrington*, 2 V. J. 540; *Nisbet v. Smith*, 2 B. C. C. 579; the observations of Eldon, C. in *ex parte Gifford*, 6 Ves. 807; and see *Orme v. Young*, Holt's N. P. C. 84. *Dunn v. Shee*, *Id.* 399, and *Quære*.

REPORTS OF CASES heard in the House of Lords, upon Appeals and Writs of Error, and decided during the Session 1821. By RICHARD BLIGH, Barrister - at - Law. Vol. IV.

ENGLAND.

COURT OF CHANCERY.

GEORGE JAMES Marquis of CHOLMONDELEY, and The Honorable ANN SEYMOUR DAMER,—*Appellants*; ROBERT COTTON ST. JOHN Lord CLINTON, and Others,—*Respondents* [15th June 1821].

[*Mews' Dig.* iii. 246; ix. 1491; xiv. 1735. S. C. 2, Mer. 171. 2, Jac. and W. 1. Adopted in *Pearce v. Morris*, 1869, L. R. 5 Ch. 227, at p. 230; *Warner v. Jacob*, 1882, 20 Ch. D. 220, at p. 221; *Farrar v. Farrar's Lim.*, 1888, 10 Ch. D. 395, at pp. 410-411; *Soar v. Ashwell* [1893] 2 Q. B. 390, at p. 397.]

S. R. devised lands, etc. (subject to a term of 200 years, for raising a portion) to the use of his daughter M. for life, remainder to the use of her first and other sons in tail male, remainder to his cousin J. R. in tail, etc.; and died, leaving his daughter M. his heir at law, who married and had one son G. Earl of O., who upon the death of his mother entered as tenant in tail under the will of his grandfather, and suffered a recovery to the use of himself in fee, and by deed in 1781, reciting "that he was willing and desirous that the said estates should remain in the family and blood of S. R.," in consideration of "the natural love and affection which he bore to his relations, the heirs of S. R.; and to the intent that the estates might continue in the family and blood of his late mother, on the side of her father," limited the lands, [2] etc. to the use of himself for life, remainder to the heirs of his body, and for default of such issue, to such persons as he should appoint; and for default of appointment, "to the use of the right heirs of S. R.," with a general power of revocation and new appointment.

In 1721 the term was assigned upon mortgage to raise the portion.

By deed in 1785 G. executed to E. H. a mortgage in fee. The term of 200 years was assigned on the same occasion.

On the 5th of December, 1791, G. died without issue, leaving H. Earl of O. his uncle and heir at law. Upon the death of G. C. entered, claiming as the then right heir of S. R. under the limitation in the deed of 1781.

Shortly after the death of G. opinions of counsel were taken by H. as to the effect of the deed of 1785 upon the deed of 1781, and he was advised that it operated only as a revocation *pro tanto*.

In 1792, C. proposing to raise money by further mortgage, and also to make family settlements, conveyed the lands, etc. to trustees for those purposes, and the lands, etc. were by a subsequent deed appointed and limited accordingly. But the proposed mortgagees not being satisfied with the title of C. under the limitation in the deed of 1781, H. Earl of O. was applied to by C. on account of the doubts which had arisen with regard to the effect of the deed of 1785.

as a revocation of the settlement of 1781, and thereupon H. executed a deed in 1794 by which reciting the several deeds of 1781, 1785, and 1792, and the doubts which had arisen, and that H. being well satisfied that Earl G. did not intend to alter the uses of that settlement, he had agreed to confirm the same: it was witnessed, that the Earl H. "did grant, bargain, sell, release, and confirm" to the trustees of C's settlement of 1792, upon the trusts of that settlement "in the same manner as if the deed of 1785 had not been made, and to and for no other use, intent, or purpose whatever."

Earl H. died in 1796, leaving A. his heir at law, and also heir at law of Earl G., and having devised his real estates to B.

C. died in 1798, and upon his death his eldest son entered under the settlement of 1792.

In June, 1812, a bill was filed in Chancery by A. and B. jointly as heir at law and devisee of Earl H., stating an agreement between them to share the lands, etc. equally, and praying a [3] redemption and reconveyance, and (as against C. the son) an account of rents and profits.

Upon the original hearing in the Court below, it was adjudged, first, upon the construction of the settlement of 1781, that the remainder "to the use of the right heirs of S. R.," vested in the settlor, as himself the right heir of S. R. at the date of the settlement: secondly, that the deed of 1794 did not operate a confirmation except for the limited purpose expressed by the recital; and, lastly, that the length of time, viz. upwards of twenty years, since C. entered, was no bar by the operation of or analogy to the statute of limitations.

It was also adjudged, that Sir L. P. having advanced money to C. by way of mortgage, should not be permitted to avail himself of that security as against the Plaintiff, upon the ground either of want of notice or of acquiescence. But as to the effect of the limitation in the deed of 1781, a case was sent to a court of law and a certificate was returned, in which three of the Judges concurred with the Master of the Rolls, and one differed from him. Upon this certificate the case being brought before the Court upon the equity reserved, the bill was dismissed; and upon appeal the decree was affirmed, upon the ground that the equity (if any) of the Plaintiffs was barred by length of time and adverse possession.

If a party has by his own act put a construction upon a deed, whether he or *à fortiori* those who claim under can dispute that construction. *Qu. D. Redesdale.*

An heir cannot sue in equity by analogy to a writ of right, or so as not to be barred by a limitation of less than sixty years. If the heir proceeds by ejectment, he is barred by twenty years adverse possession; and it seems that this analogy is adopted in equity. *D. Redesdale.*

Between co-Plaintiffs having adverse rights there can be no decree. If the heir and a devisee are co-Plaintiffs in a suit seeking a redemption of lands in mortgage, there can be no decree upon a bill so framed. *D. Redesdale.*

If a deed has a legal effect contrary to the intention of the grantor, and a party having an interest under the deed, according to its legal effect, proceeds upon the supposed intention to permit acts which create rights in the property, whether he can obtain relief in equity to the prejudice of the rights so enacted. *Qu. D. Eldon.*

An agreement made by parties out of possession to proceed in [4] a court of equity to recover and to divide lands, etc. when recovered, is contrary to the policy of the law as well as the statute of Hen. 8. against pretended titles. *D. Eldon C.*

Whether a court of equity can entertain a bill stating such an agreement. *Qu. D. Eldon C.*

If a deed is produced as matter of defence, and it appears that it has an effect beyond what was intended, it is not necessary to file a bill to reduce it. *D. Eldon C.*

If a deed is executed which does not effectuate the intention of the grantor, and parties who claim under it act under a common mistake that A. is the supposed grantee, and A. creates incumbrances upon the land supposed to be granted,

whether it is not a bar to relief in equity, and whether relief will be granted after such transactions and a lapse of time. *Qu. D. Eldon C.*

Acts done by a trustee or termor for years cannot have the effect of adverse possession. But the rule does not apply to the case of mortgagor and mortgagee. *D. Eldon C.*

A mortgagee in possession keeping no account, and making no acknowledgment, becomes owner of the estate after the lapse of twenty years. *D. Eldon C.*

Adverse possession, as against an equitable estate, may create or defeat a right where the possessor has no duty to discharge for the party against whom possession is pleaded. *D. Eldon C.*

The effect of adverse possession cannot be suspended during the continuance of long terms of years. *D. Eldon C.*

If a deed of confirmation is executed under a mistake, and the party confirming being dead, there is a probability from circumstances that he would not, or a doubt whether he could have raised any question upon the mistake, it is doubtful whether a court of equity would permit parties claiming under him to take advantage of the mistake. *D. Eldon C.*

Adverse possession of an equity of redemption for twenty years is a bar to any other claim of the equity of redemption, producing the same effect as abatement, intrusion, and disseisin with respect to legal estates. *D. Eldon C.*

Title of entry in equity is by writ of subpoena.

In June, 1811, a bill was filed on behalf of the Appellants in the High Court of Chancery.

The facts stated were as follows:

[5] By indentures dated in 1704, manors, etc. of Samuel Rolle in Devon and Cornwall and Dorset were settled to the use of Samuel Rolle for his life; remainder to trustees, etc. to preserve, etc.; and after the decease of Samuel Rolle, to the use of the said trustees for the term of 200 years, upon trust to raise £20,000 as a portion for a daughter; remainder to sons successively in tail male; remainder to the use of Samuel Rolle, his heirs, etc.

Samuel Rolle had issue by the marriage only one daughter, Margaret, and by his will, dated in 1717, devised the fee-simple of the estates to his wife *durante viduitate*; remainder to trustees and their heirs, to the use of the sons of his body in tail male in succession; and for default of such issue, to the use of his daughter Margaret for her life; remainder to trustees to preserve, etc.; remainder to children of his daughter as she should appoint; and for default of appointment, to the use of her sons successively in tail male.

Samuel Rolle died in 1719, leaving Margaret his heir at law, who upon his death entered into possession of the estates devised to her for her life, and by indenture dated in 1720, the remainder of the term of 200 years was assigned to Arscott and Spicer upon the subsisting trusts of the settlement.

In 1721, Margaret Rolle married Robert Lord Walpole, and by articles made previous to the marriage, it was agreed that the Earl of Orford (Lord Walpole's father) should receive the £20,000 under the trusts of the 200 years' term, and that Arscott and Spicer should by mortgage, etc. raise and pay the same accordingly.

[6] By indenture dated in July, 1724, Arscott and Spicer, in consideration of £20,000 paid to Sir Robert Walpole, assigned the premises to Decker, his executors, etc. for all the remainder of the term of 200 years, subject to a proviso for redemption by Robert Lord Walpole and Margaret his wife.

There was issue of this marriage only one son, George Earl of Orford, who upon the death of his mother in 1781, entered into possession as tenant in tail under the will of Samuel Rolle.

By indenture of bargain and sale inrolled, dated the 14th of June, 1781, the uses of a recovery of the premises shortly afterwards suffered by George Earl of Orford were declared to himself in fee.

By indenture of lease and release, dated the 1st and 2d of August, 1781, and made between George Earl of Orford (described as only son and heir of Robert Earl of Orford by Margaret his wife, who was daughter and only son and heir of Samuel Rolle, who was only son and heir of Robert Rolle, Esq., by Arabella his wife, who

was daughter and co-heir of Theophilus Clinton Earl of Lincoln, and Baron Clinton,) of the one part, and Joshua Sharpe of the other part, reciting the will of Samuel Rolle and his death, leaving his daughter Margaret him surviving, her marriage with Robert Earl of Orford, and her death, leaving him the said George Earl of Orford her only son, who thereby became tenant in tail of the premises; and reciting the said indenture of bargain and sale and recovery, and *that he was willing and desirous that the said premises should continue and remain in the family and blood of the said Samuel Rolle*, it was witnessed, that "for and in consideration of the natural love and [7] affection which the said George Earl of Orford had and bore unto his relations, the heirs of the said Samuel Rolle, and to the intent that the manors, etc. and hereditaments thereafter mentioned, might remain, continue, and be in the family and blood of his late mother the said Margaret Countess of Orford, on the side or part of her father the said Samuel Rolle;" and for other considerations, he the said George Earl of Orford conveyed, etc. "all and singular the manors and hereditaments therein mentioned (being the estates devised by the will of Samuel Rolle) to the said Joshua Sharpe, his heirs and assigns, to the use of him the said George Earl of Orford for life; and after his decease to the use of the heirs of the body of him the said George Earl of Orford; and for default of such issue, to the use of such person, etc. for such estate, etc. as the said George Earl of Orford by deed or will should appoint; and in default of appointment, *to the use of the right heirs of the said Samuel Rolle*." The deed also contained a general power to the said George Earl of Orford of revoking the uses therein before specified, and of limiting and declaring new uses of the same premises, or any part thereof.

By several mesne assignments, the manors, etc. comprized in the 200 years' term became vested for the residue of that term as to four fifths in Lord Keppel, redeemable on payment of £16,000 and interest; and as to one fifth, in Adair and Bullock, redeemable on payment of £4000 and interest.

By indentures of lease and release, dated the 4th and 5th of June, 1785, George Earl of Orford, in consideration of £16,000 paid to Lord [8] Keppel, and of £4000 paid to Adair and Bullock, granted, released, and confirmed to Sir Edward Hughes, his heirs and assigns, all the premises to the use of the said Sir Edward Hughes, his heirs and assigns for ever, subject to reconveyance to the said George Earl of Orford, his heirs and assigns, or such person, etc. as he should appoint, on payment of £20,000 with interest.

The residue of term 200 years became vested by assignment in the Respondent Seymour.

On the 5th of December, 1791, George Earl of Orford being seised in fee of the equity of redemption of the mortgaged estates, died without issue and intestate as to the equity of redemption, without having altered or revoked the limitation of the deed of 1781, otherwise than by the indentures of 1785, and leaving Horace Earl of Orford, his uncle and heir at law, on whom (as the Plaintiffs alleged), the equity of redemption descended; and the bill stated that Horace Earl of Orford being advised that by virtue of the limitations in the deed of 1781, the heir *ex parte maternâ* of Earl George was entitled to the equity of redemption, in consequence of such belief, did not enter into the mortgaged estates; but that upon the death of Earl George, Robert George William Trefusis, Esq., afterwards Lord Clinton, entered into possession thereof as the cousin and heir of Earl George *ex parte maternâ*.

By indenture of lease and release, dated the 5th and 6th of October, 1792, after reciting the deed of 1785, and that the premises, upon the death of the said George Earl of Orford, became vested in the said R. G. W. Trefusis in fee, as the right [9] heir of the said Samuel Rolle by virtue of the settlement of 1781, and that the said R. G. W. Trefusis was desirous of raising £34,000 for certain purposes, and had proposed to convey, etc., it was witnessed, that, in consideration of the premises, the said R. G. W. Trefusis granted, etc. and confirmed unto the Earl of Coventry, Hall, St. John, and Fortescue, their heirs and assigns, etc., all the manors, etc. of the said R. G. W. Trefusis, which were the estate of Samuel Rolle deceased, to the use of them the said Earl of Coventry, etc., their heirs and assigns, upon trust to raise by sale or mortgage the said £34,000 for the purposes therein mentioned, and subject thereto, to stand seised, etc. in trust, and to such uses, etc. as the said

R. G. W. Trefusis should appoint; and in default of appointment, in trust for the said R. G. W. Trefusis, his heirs and assigns; and by other indentures of the 7th and 8th of October, 1792, it was witnessed, that for settling and assuring the several manors, etc. therein contained, and in consideration of his natural love and affection to his wife and children, and brothers and sisters, the said R. G. W. Trefusis granted, etc. and confirmed to the same trustees and their heirs, upon the trusts and with powers under which interests by way of lease and jointure were created.

The bill then stated, that shortly after the death of Earl George a doubt was suggested to Earl Horace, whether the deed of 1785 had not revoked the uses of the settlement of 1781, and thereby defeated the limitation to the right heirs of Samuel Rolle, under which Lord Clinton claimed to be entitled to the equity of redemption of these [10] estates, and that Earl Horace thereupon caused a case to be stated for the opinion of counsel, which case being laid before Sir Archibald Macdonald (afterwards Lord Chief Baron) and Mr. Shadwell, Earl Horace was advised by both those gentlemen that the indentures of 1785 had revoked the uses of the settlement of 1781 only *pro tanto*.

The bill then proceeded to state that in the beginning of 1794 Lord Clinton (the Defendant's father) being about to raise money by way of loan on the security of the estates, caused a representation to be made to Earl Horace, that although by the limitation to the right heirs of Samuel Rolle in the settlement of 1781 he (Lord Clinton) had become entitled to the equity of redemption, yet some embarrassment had arisen to his title by reason of a doubt which had been raised whether the indentures of 1785 had not revoked that limitation, and therefore requesting Earl Horace to execute such deed or instrument as should be necessary to remove that doubt; and that Earl Horace having already taken the aforesaid opinions, and being therefore satisfied that such doubt was unfounded, consented to execute such deed or instrument as was required.

Accordingly, by indentures of lease and release, dated the 1st and 2d of April, 1794, the release being made between Horace Earl of Orford (described as uncle and heir at law of George Earl of Orford deceased) of the first part, the Earl of Coventry and others (trustees in the settlement of 1792) of the second part, and the said Lord Clinton (described with an accurate statement of his pedigree from Theophilus Earl of Lincoln as [11] heir at law *ex parte matris* of the said George Earl of Orford) of the third part, after reciting the settlement of 1781, the indentures of 1785, the death of Earl George, and the deed of 1792, and "that doubts had arisen whether the said George Earl of Orford having joined in the indenture of 1785, did not revoke the limitations contained in the settlement of 1781, and thereby defeat the settlement of 1792, and vest the estates in Horace as heir at law of the said George Earl of Orford; but the said Horace Earl of Orford, being well satisfied that the said late earl did not intend to alter the uses limited by the settlement of 1781, had, at the request of Lord Clinton, agreed to confirm the uses of the said settlement in manner thereafter mentioned," it was witnessed, that in pursuance of the said agreement, and being desirous to confirm the settlements of 1781 and 1792, the said Horace Earl of Orford "did grant, bargain, sell, release, and confirm" unto the said Earl of Coventry, etc. and their heirs, all the aforesaid manors, etc., which were the inheritance of Samuel Rolle and George Earl of Orford, "to, for, and upon such and so many of the powers, provisos, limitations, declarations, and agreements limited and declared, or any ways expressed of or concerning the same, in and by the said indentures of release bearing date respectively the 6th and 8th of October, 1792, as were then existing undetermined or capable of taking effect in the same manner as if the said indenture of the 6th of June, 1785, had not been made, and to and for no other use, intent, or purpose whatsoever."

Lord Clinton (formerly R. G. W. Trefusis) died [12] on the 28th of August, 1798, leaving the Defendant, Lord Clinton, his eldest son and heir at law, who entered into possession on the death of his father, claiming to be entitled as tenant in tail under the settlement of 1792, subject to the mortgage.

Horace Earl of Orford made his will, dated the 15th of May, 1793, by which, after disposing of his estates in Norfolk, Essex, and Middlesex, and giving several pecuniary and specific legacies, he gave, devised, and bequeathed to his cousin General Conway, his heirs, executors, etc., "all the rest and residue of his estate

and effects, real and personal, freehold and copyhold, whatsoever and wheresoever, and of what nature, kind, or quality soever not therein-before by him otherwise disposed of, which he then was or should be at his death seised or possessed of, interested in or entitled to, or over which he had a disposing power;" and the said General Conway having afterwards died in his lifetime, by a codicil to his will dated the 27th of December, 1796, Earl Horace appointed the Plaintiff, Ann Seymour Damer, to be his residuary legatee and devisee in the room of her late father, the said General Conway, deceased, and gave, devised, and bequeathed to her, the said Plaintiff, her heirs, executors, etc. all the rest and residue, etc. in the same words as he had given the same by his will to her late father.

Earl Horace died shortly after the date of this codicil, leaving the Plaintiff, George James Earl (since Marquis) of Cholmondeley, his grand nephew and heir at law, and the Plaintiff, Ann Seymour Damer, him surviving.

The bill then stated, that some questions had [13] arisen between the Plaintiffs respecting the will and codicil of Horace Earl of Orford, as far as regarded the equity of redemption of the said mortgaged estates: and that, in order to put an end to such questions, they had agreed to share the same between them: that they were advised, that by virtue of the limitations in the settlement of 1781, Earl Horace became, on the death of Earl George, absolutely entitled to the equity of redemption of the said estates: and that the Plaintiffs, upon the death of Earl Horace, became entitled to the same: that by divers mesue assignments, the legal estate in the said mortgaged premises had become vested in the Defendant Francis Drake, subject to redemption on payment of £20,000 and interest: and that the other Defendants respectively claimed some interest in the same, and the bill charged that the deed of 1794 did not absolutely confirm the settlement of 1792, but only removed the doubts which embarrassed the supposed title of Lord Clinton, by reason of the mortgage deed of 1785 conveying the estates to the uses of the settlement only in such manner as if that mortgage had not been made: and that Earl Horace executed the deed of 1794 under the advice he had received as to the effect of that mortgage, and not considering that he was, in fact, parting with any substantial right or interest whatever, but fully believing, that by the limitation to the right heirs of Samuel Rolle in the settlement of 1781, Lord Clinton became absolutely entitled to the equity of redemption on the death of George Earl of Orford. The bill prayed a redemption and reconveyance to the Plaintiffs, and that the [14] Defendant, Lord Clinton, might be decreed to deliver up to them the possession of the premises, and the Defendant Seymour to assign to them, or as they should direct, the 200 years' term then vested in him in trust to attend the inheritance, together with an account of rents and profits received by the Defendant, Lord Clinton: and that he might be decreed to pay the amount of what should be found due in taking such account, upon being allowed all sums paid by him in reduction of interest on the mortgage.

The Defendant, Lord Clinton, by his answer, submitted that it was the true intent and meaning of the indenture of settlement of 1781 to limit the estates to such person as should be heir at law of Samuel Rolle, in case George Earl of Orford died without issue. He insisted that the deed of 1794 was executed by Horace Earl of Orford, for the purpose of confirming the limitations created by the settlement of 1792, and barring himself and his heirs from making any claim to the estates, or deriving any title thereto by the operation of the settlement of 1781 or otherwise, and in order effectually to carry into execution Earl George's intention, that the estates should vest in the right heirs of Samuel Rolle, being the right heirs of him (George Earl of Orford), *ex parte materna*, the Rolles being the family from which he had derived those estates. He admitted the possession of his father Lord Clinton, and afterwards of the trustees in the settlement of 1792, and of receivers appointed by the Court in a suit in which the Defendant (then an infant) was Plaintiff, and the Earl of Coventry and others Defendants, to carry [15] into execution the settlement of 1792, which possession was alleged to have been quiet and uninterrupted till the filing of the bill. The answer then stated indentures of lease and release, dated the 26th and 27th of November, 1811, between Edward Hughes Ball, then an infant, and heir at law of Sir Edward Hughes, deceased, of the first part: certain parties therein named of the second part: and the Defendant, Drake, of the third part: by which, after reciting the mortgage deed of 1785, and an order

by which it was referred to enquire whether the said E. H. Ball was an infant trustee within the meaning of the statute and the report of the Master thereon, it was witnessed, that in consideration of £20,000 paid by the Defendant Drake to the parties of the second part, the said E. H. Ball conveyed to the said Defendant, his heirs and assigns, subject to the equity of redemption subsisting in the said estates, which sum of £20,000 so paid was the proper monies of the Defendant Lord Clinton, the name of the Defendant Drake being made use of only as a trustee for him. The Defendant further said, that no application had ever been made by the Plaintiffs to him, or to the Defendants the trustees, to his knowledge, previous to filing the bill, except by two letters to the Defendant Drake, written in May and June, 1812, and thereby referred to: but that both the Plaintiffs permitted him, the Defendant, and those claiming under him, to enjoy the estates without setting up any claim thereto, although under no disability to do so. He submitted, that it was the intention both of Earl George when he executed the settlement of 1781, and of Earl Horace when he [16] executed the deed of 1791, that the estates should become vested in the family of Samuel Rolle, so as to be a provision for the person entitled to the barony of Clinton, which title was in Earl George, and descendible to the family of the said Samuel Rolle. The answer then stated indentures of the 4th and 5th of July, 1794, between Lord Clinton (described as heir of Samuel Rolle, and heir *ex parte maternâ* of George Earl of Orford,) of the first part: the trustees of the settlement of 1792 of the second part; and Sir Lawrence Palk, Bart., of the third part: whereby, after reciting that the estates were, on the death of Earl George, vested in the said Lord Clinton in fee as right heir of Samuel Rolle, and that the trustees of the said settlement had applied to Sir Lawrence Palk to advance £25,000 on the security of the said estates, under the trust of the settlement which he had agreed to do, it was witnessed, that the said trustees at the request of Lord Clinton, and the said Lord Clinton did grant, etc. and confirm to the said Sir Lawrence Palk, his heirs, etc. all the said manors, etc. which were the estate and inheritance of the said Samuel Rolle, and afterwards of the said George Earl of Orford, in the counties of Devon and Cornwall, subject to the said mortgage for £20,000 to Sir Edward Hughes, and subject also to redemption on payment of the said £25,000, and such further sum as Sir Lawrence Palk might thereafter advance, with interest. The Defendant then submitted, that the Plaintiffs were entitled to no relief in equity: and the late Lord Clinton, and the trustees and receivers, having been in quiet and undisturbed possession and enjoyment for upwards [17] of twenty years before the filing of the bill without any claim made, except by the said two letters, the Defendant claimed the same benefit of such length of possession and of the statutes as if he had pleaded the same. He further said, that on the faith of having a good title under the deeds of 1781 and 1791, he had made several dispositions of large parts of the estates of his grandfather Trefusis, and had paid various debts of his father which he was not liable to pay: and that his father was, as he believed, principally induced to claim the barony of Clinton, in consequence of his possessing the estate which had been enjoyed with that barony.

The Defendant Drake, in like manner, submitted the construction and effect of the deeds of 1781 and 1791, and claimed, as trustee for Lord Clinton, the full benefit of the length of time and of the statutes.

The Defendants St. John and Fortescue (surviving trustees of the settlement of 1792) said, that until the filing of the present bill no notice of the claim or demand of the Plaintiffs was ever made to them, or either of them, and claimed indemnity.

The Defendant, Sir Lawrence Palk, stated the application made to him by Lord Clinton, then being in the possession or enjoyment of the estates, and being or pretending to be with the full knowledge of Earl Horace, absolutely seised of and entitled thereto, and his consequent advances of money on the security of the estates under the mortgage deed of 1791, amounting, together with interest, at the time of putting in his answer, to £11,000 and upwards. He claimed to be entitled [18] to the full benefit of that mortgage, as well against the Plaintiffs as against Lord Clinton and those claiming under him: and also all such benefit of the mortgage to Sir Edward Hughes as a collateral security for his advances generally, and especially for sums paid for interest by him to the representatives of Sir Edward Hughes upon his mortgage of £20,000 as he had in any manner become entitled to in equity by virtue

of his contract with Lord Clinton and his trustees, and under the circumstances of the case; he alleged that he had never, until long after he had made these advances, any knowledge or notice of any right or title in Earl Horace or any person claiming under him, or any belief or suspicion, or any reason to believe or suspect that Lord Clinton and his trustees had not full right and title: And he submitted that, even if Lord Clinton's title was not absolutely good and indefeasible at law against Earl Horace and those claiming under him, yet, Earl Horace having permitted Lord Clinton to enjoy the estates as his own under a claim of absolute ownership, and having, with full knowledge of the trust-deed of 1792, instead of questioning Lord Clinton's right to the estates, confirmed it in the manner before mentioned; and having also permitted the Defendant to advance his money upon the faith of the title so claimed, and suffered to be enjoyed, the Plaintiffs ought not, claiming under the said Earl Horace, to be permitted to impeach the title of the Defendant as a mortgagee, and were entitled to no relief against him, except to redeem him by paying off the whole principal and interest due on his mortgage; and he claimed the same benefit of the mortgage security as if he had pleaded the same.

[19] Sir Lawrence Palk having died after he had put in his answer, the suit was revived as against his representatives.

The cause came on for hearing at the Rolls before Sir W. Grant, the Master of the Rolls, and was most elaborately argued (see the Report, 2 Mer. 171) by Mr. Leach (now Sir John Leach, M. R.), Mr. Shadwell (now Sir L. Shadwell, V. C.), and Mr. Sugden, for the Plaintiffs; by Sir Samuel Romilly, Mr. Bell, Mr. Heald, and Mr. Preston, for the Defendant, Lord Clinton; by Mr. Benyon and Mr. Blake, for the Defendants, St. John and Fortescue, trustees in the settlement of 1792; and by Mr. Hart, Mr. Horne, and Mr. Longley, for the Defendant, Sir Rob. Palk, the mortgagee.

The decree was in favour of the Plaintiff on all the questions raised in the argument; but upon the effect of the limitation in the deed of 1781, being a question of law, the Master of the Rolls, considering the importance of the interests to be affected by the decision, thought it right, if desired by the counsel of Lord Clinton, to send a case for the opinion of a Court of Law; and, accordingly, after the original hearing of this cause, a case was sent for the opinion of the Judges of the Court of King's Bench, in which the question was, whether R. G. W. Trefusis, afterwards Lord Clinton, the father of the Defendant Lord Clinton, took any estate under the deed of the 2d day of August, 1781?

The case was twice argued (see the Report, 2 B. and A. 625) in the Court of King's Bench: first by Mr. Richardson (afterwards a Judge of the K. B.) for the [20] Plaintiffs, and Mr. Preston for the Defendants; and afterwards by Mr. Shadwell for the Plaintiffs, and Mr. Serjeant Copley for the Defendants. The following certificates were sent by the Judges:—

“ This case has been argued before us by counsel, and considering that the words ‘ the right heirs of Samuel Rolle,’ are words of plain and well-known import, and according to that import must denote George Earl of Orford, the settlor, we think that R. G. W. Trefusis, afterwards Lord Clinton, took no estate under the said indenture of the 2d of August, 1781. Supposing a different construction might be put upon those words in a deed, and that they might be held to designate some other persons in order to carry into effect a manifest intention on the part of the settlor, yet, we do not collect with certainty, from the language of the deed, what other person the settlor intended to designate by those words. C. Abbott, G. S. Holroyd, W. D. Best.

“ The case has been twice argued; and considering that it appears by the indenture of the 2d of August, 1781, that the said George Earl of Orford knew himself to be the then heir of Samuel Rolle; considering, also, that during the life of the said George Earl of Orford, or so long as there should be any issue of his body, no person could legally come within the description of right heir of Samuel Rolle but the said George Earl of Orford and his issue, who were of the united line of Walpole and Rolle, and were also provided for by the estate tail created by the indenture; considering, also, that it appears plainly by that indenture that the said George Earl of Orford meant to provide for the separate line of [21] Rolle, that no person of that separate line could come within the description of right heir of Samuel Rolle till the united line should be exhausted, and that a limitation, by way of remainder to heirs or children,

is not necessarily confined to such persons as are within that description at the time the limitation is created, I am of opinion, that the effect of the indenture of the 2d of August, 1781, was to vest in the said George Earl of Orford an estate in tail general; with remainder (if he should make no appointment) to such persons as at the expiration of the estate tail should be the right heir of Samuel Rolle in fee; and, consequently, that the said R. G. W. Trefusis took an estate in fee under the said indenture.—J. Bayley.”

In 1820 the cause came on for hearing before Sir Thos. Plumer, M. R. (Sir W. Grant had retired), on the equity reserved. Two objections were taken for want of parties, upon which the Master of the Rolls reserved his opinion till the delivery of his judgment on the merits.

The first objection was, that the brothers and sisters of the Defendant Lord Clinton, or the eldest brother, were not made parties.

The second objection was, that the persons entitled to the equity of redemption of certain estates formerly belonging to George Earl of Orford, in the county of Dorset, and which were included with the estates in question in the cause in the mortgage made in 1785 to Sir E. Hughes, were not parties to the suit.

The case then proceeded upon the merits, and was argued by Mr. Shadwell, Mr. Sugden, and [22] Mr. Brent (in the absence of the Attorney-General) for the Plaintiffs.

Mr. Bell, Mr. Heald, and Mr. Pepys for the Defendant Lord Clinton.

Mr. Benyon and Mr. Blake for the Defendants St. John and Fortescue; and

Mr. Hart, Mr. Horne, and Mr. Longley for the representatives of Sir L. Palk.

The Master of the Rolls, on the 8th of August, 1820, pronounced a judgment (see the Report, 2 J. and W.) in favour of the Defendants, dismissing the bill by a decree which was adopted, *pro formâ*, as the decree of the Lord Chancellor, and enrolled, and thereupon an appeal was presented by the Plaintiffs to the House of Lords, which was brought on for hearing, and argued during many days in May and June 1821.

For the Appellants, The Attorney-General.*

There is no such thing as equitable disseisin. *Hansard v. Hardy*, 18 Ves. 455.; *Lord Grenville v. Blyth*, 16 Ves. 221.; *Hopkins v. Hopkins*, 1 Atk. 581.; *Beckford v. Wade*, 17 Ves. 87.; *Horenden v. Lord Annesley*, 2 Sch. and Lef. 633.; the possession of the tenant of a mortgagee is like the possession of the tenant for years, it is the possession of the person in whom the freehold is vested; Co. Litt. 15 *a.* as to the doctrine of *possessio fratris*: the receipt of rent cannot amount to an equitable disseisin, except at election; the title of a reversioner is not displaced after levying a fine by the lapse of five years. His right accruing afterwards may be enforced, even in a case of forfeiture, [23] Co. Litt. 252 *a.*; Mrs. Damer's right could not be barred if the equity of redemption was in her, since her title did not accrue until after the death of George Earl of Orford. If there was an equitable disseisin, no estate passed by the will of Horace Earl of Orford. Then it descended to Lord Cholmondeley as heir at law. If it was in Mrs. Damer, the title accrued by the death of Horace Earl of Orford in 1797, and the twenty years had not elapsed. It is not a universal rule that twenty years is the term of limitation in equity. *Collins v. Goodall*, 2 Vern. 235. A rent commencing by grant is not barred by forty years. *Stackhouse v. Barnston*, 10 Ves. 453. The statute of limitations does not apply to a legal, much less to an equitable rent-charge. It is a principle of equity that no act of a trustee can prejudice or narrow the interest of the *cestuique trust*. The mortgagee was a trustee for the party entitled; and if an estate had been gained by wrong, it was the act or permission of the trustee. Fonb. Tr. Eq. 2. 166.

The Lord Chancellor said, that a mortgagee was only in a certain qualified sense a trustee, since a mortgagee in possession, keeping no account and receiving the rents for twenty years without account, would become the owner of the estate. The mortgagor would be barred by the lapse of time; that it had been held in a cause at the

* Sir Robert (afterwards) Lord Clifford, M. R. The arguments were nearly the same as in the courts below; a very short summary, therefore, is given chiefly for the sake of the interlocutory judicial observations.

Cockpit, where Lord Kenyon assisted, that such a case stated in a pleading would leave it open to demurrer.*

The Attorney-General continued, The mortgagee cannot, by collusion with a stranger, defeat [24] the equitable right; that some person had the right to redeem was admitted; that the mortgagee had gained an absolute estate by acquiescence was not contended; under the deed of 1781 there never had been a possession adverse to the title, nor could be, as it was settled in a similar case, that abatement by a younger son does not operate against the elder, because they claim under the same title; Litt. Ten.; that the limitation in the deed of 1781 had not been disturbed; and if Lord Clinton applied to redeem, he could only state a wrongful possession under the mortgagee, who is a trustee for the right owner; that in the deed assigning the mortgage to Drake in 1811, the equity of redemption is reserved to the same persons who were entitled under the deed of 1785, and according to the limitations of the deed of 1781; that is the heirs of George Earl of Orford.

Here The Lord Chancellor observed, that Lord Clinton was not a party to the deed of assignment.

The Attorney-General answered, that Drake was a trustee for Lord Clinton, as appeared by the answer of Lord Clinton; and, therefore, it was the admission of his agent that the limitations of the deed of 1781 remained untouched. He then submitted the four following positions:—1. That there was no equitable disseisin, if the estate of the mortgagee was untouched; that the right to redeem was in the party shewing a right under the original mortgagor; that no act of the mortgagee, by receipt of rents or otherwise, could alter that right; and, therefore, the lapse of twenty years did not affect the right. 2. If there could have been an equitable disseisin, as the right passed under the will to Mrs. Damer by the death of Horace Earl of [25] Orford, the twenty years had not elapsed. 3. That if there was an equitable disseisin by analogy to legal disseisin, the right did not pass, but descended to Lord Cholmondeley as heir-at-law. 4. That if at the death of George Earl of Orford there was a doubt whether the estate passed under the will or descended to Lord Cholmondeley as heir, it was competent to the heir and devisee to agree to divide the estate, and that it was not material to prove the fact, because it is immaterial to the Defendant; that it is not a case of champerty, because there was a right or claim to the estates in one or other of the Plaintiffs.

The Lord Chancellor said, the allegation of the bill was, that doubts and difficulties had arisen which were compromised by the agreement, and that the truth of this fact could not appear but by the production of the agreement.

The Attorney-General answered, that it had been held by the Vice-Chancellor (Sir John Leach) in *Ryan v. Anderson*, 3 Mad. 174. that such agreement was legal, and that the allegation need not be proved, as it was immaterial to the Defendant, whose interest was not affected by it; that the same doctrine appears in *Stapilton v. Stapilton*, 1 Atk. 2, cited 1 V. and B. 28.

Mr. Shadwell—for the Appellants—contended that such an agreement could not amount to champerty or maintenance, according to the definitions of those offences. Co. Litt. 368., Blac. Com. 4. 134.; for the supposed offenders were here parties to the record. Nor is it within the statute 32 Hen. 8. c. 9. If the possession of the mortgagee is the possession of the party entitled to the equity of re-[26]-demption, it cannot be a pretended title, for the statute excepts the case of possession.

The agreement is by parol, although minutes have been taken of what the agreement is to be.

The Lord Chancellor: It may be said, when you come to redeem, that you must shew your title as you state it. If by the proviso in a mortgage I agree to account with A. B., I cannot be compelled by C. D. to account. If, under the proviso for redemption you can shew that the two Plaintiffs are entitled to have the account, that will do. If Mrs. Damer were the sole Plaintiff, she might require the account, and it would be immaterial what agreement was made out of Court. If a mortgagor files a bill for redemption, it may be material who is to pay him the surplus.

Mr. Shadwell: The account is not the substance of the Plaintiff's case, and he may waive any part of the prayer of his bill. As to the effect of the deed of confirmation,

* See *Cuthbert v. Creasy*, in a note at the end of the Report of this case.

it is limited, not general nor absolute, and ought not to be extended beyond the intention, and will be rectified if there is a mistake. *Lansdowne v. Lansdowne*, Moseley, 361.

The Lord Chancellor: Many cases in Moseley are extremely well reported, others not so.

Mr. Shadwell then proceeded to argue that courts of equity interfere after the lapse of twenty years, and cited *Bonney v. Ridgard*, 1 Cox. 145, cited in *Andrews v. Wriley*, 4 Bro. C. C. 121.; *Medlicott v. O'Donnell*, 1 Ba. and Be. 156.; and *Moore v. Blake*, 1 Ba. and Be. 62. reversed on appeal, 4 Dow. 230. As to mortgagees in possession, he said the doctrine had been fluctuating, and cited *Pearson v. Pulley*, 1 Ch. Ca. 102., and 3 P. W. [27] 287, note B; *Meller v. Lees*, 2 Atk. 191.; *Aggas v. Pickerell*, 3 Atk. 225.; *Acherley v. Roe*, 5 Ves. 565.; *Harwood v. Oglander*, 6 Ves. jun. 199.; and the appeal against the judgment, 8 Ves. 106., in which the Lord Chancellor says that relief is not to be denied on account of lapse of time. *Collins v. Goodall*, 2 Vern. 235., decided on the authority of Foster's case, 8 Co. 128.; *Hansard v. Hardy*, 18 Ves. 455.; *Hardy v. Reeves*, 4 Ves. 466., to prove that adverse beneficial ownership for twenty years is not in equity a sufficient bar, but that after that time the courts will interfere against persons not having the legal estate. He then argued, that if there were such a thing as equitable disseisin, Horace Lord Orford could not devise an estate of which he was not seised; and the heir at law might have brought his writ.

Lord Redesdale. But Lord Cholmondeley must claim as heir of George and Horace Lord Orford. Then comes the question whether he can quarrel with the deed of Horace Earl of Orford.

Mr. Shadwell. The descent would have enabled the party to bring a writ of right. Seisin is not necessary. Co. Litt. 281 a. Fitz. N. B. 11. Lord Cholmondeley, if he claims at law, might sue as the heir of George Earl of Orford; the question is, whether a possession originally tortious can be made good by length of time, unless it is clothed with the legal estate. *Bowles v. Stewart*, 1 Sch. and Lef. 209.

The mortgagee is not simply a trustee, but by accounting remains a trustee for the party entitled while he is out of possession; receiving interest and willing to be redeemed, he holds for the party entitled. A court of equity might refuse [28] the account by analogy of the statute of limitations, but yet direct the conveyance of the legal estate. Courts have laid hold of slight circumstances to uphold the rights of the mortgagor to redeem. In 1811 there is a formal recognition of Lord Clinton that the estate is redeemable, the limitation is to be taken from the time of the recognition. Courts of equity decide upon legal possession. *Harrison v. Rollins* (1 Sim. and Stu. 171), Rolls, 24th February, 1812, decided on the authority of *Dallas v. Floyd*, Rolls, 1737. The right must be clothed with a legal estate, *Pim v. Goodwin*, not reported *, but cited *Cholmondeley v. Clinton*, 2 Meri. 303. In that case, it was the opinion of the Lord Chancellor, that the right of redemption was in the party successively entitled reckoning from the time when their titles respectively accrued.

The Lord Chancellor. The question there was, whether the time is to be counted from a certain date, or when each title successively accrues. Nothing was decided in the case, but only judicial doubts intimated.

Mr. Heald and Mr. Butler, for the Respondent Lord Clinton. There are four points of defence: 1. The construction of the deed of 1781; 2. The confirmation by Earl Horace in 1791; 3. The bar by length of time; 4. The agreement entered into between Lord Cholmondeley and Mrs. Damer, which would prevent the Plaintiffs from having the relief prayed by the bill, and they could not have different relief on this bill.

On the hearing before Sir William Grant he made no decree, but referred it to law. The Judges [29] differed in opinion. Sir Thomas Plumer, after consideration of all the cases cited, and of all which his own researches furnished, dismissed the bill.

The deed of 1791, if we are right in our construction of the deed of 1781, is a needless instrument; but in the manner in which we are directed to argue, it is of the first importance.

* See the note at the end of the report of this case.

Nothing was concealed in 1794 from Earl Horace. The recitals of the deed of 1794 are important.* In the exercise of the ownership of these estates, the late Lord Clinton, in 1792, conveyed the fee of these estates to trustees. Then the deed of 1794 recites that "doubts had arisen whether George Earl of Orford having joined in the mortgage of 1785, did not revoke," etc. The existence or retention of a particle of title in Earl Horace was inconsistent with the confirmation of the uses of the settlement of 1792 contained in this deed. The Attorney-General says this deed of 1794 was made merely to remove the objection from the deed of 1785, and that it would be monstrous to hold this a complete conveyance: but in many instances, as in the construction of wills, the particular intention is sacrificed to the general intention.

Under the powers to lease contained in the deed of 1792, a large tenantry have acquired considerable interests. A lady has been induced to ally herself by marriage with this noble Lord. £34,000 has been raised, and other acts done, on the supposition that the title was in Lord Clinton.

[30] If Earl Horace did labour under this mistake, a bill must be filed to rectify it. There is no such bill.

The cases of *Bingham v. Bingham*, 1 Ves. sen. 126; *Pusey v. Desbouverie*, 3 P. Wms. 315.; *Farewell v. Coker*, cited 2 Mer. 353; *Cole v. Gibson*, 1 Ves. sen. 503, have been relied on. But a bill was filed for the purpose of rectifying the deed in all those cases. On this bill to redeem a mortgage, there is nothing said about rectifying the instrument.

As to time, there is no variation of opinion among all the Judges in equity here and in Ireland. As a general proposition equity follows the law. Equity follows the law either in obedience or by analogy to the statute of limitations. This doctrine is as old as the statute itself. *Smith v. Clay*, 3 Bro. C. C. 639, note; and Lord Redesdale's observations about the statute of limitations in *Bond v. Hopkins*, 1 Scho. and Lefroy, 128. In *Horenden v. Lord Annesley*, 2 Scho. and Lefroy, 637, he says, "The same time would bar a redemption that would bar any other equity." *Underwood v. Lord Courtown*, 2 Scho. and Lefroy, 41.; *Beckford v. Wade*, 17 Ves. 87.; *Bonney v. Ridyard*, cited *ibid.* 97, are all authorities on this point.

A large tenantry is in this case waiting with great anxiety the decision of your Lordships. Lord Kenyon observes, in a similar case, that there are many parties interested. *Andrew v. Wrigley*, 1 Bro. C. C. 125.; *Townshend v. Townshend*, 1 Bro. C. C. 550.

The "exception to the statute of limitations holds only between a trustee and cestui que trust." Mr. Butler's argument in *Cholmondeley v. Clinton*, 2 Jac. and Walk. 29.; *Davie v. Beardsham*, 1 Cha. Ca. 39. We deny that the mortgagee is a trustee to [31] all intents and purposes. No title can be acquired by a trustee against his cestui que trust, but a mortgagee may acquire a title against the mortgagor.

Hopkins v. Hopkins, 1 Atk. 581, was cited by the Plaintiffs' counsel, and by Sir W. Grant (2 Mer. 358.) as one of the grounds of his judgment. This case has been looked into, and Atkyns's Report found to be incorrect. The original MS. in Lord Hardwicke's handwriting has been produced, and shews the incorrectness of Atkyns's Report.†

It is not necessary for the purposes of this suit to decide on Lord Clinton's title, it is only on the Plaintiffs' title your Lordships have to decide. The judgment of Sir William Grant was founded on a mistaken idea of the point before him: he overlooks the length of time, and considers the right to redeem only. *Lomar v. Bird*, 1 Vern. 182, was cited by Plaintiffs. *Harmood v. Oglander*, 8 Ves. 106, was cited by Sir William Grant.

Two misreported cases, and one inapplicable, were cited in support of the judgment.

Mr. Shadwell seems to consider that the case of mortgagor and mortgagee rests on the circumstance of the legal estate which the mortgagee has. A second mortgagee could, if let into possession, avail himself of his long possession and keeping no

* Mr. Heald quoted and argued at great length upon the recitals: see this topic fully discussed in the judgment, post.

† See the judgment printed from the MSS. in West's Reports.

account. Why was Lord Clinton's title discussed at the Rolls? The Plaintiffs' title to redeem was the only question. It was unnecessary to consider Lord Clinton's title. The question on the record being whether or not Lord Cholmondeley's bill shall be dismissed. I do not rest Lord Clinton's success in this cause on his right to succeed if he [32] should file a bill to redeem. But I think he would succeed in such bill.

Casborn v. Scarfe, 1 Atk. 603.; *Starkhouse v. Barnston*, 10 Ves. 453.; *Mellor v. Lees*, 2 Atk. 491. relate to rents, and do not concern lands.

Stapilton v. Stapilton, 1 Atk. 2.; *Stockley v. Stockley*, 1 Ves. and Beam. 23. relate to family arrangements, which are not easily disturbed in equity.

Bowles v. Stewart, 1 Scho. and Lef. 209. was cited as a case where relief beyond twenty years was given. It was under very particular circumstances of suppression of deeds, most dissimilar to the present.

Pearson v. Pulley, 1 Ch. Ca. 402., merely referred to a rule to be adopted in future.

Acherley v. Roe, 5 Ves. Jun. 565., has very little to do with the present case.

There is no evidence whether the agreement entered into by the Appellants to divide the estate between them is voluntary or for valuable consideration, whether in writing and by parol, or whether it would give a valid title in equity or not. Both parties could not be entitled.

In the absence of the agreement, we may assume that it would give a valid title. Now, if we suppose this to be a good, valid, and binding agreement, how can your Lordships decree, according to the prayer of this bill, to both; or, as they now urge at the bar, to Mrs. Damer only?*

[33] The Attorney-General in reply: The objection as to parties was not taken in time. If the Court thinks the objection material, we may be allowed to amend by making parties. Sir T. Plumer decided only on length of time. In substance and in effect this is a bill to redeem a mortgage, and get in the legal estate outstanding in the mortgagee, Mr. Drake. I shall consider the case, first, with reference to the question between a mortgagor and mortgagee.

Now, if twenty or twice twenty years had elapsed, and the mortgagee admits the right to redeem—

The Lord Chancellor: There is a difficulty as to the term. The term includes the Dorset estate.

The Attorney-General: We are content the Dorset estate shall be free from the mortgage.

Lord Redesdale: There is a question who is entitled to the mortgage money. All the persons claiming under the settlement of 1792 may claim as against Lord Clinton. This is a question, not between mortgagee and mortgagor, but between persons claiming an equity of redemption under the mortgagor. Suppose the mortgage 200 years old; that there is a mistake as to the right at the end of fifty years; and after 150 years' possession, an estate claimed by the right owner; could the claim be allowed? All the great estates in the kingdom are subject to mortgage for portions for daughters, etc. The question is, whether the existence of a mortgage is to make the statute of limitations of no effect for an indefinite time; you must hold, too, that fine and non-claim would not bar.

[34] The Attorney-General: The difficulty now thrown out exists at law in cases of ninety-nine years' leases.

Lord Redesdale: The question between mortgagor and mortgagee cannot possibly satisfy this case. The estate descending to co-heirs, one half may be redeemed and the other not, if one co-heir has been admitted and the other not: this has been decided. The mortgagee is an indifferent person. Can a tenant who has attorned reject his landlord? Your decree must be against Lord Clinton, not against Mr. Drake. The real question as to operation of time here is, whether persons claiming under the settlement of 1792, or Lord Cholmondeley, or Mrs. Damer, are entitled to this property. You go on mere right, and the question is,

* Mr. Butler's argument for the Respondent, Lord Clinton, was the same, *verbatim*, as in the Court below.

For the other parties, the same counsel as in the Court below appeared and argued the case. There was no material difference in the arguments.

whether mere right is not barred by the statute of limitations. There are other questions also.

The Attorney-General: The passage in Lord Clinton's answer, as to the assignment to Drake in 1811, is an admission of the right of redemption under the deed of 1781.

It comes to the question, whether Lord Cholmondeley and Mrs. Damer, or Lord Clinton, has the right to redeem in this cause. If Lord Clinton, on the strength of his twenty years' possession, had come to redeem, could he have redeemed? All parties agree that George Earl of Orford had the equity of redemption in him; he died seised thereof: the ultimate decision must rest on the preferable right to redeem; and the question is, whether twenty years' possession will give Lord Clinton a right to redeem, whether Lord Clinton and his father have gained the equity of redemption. It is impossible we can be barred, unless Lord Clinton has acquired [35] the right. The Defendants' counsel were cautious in arguing that question. Mr. Butler indeed stated, that at the end of twenty years he acquired the right to redeem.

I come now to examine the question, how the rule in equity is. There is no such thing as acquiring an equitable estate by wrong.

Lord Redesdale: Yes, if there is possession in equity.

The Lord Chancellor: The estate, if gained at all, is not gained merely by an act between mortgagor and mortgagee, but by laches of the person really entitled. Upon the last minute of the twentieth year the mortgagee may be redeemed; upon the first minute of the twenty-first year he cannot. Is there any thing so monstrous in saying, that an equity may be acquired by twenty years' possession?

The Attorney-General: After a lapse of 200 years, the Courts would presume a release or conveyance. It must come to this, whether tortious possession by Lord Clinton, and the laches of the Appellants, give Lord Clinton a right to redeem. Adverse possession has been confounded in the argument for the Respondent, with adverse seisin; and adverse possession at law, will not prevent the recovery of an estate. Can there be a disseisin of an equitable interest? The negative is shewn by *Hopkins v. Hopkins*, 1 Atk. 581. The alteration in expression which has been discovered by the Respondent's counsel in this case, in the observations of Lord Hardwicke in delivering judgment, makes no difference in the substance of the doctrine. Mr. Horne contended, that Lord Clinton [36] disseised the trustee and gained the legal estate. In point of law, the trustee has continued in possession. The possession of Lord Clinton was the possession of the mortgagee or trustee. All the cases cited by Mr. Butler, except the first class, are where the tenant in possession had the legal estate. All, except the first class, come within Lord Hardwicke's exception.

As to the second class. In *Davie v. Beardsham* there was an acknowledgment of title. There was an adverse possession of legal estate for twenty years, and the lord had admitted the heir. How does that case apply?

The third class is between mortgagor and mortgagee. There the mortgagee has the legal estate.

The fourth class relates to the time for a bill of review. At law twenty years bars a writ of error, and so it shall bar a bill of review. It is so laid down in *Smith v. Clay*, 3 B. C. C. 639, note.

Courts of equity have interfered in cases of rents after forty years. *Acherley v. Roe*, 5 Ves. jun. 565.

As to the fifth class. In *Bonney v. Ridgard* the legal estate was in the party in possession.

But suppose an equitable estate can be gained by wrong. Has Lord Clinton's possession gained an estate by disseisin? There is a distinction between disseisin and ouster of possession. Receipt of rents is nothing. The possession of the trustee is the possession of the person equitably entitled. The language of the statute of limitations, 21 Jac. 1. c. 16., should be looked to,—“No person shall make any entry into any land, etc. unless within twenty years from the time when his title shall accrue.” *Reading v. Royston*, 2 Salk. 423, shews that the [37] statute does not run except where there is an actual ouster or disseisin. Mere receipt of rent is not necessarily a disseisin: it is only a disseisin at election. Roll. Abr. Disseisin. (C) pl. 12. Tenant at Sufferance. Where the statute of limitations runs there must be a disseisin at the commencement of the twenty years. *Doe v. Danvers*, 7 East, 299.

The Lord Chancellor: I question the applicability of the legal doctrine of disseisin. Suppose the case of mortgagee after twenty-five years, admitting by will the estate to be a mortgage estate, will this affect a third person in possession? Time, and time only, courts of equity have put it upon. Out of a court of equity it might be held rank nonsense to say you may file the bill in the morning, but not after twelve o'clock at night; but so it has been held in equity.

The Attorney-General mentioned *Acherley v. Roe*.

The Lord Chancellor: That was not a case of mortgage certainly.

The Attorney-General: It must follow from this doctrine that twenty years' possession will give a right to redeem.

Mr. Butler: Yes.

The Attorney-General: This is the first time I have heard it maintained. In *Lomar v. Bird*, 1 Vern. 182., which was the case of a lease for ninety-nine years at law, it was held that fifty or sixty years' wrong payment of rent will not prevent a recovery by a rightful owner after the lease has expired. There are other authorities: *Doe v. Danvers*, 7 East, 299.; *Williams v. Thomas*, 42 East, 141.; *Doe v. Perkins*, 3 Maule and Sel. 271.

[38] The Lord Chancellor: If A. B. is trustee for C. D., and C. D. mortgages to E. F., and E. F. holds for more than twenty years without admission, would equity permit C. D. to come to redeem after twenty years? to redeem either E. F. or A. B.? does not A. B. after twenty years become trustee for E. F.?

The Attorney-General: The question is between the contending equities in these parties.

In 1811, Lord Clinton admits that the lands are to be conveyed to him, subject to the redemption under the deed of 1785; and it comes to the question, who is entitled to the redemption under the deed of 1785? I submit there is no dictum or case to shew a right can be gained by a wrongful possession in equity. *Lord Grenville v. Blyth*; *Harwood v. Oglander*. Lord Clinton entered under the deed of 1781. This is a most important question, as to time, in your Lordships' view; and important on the other side, if your Lordships decide that an estate in equity may be gained by wrong.

Another question is, whether a mortgagee or trustee, in collusion with a third party, shall deprive the party rightfully entitled of his right. The hardship is as much to the Appellants as to the Respondents. I never have understood that Courts have been anxious and astute to tie parties down to the strict line of the statute.

A more important question upon principle was never before your Lordships, than to decide whether an equitable estate can be gained by wrong.

The Lord Chancellor (Lord Eldon): In a case of this extreme importance, both to the parties and the pub[39]-lic, and recollecting that two very eminent Judges have differed in their opinion, on a case of so much importance, and calling your Lordships' attention to the very able manner, and the very great display of legal learning with which this has been argued at your Lordships' bar, I do not think your Lordships can be, properly, advised to deal with this case as you ought to deal with it, unless I should suggest the propriety of deferring judgment till Friday se'nnight. In the mean time, it may perhaps be useful to proceed so far in the consideration of this case, as to state to your Lordships what appears to *me* to be the nature of the cause, as we are to collect it from the record, not meaning to give any opinion whatever, at this moment, upon any of the important points which have been discussed at the bar. Whenever it becomes my duty to give that declaration of opinion, it will be necessary to preface it by a statement of the facts, as they appear upon the record, and, probably, it may be a useful employment of an hour, at present, to state those facts as they are to be collected from the record.

I am desirous, however, first to say, that when I proposed to hear the counsel on the equitable point first, I certainly did not make that proposition under any notion, that it would or would not, eventually, turn out that it would be necessary or unnecessary to hear the counsel on the effect of the deed of 1781. I had long foreseen, that in a case where the property was so large, where to the parties themselves the question was so important, and where the bearing of the decision upon titles in this country was so excessively important, it was next to impossible but that one or other of the [40] parties would bring this case before your Lordships, finally, to be here

decided: and I felt it to be my duty, as far as I could, to approach the discussion which I was to hear at the bar, and the decision which was to be made afterwards, with a mind unprejudiced and unaffected by any other matter than what I had heard judicially.

There was another mode of proceeding which might have been recommended to you, but it seemed to me to be less advisable: that is, to have begun first by considering what was the effect of the deed of 1781, because, if the legal effect of the deed of 1781 was to leave the property not in George Earl of Orford, but to have given it to those under whom the Clinton family might claim, that would have put an end to all equitable questions: but it would have decided a mere legal point on a single instrument, and upon one of the most important questions that in the course of my professional life I ever remember to have occurred, affecting so deeply and to such an extent titles in this country as the equitable question does—it would have left the case in circumstances the most unadvisable, namely, that question having been decided one way by one great Judge, and another way by another, and it, therefore, appeared to me important for the interests of all persons entitled to landed property that the equitable question should be set at rest one way or the other. If it ought to be decided with Lord Clinton, there is no occasion to discuss the legal question; if it is not to be decided with him, then it may become necessary to discuss the legal question: and in this view of the case, it appeared to me we should best consult the general adminis-[41]-tration of justice by taking the equitable question first.

It must, certainly, be stated to your Lordships, that this is a case in which you must decide by an attention to the rules of law, by which I mean the rules of equity with reference to this point, and by attention to those rules only. No considerations of hardship must influence your minds: and the real question here will be, what a court of equity ought to do under the circumstances in which this case is brought before you upon this record. Those circumstances I will now endeavour to state. I am very well aware, that this sort of formal statement cannot gain much of your attention, but it is a statement that must be made, and, perhaps, it will be best made while the circumstances of the case are fresh in your recollection, and you will be better able to retain the memory of them when they are stated in detail than when picked up in the course of the hearing of the cause.

As to the circumstance of the want of parties in this case, unless I mistake the nature of this case, I think there are some absent who ought to be here. I understand it to be the wish of both parties to waive that question, as far as it can be waived: but in one way of determining this case I do not think it can be waived. If your Lordships shall be of opinion that Lord Clinton has the equitable title, the want of parties may be waived: but if your Lordships should be of opinion the other way, then, if there are parties who have interests that may be bound by your decision, inasmuch as you have them not before you to consent to the decision, I do not know that you could, in consequence of any thing that has passed from the [42] bar, waive the necessity of making other parties: and if the case should take that turn, it may be necessary to go no further than direct the record to be amended.

The first question that here arises is, (if I may so term it, having of late been very conversant with Scotch cases,) the title of the plaintiff to pursue. Now let me suppose, and I only put it now by way of supposition, I do not say the fact is so, but let me suppose, for the sake of argument, that there had been a possession of more than twenty years when this bill was filed, adverse to every body who could claim under George Lord Orford, or under Horatio Lord Orford: indeed, it is not necessary, with a view to the circumstance which I am now alluding to, that there should have been an adverse possession for twenty years: but let me suppose, that it appears upon this record, that neither Mrs. Damer, nor Lord Cholmondeley, nor any body for them, had been in possession. I do not now enter into the question whether the mortgagee must not be considered in possession for them: but assuming for a moment that the mortgagee was not to be considered in possession for them, under the circumstances of the case. Let me suppose that they had been out of possession for five years or two years, how do they state their title to bring a joint bill. They do so by a sort of allegation, of which there is no proof, and fortunate, perhaps, it is that there is no proof:—but it is insisted at the bar that allegation is enough, and that you need not proceed in such a case *secundum allegata et probata*, but *secundum*

allegata. After Lord Cholmondeley had stated himself to be the heir at law of Horatio Earl of Orford, and [43] not claiming by this bill as the heir at law of George Earl of Orford, he says, "that some questions had arisen between the Appellants respecting the will and codicil of Horatio Earl of Orford, so far as regards the equity of redemption of the said mortgaged hereditaments; and in order to put an end to such questions, the Appellants had agreed to share the same hereditaments between them." Whether this was a written agreement or a parol agreement, or what sort of agreement it was, or whether it was a promise, is not explained on the record, and it has not been produced to your Lordships if it exists in a producible shape.

Now the policy of our law, both the common law and the statute law, has certainly set its face very much against persons entering into agreements with respect to property of which neither of them have had possession for a limited period. I do not trouble you with a discussion as to the doctrine of maintenance or champerty, or about the meaning or expressions which we find falling from the mouths of some of our Chancellors in courts of equity as to the evidence relative to what they say, "savours or smells of maintenance or champerty;" but your attention must be called in this case, I think, to that upon which I do not observe that the Attorney-General said one word, I mean, the 32 Hen. 8., as to pretended titles. Give me leave to suppose for a moment, that no person alive could doubt that the right and title was either in Mrs. Damer or in Lord Cholmondeley, or, if you please so to put it in both, the question then would be whether, consistently with that statute of the [44] 32 Hen. 8. they could enter into such an agreement as they have here stated upon their bill. It is a question, undoubtedly, which must be agitated with great seriousness, because, if they could not, the fact of entering into it exposes them to very great penalties.

Now I will read a passage which will call your attention, with some degree of accuracy, to what is the question on this part of the record, a passage from one of our best reporters (Plowden, p. 88) in the law. He says, "But before I enter into the consideration of the statute, I will lay down what is a pretended right or title. It seems to me that a pretended right or title is but in one case, and that is, where one is in possession of lands or tenements, and another, that is out of possession, claims them, or sues for them, that is a pretended right or title. For if one has right or title to land, and afterwards he comes to the possession of the same land, his right or title is extinct or suspended in the land, for during the time that he has the land, it is not in *esse*, *ergo*, during that time it cannot be termed a right or title. And that such is a pretended right or title, is proved by the statute itself, which has a *proviso* in it, that *it shall be lawful for any one, being in lawful possession, to buy or obtain the pretended right or title of any person or persons to such lands, &c.* so that, when the statute saith, *he in possession may buy the pretended right of any other*, it declares my definition to be true. Further, I take the statute, that if he, who is out of [45] possession, bargains or sells, or makes any covenant or promise to part with the land after he shall have obtained the possession of it, this shall be within the danger of the statute, whether he, who so bargains, sells, or promises, have a good and true right or title or not, and in this point the statute has not altered the law; for the common law before this statute was, that he, who was out of possession, might not bargain, grant, or let his right or title, and if he had done it, it should have been void. Then this statute was made in affirmance of the common law, and not in alteration of it, and all that the statute has done is, it has added a greater penalty to that which was contrary to the common law, viz. that a man shall forfeit the value of the thing bargained or promised, &c.; and to avoid such bargains or promises, where a man is out of possession, is the only point which the statute here remedies."

Many cases, perhaps, cannot be brought even within that construction of the statute, but courts of equity, I believe, have always set their faces against giving any effect to contracts which came within the mischief, which the policy of the statute was intended to guard against; and though the transaction may not be, precisely and accurately, hit by the statute, yet if it comes within the mischief of the statute the Court will not grant relief. Besides this, difficulties will arise as to the manner in which, supposing the plaintiffs should succeed, the decree is to be framed in order to give them such rights, as by conjecture or by information hereafter (if any such

information should be given to us) we may be able to ascertain, are vested in them by this agreement, if it be legal.

[46] Here, I come to the consideration of that part of the subject. The title, as far as depends on these deeds, begins in the year 1704. By a deed of that date, which was made in consideration of a marriage then intended, and afterwards had between Samuel Rolle and Margaret Tuckfield, the younger, several estates which are therein mentioned, were conveyed to uses which I need not now trouble you with mentioning, except, that there was one use expressed in the creation of a term of 200 years, which still exists upon trust to raise, if there should be issue of the marriage, only one daughter and no other child, the sum of £20,000 for the portion of such daughter.

That term is still in existence, and one question in this cause will be, for whom is the person in whom that term is now vested, according to the true application of the doctrines of equity, to be considered as holding in trust: a point which it may be right to consider with great attention, and the rather, because of late with respect to those trust terms which are to attend the inheritance, doctrines appear to me to have been held, which bring into question what was understood to be the old law with reference to titles: I mean rules that we seem to have been approaching, that terms, if satisfied, must be considered also as having been surrendered, although I take it, that according to the habit of old conveyancers, there was many a case where the term, although satisfied, was supposed to be kept alive, and not meant to be surrendered; the term being kept alive by the effect of a declaration, that it is to attend the inheritance in some formal instrument, or by that which is the declaration of equity, if there be no such declaration in any instrument. [47] I take it to be a clear rule, that when a term is satisfied until it is put an end to and is surrendered, it is a trust which can mould itself so as to be applicable to the benefit of all who take the property according to their rights, subject to that trust. It is necessary to observe that this was a trust term, because the original mortgage is a mortgage for a term; and putting mortgages out of the question, the great doctrines as to length of time may be very different in those cases that apply to a term of years, and those that apply to a fee-simple of inheritance.

The author of this settlement, Samuel Rolle, made his will in 1717, and he died in the year 1719. He left an only daughter, of the name of Margaret Rolle, who afterwards became the wife of Robert Walpole, Earl of Orford; he died in 1751; she died in January 1781; and they left issue, George Earl of Orford, who died on the 15th of December 1791. This bill being filed in June 1812, and therefore more than twenty years after the death of George Earl of Orford.

The papers upon the table, the deeds, the execution of which is admitted, trace that term of two hundred years to its being vested in the Respondent William Seymour, who, by the prayer of this bill, is called upon to assign that term to the Appellants; and it is unnecessary to state the various instruments which have been executed, under the effect of which by mesue assignments, that term is vested in William Seymour. The question will be for whom is he a trustee of that term.

It appears that recoveries of the estates were suffered in 1781, by George Earl of Orford, and [48] that on the 1st and 2d of August 1781, he made that deed, under which the question, with respect to the legal effect of the last limitation contained in it, arises. The deed is a very peculiar one in the terms of it.

You have before you the question of the equitable rights of the parties, and must, for the present, (whatever may be your opinion upon the effect of that deed of 1781, at law, if it becomes hereafter necessary to determine what is its effect,) understand that deed as vesting the ultimate limitation in the grantor. It may turn out, or it may not, on the discussion of the legal effect of the instrument and the intentions of the grantor, as the intention is to be collected from what appears in the instrument itself, that you may be of opinion, as one of the Judges of the Court of King's Bench was of opinion, and as the present Master of the Rolls has intimated his opinion, that the legal effect of that instrument was such as to shut out the equitable consideration; but for the purpose we are now engaged in, your Lordships will take it, without prejudice to future decision on this subject, that this deed did not (either in consequence of a mistake of the nature of the law, or of the mode of executing his intention,) vest the ultimate limitation of this estate in the persons under whom the Clifton

family now claim. It may be necessary to state the deed, if any thing of equity is to depend upon the probable intention as to what Horatio Lord Orford would have done, or would not have done, in case he had discovered the mistake; and if any thing is to turn on the question, whether Horatio Lord Orford died with-[49]-out discovering the mistake, or if he discovered it without stating what his intention would be in such a case. If the question should arise, whether those who take after him can be at liberty to avail themselves of a mistake which he did not avail himself of, and while you are in ignorance of the state of his mind on that subject at his death, except so far as you can discover that he devises all his estates by the will, (although it is hardly to be conceived that he really meant by that will to pass this estate with respect to which he had executed the deed of 1794,) what you are to look at is the legal effect of the will, and the legal effect of the will perhaps only. This will constitutes a very singular case in one respect; because, if it should be your opinion that the deed of 1781 has vested the estate in the grantor of that deed, I me in the ultimate limitation, it would be very difficult to deny, in point of fact, that the circumstances would make no difference in point of law, that that deed has not passed to the ancestors of the Clinton family, what it was probably meant to pass to the ancestors of the Clinton family, and this singularity will arise on the other hand, that if the will of Horatio Earl of Orford has the effect to give those estates, that will probably will pass what Horatio did not suppose he was about to pass by his will. These singularities will not justify any different determination as to the deed or will than you would otherwise make.

The deed of 1781, after reciting the recoveries which had been suffered, proceeds thus: "And whereas the said Samuel Rolle did in or about the month of November, 1719, depart this life, [50] without revoking his said will, leaving the said Margaret Rolle, his daughter and only child, him surviving, who afterwards intermarried with the said Robert, then Lord Walpole, afterwards Earl of Orford. And whereas the said Margaret, late Countess of Orford, did in or about the month of January last past depart this life, leaving the said George Earl of Orford her son and only child, who by virtue of the aforesaid will of the said Samuel Rolle became entitled to all his manors, lands, tenements, and hereditaments as tenant in tail." And then it proceeds to state the recoveries which had been suffered, which were to the use and behoof of the said George Earl of Orford for and during his natural life, without impeachment of and with full power to do and commit any manner of waste on the said premises, or any part or parts thereof; and from and after his decease to the use and behoof of the heirs of the body of him the said George Earl of Orford lawfully to be begotten; and in default of such issue, to the use and behoof of such person or persons, for such estate or estates, rights and interests, to and for and upon such uses, trusts, intents, and purposes, and subject to such provisos, conditions, and agreements as the said George Earl of Orford by any deed or writing or deeds or writings, or by his last will and testament in writing, by him duly executed in the presence of and attested by two or more credible witnesses, shall declare, limit, direct, or appoint; and in default of such declaration, limitation, direction, and appointment, to the use of the right heirs of the said Samuel Rolle for ever, and [51] to and for and upon no other use, intent, or purpose whatsoever.

The legal question is, who, in construction of law, will take under that use so limited to the right heirs of Samuel Rolle for ever, and to and for and upon no other use, intent, or purpose whatsoever, in an instrument made by George Earl of Orford, describing himself to be "the only son and heir of Robert Earl of Orford by Margaret his wife, who was the daughter and only surviving child and heir of Samuel Rolle, late of Heanton, in the county of Devon, Esquire, deceased, who was the only son and heir at law of Robert Rolle, of the same place, Esquire, by Arabella his wife, who was the daughter and one of the co-heirs of Theophilus Clinton, Earl of Lincoln and Baron of Clinton, also deceased, of the one part," and those other persons of the other part.

The next instrument which I will state, is a deed of the 4th and 6th of June 1785; it is made between certain persons here described, and particularly George Earl of Orford, the person who had made the deed of 1781: it recites the term in the deed of 1701; and in the recital, it points to a fact which has been repeatedly mentioned, that part of those mortgaged premises are in the county of Dorset; and we have no mortgagee here representing the lands in the county of Dorset; the other parts of them are in the counties of Devon and Cornwall. It then recites certain articles that

had been made on the marriage in 1724, and that that marriage had taken place by which Robert Lord Walpole had become entitled to the sum of £20,000, which was the portion to be raised under [52] the first instruments. Then it states certain proceedings in the Court of Chancery, under which a mortgage was made of the term of two hundred years, to raise that sum of £20,000 for Robert Walpole. Then it recites that the mortgage was transferred to Lord Keppel and others, and by various assignments of the term, finally in 1811 became a mortgage for the benefit of Lord Clinton. On that assignment of 1811, much has been argued at the bar.

This mortgage having been made, and the assignment of the term having been made at the same time, it appears, that in the year 1792, a conveyance was made by Robert George William Trefusis late Lord Clinton, George Earl of Orford having died in December 1791. It is stated in the pleadings, that upon the death of George Earl of Orford, this Lord Clinton entered into the possession and receipt of the rents and profits of the premises; and being so in possession, and conceiving, either according to law, or without sufficient warrant of law, that under the limitation of the deed of 1781, he was entitled, on the death of George Earl of Orford, to enter into possession; he accordingly did enter into the possession, and proceeded immediately to act as the owner of the property, for in the year 1792, on the 6th day of October, he executed a deed which recites the mortgage for the £20,000, and that by divers mesne acts as to the term and fee, they became vested in Lord Keppel; it recites the death of Margaret Countess of Orford, that her son George Earl of Orford, being tenant in tail, suffered recoveries; that Lord Keppel had occasion for the money; [53] and that the Earl of Orford had applied to Sir Edward Hughes to advance the £20,000: it states the title as vested in Sir Edward Hughes; and then it represents the effect of the deed of 1781, which contains the disputed limitation. It then has the following recitals: "Whereas the said Earl of Orford never did make any appointment of the said manors and premises; and the said Robert George William Trefusis is also heir of the said Earl of Orford, *ex parte maternâ*." (Horatio Earl of Orford, was not a party to this deed; but it will be to be considered, what is to be the effect of his joining in another deed, which takes notice of this deed.) "And whereas the said Robert George William Trefusis, is desirous of raising the sum of £34,000 for certain purposes, and such further or other sum or sums as hereinafter mentioned, and hath proposed to convey the settled premises subject to the mortgage money of £20,000 to the Earl of Coventry, Humphrey Hall, Ambrose St. John, and John Inglett Fortescue." (Some of them are dead, and other trustees appointed in the stead of them.) Then all these premises in the counties of Devon and Cornwall, but not in the county of Dorset, are conveyed by this deed to the Earl of Coventry, Humphrey Hall, Ambrose Saint John, and John Inglett Fortescue; and they are to raise the sum of £34,000 for certain purposes which I shall have occasion to mention to your Lordships presently; and subject to those charges by another deed of the 7th and 8th of October, 1792, the estates are conveyed first of all to raise some pin money for the grantor's lady, then to himself for life, then to [54] trustees to preserve contingent remainders, and then to the intent that she should receive her rent charge of £700 a year. (It is said that she is dead.) Then there is a term created in Robert Mackreth and Sir William Lemon for 300 years, and then there is a term of 500 years, and subject to that term of 500 years the estate is limited to the use of Robert Cotton St. John Trefusis, eldest son of Robert George William Trefusis, for life, and after his death to the trustees, to support the contingent remainders; then to the sons of Robert Cotton St. John Trefusis, one after the other; and then to various other persons of the name of Trefusis and their issue, male and female.

Under the term of 300 years, the limitations are extremely extensive with respect to the number of persons who in different events are to take under them; with respect to the term of 500 years that is expressed to be in trust to raise several sums of money as portions for sons and daughters; in some instances for daughters only, in others for the sons and daughters; and whether there may or may not now be alive individuals who may have interests under that term of 500 years, I know not; if there are, one question is, whether they also would not have a right to litigate the question before your Lordships.

This deed having been made in the year 1792, a doubt seems to have arisen in the year 1794, and to have been communicated to Horatio Earl of Orford, with respect to what might be the effect of the mortgage which had been made in 1785

upon the deed of 1781. If the intention of Earl George was that that deed of 1781 should have [55] effect at his death, and if that deed of 1781 should be a deed which, if it had not effect at his death, his intention in that deed might be supposed to be an intention which would miscarry, it was of very little importance whether his deed of 1781 had or had not been revoked by that deed of 1785, supposing that under that deed of 1781 he was himself to take as the heir of Samuel Rolle; for then the effect of that deed would amount to no more than if that limitation had not been expressed in the deed: because if a person entitled to the fee of an estate makes no ultimate limitation, it vests in himself. It seems, therefore, to be another proof, either that he did not mean that deed of 1781 to operate in favour of himself, or that he was still under some mistake, or had not discovered that it would have that operation, or that he meant that some operation should be given to it, which it is contended is not given to it by the effect of that deed of 1794, and that it has no effect in either law or equity, with reference not only to the Clinton family, but with reference to all the persons who after that deed of 1794, had upon the faith of that deed, but, as it is said, under a mistake of its real meaning, advanced their money in very considerable sums.

That deed bears date on the 2d of April, 1794, and if the operation of the deed turns out to be mistaken, it is enough to make men tremble whose property depends upon the accuracy of deeds. You have here a gentleman made tenant to the precept, Mr. Joshua Sharpe, whom my noble friend (Lord Redesdale) [56] and I recollect to have been a man of great knowledge in his profession; you have the opinion of the late Sir Archibald McDonald, and of as complete a conveyancer as existed in our time, the late Mr. Shadwell, before whom cases were laid. Undoubtedly their attention was not directed to the point; but if it should appear that mistake has crept in, the case having travelled through so much advice, any man might be alarmed for fear his instruments should not operate according to his intention; and this deed contains a particularity of description and expression which will very well deserve your attention. It is one thing certainly (and ought to be remembered) to say that a deed of confirmation, (if you may give it that name,) shall not go to weaken the title which it was meant to confirm, and another thing to say that a deed of confirmation shall come to strengthen a title that before existed. They are different propositions in law, and with reference to both, this case must be considered. The parties are described as "The Right Honourable Horatio Earl of Orford, uncle and heir at law of the Right Honourable George late Earl of Orford, deceased, of the first part; the Right Honourable George William Earl of Coventry, Humphrey Hall, Ambrose St. John, and John Inglett Fortescue, Esquires, (the trustees,) of the second part;"—"The Right Honourable George William Baron Clinton, eldest son and heir at law of Robert Cotton Trefusis, late of Trefusis, in the county of Cornwall, Esq. deceased," (the description of whom only three years after the death of George Earl of Orford, is not unimportant;) "who was the eldest son and [57] heir at law of Robert Trefusis, of the same place, Esq., also deceased, who was the eldest son and heir at law of Samuel Trefusis, of the same place, Esq., also deceased, who was the eldest son and heir at law of Francis Trefusis, of the same place, Esq., also deceased, by Bridget his wife, who was the daughter of Robert Rolle, formerly of Heanton Satchville Hall, in the parish of Petrockstow, in the county of Devon, Esq., deceased, by Arabella his wife, the daughter of Theophilus Earl of Lincoln, Baron Clinton, and Baron Saye, deceased, and was also the only surviving sister to Samuel Rolle, late of Heanton aforesaid, Esq., deceased, the only son of the said Robert Rolle by the said Arabella his wife." (You see the extreme anxiety of description to point out who this individual was, and then the description is concluded by this still more general description;) "and the said Lord Clinton being also heir at law, *ex parte maternâ*, of the said George Earl of Orford, and also Baron Clinton, who was the son and only child and heir at law of the Right Honourable Margaret Countess of Orford, deceased, who was the daughter and only child of the said Samuel Rolle, of the third part;" it then recites the deed of August, 1781, (and, in law, this is the recital of Horatio Earl of Orford, as well as the recital of the other parties;) and then it recites, that the said Samuel Rolle died in November, 1749, without revoking his will, leaving the said Margaret Rolle, his daughter and only child, him surviving, who afterwards intermarried with the said Robert, then Lord Walpole, afterwards Earl of Orford; it also recites, that the said Margaret Countess [58] of

Orford did in or about the month of January then last past depart this life, leaving the said George Earl of Orford her son and only child, who by virtue of the afore-said will of the said Samuel Rolle, became entitled to all his manors, lands, tenements, and hereditaments, as tenant in tail: then it proceeds to state that two recoveries of those manors had been suffered, but that the said George Earl of Orford was willing and desirous that the same premises should continue and remain in the family and blood of the said Samuel Rolle: it then recites, "that by the indenture of release of August 1781 it was witnessed, that in consideration of the natural love and affection which the said George Earl of Orford had and bore unto his relations the heirs of the said Samuel Rolle," (that is, (taking the limitation to operate in favour of himself) in consideration of the natural love and affection he had for himself, as the relation of the said Samuel Rolle;) "and to the intent that the said manors, messuages, lands, tenements, and hereditaments therein and hereinafter mentioned might remain, continue, and be in the family and blood of his late mother the said late Margaret Countess of Orford, on the side or part of her said father the said Samuel Rolle, and in consideration of 5s. by the said Joshua Sharpe to the said Earl of Orford paid, and for other good causes and considerations, him the said George Earl of Orford thereunto moving:" and then (for those considerations, and with this intent thus expressed) subject to the estates vested in his own issue, comes a limitation in this deed, as recited in the deed of 1794, "to the right heirs [59] of the said Samuel Rolle for ever." (Upon which limitation the question arises, whether in point of law this instrument, by "the right heirs of the said Samuel Rolle," means the grantor of the deed according to the construction which law must put on the words, or whether, with this exposition of the intent, the general legal effect of the words will or will not in point of law give way to the expression of a particular purpose, supposing that particular purpose to be sufficiently expressed for the intent of raising that question.) The deed of 1794 then proceeds to state the indenture of 1785 (which is an instrument of mortgage, and that instrument of mortgage having been made after the deed of 1781, a doubt, (so much at least must be admitted clearly to be the fact,) arose as to what was the effect of the deed of 1785 on the deed of 1781). The deed of 1794 then goes on with the following recital: "And whereas by indentures of lease and release, bearing date respectively the 7th and 8th of October, 1792, the release being tripartite, and made or mentioned to be made between the said Lord Clinton:" (then he is described in these words:) "who was and is heir at law of the said Samuel Rolle by his then name of Robert George William Trefusis, and such description as hereinbefore contained, of the first part." It then mentions the other parties of the second and third parts, reciting that the said manors, lordships, and hereditaments therein and hereinafter mentioned and described to be the estates and inheritance of the said Samuel Rolle, and thereby granted and released, with others, did, upon the decease of the [60] said George late Earl of Orford, come to and vest in the said Lord Clinton, subject and liable, together with other manors and hereditaments situate and being in the county of Dorset, to a mortgage made by the said George Earl of Orford by the before-mentioned indentures of lease and release, bearing date respectively the 5th and 6th days of June, 1785, for securing the repayment of the said sum of £20,000; and that Lord Clinton, by indenture of the 6th of October, 1792, had conveyed the estates to Lord Coventry and others for the purpose of raising the £34,000 and such further sum of money, not exceeding in the whole the sum of £10,000, as should be found requisite and necessary as therein mentioned, in the manner directed by that instrument of 1792: (it will be material to state to your Lordships presently what was directed to be the application of those sums raised under the deed of 1792;) and this deed of 1794, to which Horatio Earl of Orford was a party and Lord Clinton was a party, under the particular descriptions of each of them, which I have before mentioned, does not rest with the mere general statement of the effect of the deed of 1792, with a view to the power of raising that sum of £34,000 and the sum of £10,000, but it goes on to state with great particularity, all the limitations that were made by the settlement of 1792, subject to the raising those sums of money upon all the various branches of the Trefusis family: and then it recites this: "And whereas doubts have arisen whether the said George Earl of Orford's having joined in the said indenture of release of the 6th day of

June, 1785, [61] did not revoke the limitations contained in the said recited indenture of release of the 2d day of August, 1781, and thereby defeat the said recited settlement of the 8th of October, which was in the year 1792, and vest the hereditaments comprized in the last-mentioned indenture in the said Horatio Earl of Orford, as heir at law of the said George Earl of Orford; but the said Horatio Earl of Orford being well satisfied that the said late Earl did not intend to alter the said uses limited in and by the said recited indenture of the 2d day of August, 1781, hath, at the request of the said Lord Clinton, agreed to confirm the uses of the said settlement in manner hereinafter mentioned." Those words are very important in this case; for the doubt that is here stated, is a doubt founded upon the notion that the deed of 1781 did not vest the hereditaments in the heir at law of George Earl of Orford by the last limitation, and therefore did not vest the hereditaments in George Earl of Orford himself, so that the heir might take it, and it is a singular circumstance if it so turns out that the deed of 1781 did so vest the estate; but the law must be administered, if it should so turn out. This instrument was prepared in consequence of the opinions given, and a doubt which had arisen, whether the deed of 1785 would not vest the hereditaments in the heir of George Earl of Orford; and it will be singular if the fact be, that the deed of 1781, independent of the deed of 1785, had vested these premises in the heir at law of George Earl of Orford; but under the deed of 1794 Horatio Earl of Orford being well satisfied that the said late [62] Earl did not intend to alter the uses made in and by the said recited indenture of the 2d day of August, 1781, had, at the request of Lord Clinton, agreed to confirm the uses of the said settlement, in manner hereinafter mentioned. This is certainly a declaration, in any way of putting the case, of the intention of Horatio Earl of Orford not to alter the uses limited by the deed of settlement of 1781; but I think it is likewise undeniable that he thought, and whether by mistake or otherwise is another question, but taking for granted it was by mistake, he thought it one of the uses limited by the indenture of the 2d of August, 1781, namely, the last use not to give the estate to George Earl of Orford, and therefore not to himself, but to give it to some person other than himself, and other than George Earl of Orford; and two questions will arise upon this instrument, one of them particularly founded upon the subsequent parts of this instrument, namely, what is the effect of this instrument, regard being had to the recitals of it; and, secondly, whether this instrument is to have a more limited effect than you can bring yourselves to believe that Horatio Earl of Orford meant it should have, and to have that more limited effect because the rules of law require you to give it a more limited effect. Another question, which will not depend altogether on this deed, but on considerations of equity, is, whether after such a deed as this is executed, there is equity in the heirs at law of Horatio Earl of Orford, at the distance of twenty years, to disturb this deed of 1794, without regard to the fact that he lived till 1797, and when it does not [63] appear that in the course of his life he ever meant to disturb what he actually thought he had done, but which, in one way of putting the case, he was mistaken in thinking he had done by this deed of 1794? By that deed, after stating his entire satisfaction with respect to the intention of George Earl of Orford, he goes on to say, "Now this indenture witnesseth, that in pursuance of the said recited agreement, and being desirous to confirm the said recited settlements of the 2d day of August, 1781, and the 8th day of October, 1792, and for and in consideration of the premises;" then he releases his estate and interest therein, as far as he can or lawfully may, and he releases the premises with an *habendum*, the terms of which I will state to your Lordships presently.

The deed of the 7th of August, 1781, contained the limitation, the legal effect of which is in question. The deed of the 8th of October, 1792, is a deed which proceeds upon the persuasion that the person who then represented the Clinton family had, under that limitation of the deed of August 1781, become entitled to the estate for the various purposes of raising money, and for the purpose subject to the purpose of raising money, of sending it throughout all the branches of the family; and this at least must be clear, that Horatio Earl of Orford takes upon himself to confirm that settlement, as well as the deed of August 1781. He therefore says, my meaning is as far as I express myself by this deed, that the person to whom the deed has limited it in 1792, shall take it. Then another question is, what

induced in his mind that meaning. They say on the one hand, he [64] meant to confirm that settlement, because he meant to confirm the deed of 1781, and he meant to confirm the deed of 1781, because he was ignorant of the effect of that deed of 1781, and being ignorant of the effect of that deed of 1781, when he confirms the deed of 1781, he confirms a deed not to insure the supposed effect of it, but the real effect of it; and if the effect of the deed of 1781 was such as not to give an estate which would enable the heir to make the settlement of 1792, then his confirmation of the settlement of 1792 shall have no more effect than his confirming the settlement of 1781; and that they say is a confirmation, only so far as it operates as a confirmation of the settlement which vested the estate in George and Horatio, Earls of Orford, and not in the parties to that deed of 1792; and they further contend, that this is to be the more regarded in consequence of the peculiar expressions in the *habendum* of the release, which is, that the premises are to be held by the Earl of Coventry and others, "to for and upon such and so many of the uses, trusts, intents and purposes, and under and subject to such and so many of the powers, provisos, limitations, declarations and agreements limited and declared, or anywise expressed of and concerning the same, by the indentures bearing date respectively the 6th of October and the 8th of October, which was in the year 1792, as are now existing undetermined and capable of taking effect, in the same manner as if the said indenture of the 6th day of June, 1785 had not been made, and to and for no other use, intent, or purpose whatsoever;" and then it is said, this being the effect of the deed [65] of the "6th of October and the 8th of October, 1792," you are to enquire how the premises would have been held on the two deeds of the 6th and 8th of October, 1792, in the same manner as if the indenture of the 6th day of June, 1785 had not been made; and if that deed had not been made, though the settlement of the 6th of October purported to convey the estates to raise money, and that of the 8th to convey to the purposes therein expressed for a family settlement; yet if the deed of 1785 had not been made, the deed of 1781 could have no new effect as was supposed in 1792, and therefore the deeds of 1781 and 1792 must not be confirmed at all; that is the way in which it is argued on one side.

On the other it is insisted, that whether Horatio, Earl of Orford, was under a mistake or not with respect to the deed of 1781, this deed of 1791 contains evidence of his intent, that these estates should go in the manner or be applied for the purposes, and be enjoyed by the persons named in the instruments of 1792; and your Lordships will have to consider the nature of those instruments, particularly with respect to those mortgagees, whose case I shall have occasion to mention presently, and with respect to the other persons to take under the settlement of 1792: it is further contended that with respect to the latter claimants, there will be no equity that will authorise your Lordships to disturb the settlement that then was made, if it was made under a mistake, it not appearing that Horatio, Earl of Orford, himself, before his death had discovered that mistake, and it not appearing positively that if he had discovered [66] that mistake he would have set up that equity which is contended for by those who claim under him. That is stated with reference to those who take, if I may so express it by way of distinction, as volunteers under the settlement of 1792. But it is said as to the subsequent mortgagees, that this became part of the title which your Lordships ought to suppose was relied upon by those who lent their money, and there can be no equity, it is insisted, as against the mortgagees who have lent their money, upon a mistake of the law if you please so to put it; that is on the mistake of the legal construction of the deed of 1781, when as they say for the purposes of their dealing with the estate and lending the money, the individual who had a right to take advantage of the mistake had, by the execution of this deed, and by the assertion of such facts as are contained in the recital of this deed, authorized the parties claiming under the instruments of 1792, to go to the market with the property for the purpose of raising that money, which Horatio, Earl of Orford, could not but know was the purpose of executing those deeds of 1792, which deeds of 1792 he professes here to confirm.

This deed, which was made upon the 1st and 2d of April, 1794, was followed by a transaction which took place with Sir Lawrence Palk, on the 5th of July, 1794, that is, in about three months after the deed of confirmation; and that deed states the purposes to which the money so to be raised was to be applied (Appendix, p. 47). It

states that the £34,000 was to be disposed of in this way, namely, "the sum of [67] £4000, part of the said sum of £34,000, for and in the purchase of all and every or any of the messuages, lands, tenements and hereditaments, and other the premises late of the said George Earl of Orford, deceased, situate, lying and being in or near the borough of Ashburton, in the county of Devon; and likewise some other premises which were also late the estate and inheritance of the said late Earl of Orford," then they were to apply a further part of the sum of £34,000 "in the purchase of the several and respective estates, hereditaments and premises thereafter mentioned, and which were formerly the estates, hereditaments, and premises of the said Robert Cotton Trefusis, the late father of the said Baron Clinton;" and it goes on to state the manner in which this sum of money was to be laid out.

These deeds having been executed, the possession, (subject to any qualification that belongs to that expression,) the actual possession and perception of the rents and profits prior to the execution of all these deeds, and subsequent to the execution of all these deeds, until the filing of this bill was had by the late Lord Clinton, whose personal representative is not before the Court, and whose situation must be materially affected by the decision of this question. Upon his death, the rents and profits were received by persons who, as between themselves and the Clinton family, were clearly trustees for the Clinton family, and certainly not for Lord Cholmondeley or Mrs. Damer. They received those rents and profits for a considerable time; afterwards the Court of Chancery took possession of the rents and profits; a receiver was appointed of the rents and profits; and passing over the various periods in which the rents and profits were received by the late Lord Clinton, the trustees and the receiver; an account is prayed only against the present Lord Clinton.

It is unnecessary for me to state the various assignments that were made of the term of 200 years, which became finally vested in Mr. Seymour; but it is necessary to call your attention to a deed of the 26th and 27th of November 1811, which was made between Sir Edward Hughes Ball, who was understood to be a trustee or mortgagee, of the first part; and Coutts, Antrobus, and Trotter of the second part; it states the indentures of lease and release of 1785, mentioning the premises in Dorset, as well as the premises in Devon and in Cornwall; it traces the title to the fee of the estate, and the title to the money secured by the mortgage; it recites certain transactions that took place in the Court of Chancery, by which it was determined, that this Mr. Ball was a mortgagee in trust for Coutts, Antrobus and Trotter, as the executors of Dame Ruth Hughes, deceased; and then by direction of the Court of Chancery, by which the Master's report is confirmed, he is made to convey the whole of the premises, "subject to the like benefit and equity of redemption, on payment of the said principal sum of £20,000, and the interest henceforth to grow due for the same, as the said manors, lordships, hundreds, messuages, mills, lands, tenements, and hereditaments are now held by those persons under and by virtue of the said hereinbefore recited indentures of lease and release, [69] bearing date respectively on or about the 1th and 6th days of June, 1785, except so far as the right to the said sum of £20,000 and the interest henceforth to become due for the same, is altered or varied by these presents."

I call your Lordships' attention to this deed, because, with respect to the question between Lord Cholmondeley and Mrs. Damer and Lord Clinton, it is said, that this is to be considered as a deed in which the person of the name of Drake, accepting the conveyance from this infant trustee, is to be deemed a trustee for Lord Clinton; that Mr. Drake, therefore, in 1811, acknowledges the equity of redemption as existing, because this conveyance is made to him, subject to the equity of redemption, and that he being a trustee for Lord Clinton, it must be considered that Lord Clinton himself has, by his trustee, acknowledged that the equity of redemption existed in 1811.

With reference to that question, your Lordships will have to consider, first, what the effect of such an instrument as that would be with reference to such a question as exists in this case, attending to the practice of equity with respect to reconveyances of mortgages, and what is the duty of persons to reconvey; whether the persons reconveying are ever to be considered at liberty to decide where the right in the equity of redemption really exists, or whether, on the other hand, they are not to convey according to the equity of redemption, as it was left under the instrument by which they

became mortgagees, leaving it to the forms of courts of justice to whom they may resort, to say what is the effect of the conveyance, subject to [70] such equity of redemption; whether it is to go according to the terms used, or according to the rights of those who have got claims, either founded on contract with, or on adverse possession against those to whom in terms the equity of redemption was originally reserved.

With respect to the mortgage which was made to Sir Edward Hughes, and which was finally vested in Mr. Drake, he stating himself to be trustee for Lord Clinton, your Lordships will have the questions in this case to consider, which have been stated at the bar, and likewise the questions in respect to those who have claimed under the powers of raising money, namely, the £34,000 which I have before mentioned: and, when we come to consider what is the decree that should be made against the mortgagees, supposing the event that Lord Clinton cannot sustain the existing decree, I apprehend it will be your duty to see what is stated in this bill as against them, all the circumstances of this case being considered, and especially the effect of the deed of 1794 considered with respect to their lending their money after that deed was executed. They certainly have likewise a right of agitating the general question, which Lord Clinton himself is entitled to agitate, the general question, laying out of consideration the legal effect of the deed of 1781, and taking it as if nothing of the kind had happened: and provided there is not a vice in the title of Lord Cholmondeley and Mrs. Damer, for the reason I have before stated, you will have to consider the doctrine of a court of equity with respect to adverse enjoyment, whether taken by wrong or mistake, or in any other manner.

[71] I do not think that this is a case which can be decided upon the well known doctrines that obtain between mortgagor and mortgagee; but that in considering this case, you will have to declare who is in the contemplation of a court of equity, after twenty years have expired, to be taken to be the mortgagor, Mr. Drake admitting himself certainly to be a mortgagee. If a mortgagee is in possession for twenty years, receiving the rents and profits from time to time, never paying any rents and profits to the mortgagor, never in his deeds or instruments, to which the mortgagor is no party, acknowledging that he is a trustee, there is an end of the question. A mortgagee is *quasi* a trustee for just nineteen years 364 days and twelve hours, short by five minutes: for if he was called on to account at the end of one year, he must say of these rents and profits, I can retain no more to myself than pays my interest for this year, save that I may apply the remainder of those rents and profits to the payment of my principal. But suppose an estate, producing £500 a year, was mortgaged for £500; in the first year, the mortgagee would receive £500 from the rents of the estates so stated to be £500 a year; and he might be called on to re-convey at the end of the year, and so *de anno in annum*, till the twenty years ran out; but if the twenty years run out before he is called to account, the obligation binding his conscience in a court of equity is shifted. He may hold his tongue, or he may say, I will keep the estate myself, if the facts of the case would warrant the assertion. Such would be the case with those who claim under these Plaintiffs and Mr. Drake as the mortgagee, if Mr. Drake had been in possession, and at the [72] end of twenty years could have said, I never acknowledged the mortgage, and they never could have got the estate from him.

I will not say that this is a singular case, because he is a bold man who will say, that because he does not know of such a case being decided, therefore no such case has been decided. But the peculiarity of the case is this, whether the fact that the Clinton family have been in possession for twenty years, will or will not bar those who claim, if they can qualify their claim in the way they put it on the record: whether that fact will or will not entitle the defendants to say that those who claim as plaintiffs are barred whatever was their right originally, or, on the other side, whether, the circumstance of there having been a mortgagee during the whole twenty years, admitting him now to be a mortgagee willing to convey to any person who has the right, the intervention of such a third person who has during the period stated in the pleadings been dealing with the Clinton family as if they were his mortgagors, and dealt with by the Clinton family as if he was their mortgagee, and never dealt with by the other family as standing in any relation to them after the death of George Earl of Orford in 1791, considering the doctrines established to quiet not merely legal but equitable titles does not form a bar to the relief sought by such a bill as

this, and likewise whether, regard being had to what should be taken to be the true effect of the deed of 1791, that deed does not amount to a confirmation that would go to prejudice the titles of the Plaintiffs more than if such a deed had not existed.

These appear to be the general questions you [73] have to decide; I hope I have, in the course of what I have stated, avoided giving any opinion upon it; I am only anxious, if I can, to state the questions as they have affected my mind, with a view of seeing whether, in your Lordships' opinion, or in the opinion of others, I have mistaken the points to which judicial attention ought to be given. If I have not mistaken those points, I do not deny that I have an opinion; what that opinion is I shall not intimate at all, because, if by minute examination of the doctrines in the course of next week, I shall see any reason to alter that opinion, I shall act better in withholding it, than in stating it now; and I can only say, I shall address myself to the decision of this case with all the attention due to its great importance to both parties; with all the attention due to its great importance, as it affects others; with all the attention due to the knowledge and learning of the Judges who have before differed upon the question; certainly not failing to recollect, that the original decision was made by a learned Judge, who, as he has now left the judicial seat, I may be permitted to say of him, that his name will remain respected by the profession as long as it exists; and under the influence of all these impressions, I shall endeavour first to enable myself duly to execute justice, by delivering that opinion which is right; and by giving that attention which will enable me, with satisfaction to say to myself, that if I have erred, I am not able to convince my own mind of it, though it may be manifest to others.

Lord Redesdale: My Lords, I will trouble you with a very few remarks to relieve my mind [74] from the embarrassment which I feel, and for the purpose of stating what will be the considerations which I shall give to this question, in the interval between the present time, and the time that has been mentioned by the noble Lord.

The question which I conceive I shall have to agitate in my own mind during that period, putting out of my consideration what is the true construction of the deed of 1781, and assuming, for the purpose of discussing the other questions, that the construction is as contended on the part of Lord Cholmondeley and Mrs. Damer, is whether your Lordships can decide the case which is now before you, assuming that such is the just construction of the deed of 1781.

If the true construction of the deed of 1781 was to be discussed at this moment, unquestionably you would wish to have the assistance of the Judges, that they might give their opinions *seriatim* upon the subject. But, if that exposition of the law is not necessary, it would not be proper to give them the trouble of attending for the purpose of stating their opinions. It would not be proper to enter into a discussion of that question, if finally your Lordships were not upon that ground to decide this case; and I think it most important that you should not unnecessarily decide that part of the case, because that is a question which can affect only few titles, whereas the other questions are questions which affect most importantly almost every title in the kingdom. Your Lordships must recollect, if you advert only to the settlements in your own families, that almost the whole property of the country, I may say, is covered in some way or other by equitable interests, [75] resting upon the protection of legal maxims, by mortgages, by terms of years created for the purpose of raising portions for younger children and other purposes, which the necessities of families create; and, therefore, it is of the utmost importance for you to decide, whether the effect of an interest of that kind subsisting upon that property, is to defeat the whole beneficial effect of the statute of limitations, and the statute of fines.

The policy of the law with respect to those statutes, is unquestionably this: possession is always regarded by the law as *prima facie* title, and it is so regarded with a view to public benefit. It is not with a view to the benefit of the individuals who may be in possession or out of possession, who may have title or who may not have title, but it is with a view to public benefit, because it is the public policy that possession should remain undisturbed. The statute against pretended titles is formed on this view, and it is on such ground that a person out of possession is not at liberty to deal with the property in any way whatever, because it tends to disturb the actual possession to the injury of the public at large.

It strikes me, therefore, that the questions which you will have to consider are

numerous: First, you will have to consider what is the effect of the possession, such as it has been, qualified as it may be, of the Clinton family from the death of George Earl of Orford, for there the possession must commence, and indeed upon the face of the bill, which is now under your Lordships' consideration, it is stated, that upon the death of George Earl of Orford, the late Lord Clinton entered into posses-[76]-sion, or into the receipt of the rents and profits of this estate. You are, therefore, as I conceive upon the face of the bill itself, to consider the possession as with the late Lord Clinton, and those claiming under him from the death of George Earl of Orford.

Then comes the question, whether, on the death of George Earl of Orford, the title vested in Earl Horace and not in Lord Clinton: that question I put out of the case as a question of right, because I assume, for the purposes of the view which you are now to take of the case, that the title was in Horace Earl of Orford and not in Lord Clinton. Then, you will have to consider whether, under all the circumstances of the case, supposing the title upon the death of George Earl of Orford to have been in Horace Earl of Orford, that title so vested in Horace Earl of Orford remained, at the time when this bill was filed, untouched.

Whether it remains at the time that this bill was filed untouched, will depend upon the nature of the possession that was then taken by Lord Clinton, the effect of that possession, the acts which have since been done, and the time which has since elapsed.

With respect to the acts done, (putting for the time out of consideration the acts done by Lord Clinton himself,) I am to consider what were the acts done by Horace Earl of Orford, and whether the deed which he executed in 1794, has the effect of preventing any claim either by Lord Cholmondeley or Mrs. Damer, both claiming under Horace Earl of Orford.

That deed of 1794 is a deed operating to confirm [77] the settlement made by Lord Clinton in 1792, but in terms which unquestionably are to a certain degree ambiguous: it is not an absolute confirmation of that settlement in words, because it is not a confirmation so far as that settlement might be impeached, supposing the deed of 1781 not to have been affected by the deed of 1785.

But there is one very important question, as it seems to me, for your consideration, and which, perhaps, has not been very fully discussed, namely, what is the effect of the deed executed by Earl Horace in 1794, by which he has put a construction upon the deed of 1781? For Earl Horace, by the deed of 1794, has assumed, that if the deed of 1781 was not affected by the deed of 1785, the deed of 1781 had constituted Lord Clinton the rightful owner of the estate. You will, therefore, have to consider, whether Horace Earl of Orford having put that construction upon the deed of 1781, he himself could, to the prejudice of third persons, say that such was not the construction of the deed of 1781. That has always struck my mind as a very important subject of consideration in this case. He has led all the world to believe (that is, all who had any dealing with this property) that the true construction of the deed of 1781 gave the property to Lord Clinton. That is a part of the case which it strikes me it will be very important for your Lordships to consider.

There is another question which, upon the deed of 1794, appears to me very important to be considered, viz. what was the motive of Horace Earl of Orford for executing the deed of 1794? It was to fulfil what he conceived to be the intent of [78] George Earl of Orford in the deed of 1781. If Earl Horace were now living, if he had filed this bill, a consideration might arise very different, as it seems to me, from that which will arise upon a bill filed not by him, but by persons claiming under him. Supposing he had not precluded himself by what he has done, he might have a right to say, my intent went no farther. But whether persons claiming under him have the same right, it strikes my mind, is a very different thing, because they cannot have a knowledge of what passed in his mind upon the subject. Whether it can now be said, that if Horace Earl of Orford were living, he would at this moment be at liberty to impeach the title which Lord Clinton supposed himself to have derived, and which Horace Earl of Orford seems to have supposed he had derived under the deed of 1781 may be questioned. It strikes me that there is a very material distinction between what Earl Horace might himself have done, and what persons claiming under him, and claiming under him without any expression of what was his intention upon the subject, can now do.

The next consideration is, whether the length of time which has elapsed since the death of George Earl of Orford is a bar to the relief which is sought by this bill. That I apprehend is a question which is founded upon what is called in law the laches of persons, the inattention to their rights of persons who have rights, and who do not exert those rights in the manner in which, or at the time when the law requires that they should be exerted. With a view to that subject, the common law, to a certain point, [79] and the legislature more expressly, has laid down certain rules, and the statutes of limitation were formed with a view of drawing certain lines, by which courts of justice should be guided upon that subject. The old rule of law is a general rule, the statutes of limitations have drawn particular lines, beyond which the courts of justice are not to be allowed to pass.

You will then have to consider how those statutes are to affect, first, Mrs. Damer, supposing she were otherwise capable of claiming as devisee of Horace Earl of Orford; secondly, Lord Cholmondeley, supposing he were capable of claiming as heir of Horace Earl of Orford, under the supposition that the will of Horace Earl of Orford does not touch his title.

With respect to the title of Mrs. Damer, she claims as devisee of Horace Earl of Orford. Either there is no limitation created by the statute of limitations with respect to what are called equitable titles, or the time which has elapsed must, I presume, be considered as being a bar to her right; I mean, taking the possession to have been a possession of that description which is under the protection of the law, and taking that possession to have commenced upon the death of George Earl of Orford.

With respect to Lord Cholmondeley, his title is alleged in this bill as heir of Horace Earl of Orford. Now, upon any question which he can raise upon this subject, you will have to consider, whether all the ground of equity which is insisted upon against the title of Lord Clinton is not a ground of equity which will have the effect of [80] making the disposition of Horace Earl of Orford a good disposition, though he was not seised as required by the statute of wills, because courts of equity have constantly considered equitable rights by analogy to legal rights, and if an equitable right was vested in the party who makes the will, the will disposes of that property, though that person was not in the view of the law, supposing it to be a legal title, seised of the estate which he devised.

It seems to me, therefore, that you will have to consider, whether, as between Lord Cholmondeley and Mrs. Damer, (supposing you can enter into any consideration of the titles between them,) the will of Horace Earl of Orford might not be considered (I am not certain that it would be so, but it might be so considered) as a bar to the claim of Lord Cholmondeley. Lord Cholmondeley's title must also be affected in the same way by the release of Earl Horace; for although a person out of possession cannot deal with a wrong, a person out of possession, having a good title, may release to a person in possession having a bad title or no title at all; you will therefore have to consider with respect to Lord Cholmondeley, as well as with respect to Mrs. Damer, what is the operation of the deed executed in 1791 by Horace Earl of Orford.

With respect to the statute of limitations, as affecting the claim of Lord Cholmondeley, I apprehend that you will find, that in no instance (at least I have been unable to find any) has a court of equity considered the privilege given to an heir at law of suing by a writ of right, and that of not being barred in less than sixty years, as that limit-[81]ation which, in the case of an heir at law, is fixed in equity with respect to equitable titles; it is a particular privilege given to a particular right. There are other rights to which also particular privileges are given; but if the heir at law is not to pursue, and does not pursue by that particular right, but pursues by another mode of proceeding; for instance, if he proceeds by ejectment the heir at law is as much barred by twenty years' possession as any other person.

Then comes another consideration, which does not decide precisely upon the rights of the parties, but may decide the present suit. You observe that in this suit Lord Cholmondeley and Mrs. Damer are co-plaintiffs. Now, if you were of opinion that the right is in Mrs. Damer, the consequence must be, that Lord Cholmondeley has no right; but you are to decide that question against Lord Cholmondeley; you cannot decide that question, as I apprehend, against Lord Cholmondeley upon this bill.

because between co-plaintiffs you cannot so decide; your decision now must be in favour of Mrs. Damer, that the property passed by the will of Horace Earl of Orford, and you must establish that will as an effectual instrument against Lord Cholmondeley by a decree; and for that purpose, I apprehend, he must have been a defendant to the suit, and not a co-plaintiff. In the same manner, if you are to determine in favour of Lord Cholmondeley you must decide against Mrs. Damer, and you must decree against Mrs. Damer, that the will of Horace Earl of Orford did not operate upon this property.

[82] An attempt has been made to avoid this difficulty by the frame of the bill, by stating an agreement between the parties to divide the property between them. The noble and learned Lord who has just addressed you has stated what is the effect of such an agreement. Unquestionably it is an agreement directly contrary to law; and if such an agreement actually existed and were now produced before your Lordships, that agreement would unquestionably subject each of these parties to a proceeding which would have the effect of making each of them liable to forfeit a sum equal to the value of the whole of this property. I therefore hope that the agreement has never been reduced into the form of a deed, and indeed no such deed is offered to the House. It is therefore to be considered as a mere allegation contained in this bill. It has not that which binds the parties; but, independent of the allegation of that agreement, it will be impossible to sustain this bill between these two parties as co-plaintiffs. I should be extremely unwilling that such should be the ground upon which you should come finally to a decision upon the subject, because it would not determine the important question in this case with respect to the effect of possession upon a property where the legal estate is in one person, and the possession in another person. I take that to be a question of the highest importance to the safety and the quiet enjoyment of the property of almost every person in the country; because in consequence of what are now the habits of the country, there is scarcely any property in which the legal estate is not in one person, and the equitable estate somehow or other in another.

[83] These are the considerations which I shall think myself bound to enter into between the present time and the time when you shall come to a final decision upon the subject. I have thought it my duty to state to your Lordships what pressed on my mind on the subject, for the purpose of drawing the attention of all your Lordships to the same subjects; and to request that you will consider them with all the attention you are capable of giving to them, conceiving there perhaps never was a case which came in judgment before your Lordships more important in respect to the general rights of persons possessing landed property than this case.

The Lord Chancellor: My Lords, you will not fail to call to your recollection, that the mode you have been pleased to adopt in this proceeding, is, for the present, to assume that the effect of the ultimate limitation in the deed of 1781, was such as the present Plaintiffs represent it to be, namely, that that ultimate limitation vested the estate in the grantor of that deed himself, and not in a third person. Taking that for granted, for the present, I would take the liberty, at this moment, to intimate, that although you are bound by law to give the legal effect to the terms in which the instrument is expressed, I am not ready to admit, that if the limitation has had a different effect from that which appears to have been the intention of the grantor, provided you can, by legal means, get at the evidence of that intention, and if that intention, differing from the legal effect of the deed, has [84] been followed by a great variety of most important acts, deeply interesting to the welfare and property of other persons, I am not prepared to say, that, because such might be the legal effect of that limitation, therefore the grantor having mistaken his way of executing his intention, a party who has permitted those acts, proceeding upon the supposed intention, can at all times effectually come into a court of equity, and obtain a relief which must be injurious to those parties whose acts he has permitted.

I took the liberty the other day, for the purpose of saving time, to endeavour to represent to your Lordships the facts of this case; and it does not appear to me to be material to call your attention in much of detail, or repetition of those facts and circumstances. At the same time, with a view to render intelligible what I shall have the honour to state, I will simply repeat the dates of the several transactions, the effect of which is to be considered: and perhaps mention one or two circumstances

which it did not occur to me at the time when I before addressed your Lordships to take notice of.

The first instrument you will recollect, was a deed of the year 1701. In that deed there is a term of 200 years created: the deed provides for what we call the cesser of that term: but the circumstances, if I understand the case upon which that term was to determine, have not yet taken effect, and the term remains a subsisting term, by virtue of the assignment of 1811, in a gentleman of the name of Seymour. I wish to call your most particular attention to this part of the case, [85] because, unless I now misunderstand, and unless I have misunderstood for a good many years in which I have been laboriously in different situations discharging the duties which belong to the profession of which I have the honour to be a member, there arise, out of the circumstances which I am about to mention, many observations bearing upon this case with a great degree of importance; and bearing, unless I misunderstand the case very much, upon the titles to property in this kingdom.

This deed of 1704 provides for the cessation of the interest which the term creates. Let me suppose, for a moment, that there had been no such declaration with respect to the cesser of the term, or what comes to the same thing, that the state of things has not yet arisen in which the term is to cease. That term, created in 1704, would, according to all the ideas that I ever had of the law of this country, (I am speaking now of what would have been done twenty-five years ago, instead of speaking particularly of the present time,) be considered as a term which, whether the instrument that created it or not did so declare, would be attendant upon the inheritance, when the ends and trusts of it were satisfied, that is, it would be to be considered as a term where neither presumption that it was satisfied, or presumption that it was surrendered, would, at that period, have been entertained, unless there had been some dealing with the term, which would authorize a presumption either of the one nature or of the other; but it would be taken to be, what, in the language of those who are now no more, I have often heard stated to be the best part of a title, namely, an old [86] term that could be got in to protect the inheritance; and I conceive, that such a term, whether there was any intention that it should or should not attend the inheritance, would be a term held in trust to attend the inheritance, protecting the equities of all who had equities, during the existence of that term: (all the estates to a certain extent, that is, for the duration of the term, would be equitable estates;) but protecting them all according to the due course and order, and priority in which they existed, and according to their equities.

Give me leave then to ask, if it be true that the trust and the equity are indissolubly connected, what is the consequence of that, supposing we had no mortgage in fee here at all? I would put the case, that George Lord Orford had been living in the year 1705, and that George Lord Orford had made, in the year 1705, the deed which now bears date in 1781, then that he had died in 1706; and having died in 1706, that the ancestors of the claimant had taken possession of this estate in 1706; and taking it so, had paid the interest on the mortgage created by virtue of that term, which is dated in 1701. Suppose a mortgage had been created to raise the £20,000 in 1701, if the doctrine which has held the equitable estate not to be capable of being barred, as long as the legal estate existed, be correct, it seems to me, it must follow of course that if the Clintons had been in possession since 1706 down to 1811, yet that adverse possession would not do. If that adverse possession would do, it would have been effectual on no other ground whatever, but because it was [87] long adverse possession; and we are not puzzled in this case, as we have been in many Scotch cases, as to what is a long lease, and what is a short lease, what is a long adverse possession, and what is a short adverse possession; I take twenty years, in such a case as this, to be a long adverse possession; and it is a matter of no moment whether one half minute had elapsed after the twenty years had closed, or twenty years had elapsed, after the twenty years had closed.

In this case there has been that degree of discretion used which is always commendable, namely, that from time to time this term has been assigned; but either I am very ignorant, or the law has been very much changed; or if there had been no such assignments from time to time, this term not assigned, when the trusts were satisfied, and subject to the satisfaction of the trusts, while they were unsatisfied, would have been a term attendant upon the inheritance, according to the equities of all who claimed that inheritance! But would that connection have been indissoluble?

By no means: for we have long laid it down, and I understand it to be still the law of the land, that if I lend my money on a mortgage, and the noble Lord who sits near me afterwards lends his money upon a mortgage of the same estate, having no notice of my mortgage: if he goes to the trustee of an old term, and gets in that term, having no notice to affect his conscience that I have a mortgage before, although that term was held prior to his getting it in, in trust, first for me, and then for him; yet his conscience not being barred against the getting in that term, he will protect himself by that term; [88] that is, he shifts the equity, which was first in me, into himself, and by his diligence he gets the advantage, which by my negligence I have lost. I have thought it necessary to say thus much as to this term of 1704, because I have found it extremely difficult to know how to deal with the objection which I have now been alluding to; namely, that if this possession of twenty years and upwards, will not do with the objection, what are you to say then, supposing there had been a mortgage, and the possession had been from 1705 to the present day.

Without tracing this down through the different assignments, but again mentioning that this term is vested in Mr. Seymour, I wish to take notice of another circumstance which escaped my attention the last time I had the honour of addressing you; and that is, that this bill expressly states the fact of an entry upon the lands by Lord Clinton's father, immediately upon the death of George Lord Orford: it is not, therefore, a bill stating merely that he claimed the right, but that he had made an entry upon the lands at that time.

I wish also to call to your recollection another circumstance: adverting to the cases, and the opinions that were taken upon those cases, when we are discussing this matter about equitable relief, and more particularly with reference to those circumstances, which I am now about to allude to, and to which there is no allusion whatever made in this record, are we sure that Horace Lord Orford or George Lord Orford did not know the effect of that deed of 1781? There are no allegations in this bill to bring that question forward, as [89] a question to be decided. Now, in February 1792, a case was drawn, and an opinion was taken upon the deed of September 1781, and the deed of September 1785, and the question put upon that occasion was, whether, after the deed of 1785 had been executed, the estates would go to the heir of Lord Orford, or whether they would go according to the deed of 1781. Now those who put that question most clearly understood that the estate going to the heir of Lord Orford, was going one way, and the estate going under the limitation of the deed of 1781, was going another way. That might be a mistake: perhaps it was a mistake, not that I think it makes any difference whether it was a mistake or not; but you may observe that this opinion was taken in February 1792, and this opinion being taken in February 1792, and there being nothing before us to shew what was passing between Horace Lord Orford and the Clinton of that day, not a syllable stated either in the record or in proof about that, the deed to raise the £34,000 is not executed till the month of October 1792, and from the period at which the opinions were taken in February 1792, Horace Lord Orford having those opinions, defers till April 1794, that is to say, more than two years before he executes that deed of confirmation. I point this out, because I think there is some materiality in the period of time during which all parties had an opportunity, if they thought fit, to investigate what were their rights, and what were their claims.

Having mentioned these additional circumstances, and introduced what is a most important question in this cause, by the observations I have [90] made with reference to the rules to affect the term, you will allow me now to state, that for the present I would lay out of the case the question, whether there are proper parties before the Court for a decree at all in this cause? intimating it as my humble opinion, that it is extremely difficult to answer that question affirmatively.

I will for the present also lay out of the question, whether, by consent of parties at the bar, a court of justice can overlook the objection which arises upon the policy of the law, where a bill is filed by persons stating such an agreement between themselves, as (intelligibly or unintelligibly stated) is put upon this record, because, if this agreement falls under the censure of the law with respect to dealings as to titles, I do not conceive that it is according to the duty of a court of justice to overlook that objection, even if the parties wished it might be overlooked. I give no opinion at present upon that, neither shall I say that the parties overlook it: but I am anxious to state this, because I think it of public importance, that it should be known that the

Court would itself deem it to be an act which its duty required it to do, to take notice of such an objection if it appeared upon the record, whether taken notice of by counsel or not.

Supposing the record to be free from that objection, there is another question, namely, whether, as these plaintiffs have joined themselves together, and as they have stated the nature of the titles they may respectively have, or that respectively they may not have, the record is put into such a shape that we could give a decree upon it! Upon that question, also, I give no opinion.

[91] There is another question which is upon the effect of the deed of confirmation. That is argued in two ways; indeed in various ways. It is said on the part of those who are counsel for the Appellants, that the deed of 1791, called the deed of confirmation, really operates in this case nothing, and the way in which they put that, is this: they say, that the last limitation in the deed of 1781 gave no estate whatever to those under whom Lord Clinton claims; they say, that the deed of 1785 (the deed of mortgage to Sir Edward Hughes) having been executed, it raised a question, whether the deed of 1785 was a revocation of the instrument of 1781 as to the last limitation; and that the confirmatory deed of 1791 was a deed which was meant to have no other effect, notwithstanding all that it recites, and notwithstanding the terms in which the intent of the instrument is expressed towards the conclusion of the recital, than this, to put the estate exactly in the same circumstances as if the deed of 1785 had not been executed, and then putting the estate exactly in the same circumstances as if the deed of 1785 had not been executed, the matter gets back again to this question, namely, what would the rights of the parties have been if the deed of 1785 had not been executed? and in order to determine that question, you must then ask yourselves another question, what was the effect of the deed of 1781? and if the effect of the deed of 1781 was to give the estate to the grantor himself, that all the subsequent deeds are to be laid out of the question, and that the deed of 1791 is not to be taken as a general confirmation, but as an instrument which was merely to remove out of the way the objection [92] to the title, if an objection can be founded upon that deed of 1785.

With respect to that question, much has been said upon the subject on both sides, and particularly with respect to the mode in which you must proceed, if you mean to insist that this deed is to have no other effect. One side says, You may state it as a matter of defence; the other parties say, No, you must file a bill in order to reduce the effect of it. Now when it is urged that you must file a bill to reduce the effect of it, that introduces the question, What is the effect of it? If the effect of it be no more than I have stated, no bill is necessary to reduce the effect of it. If, on the other hand, the effect of it should be greater than that way of putting it admits, then the question is, whether that effect must not be reduced by a bill expressly filed for the purpose? and with reference to that, I confess I should say, when this instrument is produced as matter of defence, if you can fairly see that this instrument has had an effect beyond that which was intended, I cannot conceive that the parties were reduced to file a bill. But all this for the present may be represented to your Lordships as furnishing a question, upon which it is not necessary at this moment to give an opinion; if it were necessary at this moment to give an opinion upon this question so considered, I should be disposed to say here again, there is a view of this case which may not be unimportant, if we are obliged hereafter to deal with that question; and that is this, if I do more by my deed than I intend to do, there may be an equity, a clear equity, an obvious equity, such as nobody can [93] deny to exist, to relieve me against the excess which has been committed against my intention in the execution of that instrument; but I am not as yet prepared to admit, that if I execute a deed in which I do not effectuate that which I certainly intend to do, that is, if I execute a deed in which I do less than I intended to do; or to put it stronger, if I execute a deed in which I do nothing that I intended to do, and if in the notion of both parties I have done all I intended to do, and if under that common mistake both parties have been acting till the supposed grantee under that instrument has become involved in settlements, in debts, in obligations of every species, which if the mistake is to be rectified must tear him and his property and his family to pieces; although relief in equity might originally have been obtained, I am not prepared to say that subsequent transactions may not produce such an effect as to bar that relief in equity, which might have been given if speedy application had been made to a court for that purpose; nor am I prepared

to say, that it must necessarily be the effect in a court of equity that that relief must be given, whether the title to that relief is discovered at the end of one year, or twenty years, or a hundred years, and with that observation for the present I pass over that question.

All these questions, and many more that have not yet been stated, will become necessary to be considered and discussed, if your Lordships shall be finally of opinion, that in this case the circumstance that the late Lord Clinton entered (according to what is expressly stated in this bill) in 1791, and that this bill was not filed till after twenty [94] years, is not decisive. That brings us to what has been stated to be the great point in this case, the point which induces me to trespass upon your time contrary to what is the ordinary practice of this Court when you affirm the judgment. The practice of this House, if you affirm the judgment, is to affirm without saying more. That is certainly the practice of the House; and I take leave now to notice it, because, though I am the last man in the world to question the wisdom of the practice, yet I cannot help saying, that I have frequently felt in the different situations in which I have stood in this House very considerable doubts, whether that is a practice useful in the administration of justice or not.

I proceed, therefore, to give a few reasons why this non-claim for above twenty years, (it signifies nothing whether the excess is an excess of one minute above twenty years, or whether it is an excess of a hundred years above twenty years,) in my judgment, is a bar to this claim. It is not my intention to trouble you with a history of what uses were before the statute of uses, nor is it my intention to trouble you with a statement of all the decisions which took place on trusts when the courts of equity, to a certain degree, if I may so express it, nullified that statute of uses; but I take it, that there is a sort of general rule established with respect to doctrines in a court of equity, without which I do not think that those courts would be endured in this country; I mean that they must, as far as they can, assimilate themselves in their proceedings, in those proceedings that are founded upon great public policy, to [95] the law of the land, that is, they must, as far as the nature of the transactions and their dealings will admit of their so assimilating themselves, proceed according to that analogy, or to use words which have been cited at the bar from decisions in another part of this kingdom, that they must act in obedience to those laws. I say this the rather, because unless I misunderstand the history of jurisprudence in this country, courts of equity have felt at all times the necessity of quieting possession, by prescribing limitations to suits, and that independently of all statutable limitations for that purpose.

Since our different statutes of limitation have passed, I believe I may venture to say, that it has been our endeavour in courts of equity to assimilate our proceedings to those of courts of law, by attending to the statutes of limitation, not regarding them merely with reference to the statutes themselves, but as they do at law, also, with reference to such circumstances as furnish grounds of presumption, that something may have happened that may be a bar to any claim; and we go much further; for even where the time mentioned in statutes of limitation has not run out, where there is no such presumption that there may have happened something which would be a bar to the demand; yet if the demand is made under circumstances of inconvenience to individuals, that would amount to positive oppression, that would break in upon those principles which are established for the peace of all the families, constituting the great family of the public, courts of equity have said, you must go to those courts that were not made for [96] a righteous man, if there be such courts, you cannot have relief in a court of equity.

This being so, unless I misunderstand the law of the country, there is a vast difference between things to which we give the same denomination, I mean trusts. You have a trust expressed; you have a trust implied; you have relations formed between individuals in the matters in which they deal with each other, in which you can hardly say that one of them is a trustee and the other a *cestui que* trust; and yet you cannot deny, that to some intents and some purposes one is a *cestui que* trust and the other a trustee. Of the latter character, I take a mortgagor and mortgagee to be; and it is not upon this occasion, as it appears to me, necessary to be entering into the arguments about abatement, disseisin, intrusion, and so on, in the case of strict trustee and *cestui que* trust; for in the case of strict trustee and *cestui que*

trust, you are to consider not only what was done, but what it was the duty of the person to do. It is the duty of the trustee to take care of the interest of the *cestui que* trust, and there are many cases in which you will not permit that individual to do any thing for his own interest, adverse to the interest of the *cestui que* trust. So a tenant has a duty to preserve the interest of his landlord, and there are many acts, therefore, which may be done both by a trustee and a person claiming in the character of a tenant for years, which, if they were done by persons standing in other relations, would be acts to be denominated acts of adverse possession: but when the law makes it the duty of a man to abstain from doing those acts, the law will not permit him to [97] say they are acts of adverse possession, having the effect of acts of adverse possession.

But how is that between mortgagor and mortgagee? When I become a mortgagee, I am bound in the contract of mortgagor and mortgagee to be content with the payment of the interest, not until it is convenient to the mortgagor to pay me my principal, but until it is convenient to me to receive my principal; and if I demand my principal and interest, and he tenders to me my principal and interest, I am a trustee to convey to him the estate: but I am quite at liberty, after the time is out, during which there is a default, to enter and to receive all the rents and profits: and if I choose not to keep an account, that will not protect me, provided there is not negligence. If I make no acknowledgment to myself or a third person: if I do not declare in my will, or somehow or other, that I am only mortgagee, I may go on receiving the rents and profits: and if the negligence of my mortgagor suffers me to go on twenty years, I may turn round and say, "You shall not have your estate again, I will keep it;" why? because public policy says it should be so. I have often heard it said, "This is a very strange kind of public convenience, a very comical kind of public policy; on the last day of the twenty years it has not begun to operate, but at twelve o'clock that night reasons of public policy begin to operate: and though it might be redeemed the minute before, it cannot be redeemed the minute afterwards." Undoubtedly this, so stated, is startling. It seems a singular doctrine: but the fact is, you must lay down some positive rule: if you do not lay [98] down some positive rule, no man knows what he is to do with property: he cannot tell whether he can treat it as his own, or whether he cannot treat it as his own: and unless you lay down some rule applying to all cases, the consequence is, no man in any case can tell how he is to act as to property, or whether it is his property or not: it may be his, or may not be his, according to the caprice of those who may make their demands too soon or too late, as shall suit their own purposes. Without, therefore, reading passages from the books stating those doctrines, which I have been alluding to, with great precision, I may take it for granted, that there can be no doubt that a mortgagor cannot redeem a mortgaged estate after twenty years, except in those cases where there have been accounts kept, etc. that is, in the excepted cases.

I will here mention, lest I should forget it, that a case has been stated in the course of the argument at the bar of the House, which has very long depended before me, as much because I wished to know what would be the ultimate judgment in this case, as from any other reason, I mean the case of *Pim v. Godwin*. The attention which I have been called upon to give to this case, and my reflections upon that case necessarily connecting themselves with this case, I am now perfectly prepared to know how to deal with that case, and shall give judgment upon it in a very few days. If this had been a legal estate, and the twenty years had been run out, no ejectment could have been brought. But it is said that this is an equitable estate, and it is not only said that this is an equitable, but that it is an equitable estate where there is a third person acknowledging that [99] he is a mortgagee. Let us take those propositions separately. Is it to be contended, that adverse possession will not do as against an equitable estate, let that adverse possession be ever so long? I mean where there is no duty which the person that has the adverse possession has undertaken to discharge for him against whom he pleads that adverse possession, I cannot agree to that: it is a rule I never heard of; and now that almost all the property in the kingdom is equitable property, it does seem to me that would be a most dangerous doctrine indeed. This case illustrates what would be the consequence of it with respect to outstanding terms: if there is a term of 200 years, a term of 500 years, or a term of 1000 years, taking the mere proposition about equitable estates,

(independently of the question of mortgage,) and if there is adverse possession, that is a man taking the rents and profits, and putting them into his own pocket with the knowledge of the other party, and with that knowledge generated, if you please, by his mind being under a mistake, is it to be contended, that possession for 200 years, or 500 years, or 1000 years, will not do, and if it will do for 200 years, or 500 years, or 1000 years, you are then to consider why it will not do for twenty years.

Then it is said that there is a mortgage here. It is very true there is a mortgage here; and in the cases of family settlements, to which I have been alluding, how many family estates are there where mortgages go on from generation to generation unpaid off: is it to be understood that the equitable property in fee is never to change in the course of centuries, or in the course of those [100] periods which would give limitation to the title to the estate.

The distinction I take in this case is this: Lord Clinton takes an estate with the consent (founded in mistake, if you please,) of Horace Lord Orford, in the year 1791. His taking the estate by that consent does not make the possession of the estate on his part less adverse, because it is a taking of the possession of the estate for himself, where he owed no duty whatever, as it appeared to me, to Horace Lord Orford, and his taking the possession of the estate, and keeping the possession of the estate during all the time in question, is, as it appears to me, an adverse possession of the estate, and intended to be an adverse possession of the estate. The intention on the part of Horace Lord Orford may have been an intention generated in his mind by mistake: but no person can deny that it was his intention that the former Lord Clinton should have a beneficial interest in the property so handed over to him; and if it was his intention that Lord Clinton should have a beneficial interest in the property so handed over to him, it appears to me it must be the intent that he should have an adverse enjoyment.

I really cannot get rid of a difficulty which has pressed on my mind throughout this case, when it is said the mortgagee admits there is a mortgage. Yes, he does so: but does Lord Clinton admit that any body else has the equity of redemption but himself; and I should be glad to know whether the circumstance of Horace Lord Orford from time to time permitting the Clintons to deal with the equity of redemption as owners of [101] the equity of redemption, and permitting them so to deal with the mortgagee as if he was the mortgagee of the Clintons, and not the mortgagee of Horace Lord Orford, whether that is not an extremely strong case in itself, to shew that adverse possession was intended by Horace Lord Orford: and is it not a strong circumstance to shew, that if a court of equity is not to relieve where persons have been placed in situations of hardship by the concurrence of others, (not fraudulently obtained,) it cannot relieve in such a case as this.

I should be glad to know, whether it is of course that, if a party has no remedy at law, a court of equity is bound to give him relief. The question here is not between mortgagor and mortgagee, but between two persons claiming the equity of redemption, and claiming both of them adverse to the mortgagee; and, under the circumstances, without going through all the cases, every one of which I have carefully examined, it strikes me, that this being the true nature of the question, here has been an adverse possession for above twenty years, and that is a bar in a court of equity. I would ask further, am I entitled to say that there has been mistake? and, if so, am I entitled to say there has been a mistake not discovered? Can I say that Horace Lord Orford, up to the period of his death, had never heard of this doubt? There is nothing in this record to prove the fact of a mistake: then I am in uncertainty on that point: but I go further: for if he died under that mistake, unless I have reason to believe that he would have endeavoured to take advantage of the mistake, which it is very difficult to suppose [102] if you look to the deeds which have been executed, unless I can find that, knowing of that mistake, he would have endeavoured to take advantage of it, I am by no means without considerable doubt whether a court of equity would allow those who claimed under him to take advantage of it.

But there is another view (most important) of this case. As between these parties, Horace Lord Orford had a right to make his own construction of that settlement of 1781. The deed of 1781 may be represented by a lawyer (I will not say whether it is to be so represented), but it may be represented as by the effect of that last limita-

tion vesting the estate in Horace Lord Orford himself; but if he chose to involve other persons in all the consequences of his saying, "that is not my construction of the deed; I believe that George Lord Orford meant that some other persons should take the estate; I do not take, and do not mean to take the estate; I believe that George Lord Orford meant to give it to some other persons, to the Clintons for instance," on what ground is a court of equity to interfere?

With respect to cases, I shall mention only two or three: first, *Bonny v. Ridgard*, a very strong case,—for there, upon the face of the instrument, the parties who took under that instrument, could not but see, that the grantors in that instrument were not dealing with the property as they ought; but there Lord Kenyon (who, after having presided in a court of equity went into a court of law, in which he found no predecessor who knew more of law than himself; and I must do him memory the credit of saying, that he corrected a [103] great deal of error which had crept into courts of law, particularly in reference to these terms,) says, "there has been so much dealing with respect to those who have acquired interests under this property, that a court of equity must stand neutral."

I have certainly a very strong feeling as to this deed of confirmation, whether it is or not to have effect. In the year 1792 opinions were taken, and the lawyers who read the limitations in the deed of 1781, either did or did not (I cannot tell which) find out what was the effect of that deed. Six months after the opinions were taken that settlement was made, such as you see in the year 1792: money was raised upon those deeds, and the interests of families, family after family, wives and children, after wives and children, are involved in the effect of these transactions. Then comes the deed of 1794, which, in effect, lays before Horace Lord Orford all those deeds; for the deed of 1791 recites them, and I take it, in a court of justice, he must be understood to know the effect of them all. He makes a confirmation, not merely a confirmation stating that he meant to confirm the deed of 1781; but he makes a confirmation *eo nomine*, of the deed of October, 1792. I agree that it may be limited in the way which I mentioned before; but then, with all the circumstances before him, the property being carried to market, and made a security to strangers for money advanced, it appears to me to be a very difficult thing, after such transactions, to say that a court of equity ought to interfere.

With reference to Sir Lawrence Palk, what is it that we are asked to do? To redeem against him [104] without further enquiry, and that upon speculations at the bar; *vide ibidem*, that because the deed of 1791 is not recited in his mortgage deed executed a few months afterwards, we are to suppose he had no knowledge of it. If he had knowledge of it, then the case must be discussed upon what would be the effect of his security, having the facts before him; and if we are to take for granted that he had not this before him, the bill, as it appears to me, ought to have been amended. It appears to me that is a measure going a great deal further than we are in the habit of proceeding.

With respect to the other cases of *Cashorn v. Searff*, and the famous case of *Hopkins v. Hopkins*, of which we have heard so often; perhaps one may venture to say, as to two cases decided so nearly about the same time, and which contain language so little reconcileable, the one with the language of the other, that the best way of accounting for that is to intimate, that it is extremely possible that the reports may not be accurate in both. I do not carry now in my recollection precisely the case in which it occurred, but I do recollect the late Lord Loughborough stating distinctly, that that case of *Hopkins v. Hopkins* was most inaccurately reported. When Lord Hardwicke is reported to talk in one of those cases of seisin of equitable estate, I can suppose what he means; but, when he is made to speak of there being no intrusion on an equitable estate, I do not know what he means, with respect to seisin of an equitable estate.

I must act upon my own opinion in this case, as in all cases, but in this case with very great diffidence, because I happen to be differing from [105] the learned Judge who first decided this case; and of whom I should be proud to have that said of me, when I am gone into my grave, which I think may be justly said of him, as a most able Judge in equity. I am bound to give my own opinion upon the case, and I say, without entangling myself with the difficulties about seisin and intrusion, I am of opinion, that the adverse possession of an equity of redemption for twenty years is a bar to any other person claiming that equity of redemption; and it is

an adverse possession which produces the same effect as those things you call abatement, intrusion and disseisin which belong to legal estates. It is an adverse possession which has the same effect, and, for the peace of families, and for the peace of the world, I think ought to have the same effect: and therefore, without going through more of the cases, I submit it to your Lordships, as my humble opinion upon this grave and important question, that this bill cannot be maintained.

If I am right in that opinion, the consequence is, that the bill ought to be dismissed. If your Lordships shall be otherwise advised, or shall hold a different opinion, it will be necessary to enter into the other questions which I have taken the liberty of proposing should be reserved until this was disposed of. I have thought it my duty to put your Lordships in possession of this question, in the first instance, for I think it infinitely better it should be decided wrong, (which, I trust, it will not be,) than that it should not be decided at all; because, where a case, involving a point of so much importance, stands on contrary decisions in two Courts, it is impossible to estimate the mis-[106]-chief that would ensue to property in general, if the matter were left in doubt.

Lord Redesdale: My Lords, It appears to me that much of the argument which you have heard at the bar, has been founded upon reasoning drawn from what has been the state of the law at a very distant period, and perhaps without sufficient consideration of the variation which has been introduced by alteration of circumstances, and alteration of the law. In very early times the modes of conveyancing were very simple, but from time to time the devices of men have introduced complications upon that system, and the legislature has interfered upon the subject, and has altered, in a very great degree, the mode which formerly existed of conveying titles from man to man. Your Lordships must well know, that in early times, the simple mode of conveying freehold title was by feoffment and livery of seisin: that is, by delivery of the possession of the property from A. who had the property to B. who was to receive it.

In early times, leases, that is, terms of years granted to tenants, were considered as almost wholly in the power of the person who had the freehold, and were little regarded until a statute (in early times indeed) gave them protection. That alone created a considerable difference with respect to property, because it secured the possession in the person who had a term for years, and it made an entry upon that possession by the person who had the freehold unlawful, unless from some conditions in the grant of the term he had a right to enter. It, therefore, necessarily, has become a very different thing to reason upon titles, [107] since all these changes have been introduced, from what it was in the early history of the law.

Another very great change was effected (originally, as it is supposed) by the contrivance of the church, to appropriate to themselves property by devising what was called the *indication* of a use. Where the estate was conveyed to A., and he held the estate not for himself, but for B., that brought forward the jurisdiction exercised by courts of equity, operating upon the conscience of the person to whom the estate was conveyed, to give the benefit of the estate to the person for whose benefit it was intended.

A statute was made to remove the inconveniences produced by this mode of conveyance of property, as it affected rights which do not now exist, namely, those rights which were derived from tenures, which have been called Feudal Tenures; whether they have in this country been properly so denominated, or in the extent to which some persons have carried the language which has been used in the statute, it is not very important to determine. I can only say, that as far as I have been able to investigate the subject, the law of feuds, strictly speaking, never was the law of this country: and a great deal of the argument which will be found in modern cases, and which is not to be found in more ancient cases, I think is founded in mistake. However, we cannot now reason upon these principles, if we consider what is the manner in which property is now held: for the actual possession of property in the hands of the owner is now a comparatively rare part of the possessions of this country. The property is in the hands of tenants: those tenants, in many [108] parts, enjoying under terms, created for the purpose of giving to the person who was entitled to the inheritance the benefit of the property in the shape of rent, or some other shape.

Much of the reasoning in the cases at the bar has been founded upon an idea which

I shall be obliged to advert to by-and-by in speaking of the statute of James, to which I confess I think a great deal more of consequence has been given in some late cases than ought to have been given, without more consideration, at least, than it appears to me those cases have had. I mention this because a good deal of the argument at the bar has been founded upon the authority of recent decisions, which do appear to me to require a great deal of consideration. The statute is almost a nullity with respect to a great deal of property in this country, if the construction with respect to the words entry and right, and title of entry, is to be that which has been supposed. It is perfectly clear that, in courts of equity, (and your Lordships are now considering yourselves as in a court of equity,) the possession and enjoyment of the estate by receipt of the rents and profits, whether by the hands of the tenant or the owner actually taking the profit from the land, has been considered as that possession which courts of equity are bound to protect. I have said so much upon this subject, because it appears to me extremely clear that the distinction between courts of equity and courts of law, supposing the recent decisions in courts of law to be well founded, is material to your decision of this case; and further, because if those decisions are correct, it does seem to me it would be high time for your Lordships to [109] act in your legislative capacity to make a new statute for limitation of actions.

I propose to consider the questions before you, independently of the construction of the words in the deed of 1781, limiting the estate to the heirs of Samuel Rolle, supposing the true construction to be that which has been put upon them by the Appellants in this case, and entering in no degree into a discussion of that question, upon which, whatever opinion I may have formed, I must have formed without having heard it argued at your Lordships' bar, which I ought to do before I come to any decision upon the subject. I will take up the question simply upon the consideration whether you ought to allow that question to be discussed in the way in which it ought to be discussed in a court of law, by removing the legal bars to a discussion in a court of law which may exist. The nature of the suit which has been instituted by Lord Cholmondeley and Mrs. Damer, is this, in effect; it is saying, we have a legal title; having that legal title, in one sense of the word, there exist legal bars to our exercising that title in a court of law, and we desire a court of equity to remove those bars; that is the most favourable way, in my humble opinion, of discussing the question on their part. The manner in which they have attempted to discuss it has been by considering the property in question as a right in the nature of an estate; and considering it in that light, then you are to consider how estates of that description have been dealt with in courts of equity; for as equitable estates are familiar to courts of equity, you can only judge how you are to deal [110] with them, by considering in what manner courts of equity have dealt with such estates.

Lord Cholmondeley and Mrs. Damer come into a court of equity to say that George Earl of Orford being seised of the lands in question, subject to certain interests which he had created, but with an ultimate limitation (all the other interests being now merged) to vest in him the fee-simple, made a mortgage in fee; and upon that occasion a trust term which had been created long previous to his title, but under the settlement by which he derived his title, was assigned to a trustee; that, therefore, George Earl of Orford at the time of his death had, in law, no estate in the strict construction of law, but only an equity of redemption of a mortgaged estate, and a right to have the term considered as a term attendant upon his estate of inheritance, that no person claiming under him could claim more than that equity of redemption, except the mortgagee; that under those circumstances, if a mortgage had not existed, they could have proceeded at law to assert a title to the estate, as vested in the heir of Horace Earl of Orford, or the legatee of Horace Earl of Orford. Horace Earl of Orford having been the heir of George Earl of Orford. They come into equity, therefore, to obtain, first of all, redemption of the mortgage, and a conveyance of the legal estate to them; which legal estate, if conveyed to them, could give them the power of proceeding for the purpose of obtaining the estate and possession at law; and they go on further to pray, also, an account of the rents and profits, which have been received in the mean time. They state, however, that on the death of [111] Earl George, so long ago as December 1794, the late Lord

Clinton entered upon this estate, and received the rents and profits, and that the rents and profits have from that time, to the time of filing their bill, been received by the late Lord Clinton, and the person claiming under him. They contend, that upon the death of George Earl of Orford, Horace Earl of Orford became entitled to this property: and inasmuch as it was an equitable estate, that although he had not actual possession of the estate, he was entitled to that possession: and, therefore, as contended on the part of Mrs. Damer, that it passed by his will, and by Lord Cholmondeley, that the estate, if it did not pass by the will of Earl Horace, vested in him, as heir of Earl Horace, both of them asserting, therefore, that this was an equitable title: that Earl Horace, on the death of Earl George, became the rightful owner of that property: and that, being the rightful owner of that property, a court of equity ought to give the estate, either to the devisee or the heir of Earl Horace. It is observable, that Lord Cholmondeley does not claim the property as heir of Earl George, and therefore he must claim this, if at all, as the heir of Earl Horace.

The objections which are raised on the part of the Defendants to this suit, independently of the construction of the deed, are founded upon the length of possession, upon the construction given by Earl Horace himself to the deed of 1784, the settlement which has been made in 1792, the deed of confirmation of 1794, and the subsequent transactions, all of which have been founded in confidence of the perfectness of that title, which Lord Clinton supposed he had when he entered, [112] in December 1791, upon the death of Earl George: and your Lordships are now called upon, sitting in a Court of Appeal, to say, that after this lapse of time you are to destroy the effect of all those transactions, and to involve all the persons who have been engaged in them in all the difficulties that would necessarily follow, because it is according to good conscience that the estate should be delivered either to Lord Cholmondeley or to Mrs. Damer.

The ground upon which this is attempted to be founded, is, that the possession which was had by the late Lord Clinton, and by those who claimed under him since that time, must be taken to be the possession of the mortgagee: because, according to a maxim which has been adopted in courts of equity, and in a certain degree in courts of law, the mortgagor being permitted to remain in possession, with the privity of the mortgagee, the mortgagee receiving his interest, so that there could be no ground for presuming satisfaction, the mortgagor is to be considered as tenant at will of the mortgagee. That is the ground of the argument: and it has been considered as resembling the case of a *cestui que* trust in possession of a property vested in the trustees, the trustees permitting that enjoyment by the person who was the *cestui que* trust.

Now, we ought to consider upon what ground it was that courts have adopted this principle, that the possession of a mortgagor shall be considered as the possession of the mortgagee, and that the mortgagor is to be considered as tenant at will to the mortgagee. It is founded upon the principle of effectuating the security to the mortgagee, and [113] for no other purpose: and being founded upon that view, is to be carried no farther. But the counsel for the Appellants have endeavoured to assimilate the case of a mortgagee to that of a trustee: and a doctrine has been urged here as in the Court below, a position of law, which is submitted in the argument, certainly on a very high authority, that an estate could not be gained by disseisin, intrusion, or abatement, to the prejudice of a party for whom the persons having the legal estate were trustees. Now, that Lord Hardwicke should have used those words in the wide and extended sense attributed is impossible, considering what he himself had done in other cases. The report of *Hopkins v. Hopkins*, as given by Mr. Atkyns, will, upon inspection, be found to be certainly a very inaccurate report, even inaccurate in the statement of the facts of the case, and of the will. I have formerly compared it with the will of Mr. Hopkins, and I found it to be inaccurate in every part: and Lord Loughborough, in the case of *Abbott v. Vincent*, when *Hopkins v. Hopkins* was quoted, said that the case was incorrect throughout: that he had compared it with Mr. Forrester's notes, who was extremely correct, and it differed materially. I happen to have a note of the case, which I believe was Mr. Joddrell's: I have compared it with Mr. Forrester's notes, and there is certainly a very considerable difference between the two notes. However, I will take Lord Hardwicke to

have used exactly the words which are stated in Mr. Atkyns's report; but we are to consider for what purpose Lord Hardwicke uses these words. Lord Hardwicke uses these words simply for this purpose. Mr. Hopkins had devised the estate to trustees and [114] their heirs, to the use of them and their heirs, so as to make it a complete use executed in them, upon the trust and for the purposes after mentioned. Then, says Lord Hardwicke, they are trustees for all the purposes after mentioned. Mr. Hopkins had devised his estate to the son of his heir at law, and his first and other sons; and if there should be a failure of that estate, then to any after-born sons of the heir at law successively; and if they should all fail, then to the unborn sons of the daughter of this heir at law. There were other remainders in the will, which Lord Hardwicke says went beyond what the law permits in the disposition of property, limiting an estate for life to unborn persons; and he considers simply this, whether an estate limited to those trustees, to the use of them and their heirs in trust for the purposes after mentioned, would or would not support the several contingent estates, and he says nobody can doubt that it would support the contingent estates; therefore, says he, what necessity is there, when the whole is devised upon trust for all the purposes mentioned in the will, to insert distinctly the estates of the same trustees to support contingent remainders: it would not only be nugatory, but it would really be absurd; and then he refers to cases at law before the statute of uses, in which it was clear that such had been the construction of the courts of law before the statute of uses, that when the estate was conveyed to persons to the use of others, the estate so conveyed to the use of others was held sufficient to support contingent remainders, and his sole meaning in introducing those words, appears to me to be, that by the effect of the conveyance to the trustees to the [115] use of them and their heirs, in trust for the purposes after mentioned, the estate so vested in them would, from time to time, serve for the purpose of supporting contingent trust estates; and in the ancient conveyances, before the statute of uses, such a conveyance would have supported contingent remainders. He illustrates this perfectly by referring to what were the common means of destroying contingent uses where the estate was limited at law; that is, if the estate was conveyed to A. for life, with remainder to the first and other sons in tail male, he having no sons born, so that there was no person in being capable of taking that limitation, and therefore the limitation could not vest, that the conveyance of the person who had the estate for life would have destroyed that contingent remainder, because the estate to support that contingency was gone; and then, he says, the way adopted to obviate that was to substitute trustees, so that if the tenant for life thought fit to destroy his own estate, then the estate of the trustees rose *instantly*, and supported the contingent remainders; and that in reason the case before him was exactly the same thing, because, when the trustees under Mr. Hopkins's will were trustees for all the purposes of the will, they were trustees for the purpose of permitting the enjoyment, by the tenant for life, so long as he should live, and upon his death, conveying the estate to the person who thereupon would become entitled, and therefore in the mean time preserving the estate for the persons entitled, in the same manner as if trustees for preserving contingent remainders had been interposed.

I have made this statement of the case of *Hop[116]kins v. Hopkins*, because I observe, that in a very learned judgment, given originally in this case, an expression of Lord Hardwicke, as reported by Mr. Atkyns, and which is very nearly like that in Mr. Joddrell's note, is taken by that learned person in a sense which it was not intended by Lord Hardwicke to convey; it would be perfectly inconsistent with what Lord Hardwicke himself said in other cases. It is clear, from what he says in this very case, that that could not be his meaning, because he distinguishes the case of a devise of a legal estate to the trustees in trust for express purposes, and a devise of an estate of which the deviser had only the trust interest, and which was vested in trustees for him: he says, in such a case, the person who had the equitable interest for life might destroy the equitable remainder, because it was not the purpose of the trust originally created to support the equitable remainder; but the purpose of the trust originally created was to enable the person who had the devise to dispose of the estate, but to dispose of it in the same manner as if it had been a legal estate.

Putting, therefore, that authority out of the question, the only consideration, as it strikes my mind, is this, whether the courts of equity have not constantly considered equitable estates precisely in the situation, and the same in the enjoyment of them,

as they have considered legal estates. I do not mean where a trust estate is created for the express purpose of doing certain acts, because there, according to what Lord Hardwicke determined in *Hopkins v. Hopkins*, the trust was to effect all the purposes for which it was created; but I mean a trust estate, having no concern what-[117]-ever with the disposition of the acts in question, where a person, having a trust estate, acts upon it, and the whole is in the contemplation of a court of equity, precisely as if it was a legal estate: and in this very case of *Hopkins v. Hopkins*, Lord Hardwicke over and over again says, that unless such had been the rule in courts of equity, the country could not have endured the existence of that species of estate, it would have introduced so much confusion.

Under these circumstances, the question for your Lordships' consideration is this, Whether the lapse of time between the death of George Earl of Orford and the time of the bill being brought in this case is not a lapse of time which, by the provision of the statute, is a bar to relief in a court of equity. All the statutes for the limitation of actions, are statutes expressly made for the purpose of quieting possession: that is the great object of the policy of those statutes. It is generally immaterial to the public at large, whether A. or B. is the owner of a particular estate; but it is highly important to the public at large, that the person who is in possession should be the owner, for he is dealt with by all men as the owner, they seeing that he is in possession, and therefore it is a consideration of public policy. The statutes of limitation are not simply for the purpose of quieting rights between individuals, but they are founded upon public policy, that the person who is possession having the credit attributed to that possession, his possession should not be lightly disturbed. The different statutes, made at different times, have given different terms to the limitation of actions. The last, that of 21 James I., limits cer-[118]-tain actions upon particular writs, which apply only to particular persons. The general provision, that no entry shall be made by any person, unless within twenty years after the right or title of entry shall have accrued, Lord Hardwicke, and other judges in equity, have said is a provision in the statute upon which courts of equity have acted. It has been attempted, at your bar, to argue upon the ground that Lord Cholmondeley, claiming as heir, might bring a writ of right, if the question was open at law; but that is a particular writ, in which particular privileges are allowed, and the courts of equity have never regarded that, or the writ of *formedon*, or any other particular writ, but have considered the limitation in the statute of James I., of twenty years after the rights or title of entry accrued, as that which was to decide.

Now, how is right and title of entry to be construed with respect to an equitable estate? The right and title of entry, in a court of equity, cannot mean a right to go upon the land and take possession of it, in the form of the old entry at the common law; but it means the right of instituting a suit in equity upon the subject, to avoid a fine, if a fine is levied of an equitable estate: it is not by entry in the common way, but it is laid down, over and over again in very ancient cases, that the claim must be by subpoena, because your title is a title with respect to a right in equity, and the way of asserting the title of entry is not by entering on the lands, but by instituting a suit in equity.

I conceive therefore that the very words of the statute of James I., if it is a statute which has any application to a court of equity, apply to such a case as this. The title to this property accrued [119] above twenty years before the bill filed, and therefore that title in a court of equity is barred by this statute, supposing it to be a statute which courts of equity are to consider as affecting their proceedings, as well as proceedings at common law. Now, although the statute itself applies only to proceedings at common law, in direct words, it must be understood to have been intended by the legislature to affect proceedings in courts of equity: for courts of equity have been constantly declaring, we will, with respect to equitable titles, proceed by analogy to the proceedings of courts of common law; and when the lawgivers were prescribing the mode of proceeding in the courts of law, they must have been considered as intending to make an act of parliament to regulate the proceedings in courts of equity also. It is extremely difficult to frame precise words upon that subject: but if the legislature, at the time when they passed that act, were aware that there were suits in equity, and that all large estates and every considerable property was constantly turned into an equitable property, and if the object of that act was to quiet possession, they would have provided for that very imperfectly, if they had

not intended that the enactment contained in that act should be considered as binding upon the courts of equity, as well as the courts of law, according to the mode of proceeding in those courts. I take it therefore to be a positive law, which ought to bind all courts, and for that reason I have taken the liberty in another place to say, that I considered it not simply a rule adopted by courts of equity by analogy to what had been done in courts of law under the statute, but that it was a proceeding in obedience to the statute, [120] and that the framers of that statute must have meant that courts of equity should adopt that rule of proceeding.

If it were otherwise, only consider in what a situation property in this country would be, where in large settlements of estates terms are created, provisions made for younger children, and mortgages subsist upon the property. The consequence would be, that the title of the person in actual possession would be doubtful: a very large portion of the property of the country being equitable and not legal, if the statute of limitations did not apply even by its enactment to that sort of property, the whole property of the country would be in danger of being disturbed by suits without number, and the object of the statute, namely, the quieting of possession, could never be obtained.

With respect to fines, it is over and over again determined, that a fine will bar an equitable as much as it will a legal estate—it is over and over again determined, that a court of equity does not enter into the question, whether there shall be entry. It is impossible to suppose that Lord Hardwicke, in the case of *Hopkins v. Hopkins*, should not have had this subject in his contemplation.

The next consideration is upon the effect of the deed of 1794. Now, I apprehend, that that deed is extremely important to be considered with respect to the lapse of time: because, independently of the statute of limitations, and if there had been no such statute, what is the effect of that deed of 1794? The deed of 1794 recites the deed of 1781, it recites that under that deed Lord Clinton entered into possession: the deed of 1794 acknowledges that he had a legal title under that [121] deed, unless it was qualified by the deed of 1785, and then noticing the settlement of 1792, it confirms that settlement, certainly, with a qualification in point of words, so far as the deed of 1781 might have been revoked by the deed of 1785. First of all the deed of 1794 recites, that the motives of Lord Horace in that deed were his conviction that such was the intention of Earl George, and that therefore, if he had the legal right, furthering that intention, he would have preserved that intention. He has, in the same deed, stated his conviction, that under the deed of 1781, if not affected by the deed of 1785, Lord Clinton had by the intention of George Earl of Orford a right to this estate; and what reason is there to suppose that Horace Earl of Orford, had not the same view of the subject, with respect to the deed of 1781. It can hardly be doubted, whether under the deed of 1781, the estate did or did not go to Lord Clinton, whether there was a mistake, or whether it was affected by the deed of 1785 or not. If Lord Horace was here, he might say such was not my intention, but how can Lord Cholmondeley or Mrs. Damer say so; they know nothing of what passed in his mind, except what is in his deed, and what do you see in his deed? you see he was anxious that the intention of Earl George should be carried into execution; not simply, that what was the real right between the parties should have effect, but that the intention of Earl George should be carried into effect, that is, the intention of Earl George to limit his own estate to the person who should be heir of the Rolle family, and Earl Horace might have felt a conscientious desire to perform what he must know was the anxious wish of Earl George. It was the [122] wish of Lord Horace also: Lord Horace, by executing the deed of 1794, has declared to all the world, who could deal with the property: "the construction I put on the deed of 1781 is, that it gives the estate to Lord Clinton, for the deed of 1794 recites the deed of 1781: it recites the possession of Lord Clinton, under the deed of 1781, upon the death of George Earl of Orford on the 5th of December, 1791, and it recites the settlement of 1792, and the recital in that settlement, that those estates did, on the decease of the said George late Earl of Orford, come to and vest in the said Lord Clinton, subject and liable with other estates, to the mortgage made by George Earl of Orford." By this deed so executed by him, the contents of which it is to be presumed he was cognizant of, Lord Horace has declared, such is my construction of the deed of 1781: he might have taken it for granted, that that deed did vest the estate

in Lord Clinton: but either he did take that for granted, or he was willing that such should be the construction, and he held out to all the world, that the deed of 1781 had conveyed the estate to Lord Clinton. He having held out to all the world that idea, can persons, claiming under him at this distance of time, say that a court of equity is to interfere as a court of conscience, to affect all persons who have been dealing with the property.

What is the common case: If A. were to say to B., C. has a good title to such an estate, therefore, you may deal with him, I will be responsible in damages! If A. himself had the title and said that he would be responsible for all the dealings, it never could be permitted for him to frustrate what had been done in consequence of that declaration. [123] I conceive, therefore, that under this deed of 1794, a title is gained by those who deal with it, which will prevent a court of equity interfering as a court of conscience, against the effect which Earl Horace has, in that deed, given to the deed of 1781.

The next consideration is with respect to the frame of this bill: and it is utterly impossible that any decree could be made upon this bill, because the persons who are co-Plaintiffs in this bill have opposite interests. If the estate passed by the will of Horace Earl of Orford, Lord Cholmondeley has nothing to do with it; if it did not pass by the will of Horace Earl of Orford, Mrs. Damer has nothing to do with it. Then in what manner would this question arise? If there was no other objection to it, there might be a bill filed by Mrs. Damer, and another by Lord Cholmondeley; and to the bill filed by Mrs. Damer, Lord Cholmondeley must be a party; and to the bill filed by Lord Cholmondeley, Mrs. Damer must be a party; and the court must decree, that Mrs. Damer had no right, in one instance, and Lord Cholmondeley in another; and, how is this sought to be avoided? By an alleged agreement, and that is directly contrary to law. They are both of them out of possession, and are incompetent to make a bargain upon the subject, affecting any person, except the person in possession; they are both competent to make a composition with him, if he thought fit, but competent to deal with no other person by the statute, which is only an affirmation of the common law upon the subject of pretended titles, by adding penalties. By that statute, this agreement is not only contrary to law, but would make the persons who entered into it, liable to heavy penalties.

[124] It is, therefore, impossible for any decree to be made here; you could not make a decree, if nothing was stated, as to the agreement, because the relation of parties would be inconsistent with the decree. You cannot make a decree at the suit of A. and B. which is to destroy the right of A. and give the right to B.: or give the right to A. and destroy the right of B.: it is utterly inconsistent. To avoid that inconsistency, they state this agreement, which is contrary to law, and which you are bound to destroy. Nothing can be more dangerous than such contracts; and the act against pretended titles, was as much to protect possession, as the statute of limitations: the great object of the law, the policy of the law throughout, has been to protect possession. It is immaterial to the public at large whether the estate belong to A. or B.: but it is material, that the person in possession, should be quieted in that possession, and that all who deal with him, should be protected.

I concur in what has fallen from the noble and learned Lord who last addressed you, that this bill ought to be dismissed. I wish to have it understood, that I am clearly of opinion, that upon the statute of limitations, a court of equity has not jurisdiction to entertain the question, because the right was barred by the effect of that statute. I am also clearly of opinion, that the deed of 1794 has such an effect upon the property, that it would be against conscience for your Lordships now to interfere in the manner which is sought by this bill; and I am further of opinion, that upon this bill, framed as it is, with this allegation of an agreement, it is not only impossible for your Lordships to make a decree, but that it would be the duty of [125] your Lordships to dismiss the bill, whatever the rights of the parties were. I do not wish to decide the question upon that ground, but principally upon the operation of the statute of limitations, because that is a question which affects all the titles in the kingdom. The other two are more particularly applicable to the particular case; I feel it therefore more important, that it should be understood, that the opinion of the House upon this part of the case, is founded on the operation of the statute of limitations, and not on the other parts of the case.

Decree affirmed.

Cuthbert v. Creasy and others.

To a bill of discovery in aid of an action of intrusion brought by a remainder-man in a devise after a lapse of thirty-nine years from the death of the tenant for life, and twenty-seven years from the time when the remainder-man attained the age of twenty-one, demurrer allowed.

[Mews' Dig. v. 961 ; ix. 178.]

THE bill filed on the 18th of July, 1820, and amended by order dated 7th of February, 1821, stated that Robert Cuthbert, late of Friskney, in the county of Lincoln, grazier, was, at the time of making his will, and thenceforward to the time of his death, seised of or otherwise well entitled in fee-simple in possession to certain messuages, cottages, lands, tenements, and hereditaments, situate, lying, and being in the said parish of Friskney, and the said Robert Cuthbert being so seised or entitled, and being of sound and disposing mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the 24th of October, 1767, which was duly executed and attested so as to pass freehold estates by devise, and whereby the said testator devised the said messuages, cottages, tenements, lands, and hereditaments to his wife Ann Cuthbert, for her life, if she should so long continue his widow, with remainder to his sons George Cuthbert and Robert Cuthbert, and their heirs for ever, as tenants in common.

That the said testator departed this life about the year 1771, without having altered or revoked his said will, leaving the said George Cuthbert, his eldest son and heir at law.

That upon or shortly after the death of the said testator, the said Ann Cuthbert entered into the possession of the said pre-[126]mises, or into the receipt of the rents and profits thereof, and continued in the possession thereof, or in the receipt of the rents and profits thereof, till the time of her death, which happened on or about the 9th of September, 1781.

That upon or about or within a few years after the time of the death of the said Ann Cuthbert, and in or about the years 1780, 1781, 1782, or 1783, the then churchwardens and overseers of the poor of the parish of Friskney entered upon and took possession of the said premises so devised by the said will of the said testator Robert Cuthbert as aforesaid, and they and their successors have ever since continued in the possession thereof, or in the receipt of the rents and profits thereof, and the present churchwardens and overseers of the poor of the said parish of Friskney now are, and ever since their appointment to their said situations or offices of churchwardens and overseers of the poor of said parish of Friskney have been, in the possession of the said premises, or in the receipt of the rents and profits thereof, and claim to be entitled thereto by virtue of their said situations or offices.

The bill further stated, that the said George Cuthbert, the devisee, departed this life a long time ago, and in the lifetime of the said Ann Cuthbert, intestate and without issue, leaving the Plaintiff, his eldest son and heir at law; and the said Robert Cuthbert, about forty years ago left this kingdom, and went abroad, and has never since been heard of, but is or must be now presumed to be dead intestate and without issue, and Plaintiff is the heir at law of the said Robert Cuthbert, the devisee, and also the heir at law of the said testator; and Plaintiff is, under the circumstances aforesaid, entitled to the said premises in fee-simple.

The bill then stated that the churchwarden and overseers of the said parish refused to deliver up to the Plaintiff the possession of the said premises, and Plaintiff was going to commence an action, by a writ of entry upon an intrusion in the *post*, against the churchwardens and overseers of the poor of said parish of Friskney, to obtain possession of said premises; and that the Plaintiff had been advised, that it was absolutely necessary, that the writ to be issued by Plaintiff for the recovery of the said premises in the said action should contain the names of the churchwardens and overseers of the poor of said parish of Friskney in office at the time of the death of the said Ann Cuthbert, the tenant for life, or at the time when the said churchwarden and overseers first took possession of the said premises, for the purpose of stating by whom the intrusion was [127] originally made, and that Plaintiff was entirely ignorant what were or was, or are or is, the names or name of the churchwarden or overseers of the poor of Friskney, or any of them, at the time of the death

of said Ann Cuthbert, or at the time when the said churchwardens and overseers of the poor of the said parish first took possession of the said premises as aforesaid, and that the Plaintiff, previous to the 13th of November, 1813, and also since that time, had made and caused to be made all possible enquiries and researches, but in vain, to ascertain who were the churchwarden and overseers of the poor of the said parish who first took possession of the said premises as aforesaid.

That Plaintiff, accompanied by his solicitor, on the 13th of November, 1819, went to the said parish of Friskney, and personally demanded of Bletcher Creasy, Thomas Williamson, Thomas Redford, and William Bollon, the churchwarden and overseers of the poor of the said parish of Friskney, permission to inspect the parish books for the purpose of ascertaining the names of the churchwarden and overseers of the poor of the said parish of Friskney by whom the said intrusion was originally made, and that Plaintiff and his said solicitors did at the said time deliver to each of them the said B. Creasy, Thomas Williamson, Thomas Redford, and William Bollon, a demand in writing in the words and figures following: namely, "To Bletcher Creasy, Thomas Williamson, Thomas Redford, and William Bollon, churchwarden and overseers of the poor of the parish of Friskney, in the county of Lincoln, I, Robert Cuthbert, of Swineshead, in the county of Lincoln, miller, do hereby demand of you and require permission to inspect the book or books in which the appointment of the parish officers for your said parish of Friskney is written or contained for the years 1780, 1781, 1782, and 1783. Dated this 13th day of November, 1819. Robert Cuthbert. Witness, William Walker."

That the said Thomas Williamson, Thomas Redford, and William Bollon, upon such demand being made and delivered, declared that they were the overseers of the poor of the said parish of Friskney, but that they had not the books to produce; and Bletcher Creasy then acknowledged that he was the churchwarden of the said parish of Friskney, and could produce the books demanded, but the said Bletcher Creasy positively refused to produce the said books so demanded as aforesaid to Plaintiff, or any other person than a charge bearer.

That the Plaintiff was not a charge bearer of the said parish.

[128] That the said Bletcher Creasy is the present churchwarden of said parish, and that the said William Bollon, Robert Pinder, and Thomas Carter were the (then present) overseers of the poor of the said parish of Friskney, and that B. Creasy, William Bollon, Robert Pinder, and Thomas Carter were in the possession of said premises, or in the receipt of the rents and profits thereof, and that the B. Creasy, William Bollon, Robert Pinder, and Thomas Carter had in their possession or power the book or books of the said parish, in which were entered the names of the parish officers of the said parish, and particularly of the churchwardens and overseers of the poor of the said parish for said years 1780, 1781, 1782, and 1783, and that Plaintiff is entitled to have the same produced to him, in order that he may inspect the same, and ascertain the names of the churchwardens and overseers of the poor of the said parish for said years 1780, 1781, 1782, and 1783.

The bill charged, that Bletcher Creasy, William Bollon, Robert Pinder, and Thomas Carter knew the names of each of the churchwardens and overseers of the poor of the said parish for each of the said years 1780, 1781, 1782, and 1783, and when they respectively entered into their said respective situations or offices as such churchwardens and overseers, and also knew or believed, or had some reason to know or believe, which of them first took possession of the said premises, and when they or he first took possession thereof, and that Bletcher Creasy, William Bollon, Robert Pinder, and Thomas Carter ought to set forth and discover who were the churchwardens and overseers of the poor of the said parish of Friskney in each of the said years 1780, 1781, 1782, and 1783, and when they respectively entered into their said situations or offices, and how long they respectively continued therein, and which of them first took possession of the said premises, or entered into the receipt of the rents and profits thereof, and when.

The bill further charged, that Robert Cuthbert, the son of the testator, was, at the time of the death of Ann Cuthbert, and for a long time afterwards, and to the time of his death abroad, in very indigent circumstances, and ignorant of his interest and rights in or to the said premises; and Plaintiff was, at the time of the death of the said Ann Cuthbert, and for many years afterwards, an infant, and in indigent circumstances, and at a great distance from the said parish of Friskney, and ignorant

of his rights, and attained his age of twenty-one years in the year 1793, but was then and for many years afterwards in very indigent cir-[129]-cumstances, and ignorant of his rights, and at a great distance from the said parish of Friskney.

The bill then charged, that the Defendants ought to set forth a list or schedule of all books, accounts, papers, and writings in their or any of their possession or power containing any entries relative to the said premises, and the possession thereof, and the rents and profits thereof, and ought also to set forth the particulars of all such entries for each of the said years 1780, 1781, 1782, and 1783, in the words and figures thereof; that the Plaintiff on or about the 6th of July, 1820, applied to the said Bletcher Creasy, William Bollon, Robert Pinder, and Thomas Carter, and requested them to produce and shew to him the said parish books or book containing the names of the churchwardens and overseers of the poor of the said parish for the said years 1780, 1781, 1782, and 1783, in order that Plaintiff might inspect the same for the purposes aforesaid; but the said Bletcher Creasy, William Bollon, Robert Pinder, and Thomas Carter refused to shew the same to Plaintiff, and that Plaintiff has frequently applied, and frequent applications have since been made on his behalf, to the said Bletcher Creasy, William Bollon, Robert Pinder, and Thomas Carter to produce for Plaintiff's inspection the book or books of the said parish in which are contained the names of the parish officers of the said parish, and particularly of the churchwardens and overseers of the poor of the said parish for the said years 1780, 1781, 1782, and 1783, and to discover to Plaintiff which of the said churchwardens and overseers of the said parish took possession of the said premises, and when; and also to produce and shew to Plaintiff the said other books, accounts, documents, papers, and writings relating to the said premises, and the possession thereof, and the receipt of the rents and profits thereof; but they refused to comply with such applications.

The bill further charged that it would be necessary for Plaintiff, in order to sustain his intended action for the recovery of the said premises, to have the said books or book, accounts, documents, papers, and writings containing the entries aforesaid, produced at the trial of such action, but that the Plaintiff would not be able to enforce the production thereof without the assistance and order of the Court.

The bill therefore prayed that the Defendants might be ordered to produce, for the inspection of Plaintiff and his solicitor or agent, the book or books of the said parish in their or any of their possession or power containing the entries of [130] the names of the several churchwardens and overseers of the poor of the said parish for the said years 1780, 1781, 1782, and 1783, and also all other books, accounts, documents, papers, and writings in their or any of their possession or power containing any entries relative to the said premises, and the possession thereof, and the receipt of the rents and profits thereof, for the said several years 1780, 1781, 1782, and 1783, and each or any of them; and that all the said books or book, accounts or account, papers, documents, and writings might also be produced for Plaintiff's benefit at the trial of the said intended action.

To this bill the Defendants put in a general demurrer for want of equity, both as to the discovery and the relief.

The demurrer was argued before the Vice-Chancellor (Sir John Leach), in February, 1821, when liberty was given to amend the bill, which was accordingly done, and a demurrer was filed to the amended bill. The demurrer to the amended bill was argued in November, 1821, principally on the grounds that such an action could not be maintained, and if it could be maintained, that a court of equity would not aid such an action by a discovery. But the demurrer was overruled, and thereupon a petition of appeal against the order overruling the demurrer, was presented to the Lord Chancellor (Earl of Eldon). The case was argued in December, 1821, by Mr. Horne (Sir W. Horne, Attorney-General) and Mr. Pemberton for the Appeal, and by Mr. W. Agar and Mr. Duckworth for the Respondents.

The heads of the argument for the Appellant were as follows:

The first question is, whether the Court will interfere to assist a claim at law after the lapse of twenty years. Secondly, if the Plaintiffs are not able to sustain any action at law, and the Defendant can shew this fact, then the Court will not give any discovery.

The Plaintiff claims under a will, bearing date in the year 1767, and the testator died in or about the year 1771; and in the year 1781 the tenant for life died, and

thereupon the Plaintiff became entitled to one moiety, and as to the other moiety there is a lapse of thirty years.

The Court will never interfere in favour of parties who have been out of possession for more than twenty years, against parties who have been in adverse possession for more than twenty [131] years. The measure of legal right is not the measure of equitable right. Will a court of equity after twenty years interfere by direct relief or indirect relief by removing impediments: or by enforcing discovery. Discovery is a species of equitable relief. The limitation of twenty years was adopted by courts of equity above a century previous to the statute of limitations, and continued for a century afterwards without any reference to the statute, and has been now finally established.

Wincheomb v. Hall (1 Ch. Rep. 22, 5 Chap. 1) was a case to have a deed set aside as being a conveyance by the father in a state of imbecility. The relief was refused, twenty years having elapsed, and two purchases having been made. But this estate might have been recovered at law by writ of right.

In cases of bills for redemption the Court has refused relief at different periods, sometimes thirty years, sometimes twenty years, but the Court always requires the party seeking relief to shew that he comes within a reasonable time.

Pearson v. Pulley (1 Ch. Ca. 102) is the first case in which twenty years was suggested. It was a case of redemption before Lord Nottingham.

There are cases in Vernon's Reports which establish the same doctrine.

Low v. Burron (3 P. W. 264) is precisely in point. It was a bill for an account of rents and profits after thirty years. It was not a suit to set aside the deeds for the purpose of trying the right. A plea of the statute of limitations was allowed.

In *Cook v. Arnhem* (Ibid. 287) it was held, that fourteen years laches, as it would not bar an ejectment, would not bar redemption. In the note to that case, it is laid down, upon authorities cited, that as the twenty years would bar an ejectment, the same period is proper to bar redemption. The Court always fixed the time of twenty years with reference to the statute of James, and not to that of Hen. 8.

In *Cook v. Cook* (2 Atk. 67) it was held, that a court of equity will not interfere after twenty years: and it was ordered, that the Defendant should be quieted in his possession after a lapse of twenty-one years. In 3 Atk. (Anon. 313) there is a case of a bill for redemption, and the rule as to redemption was held to be analogous to the rule in the statute. All the cases establish this point.

In *Deloraine v. Brown* (3 B. C. C. 653; see 2 S. and L. 637) it appears that the doctrine that [132] length of time will bar equitable relief is not novel, but as old as the Court. *Smith v. Clay* in the note to the last case is to the same effect. *Cholmondeley v. Clinton* (2 J. and M. and M. D. P. ante) is the last case and conclusive. It may be doubted whether twenty years is not by the provision of the statute a bar to relief in equity. *Sidney v. Perry* (Red. Tr. Pl. 207).

Not one case is to be found in which a court of equity has ever interfered after a lapse of twenty years, as against adverse possession. *Foster v. Hodgson* (19 Ves. 185), *Germyn v. Best*. It may also be questioned whether writs of entry are not within the statute 21 Jac. 1. and therefore barred. Writs of entry are possessory actions; and if so, is there any instance where the entry is taken away? How can entry be taken away without right of possession? A writ of right is barred by 60 years, but this might last 100 years.

For the Respondents: *Pickering v. Stamford*, *Roe v. Acherley*, *Hindeman v. Taylor* (2 Dick. 651) *Harwood v. Oglander* (6 Ves. 199), *Pim v. Goodwin* (Post), *Bailey v. Sibbald* (15 Ves. 185), *The Dean and Chapter of Westminster v. Cross* (Bunb. 60), and *Marston v. Claypole* (Ibid. 213) were cited.

In reply it was said: The principle on which the demurrer rests is, that after so great length of time, the Plaintiff has no right to call for equity. *Pickering v. Stamford* is a case of *cestui que trusts*. *Roe v. Acherley* does not apply, because there was no adverse possession or ouster. *Harwood v. Oglander* was a very peculiar case, and has no relation to the point in question. There was no ouster of the Plaintiff, for one tenant in common cannot oust another: but the question of ouster must have been tried. *The Dean and Chapter of Westminster v. Cross* (Ibid. 60), and *Marston v. Claypole* (Ibid. 213), are loose notes of no authority.

The bill prays not merely discovery, but inspection and production of documents

also. The Plaintiff in equity must shew not only that it is not against conscience, but that it is agreeable to equity that he should recover. The Plaintiff has no title in equity, and the Defendant has title.

The case stood over for consideration until the 11th of March, 1823, when the Lord Chancellor pronounced a judgment reversing the order by which the demurrer was overruled; ordering that the demurrer should be allowed, and that the deposit should be returned.

[133] The case before the Vice-Chancellor was argued almost wholly upon the question of law upon the statute of Hen. 8.; viz. whether the time elapsed since the death of the settlor was not a bar to the claim. Before the Lord Chancellor, the argument turned principally and almost wholly upon the general question of limitation in equity, and the Lord Chancellor having said at the conclusion of the argument, that the case would require much consideration, a review of all the authorities, and a reference to the principles of a court of equity on the subject of limitation of suits, finally decided the case on the authority of *Cholmondeley v. Clinton*, which he considered as establishing the rule, that a lapse of twenty years operated generally as a limitation and bar to suits in equity.—Ex. Rel. Mr. J. Walker.

Pim v. Goodwin.

[Mews' Dig. ix. 178.]

The bill was filed in 1806, by Richard Pim, of, etc. labourer, and Anne his wife, William Spencer of Derby, etc. and Mary his wife, and Hannah Proctor of Derby, etc. spinster, stating that Joseph Wainwright, of, etc. in the county of Derby, yeoman, was at the time of his death seised in fee of a close of land called Goodages, situate in Chaddesten, containing about six acres, and then in the occupation of John Goodwin; and being so seised, mortgaged (*no date*) the close to Elizabeth Edwards, of Derby, widow, then deceased, either in fee or for a long term of years, to secure the principal sum of £70 and interest, or some other small sum of money which J. W. did not pay off in his lifetime, but being entitled to the equity of redemption of the close, and being of sound mind, made and published his will (*no date*), legally executed and in writing, which in part was the words and figures following: that is to say, "my just debts, etc. being paid, all the residue of my estate, both real and personal, I give, devise, and bequeath unto my wife for her life, hereby giving her full power to give, devise, and dispose of the same to my daughter Anne Wainwright, and my two daughters-in-law, Hannah Newham and Eliz. Newham, in such proportions as my wife shall think proper, but not to any other person, provided they live, all or any of them; and if they shall die before they possess the same, my wife shall have full power to give and devise the same to whom she shall think most convenient." The bill then stated, that Joseph Wain-[134]wright died (*no date*) without having revoked or altered the will, leaving Elizabeth Wainwright his widow, and Anne, the wife of Benjamin Cockayne, deceased, his only child and heir at law; that Elizabeth Wainwright, soon after the death of the testator, entered upon (*no date*) and took possession of the mortgaged estate, and for some time continued in the possession thereof, but afterwards delivered up possession to Francis Goodwin, then deceased, who was the son in law of Elizabeth Wainwright; and that it was alleged that Elizabeth Wainwright delivered up possession of the mortgaged estate to Francis Goodwin, in consideration of a provision on his part that he would provide for Elizabeth Wainwright during her life. The will then stated that Elizabeth Wainwright died (*no date*) without having made any disposition, by devise or otherwise, except as above mentioned, of the mortgaged premises, leaving Anne Cockayne surviving, who thereupon became entitled in possession to the close and premises, subject to the mortgage; that Anne Cockayne afterwards died (*no date*) intestate in the lifetime of her husband, leaving four daughters, her only children and heirs at law, viz. Hannah, etc.; whereupon the Plaintiffs became entitled to the equity of redemption of the premises as the heirs at law of Anne Cockayne, and also of the testator. The bill then stated that Francis Goodwin, while

he was in possession of the mortgaged estate, paid off the principal and interest due upon the mortgage, and procured an assignment of the estate and interest of the mortgagee in the mortgaged premises, and the money due thereon to be made to him, and ever afterwards continued as mortgagee in the possession of the mortgaged estate, and receipt of the rents and profits during his life, and by such means received or might have received more than the amount of the money remaining due for principal and interest upon the mortgage. The bill then stated that Francis Goodwin died in thousand (*sic*) hundred and (*sic*), and by his will devised the mortgaged premises, and all his estate and interest therein, to his son Francis Goodwin, the Defendant, whom he appointed sole executor of his will; that the Defendant proved the bill, and became the legal personal representative of his father, and possessed assets sufficient to pay, etc. and entered upon and took possession of the mortgaged estate, and had ever since been and then was in possession and receipt of the rents and profits thereof. The bill then stated applications and requests to the Defendant to reconvey the mortgaged premises, to deliver up the title-deeds relating [135] thereto, and to account, etc. for the rents received, and pay over the balance; the Plaintiff offering to pay any balance which might be found due upon the account.

The bill then charged, that if any conveyance was made to the Defendant or his father, it was made by way of mortgage or assignment of mortgage, as would appear if the Defendant would set forth the contents and dates of any such conveyance or assignment. The bill then, after the usual interrogatories, prayed that the Defendant might set forth the deeds under which he claimed to hold; that an account might be taken of the rents received by the Defendant and his father, that the Plaintiff might be admitted to redeem the mortgage on payment of what (if any thing) should be found due, an account of the assets, etc. and a reconveyance, etc.

Francis Goodwin by his answer said, he believed and admitted it to be true, that J. Wainwright in the complainant's said bill of complaint mentioned, was in his lifetime, and at the time of his death, seised in fee-simple of a certain close called the new close, and situate in Chaddesden, in the county of Derby, containing six acres three roods and eight perches, or thereabouts, and which abuts on the north side thereof on lands belonging to Sir R. Wilmot, Bart.; and on the east side thereof on lands belonging to Mrs. J. Goodwin; and on the south side thereof on lands belonging to Sir R. Wilmot, Bart.; and on the west side thereof on lands belonging to the said Sir R. Wilmot, Bart., and which this Defendant believed was the close or piece of ground in the said complainant's bill meant and intended to be described by the name of the Goodages, and which is now in the occupation of John Goodwin; and that he did not know, except by the said bill, that the said J. W. did ever convey the said estate and premises to Elizabeth Edwards by way of mortgage or otherwise, to secure the sum of £70, or any sum of money. But the said Defendant said, that by indenture, bearing date the 6th day of April, 1759, and made between the said J. W. of the one part, and Francis Goodwin deceased of the other part, and which was duly executed by the said J. W., he the said J. W. in consideration of the sum of £120 to the said J. W. in hand paid by the said Francis Goodwin, the receipt whereof is thereby acknowledged, granted, bargained, sold, demised, leased, set, and to farm let unto the said Francis Goodwin, his executors, administrators, and assigns, the said close or parcel of land, with the appurtenances, to hold the same to the said Francis Goodwin, his executors, administrators, and assigns, from the day of [136] the date thereof for the term of 500 years from thence next ensuing, without impeachment of waste, yielding yearly a pepper-corn, if demanded, but subject to a proviso for redemption thereof if the said J. W., his heirs, executors, administrators, or assigns should pay or cause to be paid to the said F. G., his executors, administrators, or assigns, the full sum of £120, together with interest for the same, after the rate of £3 10s. per cent. per annum, at and upon the 6th day of October then next; and the Defendant admitted it to be true that the said J. W. did duly make and publish, and legally execute his last will and testament in writing, bearing date the 14th of December, 1743, and that the same was executed and attested as by law is required to pass real estates, and that the same was of such purport and effect as in the said bill set forth, and that he appointed the said Elizabeth his wife sole executrix thereof,

who duly proved the same in the proper ecclesiastical court, and that the said J. W. departed this life on or about the 11th day of May, 1761, leaving the said Elizabeth W. his widow, and Ann, the wife of B. Cockayne, his only child and heir at law him surviving, and that he did not alter his said will, and that Elizabeth W. did upon, or soon after the death of the said testator, enter into the possession of or into the receipt of the rents and profits of the said mortgaged estate and premises, and continued in the possession thereof, or in the receipt of the rents and profits thereof until the said F. Goodwin entered into the possession thereof, or into the receipt of the rents and profits thereof as hereinafter mentioned, and that by indenture of feoffment, bearing date the 16th day of February, 1765, and made between the said Elizabeth W. of the one part, and the said F. G. of the other part, and which was duly executed by the said Elizabeth W., the said Elizabeth W., in consideration of the sum of £200 to her paid by the said F. Goodwin, and also in consideration of the sum of £3 per year and every year from the date thereof, to be annually paid to her by the said F. G., his heirs, executors, and administrators, or any of them, during her life, granted, bargained, sold, enfeoffed, and confirmed unto the said F. G., his heirs and assigns, all the said close of land called the New Close, then in the occupation of the said Elizabeth W., with the appurtenances, to hold the same unto the said F. G., his heirs and assigns, to the use of the said F. G., his heirs and assigns for ever: and thereupon livery of seisin of the said close of land was, on the day of the date of the said indenture, delivered to the said F. G., the father, by the said Elizabeth W., and that [137] at or about the time when the said indenture of feoffment bears date the said Francis Goodwin entered into the possession or into the receipt of the rents and profits of the said close or parcel of land, with the appurtenances, and continued in the possession thereof, or into the receipt of the rents and profits thereof, until his death, and the Defendant said that the said Elizabeth W. did not to his knowledge, information, or belief, deliver up the possession of the said mortgaged premises to the said F. G. for the reason in the said bill of complaint mentioned, or for any other reason than such as are thereinbefore in that behalf mentioned, although the Defendant admitted that the said F. G. was the son-in-law of the said Elizabeth W., and that the said E. W. did not to his knowledge, information, or belief, ever make any other disposition of the said mortgaged premises than such as thereinbefore mentioned. And the Defendant said that the said Elizabeth W. departed this life on or about the 14th day of March, 1768, and that she left Ann Cockayne, in the said bill mentioned, who was then of the age of thirty-four years, and under no legal disability of claiming the said close and premises, had she been entitled thereto, the only child and heir at law of the said testator J. W., her surviving. But he submitted and insisted that the said Ann Cockayne did not upon the death of the said Elizabeth W. become entitled to the equity of redemption of the said mortgaged premises, the said Elizabeth W. having conveyed the same away in manner aforesaid; but in case no such disposition had been made thereof, nor any other act done by which the right to redeem the said mortgaged premises was extinguished, he submitted whether the said Ann Cockayne would have become entitled to the same, or whether the said Hannah Newham and Elizabeth Newham took any interest in the same under the will of the said J. W. And the Defendant further said that the said Ann Cockayne departed this life in the lifetime of her husband, and for any thing Defendant knew to the contrary, she might die intestate; and he believed that the said Ann Cockayne left Elizabeth Preston, Ann Pim, Mary Spencer, and Hannah Cockayne, her only children, etc. heiresses at law, her surviving; and that the said Elizabeth Preston departed this life at or about the time in the said bill mentioned, intestate, leaving her three sisters, and the said complainant Hannah Preston, her only child and heiress at law, her surviving; and that the said Hannah Cockayne departed this life at or about the 30th of October, 1793, without having been married, and intestate, leaving her said two sisters, the com-[138]-plainants Ann Pim and Mary Spencer, and the complainant Hannah Preston, her surviving; and that the said Elizabeth Preston, Ann Pim, Mary Spencer, and Hannah Cockayne were at the death of their mother, the said Ann Cockayne, as the Defendant believed, all of the age of twenty-one years or upwards, and under no legal disability of claiming the said close and premises had they or any of them been entitled thereto; and that the said com-

plainants were then the sole heiresses at law of the said Ann Cockayne and also of the said testator J. W. But the Defendant humbly submitted that the said complainants were not entitled to the equity of redemption of the said mortgaged premises, for the reasons thereafter mentioned; and the said Defendant said, that the said Francis Goodwin did not, to the best of his knowledge, information, and belief, ever procure any other assignment of the said mortgaged premises to be made to him, than the said indentures of mortgage and feoffment herein-before mentioned, which were in the possession or power of the Defendant, but the Defendant submitted and insisted that the said complainants were not entitled to call upon him to produce the same; and the Defendant further said, he verily believed that the said Francis Goodwin duly paid the sums of £80 and £200, the consideration money in the said indentures mentioned, to the said J. W. and Eliz. W. respectively, or as they directed; and he said, that the said Francis Goodwin continued in the possession of the said estate and premises, or in receipt of the rents and profits during his life, and until the time of his death; and that the said F. Goodwin, the father, departed this life on or about the 20th day of November, 1789, and that previously to his death, he duly made and published his last will and testament, bearing date on or about the 9th day of February, 1787, which was duly executed and attested so as to pass real estates, and thereby gave and bequeathed the said mortgaged premises unto his wife Hannah, for and during the term of her natural life; and from and after her decease, he gave and devised the same unto the Defendant, his heirs and assigns for ever; and he thereby appointed his sons, the Defendant and John Goodwin of Chaddesden aforesaid, farmer, joint executors, but the Defendant alone duly proved the said will of his said father in the consistory court of Lichfield and Coventry, and which he believed was the proper ecclesiastical court, and possessed himself of the said testator's personal estate and effects, or of such parts thereof as he had been able; but the Defendant submitted that the said complainants had no right, [139] under the circumstances thereinbefore and thereafter mentioned, to any account of such assets. And the Defendant said, that upon the death of his said father, and the said Hannah his mother, he the Defendant did, under and by virtue of the said will, enter upon and take possession of the said close and premises, and ever since had, and was then, by himself or his tenants, in possession thereof, and in the receipt of the rents and profits thereof; and that the said Hannah, the Defendant's mother, departed this life about a week after the death of his said father, and the Defendant denied that the said complainants had made any such applications and requests to him as in the said bill mentioned; but, in case any such had been made to him, he should not have complied therewith, for he said, the said J. W. had, as he was advised, made liable the whole of his estate and effects to the payment of his debts; and that the said Eliz. W. had, therefore, full power and authority to dispose of the equity of redemption of the said premises, which she accordingly did in manner thereinbefore mentioned; but, in case the said Francis Goodwin had been a mortgagee of the said premises only, yet the said F. G., some time in the year 1765, being upwards of forty years before filing the bill of complaint in this case, entered into the possession, or into the receipt of the rents and profits of the said premises; and that the said F. G. in his life, and the Defendant since his death, had, ever since the said F. G. entered into the possession thereof, or into receipt of the rents and profits thereof, in the year 1765 been in the peaceable and quiet possession thereof, or in the peaceable and quiet receipt of the rents and profits thereof, and having during all such time treated and considered the same as their own estate, of which they were seised in fee-simple, and had never in any manner since the time when possession was taken thereof in the year 1765 as aforesaid, treated or acknowledged the same as a mortgage, or received any sum of money from any person as for principal or interest of the said mortgage, but have received and taken the rents and profits of the said estate for their own use and benefit; that under the circumstances, and after such length of time, he submitted the said complainants were not entitled to such relief as in the said bill prayed, nor to any discovery of the rents and profits of the said premises, or to any production or discovery of the title-deeds or writings relating to the same except as aforesaid; and the Defendant insisted on the statute in that case made and provided, entitled "An Act for Limitations of Actions, and for avoiding Suits at

[140] Law," and humbly hoped to have the same benefit thereof as if he had pleaded the same in bar to the said bill of complaint.

The reporter, after the utmost research, has been unable to procure any note of the argument or judgment in the case, if any judgment was ever pronounced. Mr. Barbor, who was solicitor for the Plaintiff, informed the reporter, that the case stood in the paper for judgment from 1812 to 1821, when his client Pim died. Mr. Bell, the king's counsel, has stated to the reporter, that after long hesitation Lord Eldon dismissed the bill in 1823, after the decision of *Foster v. Blake* in the House of Lords, a case which will be reported hereafter.

Foster v. Blake, D. P. 1823.

[Mews' Dig. ix. 178.]

In this case a mortgage had been made in 1730 of lands belonging to Sir Thomas Blake. In 1733 the mortgage was assigned to Charles Echlin. He in 1737 filed a bill in the Exchequer in Ireland, to obtain the mortgage money by a sale, according to the practice in Ireland, and in 1744 he filed a bill of revivor and supplement. Sir Thomas Blake, by his will in 1748, vested his estate in trustees to raise money by sale or mortgage for the payment of his debts, and subject, etc. he devised his estates to his son Ulick Blake for life, remainder to his issue in tail male; remainder to Thomas Blake for life; remainder to his issue in tail male; remainder to Walter Blake, the father of the Respondent, for life; remainder to his issue, etc. Upon the death of Sir Thomas, the suit of Echlin was revived against Sir Ulick, as heir, taking no notice of the will, which Sir Ulick disputed on the ground that his father was a relapsed Papist. A decree was obtained in 1753, under which the lands were sold as the property of Sir Ulick Blake in fee. After the sale, Walter Blake, the father of the Respondent, applied to the Court for a resale, upon the ground that the estate was sold at an undervalue. Upon the resale, the estate was purchased by a Mr. Kirwan, as trustee for Lady Blake, the wife of Sir Ulick. The money received upon the sale was applied in discharge of incumbrances, and a conveyance was made to Kirwan in the year 1765. Sir Ulick died in 1767, and thereupon Sir Thomas Blake claiming as a remainder-man under the will of the deviser, Sir Thomas filed a bill against Lady Blake, as guardian of the daughter of Sir Ulick, for an account of rents and possession of the estate. Lady Blake, by her answer, claimed the estate as purchaser under the decree.

[141] The suit was not prosecuted, but Sir Thomas filed a bill against Lady Blake in 1768, insisting that she being a Papist could not purchase or hold the estate. In 1772 a compromise was effected between the parties, and a deed executed to carry it into effect.

In the year 1786 a bill was filed to impeach the purchase by Sir Thomas Blake of Bourdeaux, another party claiming by remainder under the will. He died without issue in 1787, and the suit was revived (according to Irish practice at that day) by Walter Blake, the father of the Respondent, claiming as remainder-man under the will. Lady Blake died in 1791, when her daughter, Mrs. Forster, entered upon the estate under a settlement made in 1771. Answers were put in by Lady Blake and Mrs. Forster to the bill of Walter Blake, who took no step in the cause, and died in 1802. Sir John Blake, in 1802, filed an original bill to set aside the sale in 1765 as fraudulent. In this suit a decree was made in 1813 that the bill should be retained, and that Sir John Blake should bring an ejectment to try whether Thomas Blake, the deviser, was competent to make the will of July 1748. In 1817 Sir John Blake obtained leave, by order of Court, to amend his bill, so as to have the benefit of the proceedings of Sir Thomas and Sir Walter Blake in the suits before mentioned. The bill was accordingly amended, and a prayer was added, that the Plaintiff might be at liberty to redeem the mortgage as remainder-man under the will of Sir Thomas Blake, etc. Upon this bill, so amended, a decree was made for redemption, etc. Against this decree an appeal was presented to the House of Lords, and the decree was reversed, principally on the ground of lapse of time.

Reports of Cases heard in the House of Lords, upon Appeals and Writs of Error, and decided during the Session 1826 - 1827. By ROBERT Blich, Barrister-at-Law. Vol. I. New Series.

ENGLAND.

(COURT OF CHANCERY.)

HENRY JOHN LORD SELSEY and others,—*Appellants*; THOMAS
RHOADES,—*Respondent*.

[*Mews' Dig.* vii. 262, 428; viii. 861; xiv. 1773. S. C. 2 Sim. and S. 41. Considered in *Molony v. Kernan*, 1842 2 Dr. and War. 31 at p. 38; and *Dunne v. English*, 1874, L.R., 18 Eq. 524 at p. 534; and see note to *Ward v. Hartpole*, 1776, 3 Bli. 470.]

In 1804, A. tenant for life under a settlement with a power to grant leases for twenty-one years, concurred with B, the next tenant for life in an agreement to grant to the steward and solicitor of A. a lease of part of the lands, etc. in settlement for twenty-one years absolute at a rent fixed upon a valuation, which omitted to estimate certain rights of common annexed to the lands, on the alleged ground that those rights were disputed by the copyholders of the manor. In 1809, B, having become tenant for life, on the death of A, executed a lease, according to the agreement.

In 1810, under an Act for inclosure of waste lands, a very large allotment of the waste was made, in respect of the lands leased, the rights of common having been admitted. B died in 1816, when the reversion of the lands, subject to the lease, vested in C, who accepted the rent reserved till 1821, when he filed a bill to set aside the lease.

Held in the Court below, that the transaction was unimpeachable on the ground of fraud. On appeal, *held* that the [2] relief was barred by acts of confirmation and acquiescence; but whether considering the facts and the relation of the parties the lease might not have been avoided, on the ground of fraud (or mistake,) if the persons interested had questioned the lease recently after the transaction—*Quære: semb. affirm.*

This was an appeal * against a decree of the Vice Chancellor, dismissing a bill filed by the Appellants, as personal representatives of James Lord Selsey, and by H. J. Lord Selsey, in his own right, as remainder-man under a settlement to set aside a lease granted by James Lord Selsey and Mr. Peachy his son, to the Respondent, he being at the time steward and solicitor of James Lord Selsey.

The bill stated that the Respondent was employed by John Lord Selsey, and afterwards by John Lord Selsey, his son, as steward and receiver of their lands, and also as solicitor or law agent; that, in the course of such employment, he became intimately acquainted with their farms and the rights attached to them; and being so,

* See the Report in the Court below, 2 Sim. and Stu. p. 41.

that he prevailed on James Lord Selsey and Mr. Peachey, his son, (afterwards John Lord Selsey,) to concur in signing an agreement for granting to him a lease for twenty-one years of a farm called Amberley Castle, promising that it should be fairly valued; that a valuation was afterwards made by a Mr. Eager, who fixed the rent to be paid, allowing certain deductions, at a sum of £330 per annum, at which rent a lease was accordingly granted; that the farm was then subject to a lease having two years to run, on the expiration of which the Respondent entered, and James Lord Selsey having died, a lease was granted by John Lord Selsey, according to the agreement, for the residue of the term: that James and John Lords Selsey were successively tenants for life, with a power, under a settlement, of granting leases for twenty-one years, on the usual conditions; that the Appellant H. J. Lord Selsey became entitled, on the death of his father John Lord Selsey, to the premises in question, for term of life, with remainders over, upon such limitations that the whole interest, subject to trusts for issue, vested in the Appellants, who were also the personal representatives of James and John Lords Selsey.

The bill then stated, as facts recently discovered, that a proposal had been made to the Respondent, by the executors of the former tenant, to give £500 a year for Amberley Castle Farm, which was refused by the Respondent, on a false allegation that the farm was disposed of, and that he falsely represented to his employers that such offer was made merely from a sense of disappointment; that upon an inclosure of waste lands in Amberley, under an Act, passed in 1810, four hundred acres of land were allotted to Amberley Castle Farm, a considerable part of which was made in lieu of rights of common appurtenant to the farm; that these rights of common had been altogether omitted by Mr. Eager, in his valuation.

The bill farther alleged, that the Respondent took advantage of his confidential situation, and obtained the lease by misrepresentation, and upon a false valuation of the land; that the agreement for the lease was obtained so long before the expiration of the subsisting lease, for the purpose of preventing competition; that the term of twenty-one years absolute was contrary to the usual mode of letting the land; that the Respondent did not inform Lord Selsey of the offer of £500 a year for the farm; that he knew of the rights of common, and that they [4] were valuable and extensive, and were not included in the valuation; that the tithes of the farm were not valued by Mr. Eager, according to the number of acres, which the Respondent knew, and did not inform James or John Lord Selsey of the fact; that in 1818, upon application of the Appellant H. J. Lord Selsey to be furnished with particulars of the lands comprising his estates, the Respondent described the lands held by him, under the lease, as consisting of five hundred acres, knowing at the time, from plans in his possession, that such lands comprised more than eight hundred acres.

The bill further charged that the rent was inadequate, and prayed that the lease might be declared fraudulent and void, and that the Respondent might be charged with a fair occupation rent, during the period of his possession.

In his answer to this bill, the Respondent stated, that the former tenant of the farm having died without children, there was no tenant having a preference; that he applied, in Sept. 1803, to have the lease for a son under age of infirm health, and with a view that he should have a term of fourteen years from the time of his coming of age; that Mr. Eager was chosen by the lessors to survey the farm, and did not know who was to be the tenant, at the time of his valuation; that there were undisputed rights of common attached to certain small portions of the lands, and claims to right of common over extensive wastes, which were disputed by the copyholders of the manor, who exercised or claimed rights of common, without stint, over all the wastes; that these claims and rights as well as the tithe lands, were considered and estimated by the surveyor in his valuation, and the lessors were fully informed of all the [5] circumstances of the farm; that the trustees under the will of the former tenant, offered to James Lord Selsey £500 per annum for the farm, upon a renewal of the lease, but that they knew, at the time of the offer, that the lessor was bound by the agreement with the Respondent; that James Lord Selsey questioned Mr. Eager as to the difference between his valuation and this offer, and was satisfied that the offer was not made *bonâ fide*, and was no proof of the real value; that the Respondent nevertheless offered to give up the agreement for a lease, and have the farm revalued, which offer was declined by James Lord Selsey, who declared he was satisfied with

the valuation of Mr. Eager, and continued to employ him as a valuer; that the Respondent had expended large sums in the improvement and stocking of the farm; that the first proposal for inclosure, in 1805, was abandoned in consequence of the opposition of James Lord Selsey and the Respondent, who thought it would not be beneficial to Amberley Farm; that in 1810, upon a renewed proposal of inclosure, a discussion took place as to the right of common, which, after much difficulty, was admitted by the copyholders to be in the Lord, and two hundred and eighty-six acres were allotted in respect of the lands held under the lease; that the Respondent expended large sums of money in the cultivation of the allotments, being open down, rough and unproductive lands; that James Lord Selsey died in 1808, and John Lord Selsey, who succeeded him, executed the lease, in 1809, according to the agreement, and died in 1816; that both James and John Lords Selsey lived in the neighbourhood of the farm, and were active and attentive to their interests; that the Appellant succeeding to John Lord Selsey, in 1816, [6] inspected the property, acted upon the lease, and accepted the rent reserved until 1821, when differences arose between him and the Respondent upon other subjects.

The points made by the answer were generally sustained by the depositions in the cause, and some of the passages of the answer being read by the Plaintiffs, on the hearing of the cause, became evidence for the Defendant; but it appeared that the rights of common were not noticed by Mr. Eager in his valuation, and he deposed in chief and upon cross examination, that it is usual to mention in the return (valuation) rights of common, when valuable, but not when they are insignificant or small in comparison with the value of the farm. Upon cross examination, he further deposed, that he omitted to specify the rights of common in his valuation, because he was informed by Joseph Foster (the bailiff of the farm) and other persons in the parish of Amberley, that the common rights were but of little value, inasmuch as the commons were stocked and eaten up by persons, many of whom had *no right whatever*. In his deposition to one of the interrogatories, he said he had reason to believe, that in the year 1805, John Lord Selsey was aware that some common rights belonged to Amberley Castle Farm; but whether or not he knew *the extent or particulars* of such common rights he could not say.

Joseph Florance, a surveyor, deposed, that the rights of common claimed for Amberley Castle Farm, were disputed by the copyholders, but that upon a discussion, at a meeting before the commissioners of inclosure, the copyholders were advised by their solicitor, that Amberley Castle Farm had gained a right to share in the commons, according to the value of the [7] farm. The encroachments on the common by strangers, and the dispute as to the right of Amberley Castle Farm, were proved by other witnesses. An agreement, between John Lord Selsey, the Respondents, and others, as to the costs of inclosure, and the proportions in which they were to be borne by the several parties, was produced, and it was proved that John Lord Selsey and the Respondent acted upon that agreement. Various accounts between James and John Lords Selsey and the Appellant H. J. Lord Selsey, containing entries as to the expenses of the inclosures, were also produced and proved. With respect to the offer made by the representatives of the former tenant, before the expiration of the lease, the evidence was contradictory as to the circumstances. Some points, not distinctly put in issue by the bill, were introduced, on behalf of the Plaintiff, on the hearing, particularly whether the lease was not void, as exceeding the power, but that was considered (if put in issue) to be a question at law.

The Vice Chancellor, upon argument of the case, was of opinion, that the principal having been fully informed of all the circumstances under which the lease was granted, it was valid, although the lessee was his agent and solicitor, inasmuch as no rule of equity prevented a lord from granting a lease of land to his steward, from motives of bounty, or from mixed motives of bounty and a money consideration, provided the principal had all the information necessary to enable him to measure the extent of his bounty. With respect to the omission of the rights of common, in the valuation of Mr. Eager, he was of opinion that the Respondent, having no other means of knowledge than Mr. Eager, the valuer chosen by [8] Lord Selsey, could not be chargeable with fraudulent suppression so as to affect the lease; and by the decree the bill was dismissed with costs. Against this decree the Appeal was presented.

The case was argued for the Appellants by Mr. Horne and Mr. Sugden.

For the Respondents by Mr. Heald and Mr. Pepys.

26th Feb. 1827. The Lord Chancellor: I have looked into this case, with a desire to affect the lease; for the situation of the parties was such as to induce a Court of Equity to look at the transaction with great suspicion. If the suit had been instituted recently after the contract, and there had been no acts of confirmation, probably the lease might not have stood; but James Lord Selsey and John Lord Selsey acquiesced so long, being well acquainted with the facts, that it is difficult to say that they could have impeached the lease, and the Appellant H. J. Lord Selsey cannot do that which they could not have done. We cannot set aside the lease, upon the grounds stated in the pleadings. There is a ground upon which the lease might have been set aside; but the parties have not gone upon that ground, and we cannot set aside the lease upon grounds on which they did not proceed. This is not a case for costs of the appeal. I should not have given costs in the Court below.

26th Feb. 1827. Decree affirmed, without costs.

[9]

COURT OF CHANCERY, ENGLAND.

THOMAS WALKER, THOMAS ANDREW the Younger, and GEORGE ANDREW,—

Appellants: The WARDEN and FELLOWS of the COLLEGE of CHRIST, in Manchester, in the County of Lancaster, and WILLIAM JOULE.—*Respondents*.

[Mews' Dig. iv. 636.]

The Members of a corporation having filed an original bill in their individual names, but stating their corporate character, upon an abatement of their suit, file a bill of revivor in their corporate name only. A demurrer for want of privity between the plaintiffs in the original bill and the bill of revivor was overruled in the Court below and on appeal.

The Respondents, by the description of the Reverend Thomas Blackburne, Doctor of Laws, Warden of the College of Christ, in Manchester, in the county of Lancaster, founded by King Charles the First; the Reverend James Bayley, clerk; the Reverend John Griffith, clerk; the Reverend John Gatliff, clerk; and the Reverend Charles Wickstead Ethelston, clerk; the Fellows of the said College, and also the said William Joule, on the 24th day of April, 1806, filed their bill in Chancery against Thomas Jepson, Thomas Dewsbury, Thomas Foster, James Dean, Thomas Roberts, Samuel Taylor, John Cheetham the elder, Thomas Andrew, Thomas Walker, and Margaret Chorlton, stating that the said [10] Thomas Blackburne was in and prior to the year one thousand eight hundred and four, and had ever since been, and then was the Warden of the said College, and the said James Bayley, John Griffith, John Gatliff, and Charles Wickstead Ethelston, were in and prior to the said year one thousand eight hundred and four, and had ever since been, and then were all the Fellows of the said College, and were as such, Warden and Fellows, in and prior to the said year one thousand eight hundred and four, and still were seized or lawfully entitled to them and their successors, Warden and Fellows of the same College of or to the Rectory of Manchester in the county of Lancaster, and that they or their lessee or lessees were in and prior to the year one thousand eight hundred and four, and had ever since been, and then were lawfully entitled to all the tithes, both great and small, arising within the parish of Manchester aforesaid, and the titheable places thereof, and to all Easter offerings, and other dues which became due and payable from the several inhabitants of the said parish of Manchester, and the titheable places thereof. That the said Thomas Blackburne, James Bayley, John Griffith, John Gatliff, and Charles Wickstead Ethelston, as Warden and Fellows of the said College by an indenture duly executed under the common seal of the said College dated 25th December, 1804, and made between the said Warden and Fellows of the one part, and the said William Joule of the other part, did in consideration of the rent and the performance of the covenants therein mentioned, demise, grant, and set unto the said William Joule, his executors, administrators, and assigns, all and singular the tithes, both great and

small, together with the offerings [11] usually called Easter offerings, and other offerings, oblations, mortuaries, and all other customary dues and payments arising or to arise, or become due or payable to the said Warden and Fellows, or their successors, during the term thereby demised, from any person or persons whomsoever, occupiers of lands or premises, or inhabitants within the twenty-three townships, precincts, or hamlets therein mentioned, and every of them, and of and from all and every the messuages, tenements, lands and hereditaments, situate within the said several townships, precincts or hamlets, in the said parish of Manchester, or otherwise in respect thereof, to have, receive, take, and enjoy the same, unto the said William Joule, his executors, administrators, and assigns, from the date thereof, for and during the term of twenty-one years thence next ensuing, paying, therefore, during the said term, unto the said Warden and Fellows of the said College, and their successors Warden and Fellows of the said College, the yearly rent therein mentioned; That a counter-part of the said lease was duly executed by the said William Joule, and he by virtue of the said indenture became, and had ever since the said 25th day of December, 1804, been entitled to all the tithes, both great and small, arising within the several townships, precincts and hamlets, in the said parish of Manchester, mentioned in the said lease, in kind, and such tithes, and all Easter offerings, and other dues and emoluments, arising, or becoming payable from the inhabitants or others within the said townships, or the titheable places thereof, ought to have been paid and answered to the said William Joule accordingly. That the said Thomas Jepson, Thomas Dewsbury, Thomas Foster, James Dean, Thomas [12] Roberts, Samuel Taylor, John Cheetham, Thomas Andrew, Thomas Walker, and Margaret Chorlton, had, ever since the said 25th day of December, 1804, occupied farms and lands within the said townships, or some of them, and in the said year 1805, previous to the separation of the said tithes, had had notice given by or on behalf of the said William Joule, to set out, yield, and pay unto him, the said William Joule, who would take the same in kind, the tithes of the several titheable matters arising and growing upon their farms and lands respectively, but which they had declined to do or to pay, or make him, the said William Joule, any satisfaction for the same, and for the said Easter offerings and other dues, and praying that the said Thomas Jepson, Thomas Dewsbury, Thomas Foster, James Dean, Thomas Roberts, Samuel Taylor, John Cheetham, Thomas Andrew, Thomas Walker, and Margaret Chorlton, might set forth the particular quantities and values of the said tithes, and might account with the said William Joule, or with the Plaintiffs in the said cause, for the single value of the said tithes, and the said Easter offerings and other dues, and might be decreed to pay to him or them, what should appear to be due or owing to him or them from the Defendants respectively on the taking of the said accounts, and for further relief.

To this bill Thomas Jepson, Thomas Dewsbury, Thomas Foster, James Dean, Thomas Roberts, Samuel Taylor, John Cheetham, Thomas Andrew, Thomas Walker, and Margaret Chorlton, appeared and put in their answers, and replication having been filed, a great number of witnesses were examined, as well on the part of the Plaintiffs as of the Defendants, and the cause afterwards came on to be [13] heard before Sir William Grant, then Master of the Rolls, who on the 3d day of August, 1810, pronounced a decree therein, dismissing the bill as to some of the tithes claimed, and directing issues as to others.

Against this decree, the Defendants presented a petition to rehear the cause, and the same was accordingly reheard, and on the 10th day of August, 1813, affirmed.

From the decree so affirmed, the Defendants appealed to the Lord Chancellor, and the Plaintiffs in the cause also appealed against some parts of the decree, which appeals were afterwards heard by the Lord Chancellor, who made an order thereon, dated the 25th day of June, 1818, partly reversing and partly affirming the decree.

Subsequent to the date of the last-mentioned order, the suit abated by the deaths of the Defendants, Thomas Andrew, Samuel Taylor, and Thomas Walker, whereupon the Respondents not describing themselves individually but suing in their corporate character only as the Warden and Fellows of the College, and William Joule, on the 27th day of November, 1823, filed their bill of revivor and supplement against Thomas Walker, as the administrator of the said Thomas Walker deceased: against Thomas Hutchinson, George Hutchinson, and Edmund Yates, as the executors of Samuel

Taylor, and against Thomas Andrew the younger, George Andrew, and Littlewood Andrew, as the executors of Thomas Andrew, praying that the suit and proceedings might be revived, and that the Plaintiffs in the bill of revivor and supplement, might have the same relief against the Defendants thereto, as the last-mentioned Plaintiffs were entitled to against Thomas Walker deceased, Thomas Andrew, [14] and Samuel Taylor, at the respective times of their death, and requiring the Defendants to the bill of revivor and supplement, to admit assets of the several persons to whom they were respectively representatives, to answer the demands made against them in the suit. To this bill of revivor and supplement all the Defendants thereto demurred, and for cause alleged, that it did not appear by the bill that the complainants, the Warden and Fellows of the College of Christ, in Manchester, in the County of Lancaster, founded by King Charles the First, were entitled to have the suit, and proceedings in the bill of revivor mentioned, revived against the Defendants thereto, or any of them, or to have any relief in the said Court against them, or any of them, and for that the Reverend Thomas Blackburn, the Rev. James Bayley, clerk; the Reverend John Griffith, clerk; the Reverend John Gatliff, clerk; and the Reverend Charles Wickstead Ethelston, clerk; five of the complainants named in the original bill of complaint in the said bill of revivor mentioned, and who all appeared by the said bill of revivor, to have been, and to be parties interested in the said suit and proceedings, were not, nor was any of them parties, or a party to the bill of revivor.

The Demurrer having been argued before the Lord Chancellor, by an order dated on the 5th day of February, 1824, was over-ruled. From this order Thomas Walker, Thomas Andrew the younger, and George Andrew, appealed to the House of Lords.

For the Appellants it was argued, that the original bill was filed by certain plaintiffs in their individual capacity, seeking relief on the subject of the rights mentioned in the original bill, and the bill purporting to be a bill of revivor, is a bill filed by the [15] Respondent, William Joule, and the Respondents the Warden and Fellows of the College, who are a body corporate, and according to the practice and principles of a Court of Equity, there is no such privity of character or title between the individuals who are the Plaintiffs in the original suit or any of them, and the body corporate as will entitle the body corporate to revive the original suit; that Blackburn, Bayley, Griffith, Gatliff, and Ethelston, Plaintiffs in the original bill, who by the bill of revivor appear to have been and to be parties interested in the suit and proceedings, are not parties to the bill of revivor.

For the Respondents it was argued, that the original bill was filed on the behalf of the Warden and Fellows of the College of Christ, in Manchester, who are a corporate body, and of William Joule their lessee, and although the names of the then Warden and Fellows are inserted in the said bill, yet it is evident that the bill was not filed by the then Warden and Fellows as individuals, but in their corporate capacity; that it was not necessary to have inserted the names of the then Warden and Fellows in the original bill, and that it was not necessary to insert the names of the Warden and Fellows in the bill of revivor and supplement.

That the Plaintiff, William Joule, as lessee of the Warden and Fellows of the said College, would have been entitled alone, and without the Warden and Fellows, to have filed the bill of revivor and supplement against the Defendants thereto.

For the Appellants: Mr. Hart, Mr. Duckworth.

For the Respondents: Mr. Agar, Mr. Parker.

On the 26th of February, the Lord Chancellor, in [16] moving the judgment, said that the naming of individuals while the proceeding purports to be in the corporate character and the corporate names are added, is mere surplusage; that the appeal was apparently brought for delay, and therefore costs should be given, but as the Respondents introduced the surplusage on the record that the costs should be moderate.

Decree affirmed, with £50 costs.

[17]

ENGLAND.

(ON AN APPEAL FROM THE HIGH COURT OF CHANCERY.)

THE BAILIFFS, BURGESSES, and COMMONALTY, of the Town or Borough of Ludlow, in the County of Salop, and the Right Honourable EDWARD EARL of POWIS.—*Appellants*: RICHARD GREENHOUSE, (since deceased) JOHN COLEMAN, JOHN HICKMAN, RICHARD GARDNER, ROBERT TENCH, RICHARD TAYLOR, JOHN STEPHENS, and EDWARD POWELL.—*Respondents*.

[Mews' Dig. iii. 228: S. C. *sub nom. ex parte Greenhouse*, 1 Madd. 92. The cases as to the scope of 52 Geo. III. c. 101 (Romilly's Act), are collected in a note to *In re Hall's Charity*, 1851, 14 Beav. at p. 120; see also *In re Manchester New College*, 1853, 16 Beav. at p. 617; *A. G. v. Earl of Devon*, 1846, 15 Sim. at p. 261; *In re Dean Clarke's Charity*, 1836, 8 Sim. at p. 42; *A. G. v. Dublin (Mayor of)*, 1827, 1 Bli. N. S. 312, at p. 335.]

A. having purchased an ancient chapel with a parcel of ground adjoining, devises it by a will dated in 1590, together with certain messuages, etc., in trust to complete the building of certain almshouses which he had commenced on the ground near the chapel, and to apply the rents of the messuages, etc., to the support of four poor people, with directions for keeping up the chapel and appointing a minister, chiefly for the benefit of the almshouses; but partly also for any other persons who might think fit to attend the service. In 1769, the chapel having fallen into decay, is conveyed, together with the piece of ground, the almshouses, and the messuages, etc., by the heir of the surviving trustee to the Corporation of Ludlow, who in 1771 pull down the chapel, convert the materials to other purposes, and grant leases of the piece of ground near the chapel, upon which houses are built.

Held (reversing the decision of the inferior court), that this is not a case within the jurisdiction of the court under the enactments of the 52 Geo. III. c. 101.

The operation of the Act is confined to the simple cases of a clear breach of trust. In cases of breach of trust, courts of equity may decree an account of all the profits made; but (*Semb.*) they cannot award damages, (*i.e.*) compensation for damage done to the trust property.

The Attorney General having signed and allowed a petition under the Act, is at liberty to appear for the Respondents to argue their case.

[18] A person cannot present or join in a petition of appeal, although he may have an interest in the question, unless he was (or represents) a party in the matter in the Court below.

There cannot be a *prospective* order to pay costs, as of proceedings *to be had* before the Master. The question as to such costs ought always to be reserved.

Charles Foxe, being seized to him and his heirs of an ancient Chapel called Saint Leonard's Chapel, standing without the walls of the town of Ludlow, and of a piece of ground near the chapel, and other hereditaments, by his will, bearing date the 12th day of October, 1590, expressed himself in relation to the said chapel of Saint Leonard, Almshouses, and premises, in these words:—(*viz.*)

"Whereas I have lately began a foundation to erect four almshouses or chambers upon a parcel of ground near the chapel of Saint Leonard, in Corve-street, in Ludlow, in the said County of Salop, which ground, together with the said chapel, I lately purchased to me and mine heirs, of one _____ for the relief and maintenance of four poor and impotent persons to be there from time to time kept and relieved; my will, intent and meaning is, that if I shall happen to decease out of this mortal life at any time before the said almshouses be thoroughly finished and erected, then mine executors, with so much of the rents, issues, revenues, and profits of my mortgaged lands and the sums of money thereupon and in redemption thereof due, shall build up and finish the same in as short time as conveniently they may, accord-

ing to the plot or foundation there already begun, and for and towards the relief and maintenance of the said four poor persons, as also for divine service to be had and maintained, as shall [19] be hereafter appointed within the said chapel of Saint Leonard. I do give and bequeath unto Edward Foxe, my brother, and Edmund Foxe, my son, two of the executors of my last will and testament and to their heirs and assigns for ever, all those four messuages or burgages, and all lands, tenements, and hereditaments, with their appurtenances, etc. in the city of Worcester and suburbs thereof, etc. being now of the rent or value of £8 by the year; upon condition and to the end that the said Edward and Edmund or their heirs shall within the space of three years next after my decease (if in my life time the same be not to those uses by me conveyed and assured) by their sufficient deed lawfully and duly executed *enfeoff some three, four or more of my next name and kindred of my body descending*; and in default of them some others with them and their heirs, of and in the said messuages, lands, tenements, rents, reversions, and hereditaments in Worcester aforesaid, and suburbs thereof; to the uses and intents hereinafter limited and appointed—viz., That he or they to whom such feoffment shall be made, *and their heirs*, shall stand seized of the same lands, tenements, and hereditaments, and out of the rents, issues, and profits thereof from time to time shall yearly pay unto the said four poor or impotent persons for the time being that shall be placed or allowed in the said new hospital or almshouse, £4 to be equally divided between them quarterly in four terms or times in the year; and moreover, shall yearly pay unto the curate or chaplain of Ludlow for the time being, or to some other sufficient chaplain or minister, to read and say to the poor there divine service at certain times [20] in the week, as shall be appointed, 40s., and shall also pay and give yearly unto some sufficient and learned preacher, for a sermon to be made and preached in the said Chapel of Saint Leonard's yearly, at some convenient time within the feast of Christmas, 6s. 8d., and other 6s. 8d. for a like sermon to be made and preached in the said chapel yearly in the time of Lent, for the better edifying and instructing of the said poor and such other people as shall then resort thither. And touching the residue of the said rents of the premises shall remain and be employed as and for the necessary repairing the said almshouses and chapel of Saint Leonard's from time to time, as need and occasion shall require; and for levying and gathering the said rents yearly and other necessary charges. And that the said *feoffees and their heirs* and the survivors and survivor of them shall yearly make account unto the churchwardens of Bromfield, how the profits and revenues thereof have been defrayed, and what surplusage remaineth to pay and deliver unto the churchwardens of Bromfield aforesaid, and their order to be taken how the said surplus if any be shall be employed and bestowed, by the advice of the Vicar of Bromfield aforesaid for the time being. And I give also two bells which I have in my sollar at Bromfield, to be hanged up in the steeple of the said chapel to ring into service when any is there said, and there to remain for evermore."

The testator died shortly after the date of the will, leaving Charles Foxe, of Bromfield, his heir at law, and Edward Foxe and Edmund Foxe proved, and took upon themselves the execution of the will.

By Indenture of the 2nd April 1593, between [21] Edward Foxe and Edmund Foxe (executors of the testator) of the first part, Charles Foxe son and heir at law of the testator, Roger Foxe, Richard Foxe, and Francis Foxe, the three sons of the last named Charles Foxe, of the second part; Edward Foxe and Henry Foxe, younger sons of the testator, of the third part; and Charles Foxe, son and heir apparent of Edmund Foxe, of the fourth part. The first-mentioned Edward and Edmund Foxe, in performance of the will of the testator, granted, enfeoffed, and confirmed unto the several parties of the second, third, and fourth parts, together with the said burgages in the city of Worcester, all those messuages, lands, and tenements, with the appurtenances, situate in or near Ludlow, near to the chapel of Saint Leonard, in a street there called Corves-street, on which the testator in his life time erected four almshouses, for four poor impotent and needy persons to be therein maintained and relieved for ever; and also the said chapel of Saint Leonard, and the land, ground, and soyle of the same messuages, lands, tenements, and chapel, and all other houses, etc. of the said testator, by the testator devised or assured unto his executors for the use benefit and relief of four

poor impotent persons, to hold the same unto the several parties thereto of the second, third, and fourth parts, *their heirs and assigns for ever*, upon trust nevertheless, that they and the survivors and survivor and his and their heirs should perform, fulfil and accomplish all and singular the articles, orders, and ordinances mentioned in the schedule quadripartite indented thereunto annexed, and according to the true intent and meaning of the same, and of the now reciting indenture."

The articles and ordinances made the 2nd day of [22] April, 1593, by Charles Foxe (the testator's son and heir) and Edward Foxe and Edmund Foxe (the testator's executors) concerning the trust by the heir and executors of the testator reposed in the feoffees, and the yearly issues of the lands and hereditaments, and for the order and government of the almshouses, and of the manner and order of divine service to be had and celebrated in the chapel of Saint Leonard's, contain the following regulations and directions:

"First we doe order and appoint that when and so often as it shall fortune all the said feoffees except three, to decease that soe often within six months next after such decease or deceases, the said three survivors of the same feoffees shall by good and sufficient conveyance convey and assure unto the like number of the next of name and kindred of the body of the said Charles Foxe deceased (as the said feoffees soe happening to decease were of) the said lands tenements hereditaments and premises with the appurtenances to have to the use and behoof of the same new feoffees or persons to whom the premises shall be soe conveyed or assured, and of the said surviving feoffees that shall convey and assure the premises and *to the heirs and assigns* of the said persons conveying and assuring the premises and of the persons to whom the same shall be soe conveyed and assured. Nevertheless upon like trust and confidence as is by these presents hereunto annexed by us reposed touching the premises in the said Edward Foxe the younger and his said feoffees. And that the like order be observed and kept from time to time for ever after by the survivor or survivors of the new feoffees for the time being and of his and *their heirs* for ever for and concerning the conveying and assuring the premises with the appurtenances to other feoffees [23] and to *their heirs* and assigns for ever to their proper uses and behoofes. Nevertheless upon like trust and confidence as aforesaid and not otherwise nor upon any other consideration the costs of which said conveyance to be of the premises from time to time hereafter for ever made and done as aforesaid shall be defrayed out of the yearly rents. Then wee doe also ordain that there shall be continually for ever hereafter sustained maintained founde and kept within the said messuages mentioned in the said recited indenture soe erected founded and intended, for an almshouse foure poor needy and impotent persons, of the yearly rents issues and profits of the premises as hereafter shall be declared which foure poor persons shall be from time to time appointed nominated and placed there by the said Charles Foxe sone and heir apparent of the said Charles Foxe deceased Edward the elder and the said Edmund or the greater number of them and by the survivor of them during their natural lives and the longer liver of them and after the deceases of the said Charles Edward the elder and the said Edmund and the survivor of them shall be from time to time afterwards for ever placed nominated and appointed by the *heirs males of the body* of the said Charles Foxe sone and heir apparent of the said Charles Foxe deceased lawfully begotten and for want of such issue by the *heirs males of the body* of the said Charles Foxe deceased and for want of such issue by the *right heirs* of the said Charles Foxe deceased for ever and which poor persons and every of them shall there dayly serve God devoutly in holy prayer and divine service and shall repaire unto the said chappell for hearing of the said divine service and sermons and as often as [24] such service or sermons shall be there reade and preached according as hereafter shall be likewise declared and ordained. Then wee ordaine that when and soe often as any of the rooms or places of the said foure poore needy and impotent persons shall become void by death or otherwise that then any other poor needy and impotent person of one of the parishes of Bromfield and Ludlow in the county of Salop shall be elected and chosen as aforesaid in the place soe being then void there to continue during his or her life. Item we also ordain that out of the rents issues and profits of the said messuages lands tenements and hereditaments in Worcester in the said county of Worcester there shall be yearly for ever well and truly paid to the said four poor needy and impotent persons for

the time being four pounds of current English money to be equally divided between them quarterly at four most usual times or feasts in the year. Item wee doe ordayne constitute and appoint Humphrey Madoxe Clerk curate of the chappell of Ludford in the county of Hereford to reade say minister and celebrate divine service in the said chappell of St. Leonardes to the said poor people and others that shall resort thither and also to exercise the office of a curate or minister there during his natural life as well by ministering of the communion at such convenient times in the year as is commonly used accordinge to the course and usage of the Church of England also by ministeringe and reading the divine service there every Wednesday and Friday throughout the year in the mornings of the said dayes, and also every Sunday and Feastifull days in the year morning and evening according to the course and usage of the Church of England which order [25] and course for the celebrating of divine service there wee will order and appointe shall be for ever hereafter observed and kept by such person and persons as shall be hereafter appointed and chosen to supply the said room of the office of a minister or curate there. Item we doe further ordaine and appoint that in consideration of the said divine service soe to be celebrated and had in the said chappell of Saint Leonardes by the minister or curate for tyme being there shall be for ever hereafter yearly paid out of the said rents issues and profits lands tenements and hereditaments in Worcester aforesaid unto the minister or curate there for the time being the summe of forty shillings of current English money at two usual feasts in the yeare (viz.) at the Feast of the Annunciation of our Ladye and Saint Michael the Archangell by equal and even portions. And doe alsoe further ordayne that the said minister or curate there for the time being shall also have hold occupy and enjoy the said land soyle and ground belonging unto the same chappel of Saint Leonardes and thereunto adjoining (except only one parcel of the said land soyle and ground to be appointed and enclosed by the said executors to be a gardine or gardines for the said poor persons) during the time that he shall exercise the office of the curate there and it shall and may be lawful for the said minister for the time being to receive and take the rents and profits (except before excepted) and convert to his own use as a further recompence for the celebrating and readinge of the said divine service there in manner aforesaid. Item wee doe alsoe ordain that there shall be also for ever hereafter paid yearly out of the rents issues and profits of the premises to some learned preacher for [26] two sermons to be made and preached to the said poor people within the said chappell of Saint Leonards thirteen shillings and four pence (viz.) for each sermon six shillings eight pence of which two sermons one to be preached yearly at some convenient time in the Christmas holydays and the other sermon to be made yearly in the time of Lent for the better edifying and instructing of the said poore persons and such other people as shall then resorte thither the said preacher as also the said curate or chaplain to be nominated and appointed by the said Charles Foxe sonne and heir of the said Charles Foxe deceased, Edward Foxe the elder and Edmund Foxe and Edward Foxe the younger or the greater number of them the survivors of them during their lives and the life of the longer liver of them and after their decease to be nominated and appointed by the heirs males of the body of the said Charles Foxe the sonne and heir of the said Charles deceased lawfully begotten and for want of such issue by the heirs males of the body of the said Charles deceased and for want of such issue by the right heirs of the said Charles Foxe deceased for ever. Item as touching the overplus rest and residue of the rents issues and profits of the premises wee doe ordayne and appointe that the same shall remain and be employed and bestowed and used from time to time for ever, as necessity shall require in and upon the necessary repairacons of the said chappell and almshouses and for the levying receiving and gathering of the said rents issues and profits the receiver of which said rents shall be continually appointed by the overseers and discretion of the said Charles Foxe (sonne and heire at apparent of the said Charles Foxe deceased) [27] Edward Foxe the elder Edmond Foxe and Edward Foxe the younger and the survivor of them during their lives and of the longer liver of them and after their deceases and the longer liver of them by the feoffees of the premises for the time being or the greater number of them and that the said feoffees for the time being for ever shall yearly make account thereof to the wardens of the parish church of Bromfield in the county of Salop how and in what manner the said profits rents and revenues shall be from time to time

defrayed and employed and bestowed and the surplusage and overplus thereof (if any shall be) to pay and deliver to the said churchwardens for the time being and they together with the vicar of Bromfield for the time being to employ and bestow the same for and towards the increase of the yearly stipends appointed as aforesaid and limited to him that shall be chaplain or minister for the time being of the said chappell of Saint Leonards or otherwise as to the discretion of the said vicar of Bromfield for the time being shall seeme meet and convenient. Item wee doe also further order that if any of the said foure poor people soe placed or to be placed at any time hereafter in the said almshouse or chamber shall disorder or misbehave him or herself in such sorte as is unmeet and unseemly for such poor distressed persons being soe charitably and well provided for to doe or as to the said parties to whom the nomination election and appointment of them doth belong as aforesaid shall seeme unfitt and inconvenient that then the said parties to whom the said election and nomination of them shall for the time being appertain as aforesaid shall from time to time as neede and occasion shall require remove or displace such of the said [28] foure poore persone or persones for disordering or misbehaving him her or themselves and from time to time to nominate and appointe and place others in the place of such person or persons so removed or displaced soe as the full number of foure poore persons and noe more may be alwayes there retained succored and maintained with such allowances as aforesaid according to the true meaning of these orders herein contained."

Henry Foxe the surviving trustee named in the indenture of the 2d of April, 1593, by indenture, dated the 8th of February, 1640, conveyed and assured the almshouses, messuages, chapel, and premises, unto and to the use of Somerset Foxe the elder, Edward Foxe, Richard Foxe, John Foxe, and Ralph Foxe and Somerset Foxe, of Cainham and Henry Foxe, and their heirs and assigns, in trust for the charitable uses and purposes in the indenture of the 2nd of April, 1593, and the ordinances mentioned.

Somerset Foxe and Henry Foxe being the surviving trustees named in the last mentioned indenture, by indenture of the 1st of October, 1684, made between Somerset Foxe and Henry Foxe on the one part, and Charles Foxe of Westminster, Chesterton Foxe, Henry Foxe of Reteskin, Francis Foxe, Edward Foxe, Matthias Foxe, John Foxe, and Charles Foxe of Ludlow, of the other part; after reciting the testator's will and the indentures and ordinances of the 2d of April, 1593, and the last mentioned indenture, and also reciting that the chapel was then lately re-edified at the sole costs of Somerset Foxe (party thereto): it was witnessed, and Somerset Foxe and Henry Foxe, for the continuance and preservation of the charitable work so founded by the testator, and for other good and valuable considerations, gave, [29] granted, enfeoffed, and confirmed the premises unto Charles Foxe of Westminster, Chesterton Foxe, Henry Foxe of Reteskin, Francis Foxe, Edward Foxe, Matthias Foxe, John Foxe, and Charles Foxe of Ludlow and the survivor and the heirs and assigns of the survivor for ever: upon trust and confidence that they, and the survivor and the heirs and assigns of such survivor should and would from time to time dispose of the said premises, and employ the rents and profits thereof according to the charitable intention of the testator mentioned and comprised in the articles of the 2d of April, 1593, a copy whereof was unto the now reciting indenture annexed.

Henry Foxe of Reteskin having survived his co-trustees named in the last mentioned indenture, died about the year 1726, leaving Henry Foxe, then of Leominster, his eldest son and heir at law, who died intestate, leaving James Foxe, his brother, and heir at law.

By a deed of feoffment, dated the 10th day of April 1769, and made between James Foxe, brother and heir of Henry Foxe, and also grandson and heir at law of Henry Foxe of Reteskin, who at his death was the only surviving trustee for the charity, of the one part, and the Bailiffs, etc. of Ludlow, of the other part: after reciting the indenture of the 2d of April 1593, and the articles and ordinances of the same date, the indenture of the 8th day of February 1640, the will of Charles Foxe; and that under the indenture of the 2d of April 1593, the premises at Worcester, almshouses, and chapel of Saint Leonards, became vested in the before-mentioned feoffees, the said Henry Foxe and others, who were since dead, and also reciting the indenture of the 1st day of October 1684: and that all the trustees, named [30] in that indenture, had

long been dead: that Henry Foxe, of Reteskin, was the surviving trustee: but died about the year 1726, leaving only two grandchildren, both infants, viz. Henry Foxe, brother of James Foxe, and the said James Foxe party thereto, and the said Henry Foxe and James Foxe, the grandsons of Henry Foxe of Reteskin, being infants at the time of the decease of Henry Foxe, their grandfather, and their own father dying before their grandfather, the said infants were brought up in parts beyond the seas: and the charity during their infancy, became neglected, and the chapel went greatly to decay, as did also the four messuages and burgages, in the city of Worcester; and also reciting, that Henry Foxe, deceased, the brother of James Foxe, party thereto, upon his attaining the age of twenty-one years, and coming into England, and being informed that the said trust was then become vested in him, and that the occupiers of the premises in Worcester (who were in low circumstances) set up a right to the same, caused application to be made to such persons for the possession of the premises, in the city of Worcester, or that they would attorn tenants to him for the use of the charity; which being refused, Henry Foxe caused a suit in ejectment to be brought on his demise in his Majesty's Court of King's Bench, and obtained a verdict upon the trial thereof at Worcester assizes, some time in or about the year 1751; and also, soon afterwards, obtained one other verdict at the assizes held for the county of Salop, for recovering possession of the almshouses or almshouse in Ludlow; and also reciting, that the four houses or burgages, in the city of Worcester, belonging to the charity, and so recovered by [31] Henry Foxe, being gone so ruinous and decayed, were incapable of repair: and therefore, for the making the best advantage thereof, for the use of the charity, Henry Foxe, granted building leases thereof, at the ground rents, and under the several leases therein more particularly mentioned and described. And also reciting, that the four several messuages, tofts, or burgages, and premises, having been so recovered and demised by Henry Foxe, he from the rents and profits of the same, caused the almshouses, in Ludlow, to be repaired, and paid and maintained four poor needy and indigent women therein, until the day of his death, which happened in or about the month of May 1762; upon whose death the trust, vested in James Foxe, as being the only brother of Henry Foxe, and the only grandson and heir of Henry Foxe of Reteskin, the surviving trustee named in the indenture of release of the 1st day of October 1681; and also reciting, that since the decease of Henry Foxe, brother to James Foxe, the said James Foxe had caused the rents of the houses to be received, and had paid and maintained four poor and indigent women within the almshouses; but the chapel called St. Leonard's chapel, in Ludlow, and near adjoining to the almshouses, was many years before the last named Henry Foxe's coming to England, and had been ever since, in a decayed and ruinous state and condition, and there being then not known to be living any person or persons of the name and kin of Charles Foxe, the testator, whereby to fill up a sufficient number of trustees or feoffees of that family, for the continuing and perpetuating the charity, and James Foxe living remote from the premises, had, on application from the bailiffs and commonalty of the town of Ludlow, [32] and on their agreeing to make an order of their council or chambers for affixing their common seal to one part of the now stating indenture, and accepting the trust according to the grant therein made thereof, agreed as far as in him lay, to vest the said chapel, almshouses, and the said messuages or tofts at Worcester and premises, and the trusts thereof, in them the said bailiffs, burgesses, and commonalty, and their successors for ever, upon the trusts and ordinances before mentioned relating to the same, and that the said James Foxe had to the now reciting indenture annexed an account of the receipt and application of the rents and profits of the said premises from the time his brother Henry Foxe recovered the said four messuages or tofts at Worcester as before mentioned to the day of the date thereof, It was witnessed that for continuing and perpetuating of the charitable work founded by Charles Foxe, and for the establishing a sufficient number of trustees and feoffees for performance of the charity, and for other good causes thereunto moving, he the said James Foxe did, as trustee, and as far as he lawfully could give, grant, bargain, sell, infeoff, release, and confirm unto the bailiffs, etc. of Ludlow, and their successors for ever, all the aforesaid messuages, lands, and tenements, with the appurtenances situate near to the chapel of St. Leonard, and also the said chapel of Saint Leonards, and the land, soil, and ground of the same messuages or almshouses, and chapel thereunto belonging, and also all those

several messuages and premises, in the city of Worcester, and demised by Henry Foxe, brother of James Foxe, for the use of the charity, in and by the several indentures of lease thereinbefore mentioned, to hold subject to those indentures of lease unto [33] the bailiffs, etc. and their successors for ever in trust, and to and for the support of the said almshouses and four poor, needy, and indigent persons, to be paid, kept, and maintained therein, from the rents and profits of the said premises according to the original intention of the said charity, such persons to be thereafter nominated and chosen of the parishes of Ludlow and Bromfield, or one of them by the majority of the bailiffs, burgesses, and commonalty for the time being, and for the other charitable uses and purposes set forth in the said recited indentures, articles, and ordinances relating to the said charity: and the bailiffs, burgesses, and commonalty for themselves, and their successors, covenanted and agreed with James Foxe, his heirs, executors, and administrators, that they the bailiffs, burgesses, and commonalty, and their successors, should from time to time for ever thereafter save harmless and indemnified the said James Foxe, his heirs, executors, and administrators, from and against all costs, charges, and damages which should happen or be occasioned to him or them, by means, or on account of his granting or conveying the premises thereby granted or conveyed unto the bailiffs, burgesses, and commonalty, or their successors, on the trusts, and in manner therein mentioned.

Upon this indenture of feoffment livery of seisin was indorsed.

By lease and release dated the 7th and 8th of October 1771, the release being made between James Foxe of the one part, and the bailiffs, burgesses and the commonalty of Ludlow of the other part, reciting the indentures and articles of the 2nd of April 1593, of the 8th of February 1610, and of the 1st of October 1648, it was wit-[34]-nessed that for continuing and perpetuating the charitable work founded by the testator and for establishing a sufficient number of trustees for the performance of the charity and in consideration of ten shillings James Foxe as trustee and as much as in him lay, granted, released, and confirmed unto the said bailiffs, burgesses, and commonalty and their successors and assigns for ever the said almshouses, chapel, and premises by the description therein mentioned. To hold the same unto and to the use of the bailiffs, burgesses, and commonalty and their successors for ever, In trust for the support of the almshouses and four poor, needy, and indigent persons to be paid, kept, and maintained therein from the rents and profits of the premises according to the original intent of the charity, such persons to be thereafter mentioned and chosen of the parishes of Ludlow and Bromfield or one of them by the bailiffs, burgesses, and commonalty or the major part of them. And for such other charitable uses and purposes set forth in the therein recited articles and ordinances relating to the said charity as were then existing and capable of taking effect:—And the indenture contained a similar covenant on the part of the said corporation to *indemnify* James Foxe, his heirs, executors, and administrators—and a declaration that James Foxe had deposited with the corporation for safe custody the several indentures, articles, and ordinances in or by the now reciting indenture mentioned or recited.

On the 8th of July 1815, The Respondents presented their petition to the Lord Chancellor whereby after stating that the testator Charles Foxe was entitled to the chapel, burial ground and almshouses, and [35] reciting the will of the testator, the indentures and ordinances of the 2d of April 1593, the indenture of the 1st of October 1684, and indentures of lease and release of the 7th and 8th of October 1771, and that the stipend of the minister of the chapel for the time being had been augmented by various other persons who had granted certain endowments thereunto payable for ever and which consisted of an annual payment of one pound out of a certain estate situate in Ludford, an annual payment of one pound out of a certain estate situate in the parish of Ashford Bowdler, the annual sum of fourteen shillings out of certain leasows called chapell leasows, and the annual sum of twelve shillings out of three houses situate in Dinham, which several sums passed to the corporation by the indenture of the 8th of October 1771, and that upon the execution of that indenture the corporation entered upon and took possession of the chapel almshouses and all other the messuages lands and premises belonging to the charity and into the receipt of the rents and profits thereof and had ever since continued to hold the charity premises, but that in the year 1773, the corporation caused the chapel to be pulled down and destroyed contrary to the trusts reposed in them, and without any faculty from the ordinary of the diocese

or any other authority for so doing, and that they sold or applied to some other building all the timber and the materials thereof and received the produce arising from such sale amounting to a considerable sum but that they did not apply such produce to the purposes and upon the trusts of the charity, and that soon after such sale the corporation granted a lease of the scite of the chapel and the chapel-yard adjoining to a member of the corpo-[36]-ration, for a term of ninety-nine years at the low and inadequate rent of £1 15s. per annum, and that since the demolition of the chapel the proprietor of the estate in the parish of Ludford had refused to pay the annual sum of £1 on the ground that there being no chapel existing the rent charge for the minister thereof could not be claimed or demanded, and further stating that during the time when the chapel stood many of the parishioners of the parish of St. Lawrence (in which parish the chapel was situate) used to resort thereto for the purpose of attending divine service and that the ceremony of baptism and burial was frequently performed there, but that since the chapel had been pulled down and the scite thereof and the yard adjoining let, the parishioners had been deprived of the benefit and all opportunity of resorting thereto, and had been prevented from using the chapel yard for the purposes of burials, which was attended with great inconvenience to the parish, as the burying ground belonging to the church of Saint Lawrence (which was the only burying ground in the parish) was infinitely too small for the purposes of burial in the parish, and that the bodies of deceased persons were constantly taken up before they ought to be in order to receive the bodies of others, and that the corporation had constantly elected poor persons of the town of Ludlow to fill up the vacancies which had occurred in the almshouses and had not elected any poor persons from the said parish of Bromfield (except in one instance) since the trusts came under their management, and that the trusts of the charity had been in numerous other instances mismanaged and neglected: and that when the chapel was kept in repair there was an excellent pulpit, and many good [37] pews therein, and a very large congregation always attended divine service there, and that when the same was going into decay several of the inhabitants of Ludlow were about to make a subscription for the repairs thereof, which was opposed by the Rev. Thomas Rocke, then rector of Ludlow, who stated that he should be deprived of some Easter dues, if the chapel was repaired: the fact being that the rector of Ludlow had a small glebe but chiefly depended for his income on his Easter dues:—and further stating, that at the time when the chapel was pulled down in the year 1773, the bell belonging to it was removed to the market cross of the town of Ludlow, where it had ever since been and then was, and that the timber of the chapel was either wholly or for the most part sold, and part of the timber was used in building the house of one William Felton, of the town of Ludlow, and the stones of the chapel were applied in building a new bridge over the river Corve, in the town, and some of the pews were removed from the chapel to the parish church of the town and placed in the galleries of the church:—and further stating, that the chapel yard had many grave stones in it and was used for a burying ground during many years, and that the chapel when it was pulled down might have been repaired at a small expense, for the side and end walls were of great thickness and quite sound, and that the timbers consisting of the beams, summers, wallplatts and rafters of the roof were also sound and strong, and that the decay was only in the tiling of the roof: that there was only one church in Ludlow which was not sufficient to contain one-fourth of the inhabitants: that two or three families used one pew, and that the church nearest to it was not in the same county:— [38] and further stating, that the rents and profits of the trust estates when the leases had expired, would be much more than sufficient to answer all the purposes of the charity, but the corporation had not rendered any account thereof to the vicar or churchwardens of Bromfield, or to any other person, and what they had received they had retained or in some manner misapplied: and that the corporation had omitted and neglected to register the charity and the purposes and trusts thereof in manner directed by an Act of Parliament passed in the fifty-second year of his late Majesty's reign entitled "An Act for the registering and securing of Charitable Donations," as by the Act they were bound to do.

The Respondents by the petition prayed, That it might be referred to one of the Masters of the Court to enquire into the trusts of the charity, and to approve

a proper scheme for the due regulation and management thereof, and that the lease of the chapel yard might be ordered to be cancelled, and the yard applied to the purposes of burial, and that an account might be taken of the want of repairs to the chapel, when the same was taken down, and what sum of money would have been sufficient to repair the same, and what sum of money it would now cost to rebuild the chapel upon the same plan and dimensions as the old chapel, and that the corporation might be ordered to account for all the rents and profits of the trust estates received by them or by their order or for their use, and also for the timber, pews, stones and other materials of the chapel converted or disposed of by them and that the amount of what should be found due from the corporation upon taking the accounts might be paid into the hands of the Accountant General of the Court, in trust for the charity, and [39] that if on taking the accounts the amount should be found insufficient to rebuild the chapel that the corporation might be ordered to pay such further sum of money sufficient to rebuild the chapel, or put the same into the condition it was in at the time when it was taken down, and that proper persons might be appointed feoffees or trustees of the chapel and charity premises; and that the corporation might be ordered to convey the premises to such new feoffees or trustees upon the trusts of the charity, and that proper directions might be given for registering the charity according to the provisions of the Act of Parliament, and that the corporation might be ordered to produce and leave with one of the Masters of the Court, for safe custody, all the title deeds, papers and writings in their custody or power, and upon the oath of their treasurer, secretary, town clerk or agent, relating to the charity premises.

This petition having been allowed by the Attorney General, twelve affidavits were filed by the Respondents in support of the allegations of the petition, which came on to be heard on the 17th of November, 1815, before the Vice Chancellor,* when the Appellants the corporation appeared by their counsel and opposed the prayer of the same, having filed nine affidavits in answer to the petitioners' affidavits. After hearing the petition, the Vice Chancellor declared:

"That the bailiffs, burgesses and commonalty of the borough of Ludlow, had been guilty of a breach of trust in pulling down Saint Leonard's chapel in the said petition mentioned, and converting or disposing of the timber, pews, stones, [40] bell and other materials of the said chapel as stated in the said petition, and did therefore order that the said Corporation be discharged from being feoffees or trustees of the charity estate, and did order that it be referred to Mr. Jekyll, one of the Masters of the Court, to appoint new feoffees or trustees of the charity estate in the room of the corporation, and did order that the bailiffs, burgesses and commonalty of Ludlow, should at their expense convey the charity estate to such new feoffees or trustees and their heirs upon the trusts of the said charity, and they were to declare the trusts thereof accordingly. And his Honor did also order that the said Master should settle such conveyance, and that the said Master should enquire and state to the Court what were the timber, pews, stones, bell and other materials of the said chapel, and the value thereof at the time they were converted or disposed of by the said Corporation, and what had become of the said timber, pews, stones, bell and other materials. And did order that the said Master should also inquire and state to the Court what would be the expense of restoring the chapel and the burial ground belonging thereto into the state in which they were at the time such breach of trust was committed, and for the better discovering of the matters aforesaid the parties were to produce before the Master upon oath all books papers and writings in their custody or power relating thereto, and were to be examined upon interrogatories as the Master should direct, and did order that the corporation should pay unto the petitioners their costs of the said application, and of the proceedings to be then had before the Master [41] under the same to be taxed by the Master, and after the Master should have made his report, such further order should be made as should be just."

In July 1816, the corporation presented their petition of appeal to the Lord

* Sir Thos. Plumer. See the Report on the original hearing. 1 Mad. Rep. p. 92. The order was pronounced after Sir T. P. had become Master of the Rolls.

Chancellor against this order which was heard on the 10th, 11th, and 13th days of August 1821, and on the 12th of September following, the order was affirmed.*

Pending the appeal, various proceedings took place before the Master under the original order of the Master of the Rolls, and several orders were made against which no appeal was presented.

Upon the hearing of the petition of appeal the Lord Chancellor observed that unless the possession of the site of the chapel were recovered, the chapel could not be restored, and therefore he suggested that an information with the Attorney General's sanction to vacate the lease granted by the Corporation of the chapel, scite and burial ground should be filed which the Respondents undertook forthwith to do, and accordingly on the 13th of February, 1822, the Attorney General at the relation of Francis Hand, Edward George, William Edwards, and Thomas Cadwalladar, (three of whom were the new feoffees of the charity appointed and approved of by the Master under the reference to him) filed an information in Chancery against [42] Richard Gibbon, and Hannah his wife, and other persons representing or claiming under Edward Acton, the original lessee, praying that the lease granted to Edward Acton by the Corporation of Ludlow might be declared a fraud upon the charity, and that the defendants might be compelled to deliver up the lease to be cancelled. To which information two of the defendants (Sarah Acton and Mary Acton) appeared and put in their answer.

The bailiffs, burgesses, and commonalty of Ludlow, appealed to the House of Lords against so much of the order of the 17th of November 1815, as declares

"That they have been guilty of a breach of trust in pulling down and converting and disposing of the timber, pews, stones, bell and other materials of the chapel; and as directs that they shall be discharged from being trustees of the charity estates, and also against so much thereof as directs a reference to the Master to appoint new feoffees or trustees, and also against so much thereof as directs that the Appellants shall at their expense convey the charity estates to such new trustees and their heirs upon the trusts of the charity, and that the Master should settle such conveyance and inquire and state to the Court what were the timber, pews, stones, bell and other materials of the chapel, and the value thereof at the time they were converted and disposed of by the Corporation, and what had become thereof, and to state what would be the expense of restoring the chapel and the burial ground into the state in which they were at the time when such breach of trust was committed.

"And also against so much of the order of the [43] Lord High Chancellor of the 12th of September, 1821, as confirms the order of the 17th of November, 1815."

For the Appellants, The Attorney General and Mr. Hart.

For the Respondents, Mr. Heald and Mr. Roupell.

Before the case was opened an objection was taken on the part of the Respondents, that the Attorney General appearing as Counsel for the Appellants, appeared against his own petition.

Upon this objection, the Lord Chancellor having observed that the Attorney General was no party to the appeal, and although he was a party to the petition which was the foundation of the proceeding, was no party upon the record in the House, proceeded thus:

It affords me great satisfaction that Mr. Heald should have raised a point which in my opinion calls for the judgment of the House upon this subject, because I think that the judgment of the House, if it shall happen to agree with my opinion upon it, may set right the practice in the Court below, which is entirely at variance with what it was when I had the honour of standing outside that bar; and I think my Noble and Learned Friend (Lord Redesdale), who sits near me now will inform your Lordships

* A question was made whether this order of affirmance was absolute and final, or conditional. The minute delivered out by the Lord Chancellor in his own hand writing ran thus:—"Confirm the order of the 17th Nov., 1815, reserving the consideration as to the regularity of the proceedings subsequently had till the next day of petitions; and in the meantime, if the parties mean to file an information, with the Attorney General's sanction, to affect the lease, let the same be filed." E. C. 12th Sept., 1821.

what was the practice with respect to the Attorney General's appearance in every proceeding by information, whether it came on before the Chancellor or at the Rolls.

This Act was passed in the 52d year of the late King, and is known by the name of Sir Samuel Romilly's Act: and having myself in this House taken a part [44] in the passing of that Act, I hope I shall not be thought to speak with any disrespect, which is the last thing in the world I intend to the high character of that individual, when I declare respecting this Act what I believe may be predicted of a great many other Acts introduced by great men, that they have done more harm than good. The interposition of the Attorney General was made necessary by the second clause of the Act, which is in these words:—"Provided always, and be it further enacted, That every petition so to be preferred as aforesaid shall be signed by the persons preferring the same in the presence of, and shall be attested by the Solicitor or Attorney concerned for such petitioners, and every such petition shall be submitted to and allowed by his Majesty's Attorney or Solicitor General, and such allowance shall be certified by him before any such petition shall be presented." Now if this Act is to be construed otherwise than by the application of those principles which belong to informations, or at least if it is not to be construed in some degree by such an application, it appears to me that the extent of the mischief will be very considerable indeed; that is, if the Attorney General has no right to interpose against that to which he has given his own sanction in the same manner and to the same extent as he can interpose with respect to the proceeding by information.

With respect to those proceedings by information, I have often taken the opportunity of stating, that within my own memory neither Lord Thurlow nor Lord Loughborough would permit a matter to proceed in the Court of Chancery on an information unless they were concerned in the cause, and I have known Lord Loughborough very often get up [45] and state to the Court, when he was Solicitor General, that neither he nor the Attorney General had been consulted upon a proceeding that was about to take place. I think my noble and learned friend near me will confirm me in that observation to the extent of saying, that even at the Rolls, the Master of the Rolls would never proceed unless there was somebody instructed to appear as Counsel for the Attorney General, not merely for the relator, but for the Attorney General.

Two cases have been mentioned, in which, certainly, I had not the least notion that I was trespassing against the rule of proceeding: *The Attorney General v. the Corporation of Bristol*,* and *the Attorney General v. the Corporation of Ereter*.† In the case of *the Attorney General v. the Corporation of Bristol*, the object of the information was to find out a fund that was to be applied to some purpose, which the Corporation of Bristol were under an obligation to execute by the application of that fund. The information had been filed, and I suppose had been laid before the Attorney General of that day, and had not been very much considered by him: but the matter when it came before the Court appeared to me to be this, that the information had called for a discovery which was to be put upon the Records of the Court of Chancery demanding information with respect to every title, every property, every right, every valuable thing which that corporation had for the then unnecessary [46] purpose, as it seemed to me, of finding out some fund that might be applied to the purpose for which that information was filed. It had the authority of the Attorney General. He had allowed it by not only putting his name to it, in the case of a petition, but he had allowed it by becoming himself a party to the information, and it did appear to me in that case, as it always appeared to me, that the Attorney General, as representing his Majesty, is bound certainly to take all necessary care of the relators: but, on the other hand, he is equally bound, as representing his Majesty, not to suffer oppression to affect the interest of the defendants, who are equally his Majesty's subjects. I therefore thought myself authorized, and I feel thoroughly convinced that I was right, in calling upon the Attorney General to look into that information, and to inform the Court whether he would abide by the information in that form, or address

* The case is still depending before the Lord Chancellor, on Appeal from the decision of the Vice Chancellor [see 2 Jac. and W. 294]. The case as it stood before the Vice Chancellor is not reported.

† See the case reported as reheard before Sir T. Plumer, M. R., Jacob's Rep. Vol. I. p. 443.—The case before the Chancellor, as alluded to in the text, is not reported

himself to a correction of it, making it effectual for the plaintiffs without being oppressive to the defendants.

The same principle was applied to the case of the Corporation of Exeter. The corporation put in an answer, which, as the answer of a corporation is without oath, had been somewhat slovenly drawn with respect to the date, for which they had submitted to account, and there was a matter of law which it may be necessary to set right at the hearing of the cause. I do not recollect how that is, but it appeared to me a most oppressive thing to call upon the corporation to account for two or three centuries, and that therefore was submitted to the Attorney General's consideration, who has the carriage of the relator's cause, and the duty of taking care of it, but such care is not to be oppressive to the defendants in the suit. It was then found that [47] all that justice could require, was to cut down that account to a reasonable period, and that a pretty long period.

I believe it will likewise be found that, even after a decree, when the cause came into the Master's office, it was the custom to require express notice to be given to the Attorney General in cases in which it was important that his consideration should be given to the proceeding in those offices.

Then the question is this. Is the allowance of the Attorney General required by the second section of this Act to have an effect which his being a party to the information would not have, and when the Attorney General has once allowed the petition which at the time of approving it he might think right, is it from that moment out of his power to correct his own opinion, though that correction be for the interest of those whose interests he is to protect, recollecting always that he is bound not to permit the plaintiffs in a cause to oppress the defendants in a cause, but to take care that the proceeding is a reasonable, fair, judicial proceeding as between the parties. I submit therefore to your Lordships, as my humble opinion, that there is no objection to hearing the Attorney General in support of this appeal.

Lord Redesdale: In all cases in which it would be important to substitute summary proceedings instead of the original regular mode of proceeding in courts of justice, this Act ought to be construed as merely intended for the purpose of saving either time or expense. Unquestionably, looking at this Act, it appears to me to be (so far as relates to the concurrence of the Attorney or Solicitor General) which is thrown into the second section of the Act, loosely and incor-[48]rectly worded. The preamble of the Act is, that it is expedient to provide a more summary remedy in cases of breaches of trust created for charitable purposes. It was not intended to alter the law upon the subject, but merely to provide a more summary remedy. Now why was the Attorney General a party before this Act passed to informations filed for the purpose of carrying into execution any charitable purpose or of remedying any abuse which might exist with respect to the application of funds given for the purposes of charity? The ground stated in all the books is this, that the King is to be considered as the *pater patrie*, that he is the protector of every part of his subjects, and that, therefore, it is the duty of his officer, the Attorney General, to see that justice is done to every part of those subjects. It would be highly improper for the Attorney General assisting in that character to press harder upon one party than upon another. It is his duty to see that justice is done, and it was for that purpose as I conceive that informations in the name of his Majesty's Attorney General were permitted for the purpose of carrying into execution charitable dispositions, or for providing for the due distribution of charitable funds. Relators were required for this reason, because the crown paid no costs. The Attorney General prosecuting as the officer of the crown could not be liable for costs, and a complaint might be made against individuals highly oppressive to them unless there were some person responsible for the costs that might be incurred in consequence of that proceeding.

I conceive that the intention of this Act, however loosely it may be worded, was simply this, to substitute a summary proceeding, instead of a [49] more regular proceeding. I have always considered that it was a wise saying, that the farthest way about is often the nearest way home; and I believe that these summary proceedings will be found to be not always the nearest way home, or at least not the best way home. I have an objection, a fixed and rooted objection, to any rash alterations of established laws, because I am thoroughly persuaded that, generally speaking, such alterations lead to mischief. In the first place, they are generally ill understood,

they are precipitately undertaken, and loosely expressed; and that which the wisdom of ages has contrived to have clearly described, is confused by the words of an Act of Parliament, often extremely difficult to interpret. The fair way of interpretation of every Act of this description is, in my opinion, to proceed by analogy to that which existed before, and to conceive that Parliament did not intend that any other alteration should be made, than that which it expressly says shall be made. It says that the proceedings, instead of being in the form of an information, shall be by petition, and upon affidavits, or such evidence as shall be produced, to determine the matter; and such order shall be made for costs and other matters, as the Court shall think proper.

If this case had proceeded in the regular ordinary course, by way of information, that information would have stated clearly what that was which the Attorney General thought a fit object of his protection: it would have been limited according to what the Attorney General thought consistent with justice, with respect to the party whom he called upon to account to him. An answer would have been put in: the matter would have thus been put in issue between the parties; and whatever was not [50] admitted in the form of an answer, must have been proved by the usual mode of giving evidence in Courts of Equity; the cause would then have come to a hearing, and a decree would have been pronounced upon a view of the whole case. The Attorney General would then have had the control of the whole proceedings; he certainly might, and unquestionably often did refuse to proceed to the extent to which relators would proceed, who might be urged on by animosity and by party considerations, especially against a corporation; and it was his duty to see that justice should be done—that justice should be done, not only to those who were the objects of the charity, but to the trustees of that charity. Many things have lately passed with respect to charities, which have had a very unfortunate effect. I know that a great many persons now refuse to be trustees for charities: they say, we are exposed in such a manner to proceedings against us, that we must beg leave to decline being trustees for a charity; and the effect will be to prevent respectable persons being trustees for charities, if they are to be exposed to the sort of proceeding which unfortunately this Act of Parliament has more than once given rise to.

As long as the law was under the direction of what had been established by practice perhaps more than by any original law upon the subject, but by practice founded on principle, namely the right of the King to protect any part of his subjects, the proceeding was perfectly well understood and regular, and, no doubt, was always under the control of the officers of the Crown. It is true that in this Act, all that the Act in words says is, that his Majesty's Attorney or Solicitor General must allow the [51] petition. Now what could his Majesty's Attorney or Solicitor General know of the merits of a case of this description, merely from the representation of the persons who bring such a petition into court. They cannot possibly know what may be the answer to the proceedings, and therefore I think the word allowance, which is introduced into this Act of Parliament, cannot be construed to mean that the Attorney General having once allowed a petition, he should never afterwards have any thing to do with the subject. The Act of Parliament does not pretend to subvert the law upon this subject. It only proposes to substitute a summary proceeding instead of a more formal proceeding; and therefore I conceive that the Attorney General must be considered as having a control over any proceeding by petition as he would over any information.

The looseness with which the Act is framed is evident from these words: "to be approved by his Majesty's Attorney or Solicitor General." Taking that without reference to what was the law previously upon the subject, that would mean that the Solicitor General, without the concurrence of the Attorney General, might approve of these proceedings; but we know very well that according to the previous law the Solicitor General could not file an information except in the vacancy of the office of Attorney General. If there was no Attorney General, the Solicitor General could in the vacancy of the office file an information. But even that was a mooted question, whether in the vacancy of the office of Attorney General the Solicitor General could file an information. The office of Attorney General being vacant, an information was filed in the name of the Solicitor General; but when an [52] Attorney General was appointed, under whose control was that information? not of the Solicitor, but of the Attorney General.

When I was early in life practising in the Court of Chancery, I had no idea that any case of an information could proceed without inquiring of the Attorney General, if it was thought fit to set down the cause for expedition at the Rolls, where the Attorney General did not usually attend, what counsel he chose to have a brief delivered to, on behalf of the Attorney General. That question was always asked, and the Attorney General always directed to whom the brief should be given. The person to whom that brief was given stood in the place of Attorney General; and it was as much his duty to see that every thing was done fairly towards the defendants in the case, as toward the charity who were the objects of the information. He considered himself as standing in the place of the Attorney General, and that it was his duty to see that nothing more was done than what justice required.

I conceive, therefore, that the object of this proceeding has been somewhat mistaken if it is supposed that the Attorney General has no right to interfere. I take it that the true meaning of the Act of Parliament is this: merely to give a summary remedy, instead of a more regular proceeding, which in ninety-nine cases out of a hundred will be found to be the best course at last. But it was intended to give this summary proceeding instead of the more formal proceeding, and was not intended in any manner to alter the law upon the subject, or to put the proceeding out of the control of the Attorney General after he had once given his *fiat*. I think, therefore, that the objection must be over-ruled.

[53] After these observations the Attorney General proceeded to argue the case for the Appellants.

In the course of the argument, the following observations were made by the Lord Chancellor and Lord Redesdale:—

1. As to the character and quality of the chapel, and the proceedings with respect to it.

Lord Redesdale: I do not see that any attention has been paid to the incumbent of the parish. Does it appear at all what the foundation of this chapel was? I ask that question because I suppose there are not less than three or four hundred spots of ground of this description in this country.

It does not appear whether the chapel was dissolved by the Act of Edward the 6th. That is extremely material; because if it was dissolved by the Act of Edward the 6th, it was desecrated by that Act, and it remained no longer a consecrated chapel; and if it was not subsequently consecrated, I apprehend that no person could, strictly speaking, do what is required to be done in that chapel.

It would have been easy to trace the title to the chapel, because being vested in the Crown it must have been granted by the Crown, and that grant of the Crown would have traced it to the individual to whom it was granted.

The ordinances are very material in one point of view, because they treat this completely as a private chapel to which the trustees had a right to appoint the chaplain, who was merely a private chaplain. Those trustees could have no right to appoint a curate to perform duty in a chapel that was to be the chapel of the parish. It might be lawful for them to have a private chapel for the use of [54] those poor people in the almshouse, but that is a very different thing from having a chapel for the use of a parish. When a chapel is for the use of a parish, I apprehend no person can appoint a curate to it without the consent of the minister of the parish, whoever he is. Is there any evidence that this was a parochial chapel?

The Master of the Rolls was of opinion that the inhabitants were bound to contribute.

The question of its having been a parochial chapel must depend upon the records in the Bishop's Court; it would have been the duty of the Archdeacon to have reported it at the time when the corporation took possession of it. That would all appear upon the record.

The witness noticed in the proceedings is not a competent witness as to the chapel, because he claimed a right to sit there.

The Lord Chancellor: The real character and nature of this chapel does not appear to have been inquired into. With respect to this being a parochial chapel there is no evidence, the order does not say so. I apprehend there are many chapels, the nature of which it is difficult to state, but having been annexed to schools and almshouses, they cannot be considered as desecrated to the extent that they may be turned into

playhouses. There are hundreds of chapels not parochial chapels annexed to colleges and other institutions, that could not be so converted.

2. As to parties.

The Lord Chancellor: Unless it can be shown that this is a parochial chapel in the strict sense of those words, what interest have the parishioners in [55] this deed? Do the petitioners state themselves to be parishioners?

In the papers, the churchwardens of Bromfield (to whom the surplus, after repairs, was to go) are mentioned, but I do not observe that the character is given to them in the petition.

Lord Redesdale: The right heirs of Charles Foxe were necessary parties to the proceeding, because they have the right to nominate and appoint the minister.

In the petition they state that the nomination is in the heirs male of Charles Foxe, with a view, I suppose, to the allegation, that all the heirs male are dead. By the ordinances, it is vested in the right heirs of Charles Foxe.

The person who made the conveyance to the corporation was the last heir of the trust, but not of Charles Foxe.

3. As to the breach of trust.

The Lord Chancellor: The agreement entered into with the corporation was a breach of trust, because the corporation undertook by that to indemnify the person, the heir male, against the effect of it—and to be sure, that was a most improper creation of a trust. They could not take the property otherwise than subject to the trusts. The transaction in 1774 was a breach of trust. Suppose this deed of trust executed in 1771, and the pulling down and the selling of the property had happened in the same year. Could the act be held consistent with that trust deed. If there had been any other trustees accepting the trust, what have they to do in destroying the trust, because other persons may not accede to a due execution of it.

[56] The order of the Vice Chancellor takes no notice of other parts of this petition, which state conduct that certainly may be wrong if truly stated: such as payments out of the charity fund on account of pulling down the chapel.

Lord Redesdale: The conveyance to the corporation was a breach of trust, and therefore it is that they indemnify the person who conveys from the consequences. The existence of a burial ground is contrary to the terms of the trust, because whatever was not assigned for gardens for the poor people in the almshouses was to be occupied by the minister.

1. As to the jurisdiction and the form of the proceedings.

The Lord Chancellor: If I remember right, in the Court of Chancery it was thought they could grant no extension of the Act. If that could be done we should be quite ready to admit that there was a jurisdiction: one question is, therefore, whether the Court has jurisdiction? I am glad to see an appeal to the House of Lords to have the point settled. If the House should be of opinion that the jurisdiction does not extend to such cases as this, it may be necessary to have a short Act of Parliament to confirm orders made upon petition which ought to have been made upon bill.

Suppose this had been an information instead of a petition, what could the Court have done with an information two and twenty years after the act committed?*

[57] If the proceeding had been in 1774, before they began to pull down this chapel, for an injunction to prevent their pulling it down, the Court would have granted that injunction.

The order of the Vice Chancellor of 1815 did not necessarily lead to charging the Appellants with any thing beyond the value of the property, the value of which he directed to be inquired into: subsequently he goes a great deal further. But supposing this matter to have come on in the year 1774 instead of the period in which the cause came on in the Vice Chancellor's Court, it would have been a question whether the value of those materials might have been charged against the Corporation as far as they would go in restoring the walls of that chapel.

Supposing the original order to be right, and supposing the confirmatory order to be right, there is nothing in either of those orders that would justify £1220 being

* See the *Attorney General v. the Brewers' Company*, 4 Meriv. 495, where Grant, Master of the Rolls, said, "It was a point not decided from what period a corporate body should be obliged to account in matters of trust." The decree was in 1816, and the account was directed from 1779. The authority of this case was adopted by Sir Thomas Plumer in the *Attorney General v. the Mayor of Exeter*, ante, page 45.

demand necessarily; that would be a question when the Master's report came before the Court. The question upon that report would be not whether the £1220 was to be paid, but whether so much of the £1220 as was the value of the materials was to be paid, for there is nothing in either of those orders that necessarily concludes that the whole expense is to be paid; if it turned out upon inquiry, as it might have turned out, that the value of the materials was equal to restoring the chapel to the state in which it was; whether, according to law, the corporation ought to be charged with something in the form of damages ultra what they have received, that is a question quite open.

Lord Redesdale: Is there any case in which the [58] Court of Chancery has awarded damages for a breach of trust? Lord Keeper Coventry was of opinion that he could not. In the case of a chapel of which I am trustee, Lord Coventry declared, that where there was a gross breach of trust, all he could do was to make the persons who had committed it account for all the profits they had made, though the thing had received considerable damage.

The Lord Chancellor: The Vice Chancellor, in the first instance, before there were any proceedings in the Master's office, orders the costs of those proceedings in the Master's office to be paid by the other parties. He does not suspend the order for the costs of the proceedings till an opportunity was had of judging by knowing what the proceedings were, and then deciding which party should pay. When that note (the minute of the order, see ante, p. 41) of mine was delivered, I conceive that it was my intention that that order should be drawn up with a reservation of the question of the regularity of the proceedings. How is it that order is drawn up, supposing it to be my opinion that the whole of the order should be confirmed? When the order was drawn up, it ought not to have been an order for the confirmation of the whole of the Vice Chancellor's order, but expressly reserving that part which relates to the regularity of the proceedings which were subsequently had.

The order of 1815 has given the costs of the subsequent proceedings, of which they complained in their petition of appeal.

With respect to that part of the original order which gave costs in the Master's office, undoubtedly when that order was confirmed there ought to have been a saving of that part of the order.

[59] The House cannot take any notice of the minute (see ante, p. 41), because the minute is not the order of the Court; there is the order of the Court, which whether it be right or wrong is not drawn up according to the minute. And it is upon that order only that this House can proceed.

The order might have been rectified upon rehearing, according to the minute.

Lord Redesdale: If the order was not drawn as it ought to have been by the Register, an application should have been made to the Court to amend the order. If the officer of the Court, in discharging his duty, did it erroneously—if he drew up the order different from the directions given by the Court, your application should have been personally against the Register, for drawing up a wrong order.

The Lord Chancellor: A question would have arisen upon the argument upon the Master's report, supposing there was the breach of trust complained of in this form, whether the Court would be justified in ordering any thing more to be repaid than what was the value of the old timber and other materials. Or if the Court thought it could not order the restoration of the chapel at a greater expense, whether this Corporation was to be visited in damages. If there had been a proceeding right in its nature, proper in its jurisdiction, and all the proper parties brought in at the time, nobody can deny that the Corporation must have been answerable for the materials.

With respect to any orders but those two appealed against, we have nothing whatever to do. If those two orders are confirmed, whether any others are to stand this House cannot decide, because they are [60] not appealed from; if those orders are reversed, then they fall without any order at all.

If the value of the timber and materials was equal to the expense, by incurring which the whole was to be restored, the Court would have been justified in directing that value to be so applied.

At the conclusion of the argument the following observations were made by

The Lord Chancellor: I rise for the purpose of protesting against its being understood that we have any thing to do with the various transactions stated upon the appeal and the printed cases, in the first place with respect to the report of 20

December 1817, the order of the 13th of June 1818, the Report of the 6th of February 1819, and the order of confirmation, bearing date the 22d of February 1819, or the order of the 26th of June 1822, or the 30th of July 1822. The appeal being only against the order of 1815 and part of the order of 1821, it appears to me that a great deal of the argument with respect to what is the law by which you are to charge a Corporation arising out of the other orders, is quite out of the case; because there is no appeal against any of those proceedings. If those proceedings fall to the ground by the reversal of the order of 1815 and the order of 1821, then there is no occasion to say any thing about them. If, on the other hand, these orders do not fall to the ground by reason of that reversal, the consequence is that they must be dealt with as they can be dealt with elsewhere; for there is no appeal against them here. The case therefore must be necessarily confined to the question, are the orders of 1815 and 1821 right or wrong? And that question embraces so many [61] important considerations, that you will have enough to do in confining the subject of the appeal to that question, and not travelling out of it.

Lord Redesdale: This Appeal comes before your Lordships upon a proceeding under the authority of an Act of Parliament which was probably intended for the furtherance of justice, but which undoubtedly, as it appears upon this proceeding, seems only to have tended to increase expense, and answer no useful purpose.

That Act of Parliament was calculated to supply a more summary mode of proceeding, instead of the established mode of proceeding with respect to charities. In the reign of Queen Elizabeth, an Act was passed which is commonly called the Statute of Charitable Uses, and that Act authorized the issuing of certain commissions to inquire in respect of what are called charitable uses and trusts. That Act authorized the Court of Chancery to issue commissions directed to certain persons: of those persons, one was to be the bishop of the diocese, with other persons selected for the purpose, and they were authorized to proceed by summoning a jury of the county where the property in question was situated for the purpose of inquiring whether there had been any abuse or misapplication, or mistaken application of the funds belonging to the charity. Several proceedings were had under that Act, and a long train of decisions by the commissioners is reported in a book called "*Duke's Law of Charitable Uses*." Of those proceedings many were not very consonant to justice: those proceedings, however, were subject to review by the Lord Chancellor, many of them were reviewed, and when [62] reviewed, they were found so puzzling, or at least not obtaining the ends of justice by an easier mode of proceeding, that I believe a commission has not been issued for a great number of years, it having been found to be much more convenient to return to the old mode of proceeding by information by the Attorney General, bringing the matter in question formally upon record, stating the claims that were made upon individuals charged with a breach of trust, calling upon those individuals to make a defence, and putting their defence upon record, and then having a complete issue upon the record, upon which the judgment of the Court of Chancery might be formed.

Commissions for charitable uses having thus fallen into disuse, partly by their abuse (and whoever reads the proceedings under them must see there was frequently great abuse) and partly because they were found insufficient in prosecuting the claim in many instances, and also from being extremely unjust, in many instances, as to the persons called upon to account for property, or the persons sought to be charged by means of those commissions, the proceeding, for many years past, has been by information in the name of the Attorney General. Those informations were necessarily under his control, and it was the duty of the Attorney General to see that they were not improperly exhibited. Unfortunately, I believe, the Attorney General has not always been selected from among persons in the habits of business in the Court of Chancery; and it sometimes happens that informations of this description have been inadvertently signed by the persons holding the office of Attorney General. By the Reports of *Atkyns* and *Vesey* you will find that Lord Hardwick frequently [63] found fault with the proceedings of that description. In some cases he dismissed the informations, and ordered the relators to pay the costs, hinting that the Attorney General had not used sufficient caution upon the subject. I mention this, because in the course of the proceeding an objection was taken to the Attorney General appearing in the appeal against the proceeding which has been had for what was supposed to be a furtherance of the charity. I apprehend

it was the duty of the Attorney-General to interfere, I do not say exactly in the manner in which he interfered in this case, because I think the Attorney General ought to have stopped the proceeding in an earlier stage of the business, for it is impossible to look at these proceedings without perceiving that the Act has done what could not be the intent of the framer of the Act, under the authority of which it proceeded: it has done that which Lord Hardwick frequently reprehended; it has produced great expense without any possible adequate good.

The Act of Parliament is entitled "An Act to provide a summary remedy in cases of abuses of the trusts created for charitable purposes." If the intent had been to supersede the prior law on the subject, the Act would have been so expressed; but it seems to me it cannot possibly be so intended: indeed I should say that almost in any case it was not a positive Act. It recites, "Whereas it is expedient to provide a more summary remedy in cases of breaches of trust created for charitable purposes, as well as for the just and upright administration of the same, Be it therefore enacted," etc. The preamble seems to me to import, that it was applicable to those cases only in which upon complaint made by petition in this way, the Court of Chancery could see the whole of the [64] proceedings which they were called upon to institute, and all that ought to be done by them in consequence. The Act does not create what one might properly call a new jurisdiction, but it gives the liberty to proceed upon the old jurisdiction in a summary way in certain cases; it certainly does not provide for a variety of cases relating to charitable uses and trusts; it cannot possibly therefore extend to all: it must be considered as referring to certain particular cases. The Act says, that this proceeding shall be "by petition to the Lord Chancellor, the Lord Keeper, or Lords Commissioners for the Custody of the Great Seal, and to the Master of the Rolls for the time being, or to the Court of Exchequer, stating such complaint and praying such relief as the nature of the case may require."

Now, although adverting to the subject in question, the Attorney General might have a choice, perhaps, in which Court he would sue, it does not seem to me that this Act, in that enactment, has been very attentive to what was the established jurisdiction either of the Court of Chancery or the Court of Exchequer in this matter. But it then provides, "That every petition so to be preferred as aforesaid shall be signed by the persons preferring the same in the presence of, and shall be attested by, the Solicitor or Attorney concerned for such petitioners and every such petition shall be submitted to and be allowed by his Majesty's Attorney or Solicitor General and such allowance shall be certified by him before any such petition shall be presented."

I cannot conceive that it was the intention of the framer of that Act merely that the Attorney General should sign his allowance to this as a matter of course, or the Solicitor General: for under this Act [65] parties are told that they may proceed either by the Attorney or Solicitor-General; but it has been determined that the Solicitor General is no officer of the Crown for such a purpose; while there is an Attorney General his office is subordinate, and therefore it cannot have been the intention of the legislature that a practice of that kind should be altered by Acts of Parliament framed sometimes by persons ignorant of the subject to which they apply, which cannot be said in this case, supposing the framer of the Act to have held the office of Solicitor General; he must have known that his office of Solicitor General was subordinate to that of the Attorney General. Having provided that, it does not go on to say the subsequent proceedings shall at all be under the control of the Attorney General, but surely it must be so intended. Can it be imagined that the Attorney General was merely to put his *allocatur* to this petition, and then it was to proceed without any further control on his part? That would not be at all analogous to a proceeding by information, because, whenever the proceeding is by information in the common and ordinary way, the Attorney General is in every part of the proceeding, though the Attorney General does not always act personally. If he happens to act in the Court of Chancery before the Lord Chancellor, of course he is the person who appears as counsel in the information. It is in the course of business to send a brief to him upon the subject; but if the proceeding is heard at the Rolls, where the Attorney General does not always attend, I believe he never interferes there; then the course I have always understood was to apply to the Attorney General, to know to whom he chose the brief should be deli-

instituted for one of these purposes, it was thought fit by Parliament to put an end to it. Perhaps chapels of this description, many of them, could have become, if they had been suffered to remain, chapels of ease to parishes; that would have been a great accommodation to the [69] inhabitants living near those places; but in the progress of the Reformation (we must allow there was a little violence in the proceedings) they were all swept away. Perhaps one reason for that was, that the counsellors and advisers of Henry the 8th and Edward the 6th were rather desirous of obtaining some of these lands, which they did in great plenty. The ancestor of the present Lord Petré was then Secretary of State, and he got a very large grant of that description; and Queen Mary, wishing to restore them to their original purpose, took them from him. This chapel was probably of that description. But whatever it was, the persons who preferred this proceeding have never thought it worth their while to inquire. Now if this had been a proceeding by information, I apprehend the Attorney General, or the person whom he deputed for that purpose to look into the proceedings, would have desired to know what this chapel was; he would have said, If I am to file an information for the purpose of having this chapel rebuilt, which is the object of these proceedings, I must desire to know for what purposes it is to be rebuilt. I must desire to know what it was, and some inquiry must be made on the subject—and I have very little doubt that a little diligence would have found out the origin. It must have been derived from a grant by the Crown; there was nothing to do but to search the calendar of Patents from the Crown previous to 1590, and probably a grant would have been found, for it must have been from the Crown, and they would then have known whether it was possible to be applied to the purposes for which they sought to have it applied.

The persons who present this petition are inhabit[70]-ants of Ludlow, who insist by their petition that this is a chapel which ought to be maintained for their convenience; so far it is a question of the personal interest they have in the subject; and they ought to have informed themselves upon the subject before they went to the extent of filing this petition, praying that this chapel might be appropriated to the uses to which they desire it to be appropriated; for they state expressly they had a right to have it applied to the uses of a parochial chapel.

For the purpose of deciding whether they have a right to this relief or not, there are other persons to be consulted. In the first place, the incumbent of the parish of Ludlow was to be consulted. I doubt whether the person who made this will was not aware of this, for he directs that the curate of Ludlow shall be the person who shall serve this chapel. I have been unable to find out (though I have looked into Mr. Bacon's book for the purpose) what sort of a living the incumbent of Ludlow has; I do not know whether he is a rector or curate or what. I think he is a curate only, and that there is not in Ludlow an ecclesiastical rector; there may be a lay rector or vicar, but no ecclesiastical rector, or if so, I apprehend he has no tithes, because this proceeding states that he had nothing for his maintenance but a small glebe, and the rest of his maintenance consists of his fees for marriages, baptisms, and so on. If he has nothing for his maintenance but this small glebe and those fees, he was importantly interested in these proceedings, for he had a right to contend that no burials, baptisms or marriages should take place in that chapel and that a chaplain should not be appointed. I am not clear whether his Majesty's Attorney General (as I under-[71]-stand now * the appointment of the rector of Ludlow is in the Lord Chancellor, in right of the crown) ought not to be a person appearing for his Majesty's own interests. It seems to me, therefore, that when we consider this case throughout, with respect to the rights of the person who may be rector, or whatever he is called, in Ludlow, (and I cannot help thinking, that although he may be now called rector, that at the time of this bill, he was called curate, because I have known cases of that kind, where a curacy of this description has been transformed into a rectory, by the presentation to the rectory, and so altered in the books,) the person who penned this will evidently conceived there was an interest of some description in the person having the ecclesiastical office in

* The Lord Chancellor had said that he believed he had once or twice made a spiritual rector of Ludlow.

Ludlow, which would be interfered with by the purposes for which he built the chapel.

If it was not a chapel authorised by law, at the time when this will was made, directing it to be applied to the purposes mentioned in the will, the will could not lawfully direct it to be so applied, but it might still be applied, according to the doctrine which is often laid down in cases in Duke's Law of Charitable Uses, to another description of charity. However, the claim upon this proceeding is, that it should be applied to this as a parochial chapel. It is impossible under a summary proceeding of this description, for the Court of Chancery to limit its application in that way, because there are not persons before the court capable of sustaining a proceeding of that description. The will then directs that a further proceeding shall be had after his death, for the purpose of completing certain [72] almshouses he meant to be built, and which formed the first object of his consideration, and also the carrying into execution the rest of the directions in his will, the appointment of people and so on for the almshouses.

After his death a deed was executed for this purpose, in which very complete directions are given with respect to this charity, in conformity with his will. So far directions were not necessary for the purpose of this chapel: those directions apply to the almshouses and the persons to be appointed. That is not the object of this proceeding by petition: that has been totally lost sight of: the almshouses and the people in the almshouses have never been thought of in this proceeding; the minds of the persons engaged in this proceeding were solely confined to this chapel for the convenience of certain persons in Ludlow. Now in the view of the original testator Charles Foxe, and in the view of the person who after his death proceeded, according to the directions of his will, to carry it into effect, the almshouses were the principal object of their consideration, and they appropriated this chapel more with a view to the attendance of the people in the almshouses, than the accommodation of any other persons who might live in the neighbourhood, and who probably, as the parish church of Ludlow is not so convenient to many of the inhabitants as this chapel, would have attended it: in the proceeding upon this petition of appeal, the attention of the court has been directed to the chapel and nothing else.

The deed which was executed in pursuance of the direction in the will of the original testator Charles Foxe, prescribes the manner in which the charity [73] shall be afterwards managed; it provides also for the manner in which new trustees shall be appointed, and it directs that those shall be nominated first of all by the heirs male of Charles Foxe; and if there are no heirs male, then by the heirs general. An inquiry has been made upon these proceedings, whether any such heirs existed, and this has introduced into this proceeding something which appears to be extraordinary. Lord Powis asserts that he is, in right of Lady Powis, entitled to name the trustees of this charity, and entitled also to present to the almshouse and chapel, and therefore he has put himself in as an Appellant with the Corporation of Ludlow. Now he is no party, and therefore, I apprehend, that the appeal, as to him, ought never to have been received, and if the House had attended to the circumstances, the petition of Lord Powis, as an Appellant, ought to have been instantly rejected, as being a person who had no right to appeal: with respect to him, therefore, I apprehend that the appeal must be dismissed as having been improperly received.

With respect to the bailiffs, burgesses and commonalty of Ludlow, they certainly are persons interested in what has been done in the court below, and they have a right to complain of it. It is not possible, upon a proceeding such as this is, in the court below, that any thing can be done effectually for the purposes of this chapel, if it is such as has been represented, because it is impossible, upon that summary proceeding, to make any order effectually upon the subject. This has been found, as I understand, already upon one part of the case, viz. the ground which was the site of this chapel, has been granted for the purpose of a building lease, and is [74] built upon, and in order to erect this chapel, those buildings must be removed, and there must be a proceeding calculated to effect that object against the person in possession of this ground, as lessee, in whom the legal estate appears to have been vested, by the demise which has been made to him, under the circumstances of this

case, for the purpose of removing him from that ground, in order to enable the Court to direct that this chapel should be re-erected, if by law it can be used for the purposes mentioned in these proceedings. It has therefore after all been found necessary, as I understand, that an information should be exhibited for that purpose. Now that circumstance alone shows that this application was improperly made to the Court, in the first instance, by way of summary petition. The object of the act of parliament was to save expense, to make it a more easy and less expensive mode of proceeding, to bring before the Court the abuse or any misapplication of a charity; but if there must be also a proceeding by information, of what use is this summary application.

It is often found that attempts to introduce more summary proceedings lead only to greater inconvenience and greater expense; the ordinary and regular proceedings in Courts of Justice are carried on in a way with which all the persons who practise in those Courts are familiar: they proceed regularly in a course which puts in issue all matters that ought to be put in issue, and enables the Court to judge in what manner finally to dispose of such a proceeding. Upon this summary mode of proceeding, calculated it is said to save expense, the taxed costs of the persons who present this petition under the orders pronounced upon that subject (I do not [75] mean to say your Lordships have any thing to do with it, because there are proceedings subsequent to those complained of in this Appeal, but I mention it merely for illustration) that the expense very nearly amount to £300 upon one appeal, including the costs of the other party; and after all there is an information, which information might have included the whole of this case, and brought the expense into one suit, instead of dividing it into two. The proceeding, therefore, instead of saving expense, has created a very considerable additional expense.

But this is not all. I apprehend that the information which has been filed will not do unless they have brought before the Court other persons than are brought before it upon this petition; for in that proceeding, if it is merely a proceeding to vacate the lease and to have the property restored, I presume the Corporation of Ludlow must be parties, and there must be other parties to the proceeding, because if this cannot be restored for the purpose for which it was intended to be applied, what is to be done? Is the Court to direct the chapel to be built for no purpose? Certainly not; that would not be an advantageous application of the funds of this charity, the original object of which was the establishment of almshouses. The Corporation of Ludlow have acted certainly most unadvisedly in this business, and in consequence of having so acted they have got themselves into a great difficulty. It seems to me, that in this case, when this petition came before the Vice Chancellor, he thought that all he had to do was to make them pay for having so acted; for he not only directed the Corporation of Ludlow to pay the costs of the original proceedings, but he directed them to pay the costs of all the pro-[76]ceedings before the Master, however vexatious and improper those proceedings might be; although it is usual, I apprehend, in such cases to reserve the consideration of those costs until it shall appear what has been done. That is a little of the rage that belongs to this sort of proceeding; but he seems never to have thought of the almshouses. Now, what is the object of those relators who are named in this petition as being of the parish of Bromfield—what is their subject of complaint? Their subject of complaint is, that in the appointment of persons to those almshouses the Corporation of Ludlow have with a natural sort of predilection preferred the people of Ludlow to the people of Bromfield; and though the people of Bromfield were entitled as much as the people of Ludlow to have their neighbours appointed to the almshouses, the Corporation of Ludlow had thought of their own people only. There was a pretty good ground of complaint on the part of the inhabitants of Bromfield, yet this petition seems to have been silent upon that point; and the Corporation of Ludlow having neglected their friends at Bromfield, the Vice Chancellor who made the order seems as little to have thought of them, because the counsel probably were instructed only by the good people of Ludlow, and did not care for the people of Bromfield. But nothing effectual can be done in this matter without having before the Court (if they exist) the heirs at law of Mr. Charles Foxe. There may be no heir male of Charles Foxe living; but it is not very probable that Charles Foxe has left no heir—it is

extremely improbable: but that is not put in issue in this proceeding—it is not asserted he had no heir, and it is impossible to proceed in this case without the heir at law of Charles Foxe, if there is [77] such heir at law in being; and if there is no such heir at law in being, the right that was in Charles Foxe is vested in the Crown, and the Attorney General, if he is not the party claimant, must be the party defendant. It is clear that this proceeding can answer no purpose but of expense; it can answer no good purpose whatever; it is impossible to act upon it if you had now before you that sum of money that may be finally reported due upon these proceedings; you cannot attend to those subsequent proceedings except for illustration. If you had it now before you, or the Court of Chancery, if they had it in Court, they could do nothing with it; what has taken place since we have nothing to do with, further than as it affords an illustration of these modes of proceeding: it is impossible to proceed upon it. If such an order had been made, the money ought to be paid; if not paid into Court, to trustees appointed for the purpose of carrying the trust into execution: no such trustees are named, as far as I can find, and even the relators are not trustees; they might as well have ordered the money to be paid to any of your Lordships as to these trustees. That is a necessary consequence of this sort of summary proceeding: the view of the Court is confounded by not having before it a regular proceeding on record in which the matters are put in issue, and the decree founded upon the matters so put in issue, and that decree regulating all the subsequent proceedings, the house acting upon the regulation so introduced by the original decree in the cause. I use that only for the purpose of illustration, for otherwise it is not properly before you, although there is a great deal of other matter in these cases. That part of the order of the Vice Chancellor which directs an appointment of new trustees has never [78] been acted upon at all; and I wish to know what right the Master had to make the report he has made without having other parties before him. If one looks at this case one sees with what a temper the whole of these proceedings have been carried on; indeed, I must express my surprise at the original order: the original order proceeds in great degree, though not with the same violence, to charge this Corporation with a breach of trust. Now that they were guilty technically of a breach of trust is certainly true. They were guilty of a breach of trust when they took upon themselves this conveyance—this was itself a breach of trust; they had no right to interpose themselves as trustees, and they must endure all the consequences of that improper conduct on their part: they put themselves into the character of trustees where they had no right to put themselves.

But when I look at this case I think there are facts to try the truth of the evidence without any thing else. The Noble Lord now at the head of the Government in Ireland, when he was in India did me the honour to consult me upon several matters relating to the Mysore country, and amongst other things informed me of a report made to him by the Agent at Mysore, and he related a conversation with a Bramin, the Prime Minister of the Native Prince at Mysore, upon the extraordinary contradiction of evidence he observed in their Courts of Justice: ten persons would swear one way and ten other persons the contrary; and he said, How is it you are able to distinguish the truth? The answer was, it was certainly very difficult, but the way in which we act is this: we endeavour to find out some circumstance which is unquestionably true, and by that circumstance we try all the rest. I happened to mention [79] this to a gentleman, now the Chief Baron of the Court of Exchequer in Ireland, then Attorney General in Ireland, and he said that is what we are obliged to do in Ireland: we often find ten people swearing one thing and ten people another, directly in contradiction to each other, and we endeavour to find out some fact to try the truth of the evidence. Applying that rule to this case, there is a fact which seems to me to be pretty strong to show that the Vice Chancellor, afterwards the Master of the Rolls, did not properly try the contradictory evidence: for it appears that the surviving trustee named in the last of these deeds died, leaving two infant grandchildren, who were his heirs, and at his death it became the persons interested in this charity, the parish of Ludlow as far as it was interested, and the parish of Bromfield also, that they should immediately at least have instituted a suit to have proper persons appointed; but it was suffered to remain forty years in that condition, and all the objects of the charity alienated. After a length of time, the grandson of the surviving trustee became of age, and returning to England from abroad, he pro-

ceeded first of all to recover the property which was the foundation of this grant, and was put to a considerable expense in that proceeding. Upon his dying, his brother went on in the same way with the suit. Those gentlemen were certainly trustees, as heirs of the surviving trustee, therefore they carried it on very properly; being put to expense and trouble in this proceeding they were very glad to get rid of it, and willingly enough transferred this to the Corporation of Ludlow, receiving from that Corporation an indemnity for what had been so done.

[80] Now this fact, that for so many years this charity was left in this situation, proves to me what is the truth of the evidence in respect to the state of this charity. I believe it to be perfectly true, as it is stated, that there was not a whole window in this chapel, and that all the pews were burnt: that the boys and girls of the place played at ball, or any thing else there; nay, that they built up with loose stones a wall for the purpose of playing in that archway: the very circumstance of the desertion of that charity for so many years convinces me that that evidence is true, and that the evidence on the other side is not true.

All that has been done in this proceeding has been money thrown away: and after all is it possible for any effectual proceeding to be had for the purposes of this charity but by an information in the name of the Attorney General? Such an information it is said has been already filed for the purpose of vacating this lease. But how can they proceed in that information if they have not the heirs at law of Charles Foxe before the Court, or cannot show by fair evidence that he died without heirs at law? I apprehend the Court can make no decree upon that information as it stands. The first proceeding upon that information, as I apprehend, must be to direct an inquiry to be made, whether there is such a person as the heir at law of Charles Foxe; and I also apprehend, that upon that proceeding, there must be some means found to ascertain whether this is a chapel for the purposes mentioned in the petition in this case; that is, whether it is a parochial chapel or no: if it is not, what is to be done? Are the funds to be applied for the purpose of rebuilding this chapel if it cannot be used for the purposes mentioned [81] in these papers? It is therefore evident to me that this is not a case within the true intent and meaning of this Act of Parliament; that the Act meant to apply to those sort of single cases where nothing was to be inquired but whether A B and C made parties to the petition, had been guilty of a breach of trust, and to order that to be done in consequence which seemed fit and necessary. Where a proceeding by information is necessary, there can be no use in this summary proceeding, which was certainly intended by this Act to supply the purposes of an information, and to prevent expense; whereas, if it is to be used for the purposes to which it is intended to be applied by these proceedings, there must be an information, and the proceeding by petition only increases the expense.

Under this apprehension, I conceive it is clear that no order could be made by the Vice Chancellor: he ought to have said, this is a case which cannot proceed by the summary mode, you ought to have proceeded by information; this is not a case within the Act of Parliament; I have no jurisdiction to pronounce an order. The Vice Chancellor under the circumstances of this case, was not authorized by this Act of Parliament to pronounce any order whatever; he had no right to direct trustees to be appointed, because the deed before him expressly directed that the heirs of Charles Foxe should nominate the trustees: what right had the Vice Chancellor to supersede that direction in the face of the deed itself? Certainly none: the proceeding was improper, and the order which has been pronounced must be reversed: the petition must be dismissed, the Court not having power to pronounce upon it.

With respect to the subsequent proceedings, they [82] are not before the House, and we cannot pronounce any order upon them. With respect to Lord Powis, he has no business here, and as this is a case in which all parties are wrong, the consequence is, that being all wrong, each must pay his own costs: it is a consequence of the bad advice they have received.

I think it extremely important upon this occasion to signify what appears to me, at least, to be the true and proper construction of this Act: the Act itself, though certainly it has the reputation of being framed by a very respectable and a very able person, yet I must say that it has the appearance somewhat of haste. One ques-

tion has arisen upon it, I am told, whether an information could not be filed by the Solicitor General? The words in the Act are "the Attorney or Solicitor General." Now that has arisen from the haste used in drawing this Act. The learned person who is supposed to have framed it himself, must have known that the Solicitor General could not act of himself when there was any person occupying the office of Attorney General: perhaps he thought it was so well understood that it was not necessary to insert words for the purpose; but there ought to have been inserted in this Act the words, "by the Attorney General or in the vacancy of that office by the Solicitor General:" Those words, to make this Act correct, ought to have been so inserted, but all who are cognizant of the law must interpret it in that way.

There is another thing which ought in prudence to have been inserted, but perhaps the person who framed the Act thought it the natural construction, viz., that the proceedings should be constantly under the control of the Attorney General, because it seems according to the expressions of the Act, that having [83] signed the petition there is an end of his office, and that the Attorney General has nothing more to do with it. That cannot be the meaning of the Act; the Act does not import that you are to take away from the Crown the authority which it exercised in cases of charity by means of its officer the Attorney General; the Attorney General is merely the representative of the Crown; it is in right of the Crown the Attorney General appears in cases of charity; it is not by any thing that is vested in him as Attorney General except as he is the officer of the Crown. The King, as *parens patriæ*, interferes to protect his subjects who have an interest and who, from their situation, cannot themselves interpose in cases of charity; and if the application of any part of the property to superstitious uses had formed any part of the establishment of Charles Foxe, it would not have been the officer, but the King, who would have had the right to interfere.

In a case* which has been partly heard, your Lordships will have very seriously to consider these questions: having looked at that case with some view of this subject, I have no doubt in my own mind the information is there by the Attorney General. The only question is, whether the King has a right to interfere; whether, when a duty is imposed and that duty is not discharged, and there is no individual who has a right to compel the performance of that duty and to institute a suit in a court of justice for that purpose, it is not a part of the prerogative of the Crown, or whether the Crown has not generally a right, to compel the performance of that duty?

In the time of Lord Hardwicke, several cases occurred where informations by the Attorney General came before him which he dismissed, making the rela[84]-tor pay the costs; and he dismissed them for this reason, because they were improperly instituted: they were suits in which either the parties personal interests led to the institution of the suit, or the suits might have been wholly avoided; and if this had been an original proceeding before your Lordships, or if the decision of the Vice-Chancellor had originally been to dismiss the petition with costs, I must have concurred in affirming the decision: because if four persons take upon themselves to institute such a proceeding, they ought to inquire whether they are authorized to institute it. I apprehend they are not authorized: at the same time there was an excuse to be made for them, we are told; namely, that in some cases the Court of Chancery had taken upon itself to make orders, which, according to the better judgment of the Court in subsequent cases, it would not now make. I believe Lord Hardwicke presided at the time when this rage for charity, something like the rage for Negro emancipation, carried the zeal of the people too far; and upon one occasion, where there was something extraordinary, (I am not certain that it was before Lord Hardwicke, I think it was Lord Maclesfield,) he said the Courts had forgotten a very common expression, that it was not lawful to steal leather to make poor men's shoes. In this case there can be no doubt there ought to have been an information, and not a proceeding in a summary way. No effectual order can be made upon the proceeding now before your Lordships. As to one part of the case an information has been actually filed, and that information might with propriety have embraced the whole case; instead of

* *The Attorney General v. the Corporation of Dublin*. Argued in D. P., 23-26 Feb. 1827. The case will be reported.

saving expense, this has been a proceeding to create an additional and unnecessary expense, and after all it cannot be applied to any useful purpose.

[85] Why were commissions for charitable uses in these cases not pursued? The Act of Queen Elizabeth directs the Court of Chancery to issue in certain cases commissions to inquire by commissioners, who were to be respectable persons, and were to proceed upon the verdicts of juries. Under these commissions questions were tried constitutionally, and by the interposition of a jury. The commissioners, upon the finding of those juries, made decrees, and those decrees were subject to review by the Chancellor, and he might affirm or reverse those decisions founded upon the finding by juries. We may grant that that was a much more solemn way than this, in which questions of fact were to be tried in the ordinary way of trying questions of fact, by the cross-examination of witnesses instead of proceeding as has been done in this case, merely upon affidavit, in which there is no cross-examination. Now in this case can it be doubted, if the persons who made those affidavits had been cross-examined, that the case would have come out very differently on both sides. One side has sworn a great deal too much, because not checked by cross-examination; and the other side a great deal too much the other way. Those are consequences which the commissions for charitable uses provide against, by trying questions of this kind before a jury, in which all the witnesses might be examined in chief and cross-examined. Why have commissions for charitable uses not been issued of late years? because it was found instead of tending to diminish expense that they created it, and unless this Act of Parliament is confined within very narrow limits, I have no doubt in the world it must have the effect it has had in this case, namely, of creating expense instead of diminishing it. Upon [86] the other branch of the question, in what manner the trust shall be executed, and how trustees are to be appointed, that may be done by petition to the Chancellor: it is a very simple case, in which the Chancellor may give directions upon the subject: but if there is a question what is the nature of the trust, and who are the parties to manage it, it is not a case for a petition, but the party ought to proceed by information.

I have troubled your Lordships very much at length upon this case, because I thought it most important that it should be rightly understood that this Act is confined within a narrow compass; and unless it is so confined, instead of being productive of convenience it will be productive of inconvenience, and instead of saving expense in the administration of charities, it will be the means of creating very great expense without at all facilitating the object in view. It is upon this impression that I move your Lordships to reverse the order that has been pronounced by the Vice Chancellor which is complained of, and which is complained of only in part. It is in effect complained of with respect to the whole, though in terms it is complained of only in part, and that has produced some difficulty in my mind on the case; but I apprehend if you are of opinion that under the circumstances no order can be pronounced upon the Vice Chancellor's order, that then you are, from the nature of the case, compelled to reverse the order, without attending to any particular exceptions; and if the substance of the order is wrong, the only course for you to pursue is, to reverse the whole of the order. With respect to the other Appellant, you ought to declare that the interposition of Lord Powis in the character of Ap-[87]pellant, was wholly irregular, and that his petition of appeal ought not to have been received.

The Lord Chancellor: Upon this petition, as to some points, there can be no hesitation what the House ought to do, or to forbear to do. As to the question whether the Master ought to have made his report in 1817, or whether the subsequent orders not appealed against should or should not have been made, the House has nothing to do with the consideration of those points. The single question here is, ought the Vice Chancellor's order of November 1815 to be reversed; if that order is reversed, it follows of course, that what is stated to be the order of the Chancellor of September 1821 (if it be the order of the Chancellor) ought also to be reversed; and I do not think I should be doing justice to the character of a deceased Judge of a very high reputation, if I did not most distinctly admit, that upon the 12th of September, 1821, the present Lord Chancellor had in his own hand writing handed out a minute confirming that order. It is a duty I owe to Sir Thomas Plumer's memory to state, that though that order of confirmation has been most irregularly drawn up, it is

most undeniable, that upon the 12th of September, 1821, those words flowed from my own pen, and then the question may be put in this way: are you to reverse or to confirm the order of the Vice Chancellor? and what I must now take to be the order of the Chancellor, whether it was his order or not, for being drawn up, and that order not being discharged by any subsequent application, it stands upon the records of the Court as the order of the Chancellor, proceeding either correctly or incorrectly upon the authorities that are to be found for it.

It is my habit to put down short notes of what I con-[88]-ceive may be right to be done, giving to the parties an opportunity of representing why they think that which I think right, is wrong. This order was made upon the 12th September, 1821, when the Lord Chancellor could have very little assistance from the gentlemen at his own bar. The whole question now is, are those orders made consistently with the true intent and meaning of the Act which is usually called Sir Samuel Romilly's Act? With respect to the jurisdiction of the Attorney General in charity cases, I have always stated it to be his duty to watch every proceeding from the commencement to the end in an information by relators; for certainly I could never understand why relators are to have the sanction of the Attorney General, if it was not founded upon this principle, that the Attorney General, proceeding on the one hand as representing his Majesty in courts of justice, was to take care that those interests should be protected which the relator sought to maintain, and that he was likewise to take care that those against whom it was to be sought, were not to be oppressed.

The Act upon which we are now proceeding is an Act which is part of the law of the land, and according to that law we must proceed in courts of justice. I do not at present enter into the consideration whether Parliament did or did not act wisely in that particular act of legislation. It is an existing Act of Parliament which binds courts of justice. The question therefore is, have we or have we not in this order done that which Parliament meant we should do under the authority of that Act of Parliament? There is no denying that it was a very favorite Act at the time when it passed, though it has been open to great difficulty in the construction. That [89] learned and most respectable person himself, who is known to have been the author of it, did over and over again maintain, as Counsel at the bar of that Court in which I have the honour to preside, a construction of this Act which goes far beyond what is now the acknowledged construction. Those words "breaches of trust," to be found in the Act of Parliament, have been so largely construed as that a great many cases have passed there without an objection being taken that those proceedings were out of the reach of the provisions of the Act in the presence of the author of that Act. However, I think we have now got to this restriction, (and I shall be glad to have the sanction of this House upon the present occasion, if your Lordships agree in the judgment proposed,) that this Act is to apply only to simple cases, and not to cases as involved as some of those have been in which, without all question, orders of the Court have been made upon petitions founded upon a much larger view of the authority of the Court than could be now maintained with any hope of success.

With respect to the petition of Lord Powis, he being no party in the Court below, it appears to me he has no right to interpose by appeal, and that petition must, upon the ground that has been stated, be removed from this table.

With respect to the facts of the case, we find that in the year 1590, there was unquestionably a chapel in this place, called Saint Leonard's Chapel: that is quite clear, because the purchase deed of Mr. Foxe states the fact that there was that chapel. In the year 1769, when the family of that name was reduced to the individual who seems to have wished not to execute the trust any longer, a conveyance was made [90] to the Corporation of Ludlow, and after that conveyance had been made to the Corporation of Ludlow, if an information had been filed in the year 1773, when they were about pulling down that chapel, either to enjoin them from pulling down the chapel, or if they had sold the materials, calling upon them only to account for the price of the materials, I should have said, without all question, that the corporation taking that conveyance in 1769, were parties to a clear breach of trust: that they were guilty of a most obviously clear breach of trust: because notwithstanding all that I can suggest to my own mind, with respect to the right of the Bishop as diocesan, with respect to the right of the Curate of Ludlow, if there be a curate, or with respect to the Rector of Ludlow, if he is a rector, or with respect to the heir of

the Foxe family, when the Corporation of Ludlow by the instrument in 1769, took upon themselves to carry into execution all the charitable uses and purposes upon which this charitable foundation was made, and made themselves trustees for those purposes, that the Corporation being such trustees, had no right whatever to take upon themselves to turn diocesan, rector, curate, heir at law, or any thing else, and destroy the charity; and it is pretty obvious, I think, and no very strained construction of the matter to say, that those who took the conveyance in 1769, upon the trust to carry into execution the charity-purposes mentioned in that very instrument, that they put an end to it in the year 1773, giving an indemnity to Mr. Foxe, who conveys to them, actually contemplating when under a breach of trust, they became trustees, also to carry that breach of trust further by intending to do the act, and doing the act they did in 1773. That [91] raises the very difficulty whether looking at the whole that is stated in this petition, this is or is not to be considered a case within Sir Samuel Romilly's Act.

The Court is bound to take care, (and I do not think that in this case I took sufficient care,) that the petitioners have a clear interest in the subject, and that they prove themselves to have that interest in the subject which they state upon their petition. I mention this circumstance the rather because Sir Thomas Plumer in his judgment proceeds upon this as a parochial chapel: I mean, in giving the reasons of his judgment as they are reported. He does not state it to be a parochial chapel in his order; but let it be recollected that the petitioners do state it to be a parochial chapel: that they so treat it; and if they treat it as a parochial chapel, I apprehend they will be bound to show it is a parochial chapel, if they are seeking for the maintenance of their rights as such parishioners. Now if they fail in proving themselves to be such parishioners, it does not therefore follow that the Corporation of Ludlow was not guilty of a breach of trust: because, whether this was a parochial chapel or not a parochial chapel, provided the complaint were recent and brought by persons competent to bring it, and in a form in which it was competent to make the complaint, I should say it was a breach of trust by the Corporation of Ludlow, whatever was the nature of the chapel. For they who took the conveyance as trustees to maintain the chapel, had no right to exercise any notion of their own, and destroy the possibility of executing that trust. But when the petitioners come to state that it is a parochial chapel—which is what they state in effect—when they say that their [92] interest is founded on their character as parishioners, I apprehend the Court is bound to try that question, because it is the issue that they offer; that we as parishioners have a right in this, and therefore if the order stops short of such an inquiry as that which the case would require, and the Court ought to have directed, I apprehend that would be an objection to the order itself.

But there is another question, which it is quite impossible to deal with in this short mode of proceeding under this Act: and that is, whether, supposing them to have the right, it is competent to them (I think this is a question that should be decided upon an information, and not upon petition); whether it is competent to them as parishioners to see this destruction taking place in the year 1773, and to make no complaint in any form to any Court until the year 1815; that is to say, whether they shall for forty-two years together acquiesce in this, and then at the end of forty-two years come into Court to have that done (for you are to look at the prayer of the petition) which, under the circumstances that have taken place during their acquiescence for forty-two years, cannot be done. Sir Thomas Plumer's order about inquiring into the value of those materials, and so on, might be right upon an information recently brought. It might be very right as to the particular objects; but could it be possible, without going a great deal further, to maintain, that even upon an information, without other parties, you could have entered upon the soil of the ground where this chapel stood, recollecting how that is now occupied, merely upon bringing before the Court a case in which you might establish the right you sought to maintain; but which you [93] could never maintain effectually without having destroyed other rights which this petition could not destroy, because we have agreed that a right granted to a third person cannot be destroyed by petition.

In the first place, it is open to the most serious consideration, whether after such a length of time, regard being had to the authorities, you can or cannot give the relief that is asked even by information. And in the next place, if there is to be an

information, under all the circumstances that now attach upon this property, an information for that purpose, which is the prayer of this petition, to rebuild or restore this chapel to the state in which it was in 1769, that is the walls of it and so on; I say you cannot get the length that is necessary to do justice between all persons interested in this case, without various other parties, and without other proceedings, which proceedings with reference to other parties, I am not aware could be mixed up in this petition; after you have got this proceeding upon petition, you must begin the other proceedings by information, to set aside the lease, and obtain those directions consequential upon the destruction of the lease, to carry this charitable institution and all its purposes into effect.

The result upon the whole of my opinion is, that in making this order, Sir Thomas Plumer has made an order upon a petition which ought only to have been made upon an information; and I think it but justice to him to repeat, that I have fallen into that error myself. Let it however be recollected, in justice to Sir Thomas Plumer and myself, that a great deal of what has now been stated in objection to those proceedings, is stated upon a further consideration of the proceedings, upon matter, in many respects, [94] additional to all that the judges in both the Courts below heard upon the subject. The public is much indebted to Mr. Hart for bringing this matter before this House, in order that the true intent and meaning of the Act of Parliament may be better understood, and that we may avoid in future those errors which the Court has fallen into, not in this case only, but I am afraid in many other cases.

There is not the least pretence for dismissing those orders with costs; both the parties have been very much to blame in the business; the Corporation never ought to have taken this trust, and the manner in which they have dealt with it, does not entitle them to costs. It is right that the order in the Court below should be reversed, without costs on either side.

After these opinions had been delivered, the Attorney General and Mr. Hart suggested that certain costs paid by them under an order, which by the judgment now about to be pronounced, was ascertained to be erroneous, should be refunded.

Lord Redesdale: It is the fault of the Corporation of Ludlow to have suffered this case to go on without making earlier application to this House; if they have suffered any thing in consequence of not so applying, it is the result of their own negligence. When Sir Thomas Plumer, as Vice Chancellor, pronounced that order, if the Appellants were dissatisfied with it, they might immediately have appealed to the Chancellor, without having incurred any other costs than the costs of the petition. They did not think fit to do so, but they suffered the case to go on a considerable time, and then they appealed to the Chancellor, and the Chancellor affirmed the order; and I must now take it, because I have no [95] doubt that the fact was so, that it was not drawn according to the intention of the Chancellor and the direction he gave. It was their duty to have applied to discharge the order drawn up contrary to the Chancellor's intention; they have not done that; and the consequence is, as it seems to me, that the difficulty they have got into, has been owing entirely to their negligence; whether they can or ought in any manner to have those costs is another thing, but I think it is a subject upon which this House cannot act.

The Lord Chancellor: There is another reason which makes it very difficult for this House to deal with it; upon the 18th of June 1818 there is an order not appealed against, which not only directed the Appellants to pay the costs of the application then made, but goes on to order also that they should likewise pay £160 6s. 8d., the former costs.

Mr. Hart: That is not appealed from to this House, because there is upon that subject an appeal from the Rolls to the Lord Chancellor not yet decided.

Lord Chancellor: Then upon that appeal the question whether you should be ordered to pay those costs or not, may be discussed below.

Judgment reversed.

[96]

ENGLAND.

(IN APPEAL FROM THE COURT OF CHANCERY.)

ZACHARY MACAULAY,—*Appellant*; EDWARD SHACKELL, THOMAS
ARROWSMITH, and WILLIAM SHACKELL,—*Respondents*.

[*Mews' Dig.* vi. 979, S. C. (*Shackell v. Macaulay*), 3 L. J. (O. S.), Ch. 27-42; 2 Sim. and S. 79. Considered on point as to discovery in *Wilmot v. Maccabe*, 1831, 4 Sim. 263, at p. 265; but see *Hill v. Campbell*, 1875, L. R. 10 C. P. 222 at p. 247. Commented on in *Springhead Spinning Co. v. Riley*, 1868, L. R. 6 Eq. 551 at p. 561.]

Where a libel had been published, and the person libelled elected to seek his remedy by action for damages, and to the declaration in such action, the Defendant pleaded as a justification the truth of the facts constituting the libel, and filed against the Plaintiff in the action a bill, stating that the transactions in question took place in a distant colony, and that the witnesses to the facts were not in England, and praying a Commission to examine those witnesses, and a discovery from the Defendant, and an injunction to stay proceedings in the action until the return of the Commission: *Held* upon a demurrer to the bill in the Court below and upon appeal that the Plaintiff in equity was intitled to the Commission and the injunction. But as to the discovery, the Plaintiff having, in his bill, charged and interrogated upon facts impeaching the character of the Defendant in Equity, and facts which might subject him to criminal proceedings, whether such Defendant is bound to answer any interrogatory which indirectly tends to establish the charge, or any interrogatory affecting him with moral turpitude or degradation of character. *Quære*.

Such a bill is not sustainable where it appears that the evidence is not material to prove the case at law. The bill ought therefore to shew what are the pleas at law. But if it refers to them so as to make them part of the bill, it is sufficient.

To support such a bill it is not necessary to allege that the witnesses were residing in England at the time of the publication of the libel, or have since left it.

On the 1st of July, 1824, the Respondents filed a bill in the High Court of Chancery, stating that there had been for some years back, and was in the month of October, 1823, printed and published a certain weekly newspaper, entitled "John Bull;" and that, towards the latter [97] end of the year 1823, a Controversy arose and took place relative to the State and Condition of the West India Islands and the Slave Population there; and that Edward Shackell, as the printer and publisher of the said newspaper, engaged in such controversy, and published in the said newspaper, divers articles of intelligence, arguments, and observations, in and about such controversy; and that Zachary Macaulay had been for many years actively engaged in divers societies, professing to have for their object the abolition of the slave trade, the improvement of the condition of the negro population of the West Indies, and the civilization of the west coast of Africa; that the said Zachary Macaulay took an active part in the aforesaid controversy, on the side opposite to that advocated in the said newspaper; and that on the 26th of October, 1823, in the course of such controversy, the complainant, Edward Shackell, printed and published a number of the said newspaper, in which is a passage in the words and figures following; that is to say, "Of all the papers printed in the metropolis, we believe we may take to ourselves the exclusive credit of having prognosticated the evils which have arisen to our occidental possessions from the laudable efforts of the saints. We alone have stood forward to vindicate the West Indian planter against calumny and aspersion— we alone have made the struggle in defence of his character and property— we have called with a loud voice— we have sounded the alarm. This, let it be observed, we have done alone, and in opposition to the powers that be. It cannot but be gratifying to us, therefore, to find that Government have resolved to send ships and troops immediately to the West [98] Indies, to protect the lives and property which have been put into jeopardy by the agitation

of the emancipation question in Parliament. In another part of to-day's paper we have commenced an exposure of the character of Mr. Wilberforce, which we purpose to continue. It is impossible that we should suffer a person, whose name is known all over the world, to use the influence his notoriety gives him for such purposes as those to which he has been pleased to apply them; and it is only by ripping off the mask, which he has so successfully worn for many years, that we can do our duty to our country. Those who have traced the proceedings of the African Societies through a series of years—those to whom the names of Macaulay, Stephen, and Wilberforce are familiar, will do well to recall all the facts which have come to their knowledge, arrange them, sift them, and analyze them; and we think, after this calm examination, their minds will be better prepared for what we, perhaps, may have occasion to publish, than they can possibly be at this moment. Far are we from wishing to ask any question of Mr. Zachary Macaulay, the once needy overseer, now elevated into an opulent merchant, touching the sum of £129,961 11s. 11d. paid to him on account of Sierra Leone; nor do we mean to inquire how much philanthropy was blended in the exertions used to capture negroes, for which upwards of £275,000 has been paid by Government. We certainly have no desire to recur to the paltry sum of fifty guineas, which Mr. Macaulay actually took for sending home upwards of ten tons of white rice as a premium, which, we believe, he himself proposed that Government should offer. We do [99] not mean to call public notice to the fact, that in the same page of the accounts of the Sierra Leone Company, in which the sum of £14 5s. 6d. is charged for clothing African boys at school, there is an item of £107 12s. for a piece of plate to Mr. Macaulay,—to that Mr. Macaulay who served himself in all he did for the Sierra Leone Company, or the African Institution, who had obtained nearly a monopoly of the trade, constant freights for his ships, the prize agency of almost every man of war since the abolition, the agency for the governor, garrison, seizures, and a control over every thing in the colony; who, when the colony was given up to the Government, appointed himself King's Agent, which, however, the late Duke of Portland did not sanction; we care not for all this: this, if it be not sanctity and purity, is human nature, and we find no fault with Mr. Zachary Macaulay for feathering his own nest; but we must have off the mask—we must strip him of his cloak—we will have the world to see a very active, bustling, worldly, enterprising man, making his way in the world, and getting rich from a mean origin and a humble station. But we will have no cant—these Gents have gone on quite long enough—they have played their game to the extent of risking our colonies once or twice before; those colonies are now in actual danger—it is no time for half-measures—the moment to strike the blow is at hand, and the saints and their motives must be exposed. In all we have said of Mr. Macaulay, we have said nothing that could injure any man who did not set himself up as a spotless moralist, an unworldly philanthropist; perhaps Mr. Macaulay may remember to have read a petition from the [100] Nova Scotia Settlers to the Directors of the Sierra Leone Company; there is in it a paragraph, in which they complain that Mr. Clarkson had promised, amongst other things, they should be supplied with every necessary of life from the Company's stores, at the moderate advance of 10 per cent. on the prime cost and charges: that while Mr. Clarkson remained in the colony they paid no more, but since that they were charged upwards of 100 per cent. At the time alluded to Mr. Zachary Macaulay had the monopoly of trade; perhaps Mr. Macaulay may remember the time when the African Institution obtained the direction of the Crown estates in Barbice, in order to try experiments for the amelioration of the condition of slaves: the consignments fell into the hands of Messrs. Babington and Macaulay; perhaps Mr. Macaulay will recollect, that the agent for the ships of war claimed and received from the Navy Board large sums as bounty upon captured negroes, payable by government when the prizes were finally condemned: perhaps he will remember that the sentences of the Colonial Vice-Admiralty Court were reversed by the High Court of Admiralty in England—that this agent then informed the commissioners that he was ready to refund £5000 upon application, which was made, and the money paid; but it was at the same time discovered, that the agent still held in his hands £46,000 more bounty money, which he had received while the cases were under appeal; and as he could not legally hold the sum, he was compelled to refund that money also: the commissioners demanded the interest for the time he had kept the principal—the agent refused to pay it—the affair [101] was put into

the hands of their solicitor—this agent was Mr. Zachary Macaulay: Mr. Macaulay may, perhaps, remember, that when Mr. Stephen wrote those letters which bear the signature 'Truth,' he mentioned the fact, that the Berbice commissioners so rigidly adhered to the principle of economy, that they borrowed the house of a friend as a place of meeting: this very Mr. Stephen subsequently signs a report, being one of the commissioners, in which it is declared that the commissioners found it necessary to appoint a secretary at £300 per annum, which included, however, the expense of an office: to this secretary then, in an unprecedented manner, the commissioners gave £300 per annum, while every other consignee of West India property carries on all the correspondence, and pays his clerks and office rent and other expenses out of his commission—this secretary was Mr. Macaulay: perhaps Mr. Macaulay will recollect the circumstance of removing the field women from town to Sandvoort, and tearing them from their husbands and families, which excited discontent, and induced the necessity of punishment: perhaps Mr. Macaulay may recollect that the object in thus breaking every tie which the abolitionists profess to maintain, and in doing that upon which the whole anger of the African Institution had in all other cases been fulminated, was considered favourable to the property of the commissioners, and the consequent augmentation of the consignments to England—the consignees were Messrs. Macaulay and Babington."

The bill then stated, that although such number of the said newspaper was published on the 26th of October, 1823, yet the said Zachary Macaulay took no [102] notice thereof until the latter end of the month of January, 1824, when the said Zachary Macaulay having discovered, as the fact was, that the several witnesses, by whose testimony the Plaintiffs could establish and prove the several allegations contained in the said passages, were abroad, and not likely to be in England, he, the said Zachary Macaulay, did, in or as of Hilary Term, 1824, commence an action at law against the Plaintiffs in his Majesty's Court of King's Bench at Westminster, and declared in such action, in or as of the said Hilary Term, 1824, and in the first count of the declaration filed in such action, the said Zachary Macaulay complained of the whole of the said passage so printed and published as aforesaid, on the 26th of October, 1823, as being, and charged the same to be, a false, scandalous, malicious, and defamatory libel, of and concerning him, the said Zachary Macaulay; and in such count the said Zachary Macaulay set forth the whole of such passage; and in the second, third, and fourth counts of the said declaration, the said Zachary Macaulay set forth particular parts of the said passage, and laid his damages in such action at £10,000.

The bill then further stated, that by leave of the Court of King's Bench, the Plaintiffs, on the 29th May, 1824, pleaded divers pleas to the said action in justification of the several allegations contained in the said passage so printed and published on the 26th October, 1823, as aforesaid, and therein alleged, as the facts are, that the several allegations contained in the said passage were true.

The bill then charged, that Zachary Macaulay intended to press on the trial of the action, without allowing the Plaintiffs to prove the truth of the allegations contained in the said passage; and refused to con-[103]-sent to a commission or commissions issuing in the said action for the examination of such witnesses who are abroad, or to admit the truth of the allegations.

The bill then proceeded to charge that Zachary Macaulay had been engaged in the service of a Mr. M'Leod, a planter in Jamaica, and had in such service superintended the plantation of the said Mr. M'Leod, and was then in needy circumstances, and had, in manner aforesaid, been a needy overseer of a plantation in the West Indies, and had become, and when the said passage was published was, an opulent merchant; and that the sum of £129,951 11s. 11d. has been paid to the said Zachary Macaulay on account of the colony at Sierra Leone, and that upwards of £275,000 was paid by the government of this country for the capture of negroes who had been unlawfully made slaves, and in which payment the said Zachary Macaulay had an interest; and that the said Zachary Macaulay, on or about the 1st January, 1807, proposed to the said government, that a premium of five guineas per ton should thereafter be paid by the said government to such persons as should import, from the west coast of Africa to England, white rice, the produce of the said west coast of Africa, and that such proposal was needed to and adopted by the said government, and that in or about the month of January, 1808, the said Zachary Macaulay took and

received of and from the said government the sum of fifty guineas, as bounty or premium for importing 10 tons of such rice; and that in certain accounts of disbursements rendered to the proprietors of the said African Institution, on or about the 31st day of December, 1813, being the accounts mentioned and referred to in the said passage, under the name and title of the accounts of [104] the Sierra Leone Company, there was an item of £14 5s. 6d. charged for clothing certain African boys at school, and in the same page of the said accounts there is an item of £107 12s. as having been paid out of the funds of the said African Institution for a piece of plate given, and which was given by the said African Institution to the said Zachary Macaulay for his supposed services, who did then and in such manner serve himself in all he did for the said Sierra Leone Company, or for the said African Institution; and that the said Zachary Macaulay did obtain a monopoly of the trade of the said Colony of Sierra Leone, constant freight for divers ships of him the said Zachary Macaulay, the prize agency of almost every man of war belonging to the navy of this country, sent to or being at the said colony since the abolition of the Slave Trade, the agency for the seizures of or by the governor and garrison of the said colony, and a control over every thing in the said colony; and that when the said colony was given up to the government of this country, in the month of January, 1808, the said Zachary Macaulay did cause or procure himself to be appointed King's agent in the said colony, but which appointment the most noble William Henry Cavendish, late Duke of Portland, then being the first lord commissioner of his late Majesty's treasury, did not sanction; and that, before the publication of the said passage, the said Zachary Macaulay had been and was a very bustling worldly enterprising man, making his way in the world, and getting rich, in the manner in the said pleas mentioned, from a mean origin and humble station; and that, in or about the month of January, 1793, a petition was presented by certain settlers from Nova Scotia, at Sierra Leone aforesaid, [105] to the said Directors of the said Sierra Leone Company, and that in the said petition there is contained a paragraph, wherein the said petitioners complain, that one Thomas Clarkson had promised that they, the said petitioners, should be supplied with every necessary of life from the stores of the said Sierra Leone Company, at the moderate advance of ten per cent. on the prime cost and charges thereof respectively; and that whilst the said Thomas Clarkson remained in the said colony of Sierra Leone, they, the said petitioners, paid no more for the said necessities of life respectively; but that, since that time, they, the said petitioners, had been and were charged for the said necessities of life upwards of one hundred per cent. advance upon such prime cost and charges respectively; and in fact, the said Thomas Clarkson did promise that the said petitioners or settlers should be supplied with necessities from the stores of the said Company, at such advance of ten per cent. as aforesaid; and that whilst the said Thomas Clarkson remained in the said colony, the said settlers or petitioners paid no more for the said necessities respectively; and that after that time, and during the years 1791 and 1792, the said settlers or petitioners were charged for the said necessities upwards of one hundred per cent. advance as aforesaid; and that during the time the said settlers or petitioners were so charged upwards of one hundred per cent. advance as aforesaid, the said Zachary Macaulay had the monopoly of the trade of the said colony of Sierra Leone; and that in or about the month of January, 1811, a certain Society, called the African Institution, obtained the direction of certain Crown estates in Barbice aforesaid, in order to try experiments for the ameliora- [106]-tion of the condition of Slaves, as in the said passage mentioned; and that the consignments of sugar and other produce, made from the said estates, fell into the hands of Messrs. Babington and Macaulay, a house of trade wherein the said Zachary Macaulay was a partner, which consignments were a source of great profit and emolument to the said house of trade; and that during the years 1809, 1810, and 1811, the said Zachary Macaulay was the agent of certain ships of war which had captured Negroes, unlawfully made Slaves, and, as such agent, claimed and received from the board of commissioners of his Majesty's Navy divers large sums of money, as a bounty upon the capture of such Negroes, payable by the said government when the respective prizes or captures were finally condemned by legal authority, and that divers sentences of the Vice-Admiralty Court of the said colony, in the said passage mentioned, upon which the said bounty was received by the said Zachary

Macaulay, were, upon appeal, reversed by the said High Court of Admiralty in England, as in the said passage mentioned; the said Zachary Macaulay, as such agent, afterwards, on or about the 1st day of January, 1812, informed the said last mentioned commissioners, that he, the said Zachary Macaulay, was then ready to refund the sum of £5000, as and being the sum due from him as such agent, upon application for the same; and that upon application being made, the said last mentioned sum of money was paid by the said Zachary Macaulay; and that it was afterwards discovered, as the fact is, that at the time when the said Zachary Macaulay so professed to have only the said sum of £5000 to refund, and when he paid the said sum of £5000, he [107] held in his hands the sum of £46,000 more bounty money, which he, as such agent, had received while the said cases were under appeal, and which last mentioned sum, because he could not lawfully retain the same, he was afterwards compelled to refund; and that such commissioners also claimed and demanded of and from the said Zachary Macaulay interest upon and for the said last mentioned sum of money, for the time during which he had so kept the same, which the said Zachary Macaulay refused to pay, and thereupon the said commissioners instructed their solicitor to proceed against the said Zachary Macaulay for the recovery thereof; and that James Stephen, the person called Mr. Stephen, in the said passage, in the month of January, 1816, wrote certain letters, respectively bearing the signature of "Truth;" and that in the said letters the said James Stephen mentioned, that the said Berbice commissioners so rigidly adhered to the principle of economy, that they borrowed the house of a friend as a place at which to hold their meetings as such commissioners, and that afterwards, and whilst the said James Stephen was one of such last mentioned commissioners, a report was made and signed by the said commissioners, whereby it was declared that the said commissioners had found it necessary to appoint a secretary, at £300 per annum to be paid to such secretary, but which salary included the expense of such secretary's office, and that the said Zachary Macaulay was appointed such secretary with such salary, as in the said report mentioned; and that such salary was an unnecessary and improper allowance to the said Zachary Macaulay in that behalf, and that all other consignees of West India property, at the same time, carried [108] on their correspondence, and paid their clerks and office rent, and other expenses, out of their commission; and that the said Zachary Macaulay, while he was such secretary, was one of the consignees of the produce of the said estates in Berbice; and that in the month of December, 1812, certain women, in the said passage mentioned, and called the field women, being the wives of certain slaves employed in the town of New Amsterdam, in Berbice, were removed from that town to certain estates at Sandvoort, in Berbice, and were thereby separated from their respective husbands and families, which excited discontent in their minds, and induced the necessity of inflicting punishment upon some of them; and that such removal of the said women was at that time considered as being advantageous to the property under the care of the said commissioners, and calculated to produce an augmentation of the consignments of sugar and other produce made by or on account of such commissioners, from Berbice to this country; and that this property, and these consignments, thus augmented and thus imported into this country, were afterwards, and during the years 1813 and 1814, consigned to the house of trade of Babington and Macaulay, and were to the said house of trade a source of great profit and emolument; and that by means of the several transactions thereinbefore charged, and in the said passage stated, the said Zachary Macaulay procured for himself great pecuniary profits and emoluments, and greatly promoted his worldly interest and advantage; that at and during all the several times of the transactions aforesaid, he the said Zachary Macaulay proposed and held himself out to the world to be a person of highly religious [109] and moral character and conduct, strenuously engaged in promoting, by all the means in his power, the cause of humanity and philanthropy, and as an unworldly philanthropist.

The bill then farther charged that the Plaintiffs could not defend themselves against the said action at law, without proving the several matters charged in the bill and contained in the pleas: that some correspondence, or written communication, had taken place between the Defendant and the Plaintiffs, and also between the Defendant and some other persons or person relating to the matters aforesaid, or some of them, from which the truth thereof would appear; and which correspondence

the Defendant refused to discover, although now or lately in his power, custody, or possession, as well as divers books, etc. relating to the matters aforesaid, or some of them, from which the truth thereof would appear.

The bill then further charged, that divers of the witnesses by whom alone the Plaintiffs could prove the several matters aforesaid, were abroad in the west coast of Africa and in the West Indies, and in other parts beyond the seas: and that the Plaintiffs were unable to proceed to trial in the said action, without having one or more commissions for the examination of such witnesses.

The bill then contained interrogatories adapted to all the facts before stated and charged: called upon the Defendant to produce all letters, etc. and prayed for a commission or commissions for the examination of witnesses residing on the west coast of Africa, and in the West Indies: and that the Plaintiff might have the benefit of the testimony of such witnesses respectively on the trial of the said action; and that [110] in the mean while the Defendant might be restrained, etc.

To this bill the Defendant put in a demurrer, shewing for cause, that the complainants have not, in and by their said bill, shewn any right or title to the discovery, or to the commission and injunction thereby sought; and for further cause of demurrer, that the discovery and commission, thereby sought, appear, on the face of the bill, to be sought in aid of the said complainants' defence to an action therein mentioned to have been brought against them by this Defendant for a defamatory libel, by the said bill admitted to have been published by the said complainant Edward Shackell, against the Defendant, the publication of which libel, as appears on the face of the said bill, was an indictable offence; and for further cause of demurrer, that the discovery and commission sought by the said bill appear, on the face of the said bill, to be sought for the purpose of enabling the said complainants to prove, on the trial of the said action, the alleged truth of certain pleas therein mentioned to have been pleaded by the said complainants to the said action, but which pleas are not in the said bill set forth with sufficient distinctness and particularity to enable the Court to ascertain whether the discovery and commission sought by the said bill are material to the defence of the said action; and for further cause of demurrer, as to so much of the said bill as seeks any discovery touching the matters contained in the libel, or statement therein set forth, and whereupon the said action is founded, the Defendant shewed, that such matters appear on the face of the bill to be of a scandalous and defamatory nature against the Defendant, and imputing to him moral [111] turpitude; and as to the residue of the said bill the Defendant shewed, that it doth not appear on the face of the said bill that the witnesses, whom the said complainants seek to examine under the commission thereby prayed, or any or either of them, were or was resident in this country at the time of the publication of the libel or statement in the said bill mentioned, or have or hath, at any time since such publication, left this country, or gone into parts beyond the seas.

On the 19th of July, 1824, the demurrer came on to be argued before the Lord Chancellor, who ordered that it should be over-ruled.

Upon the over-ruling of the demurrer, an order was made, bearing date the 20th day of July, 1824, on the motion of the Respondent, that an injunction should be awarded for stay of the Appellant's proceedings at law, until the Appellant should fully answer the bill, and the Court should make order to the contrary; but the Appellant was in the mean time at liberty to call for a plea and proceed to trial therein, and for want of a plea to enter up judgment; but execution was thereby stayed.

On the same 20th of July, 1824, an order was made that the injunction should extend to stay trial.

On the 22d of December, 1824, upon the motion of the Respondents, and upon hearing read an affidavit of the Respondents, and an affidavit of the Appellant, it was ordered that the Respondents should be at liberty to sue out one or more commission or commissions for the examination of witnesses at Sierra Leone, and such of the West India islands as the Respondents might be [112] advised, returnable without delay, with the usual directions in that behalf: and it was ordered, that the injunction should extend to stay trial of the said action until the return of the said commission or commissions.

The Appellant, by his affidavit, in opposition to the motion, specifically, and in detail, denied the truth of the charges and insinuations contained in the alleged

libel, and of the allegations in the bill founded upon it; and further said, that there were persons resident in this country, by whose testimony the truth of the matters in issue might be ascertained; and he verily believed, that although there were not nor was any witnesses or witness residing in the West Indies, or at Sierra Leone, whose testimony, if true, would enable the Respondents to defend the action, or enable them to prove the pleas therein pleaded; yet the Appellant believed that in consequence of the prejudices, irritation, and hostility, prevailing against him in the West Indies on the account therein mentioned, he could not safely put his character upon trial on evidence to be produced in the West Indies by commission; and the rather because the Appellant did not believe that he could, in the West Indies, obtain commissioners or agents to execute, or attend the execution, of such commission, who would be willing to encounter the danger and obloquy to which a faithful execution of their duty would expose them; and because the Appellant was advised, that it was doubtful whether a witness, giving false evidence under such commission, could be indicted for perjury there; and because if such indictment would lie, and an indictment for perjury were preferred in the West Indies [113] against a witness giving such false evidence, the prejudices, and hostility, and irritation against the Appellant, prevailing in the West Indies on the account therein mentioned, were so strong, that there would be no prospect of such indictment being found, or, should the same be found, of its being fairly tried.

The appeal was presented against the orders over-ruling the demurrer, and directing the commission, on the ground that the publication of the libel being an indictable offence, the Respondents were not entitled to the assistance of a court of equity, their case being founded upon and arising out of the commission by them of such indictable offence; and that there was no precedent of a bill for a discovery and commission in aid of pleas to an action for libel, averring the truth of the matters contained in the libel; and the establishing of such a precedent would put an end to actions for libel—the only effectual mode of vindicating character.

For the Appellants: Mr. Shadwell and Mr. Pepys.

For the Respondents: The Attorney General Mr. Sugden, and (Mr. Wakefield.)

In the course of the argument the following observations were made.*

Mr. Shadwell in argument having referred to the cases upon bills complaining of piracy of literary productions in which the courts of equity had refused injunction and account upon the ground that the works alleged to be pirated were libellous or crimi-[114]-nal, and such as could not be made the subject of an action as matters of property,† put the case of an action for a libel against the publisher of Harriette Wilson's Memoirs, and asked whether the peers libelled in that work might be compelled to answer all the interrogatories which might be put to them in a bill of discovery?

The Lord Chancellor: In the case you put, Mr. Stockdale might have pleaded that the whole matter was true. If he could have pleaded that the whole matter was true, are there any cases which show that he shall not have the benefit of the usual proceedings to prove that?

On that part of the demurrer which raised the question, whether the pleas at law were set forth in the bill in equity with sufficient distinctness and particularity—Mr. Shadwell having referred to a case of *Templer v. Lonsdale*,‡ in which the Lord Chancellor refused a commission.

The Lord Chancellor observed: What the Plaintiff in equity says here is this: "That the several allegations contained in the said passage (*i.e.* of the libel) are true,

* The argument occupied two days. It being too long to insert fully, those points only are noticed upon which observations were made by the House.

† *Walrot v. Walker*, 7 Ves. J. p. 1. *Southey v. Sherwood*, 2 Meriv. 135. *Lawrence v. Smith*, 1 Jac. 171. *Murray v. Bunbrow*, in Chancery, Feb. 1822; and the case of "Don Juan," before the Vice Chancellor, in 1823.

‡ *Sittings after Hil. Term, 1827.* The reporter has been informed by Mr. Russel, who was counsel in the case, that the bill was originally for a discovery and commission, but the Lord Chancellor, doubting whether the evidence proposed to be obtained would be a defence at law, and whether it was not a case for relief in equity, refused the commission, but gave leave to amend the bill, by turning it into a bill for relief.

as by the said pleas, reference being thereunto had, will appear." Now in the [115] very case you refer to, that would enable the Chancellor to call for the pleadings; and the Chancellor did call for them.—I believe it is a little new, but I go along with you. I think when the Court of Chancery is applied to for a commission, it ought to see that the commission can be of use to prove something to establish the Plaintiff's case, or to establish the Defendant's case.

The Lord Chancellor: This demurrer must admit the truth of that which is alleged in the bill. Then there is an express allegation in the bill that the allegations contained in the passage which is called a libellous passage are true.

The Lord Chancellor: If you prevail upon the House to reverse the order respecting the demurrer, all the rest falls to the ground, but in all the cases I have found an answer is put in. The question then will be, supposing the House support the order made upon the demurrer, as to which I say nothing: supposing you cannot affect that order, are you at all regular in filing an affidavit instead of putting in an answer? I put that to you as a point of practice.

To this it was answered, that the application (for the commission) being made on affidavit, it was regular to file an affidavit in answer; and that the Lord Chancellor in a former stage of the proceeding permitted the affidavit to be read without objection.

Mr. Shadwell having cited the practice in the King's Bench of putting off trials, and changing the venue on proof that a fair trial cannot be had on account of existing prejudices; the Lord Chancellor said: the cases which you mention perhaps are not quite similar to a case in which it is contended that [116] if there are witnesses in one part of the world, and those the only witnesses who can prove the fact, because they may be prejudiced they are never to be examined in a cause.

The Lord Chancellor: The question is, whether a court of equity should entertain a case of this sort, regard being had to the fact that it relates to an action brought that cannot be supported if a justification is made out, viz. the truth of the alleged libel.

Mr. Pepys having argued that the cases in the House of Lords * were distinguishable; that no precedent of such a bill was to be found, and citing the case of *Montague v. Dudman* (2 Ves. 397), in which Lord Hardwicke said, that no such bill of discovery as in that case having ever been filed, he would go by the rule of Littleton, and would not make a precedent.

The Lord Chancellor observed: There are I think three (two of them were consolidated) cases in the House of Lords; in one (*Nicol v. Ferelst*) of them it is quite clear, (is it not?) that the person who brought his action at law might have indicted the defendants; but instead of indicting the defendants, he brought an action for damages; and there this House allowed a bill of this kind to be filed, to have a commission abroad for the purpose of assisting a defence to be made to that action for damages.

The difficulty I have is to distinguish this thing called libel from a case of crime; and you are not quite sure that it can be called a libel till found to be so. No doubt in one of these cases they might have [117] been indicted for conspiracy. I set off against the great authority of Lord Hardwicke, the considerable authority of this House.

The Lord Chancellor: Lord Mansfield (I am speaking from memory) laid down a doctrine, that a party should not proceed both civilly and criminally: he should have his choice of an action or an indictment, but not both.† Then if a party chooses to give up an indictment, and brings an action, has he a right to say that the public are concerned? On applying for an information you must make an affidavit that the facts alleged are not true.

The case having been put of a libel on a merchant, alleging his insolvency, an

* *Cojamant v. Ferelst*, 4 B. P. C. 107. *Nicol v. Ferelst*. Id. 416. *Davie v. Ferelst*. See the printed Cases in D. P. 1776.

† See *Rex v. Sparrow*, 2 T. R. 198, where upon application for leave to file a criminal information for a libel, the applicant was put to his election, and Ashurst J. said, it was of course, if the information was granted to stay proceedings in an action for the same cause.

action for damages, a plea in justification of the truth of the allegation, and a bill of discovery against the merchant, calling upon him to disclose all the accounts of his trade. The Lord Chancellor observed :

You must consider hard cases on both sides, because if a merchant had admitted insolvency fifty times over wholly as between himself and another party, yet if he chose to indict the man for stating it, the truth could not be given in evidence at all, and the verdict would be as much against conscience in one case as in the other. There is a notion afloat that a man should be at liberty to prove the truth of a libel. A defendant in cases that may be put may be in a very hard situation upon an indictment that he cannot prove the truth though he might be able to do it by fifty witnesses.

[118] The law puts it in this way: if you make your complaint on the general ground of mischief to the public, you must do it in the shape of indictment, and there is no defence if the fact is proved: but if you say you will give the public no protection but bring a civil action, then the question is, whether the law does not consider it is a question between A and B, and not between the public and an offender.

The law is (whether wise or not) that if a man proves the truth of the libel in an action, you have no right to complain of it: then the question really comes round to this, whether the defendant in an action shall be confined to such modes of proof as a court of law enables him to have or not; and that brings another which is a difficult question, whether a court of law which has the power to grant or not to grant a commission, would, in the fair exercise of judicial discretion, be justified in refusing such a commission if the proceeding were by action.

It having been said in argument, that it was the rule of the courts of common law not to permit a party to be delayed in his action by an application for a commission, unless he was in possession of facts and evidence to make out the truth of the libel at the time when it was published.

The Lord Chancellor observed, One of the first questions is, how that rule was introduced putting off the action till the commission returned: and the next question is, whether it is a sound rule, for I may have the greatest possible belief that I can prove the truth of the libel when I wrote the libel, but cannot do it at the time of the action. Suppose it related to a conversation passing between Mr. Pepys, the Attorney General, and myself, that [119] you two shall have been made judges in India, does the Court of King's Bench, because you do not happen to be here but in India (when the libel is published) though here when the thing complained of occurred, will the Court say you shall proceed though I have fifty witnesses who could prove the fact, if I could have them examined: and it is to be recollected that upon interlocutory orders in a court of law, there is no appeal to this House: but in granting commissions in a court of equity, thank God, there is an appeal to this House.

The Lord Chancellor: The law takes an odd turn in those things. The original jurisdiction of granting commissions was under the great seal, because no commission at one time could be granted in common law courts. Then having adopted them there on their own authority, they pretend to tell us when we shall or shall not direct them.

It is a great thing for the subject that he may come here to appeal against an injudicious exercise of the jurisdiction of a court of equity, but in respect of commissions issuing from a court of common law the subject has no remedy at all.

What antiquity has that rule (of granting commissions in a Court of law)? It is quite modern, is it not? I am sure it was not the rule some little time ago. Is there not a case of this sort that may arise in the Court of King's Bench? If an action is brought, the party who is the defendant says, I had two or three witnesses here at the time when I did that of which you complain, who have since in the course of their business gone to India, and I wish to have a commission to examine them. I put my-[120]self upon the ground that you, the Court of King's Bench, require me to take; I make an affidavit that they were here when I published this: what would the Court of King's Bench say to that? It appears that they would grant a commission to aid a defence against a libel when the plaintiff was proceeding for damages. If in such a case the Court of King's Bench would grant a commission.

that would reduce the case to this, whether the Court of Chancery is to act upon its own rules or upon theirs.

It having been said in the argument that the interrogatories of the bill calling upon the Defendant to state his origin and the history of his life, and all the means by which he had advanced his worldly interests, and to set out all profits made by him in trade, and a schedule of all correspondence and all the facts relating to the matters stated and charged in the bill, with an account of his profits in trade, etc., could not be answered, and were calculated only for delay and to stifle the action, not to aid the defence to it,

The Lord Chancellor said: Was there any argument on the particular passages in the Court below, or only a general argument? It is a very material part of the case: Mr. Sugden will recollect in a late case (*Templer v. Lonsdale*, ante p. 114) that it was thought not inconsistent to look into the declaration (and pleas) in order to see how far the Court of Chancery ought or ought not to grant a commission. If it appeared upon the pleas pleaded at law that the case which is sought to be made out in equity would not constitute a defence at law I would not let a commission go.

[121] Mr. Pepys having cited the case of *Moodalay v. Morton*, as containing, in the argument of Mr. Madocks, as reported (1 B. C. C. 469), a statement of the case of *Nicol v. Verelst* differing from the report in Brown's *Parliamentary Cases*,

The Lord Chancellor said: In that case a commission was granted, and the demurrer was overruled.

Upon the argument that the answer to some of the interrogatories might furnish matter of and expose the party to indictment the Lord Chancellor observed:

In this case of *Macaulay v. Shackell* (2 Sim. and Stu. 79) the report of the case before the Vice Chancellor concludes in these words, "The report of *Kensington v. White* is too loose to afford a principle: and underwriting causes are not to be reasoned upon as furnishing general rules;" what I understand his Honor to mean, is with respect to the practice in underwriting causes, which is adding many together by the rules of consolidation: but unless they are going on in the Court of Exchequer in a way different from what they did when I had the honour of practising there, it is the practice to file such bills, and the parties are obliged to answer the underwriters as to those frauds which are charged.

Unless you find the policy of insurance has been found to be affected by gross frauds, there have not been many cases in which the underwriters have defended themselves by bringing bills of discovery.

When I attended the Court of Exchequer, underwriters frequently brought the assured into the Court, to be relieved against their liability in respect [122] of the assured's actions against them, by pleading frauds, which frauds would have been indictable.

It being suggested by the counsel that the observation of the Vice Chancellor in *Kensington v. White*, applied only to the question of multifariousness, which was the point in the case before him,

The Lord Chancellor said: Take it for granted that it does: but it brings back to my mind a class of indictment cases in which this jurisdiction was exercised.

The Lord Chancellor (at the conclusion of the Argument): It is not my intention to advise your Lordships to proceed to judgment at present. I always wish to be extremely cautious in forming an opinion on an appeal from a judgment of my own, and I requested of the Noble Lord (Redesdale), who is now come to the House, conceiving it might be possible, as the fact has happened, that there might be demands made upon his time which would not allow him to attend here.—I requested him to take the papers with him, to read them, and form his opinion upon them. I believe he would confirm me if I were to state that, upon his review of what is to be found upon the papers, he does not think there is any ground for this Appeal: but I shall feel it my duty to state to him, with as much impartiality as I am able, all that has been represented by Counsel from the bar, before I proceed to give my own judgment upon the subject.

I think the question lies in a very narrow compass. There has been a great deal said about the mode which Mr. Macaulay has adopted with respect to making this a question of character, and I am never in the habit of looking upon that as an im-[123]-proper motive. Every man whose heart is in the right place, would desire

that parties should be reasonably indulged in endeavouring to set their character right, but in truth, as a court of justice, we have nothing to do with that. The single question is, whether Mr. Macaulay, having thought proper to bring an action for damages for that which, considered with reference to what is alleged, and which may or may not hereafter be proved, may be stated *prima facie* to be or not to be a libel, whether, according to the law of this country, the Defendants, from whom these damages are asked, can in that case of alleged libel, bring a bill in a court of equity, for the purpose of proving the truth of that which is stated in the papers to be a libel, it being true that if he justifies his act by alleging and proving the truth of what he has said, he has a valid defence to that action; that is purely the question before us. Upon that question, after I have had an opportunity of doing the parties the justice of stating to the Noble and Learned Lord, as fully as I can, the arguments used on both sides, I shall proceed to give my humble advice to the House on the matter of the Appeal.

The Lord Chancellor: This was an appeal from a decision of the Court of Chancery, pronounced by myself, and I therefore certainly felt a great anxiety that it should be submitted to the consideration of a Noble and Learned Lord, whose knowledge in the practice of the Court of Chancery, I think I may venture to say, is not excelled by that of any other person in his Majesty's dominions, and who has been at the head of the Court of Chancery in Ireland. It appears to me to be extremely desirable that his [124] opinion should be obtained upon the subject. I have asked him, therefore, as he was not present at the hearing, to peruse the cases which have been laid upon the table, and I have taken upon myself the duty, which I hope I have faithfully executed, of stating to him the several arguments which have been pressed in objection to the order of the Court below, as well as every other which has occurred to myself. If ever I had any doubt upon this case, after consideration that doubt has been removed. I believe I may venture to say, that the Noble Lord to whom I have alluded has no doubt whatever upon this case, after having read the papers upon this subject, and heard all which could be stated to him in opposition to that judgment.

The case is no more than this, Mr. Macaulay considers himself injured by the publication of an alleged libel. When a libel is published, the person who is the object of that libel has different modes of pursuing the person who has thought proper so to libel him; he may apply to a grand jury, and if they find a bill of indictment, inasmuch as that is a proceeding which has its principle in the allegation, that there is a breach of the public peace, and that is, therefore, a proceeding rather on account of the public injury than the private right, the law does not allow the truth of that libel to be given in evidence in that proceeding. There is another mode of proceeding, a sort of criminal proceeding, and that is by applying to the Court of King's Bench for an information. That Court is in the habit of saying, (and with great propriety, if I may humbly state an opinion upon that.) If you will have this extraordinary remedy by information, you must deny the truth of the libel; if you do not think proper to do that, you [125] may proceed by indictment; but we will not give you this extraordinary remedy. In this case Mr. Macaulay (to do him justice, it should be observed,) states, in the affidavit he has filed, that his counsel advised him, for reasons that are represented, not to apply to the Court of King's Bench for an information. It is not my design to offer any opinion to your Lordships with respect to that advice, it is sufficient to say that that proceeding was not adopted; the proceeding by indictment was not adopted; and the reason given for proceeding by action is undoubtedly a reason that does great credit to the person who does proceed in that mode, namely, that his intention is to vindicate his character and not to vindicate the public in respect of the alleged tendency to a breach of the peace; but it is perfectly settled law that if a person brings an action for damages occasioned by a libel, the party proceeded against may justify the alleged libel by stating in his plea that what he has so said and what is so alleged to be libellous, is perfectly true: the law having established this doctrine, that for the publication of truth a man has no right to complain, (though the libel may tend to a breach of the peace,) and seek to receive damages if that which is alleged to be a libel is true.

There has been a great deal of observation upon the doctrine applying to the

law of libel, that if the party is indicted, he shall not be at liberty to show the truth of the libel. The reason of that, as we collect it from our books, is that it is a breach of the public peace, that is the thing complained of, and whether the libel be true or false it may equally tend to a breach of the peace, therefore the mere truth of the libel shall not excuse the libel: but if the person [126] who may proceed on behalf of the public thinks fit to proceed on behalf of himself for damages, the law has always said, as far as I can trace it, that the defendant may plead the truth of the fact in answer to that action for damages.

In this case, such an action having been brought, the Respondents filed a bill in the Court of Chancery for a discovery and for a commission to examine witnesses abroad. To this bill a demurrer was put in, and a demurrer may (to use a familiar expression) cover a great deal too much; the demurrer was therefore overruled: and I cannot conceive that it is possible in any view of this case to say that that demurrer could be allowed so far as it seeks to defend a party against a commission, unless the case is of such a particular nature that a court of equity ought not to interfere at all; the demurrer certainly appears to have covered a great deal too much.

Now the way in which this has been put at the bar is this: It is said that you shall not file a bill of this sort in a case where the matter alleged in the action at law amounts to an indictable offence. In the first place, I take that to be against precedent; in the next place, I doubt whether it is consistent with reason: because if a party chooses to consider the matter not as an indictable offence, and for his own benefit to receive a recompense in damages, it appears to me a little difficult to contend that he can with propriety say, though I am not pursuing this on the ground of its being an indictable offence, yet I do object to you, the defendant, that the matter I am now proceeding upon is an indictable offence, and therefore you shall not have the common defences which the subjects of this country have in general cases in actions for damages.

[127] It is said, moreover, that a libeller has no right to come into a court of equity. Now in the first place, one answer to that is, that you cannot consider it as more (whatever may be your individual opinion) than an alleged libel. In the next place, if the party thinks proper to go into a court of law for a recompense in matter of damages, that makes it a civil action, and making it a civil action, the question arises whether the Defendant has not as good a right to pursue his defence to it as a civil proceeding as the Plaintiff has to pursue it as a civil proceeding.

Cases have been alluded to in which a court of equity has said, we will take no cognizance of the matter: in a case of copyright, for instance, it was argued at the bar that if a man published an obscene book, such a one as was mentioned at the bar about Mrs. Harriette Wilson, or if a man thinks proper to publish a book reflecting on Christianity: if such a man comes into a court of equity for the purpose of maintaining his copyright, and having an injunction against the violation of it, the Court will say, No; you do not come here with clean hands, and we will not assist you in the way in which you apply that we should assist you. But these cases are founded in property. The reason why the Court will not interfere in those cases is, that it has no criminal jurisdiction. A court of equity has no criminal jurisdiction, but it lends its assistance to a man who has, in the view of the law, a right of property, and who makes out that an action at law will not be a sufficient remedy and protection against intruding upon his publication. But in the case which has been put, the answer of a court of equity immediately on a bill being filed is this:—Inasmuch as your suit here is [128] founded on property, and that the law will not acknowledge you can have any property in such a book as this, we cannot assist you because the law has determined that you have not that property, which is the only thing we could protect. Now to take the instance of that book, the *Life of Harriette Wilson*, which has been talked of at the bar, I recollect, I think, to have read in the newspapers, that an action was tried, I believe, in the Court of Common Pleas, brought by a man for his labour in printing and publishing that book. The court of law, according to the representation made in the document to which I allude, said, You shall not recover in that action: the labour you have expended in producing a book which ought never to have seen the light is not labour in respect of which you can have any right. And here let me suppose that

an action of libel had been brought on that very book, and I am now putting the case which was put at the bar, I apprehend that it would have been impossible consistently with precedent and what we know has been considered law to say, that if that action had been brought and a civil right was to be tried, a court of equity would not assist the Defendant in that action in trying, according to what was alleged upon the plea of justification, the fact, whether that justification was truly or not truly pleaded?

In reference to the facts of this case (the supposed facts, for let it not be understood that I am presuming to say that one word of the bill is founded in fact,) the alleged facts are supposed to have arisen out of what passed, I think, at Sierra Leone, and other places abroad, I believe, in the West Indies. To be sure prejudice must have reached a most monstrous height, if the affidavit in this case is [129] correct, that neither at Sierra Leone nor in any part of the West Indies, is it possible to have either the witnesses or the grand jury, or any thing else that is concerned in the administration of justice, so impartial, as to have a commission fairly executed there, or indeed any other proceedings in the courts of law fairly executed between these parties. I think I must be permitted to say, that on an allegation of that kind, it would be quite impossible for any court of justice in this country to proceed at all.

I cannot see what difference there is between one indictable offence and another indictable offence. I have here those cases which have been alluded to at the bar. I mean the case of *Davie v. Forrester*, and two others, in which it appears to have been clearly the opinion of the courts below, and the opinion of your Lordships' House, that although the matters of allegation amounted to indictable offences, yet if the parties thought proper to bring actions, the Defendants in respect of facts which happened abroad, would be entitled to have commissions to examine witnesses, and the fact that the circumstances alleged applied to indictable offences which unquestionably they did, was not a fact which this House thought ought to repel the right to the common defences in civil actions, as those defences were either to be made in a court of law or a court of equity.

It is very true that the House proceeded differently in those cases which are related in the books I now have in my hand, but then they did not proceed differently in respect of the general principle on which they decided the cases, but they proceeded differently on the different circumstances of each: in both cases, as it appeared to me, acknowledging [130] the general right of the subject to conduct his defence in the way I have stated, in case the party thought fit to proceed by way of civil remedy, I will read to your Lordships the reasons assigned in one of those cases, by way of explaining the view which was taken of this question. It may not be improper to preface the reading of them, by stating that it seems to have been some time ago the notion that a court of common law could not award these commissions abroad; and indeed now the law upon that subject stands in a very singular state, because if a plaintiff brings an action against a defendant, in the Court of King's Bench, and if that defendant wants a discovery, he must, of course, go to a court of equity. If he wants a commission to examine witnesses, he must likewise go to a court of equity, unless the plaintiffs will consent that he shall have such a commission, and if the plaintiff will not consent, the mode which that court has thought proper to adopt, is to say, your cause shall not be tried, till you do consent; that is the mode in which they make a volunteer of a man.

What the state of the law was, at that time, in a court of equity, as laid down in this book (the printed cases in D. P.), I think may be pretty well ascertained from the case of *Davie v. Forrester*, as it was stated by Lord Thurlow, then Attorney General, and by Mr. Madocks, whom some of us remember as a pleader very well versed in equity. The order was for a commission abroad, and so on, and the reasons in support of it are these: "The order appealed from, proceeds upon a fundamental maxim in the administration of justice, namely, that both sides are to be heard, and the parties are to be heard by their evidence and wit[131]nesses to matters of fact. The end of the order in question, which was for a commission, is to give the Respondents an opportunity of bringing over their evidence from a foreign country, to maintain the truth of the justification which they have pleaded; the courts of law pay an attention to *audi alteram partem*, as far as the powers of a court of law can

go, and therefore will put off trials, upon an affidavit made by the Defendant, showing that he has material witnesses abroad, who are expected home in a reasonable time it not being the fault but the misfortune of the party, that his witnesses are not within the reach of the process of the Court, whereby their attendance on the trial may be compelled. This reasoning goes only to the putting off the trial where there are witnesses abroad who are expected to be here in a reasonable time, and not when the witnesses were not expected to be here, and their testimony was to be sought by sending a commission to them instead of waiting for their coming home here to be examined; but where witnesses reside abroad, and cannot or will not personally attend in England, the power of the courts of law is at an end, as they have no means of examining witnesses abroad; but the Court of Chancery having an authority to issue commissions, under the great seal, for various purposes, and amongst others for examining witnesses in causes in that Court, the suitors Defendants at law have availed themselves of the power of the Court of Chancery to come in and supply the failure of justice, by preferring their bills there, containing a state of their case, and of the proceedings at law, with the Defendants' misfortune that their witnesses being resident [132] abroad, and not compellable to appear at the trial, they cannot have the benefit of their testimony: and therefore praying that the Court will relieve them against this accident, and grant them a commission for the examination of their witnesses, to the end that their depositions may be read at law: and as it would be nugatory to try the cause without evidence, praying also that the Plaintiff at law may be restrained, by injunction, from proceeding in the meantime, till the return of the commission. Both the Court of Chancery and of Exchequer, as courts of equity, have always entertained these bills as belonging to one of their great sources of jurisdiction, the relief against such accidents as are beyond the power of courts of law to aid." (Now if the courts of law assume to themselves a power to interfere, I believe I may venture to say, that that is no ground for destroying the more ancient jurisdiction of the Court of Chancery: there are many instances in which the courts of law maintain actions on equitable principles.) "But as such applications occasion a delay to the Plaintiff at law, therefore courts of equity have regulated the practice of issuing injunctions, in such cases, with great care and caution. The injunction issues if the Plaintiff at law delays appearing to or answering the bill beyond the periods allowed by the Court;" (and I will just observe in passing, that it is one thing to put in an answer to such a bill, and quite a different thing to file an affidavit, because there is no man who does not know that to answer a great many questions put to him, is not quite so easy an operation as to make an affidavit, stating what he is pleased to state, without having any questions asked of him;) "because it is unjust that [133] he should take advantage of his own contumacy or delay to distress the Defendant."

Then he proceeds to state, "policies of insurance have afforded numberless occasions for the exercise of this jurisdiction in courts of equity, where the underwriter being sued upon a policy made upon a ship in foreign parts, has discovered a fraud in the policy by misrepresentation of the true state of the ship at the time, but cannot show the fraud in proof, because his witnesses are in foreign parts, and many other foreign transactions have afforded like occasions, so that the use of such bills has been long established, and the increase of commerce has augmented their use."

Now I believe no lawyer of any experience in the Courts of Westminster Hall, particularly of proceedings in the Exchequer with reference to matters of this kind, can hesitate for one moment to say that, in many cases, there have been indictable offences stated as the grounds of defence against policies of insurance, frauds which might have been the subject of indictment. What the Courts have said is this: If you do not choose to indict for those frauds, you make it a civil action to all intents and purposes: and if that be true as to one species of indictable offence, it does not appear to me on what ground it is not true as to another species of indictable offence. Cases must arise from time to time which are new cases in specie, but which are not new cases with respect to the general principle by which they must be decided. With reference to these cases in the Exchequer, a very learned Counsel stated at your Lordships' bar, that they were so familiar that they have a sort of repository or pigeon-hole, I think he called it, out of which a sort of [134] form or precedent was drawn, and the bill might be all false from the beginning to the end: but still the Court pro-

ceeded upon it. Whether that way of filing a bill should or should not be approved or disapproved is one question; but the fact that the courts of equity, which have not been informed how those bills have been framed, always act upon those bills, only tends to make the precedent the stronger, to show that courts of equity will act where there are allegations of that kind made, which those courts must suppose to have been properly made until the contrary is shown. Upon the whole, therefore, it does appear to me, that it is impossible to distinguish this case from other cases of indictable offences where this species of remedy has been given in courts of equity.

I do not enter here into the consideration whether there have not been too many questions asked upon this bill; * whether there have not been questions asked upon this bill that may not perhaps be quite pertinent to the business in hand; nor do I now enter at all into the consideration whether the commission granted should or should not be more or less limited either as to the subjects into which those are to inquire who are authorized by that commission to make inquiry, or whether there should or should not be a limitation in point of time within which the commission is to be returned; [135] because all those matters I apprehend may be adjusted by application to the Court below; and the Courts below are in the constant habit of regulating those things as justice may require. But to say that the remedy which is given in other cases shall be withheld entirely in this case is a proposition to which I certainly could not feel myself authorized to assent in giving judgment in the Court below. On the best consideration I have been able to give this case, I can see no reason for thinking that that judgment was wrong in its principle; and I have the satisfaction to know that the Noble and Learned Lord to whom I allude, has certainly not been able to introduce into his mind so much of doubt as I have introduced occasionally, in considering this case, into my mind; but which certainly has been removed from that mind by the consideration and attention I have given to the subject. I shall therefore propose to your Lordships, on the usual questions being put, that this judgment be reversed, to say not content; which, if adopted by the House, has the effect of affirming the decree below.

I should be sorry to part with this case without saying, that I desire that it may be understood, that nothing which falls from me is to be considered as stating any opinion of mine with respect to the truth of one word that is contained in this publication. The simple question before us is this: A, having brought an action, and B, having justified by pleading that what he has stated in his publication is true, the simple question is—Is B, entitled to the ordinary means of proving the truth of his pleas of justification? The case, I think, may be simply so put. I am now speaking at the close, perhaps, of a very [136] long judicial life; and certainly at a period very much advanced in my professional life. And I take upon myself to say, that I do not know anything more incumbent upon Counsel and upon Judges, than to take care to confine their observations to the cases before them, both in pleading and in judgment, in such a manner as to affect the character and honor of parties as little as possible, and as the circumstances of the case will admit. I will take the liberty to add, that that must be done on the part of the Judge without favor; and it is a singular thing, that the person who has now the honor to address your Lordships, and whose anonymous correspondence may be called Legion, has received a letter of admonition from some such correspondent; which letter of admonition informs him, that all the men of eminence at the bar think that this decision is wrong, and that it is produced by the affection which the Lord Chancellor is supposed to have had for some Mr. Shackell, or some such gentleman. I wish my anonymous correspondent would be so good as to give me his name, and I think I could satisfy him that I have never disgraced myself by any partiality towards any suitor whatever. Why I should do it in this particular case is to me a mystery. It may be otherwise to him. Had he given me an opportunity of answering his letter in another way, I should

* Upon the hearing in the Court below, the Lord Chancellor, in giving judgment, alluded to a passage in Mr. Philipps' Law of Evidence (p. 289), in which is discussed the rule of the courts of common law, as to putting a question to a witness, tending to degrade his character: the Lord Chancellor said, "he disapproved of the practice of leaving the witness to refuse to answer such question, and directing or permitting the jury to draw from his silence, an inference unfavourable to his character."

have done so; but I can only answer it in this way by assuring him, that if he had made any such assertion I should have been entitled to have proved that it was a libel; but if I had complained of that as a libel in a civil action, I should certainly have said that he was very well entitled to file a bill of discovery, and to have had a commission to examine his witnesses abroad; for [137] I do not believe he would have found one in the country in which I have the honor to administer justice, knowing what had been my practice, who would have confirmed by his testimony a slander so base as that is.

The only question remaining is, whether in this case your Lordships should give costs. Now it is a case that in its particular kind is new, and on that ground I do not recommend to your Lordships to give costs.

Judgment affirmed.

[138]

ENGLAND.

(COURT OF KING'S BENCH.)

JOHN POULETT, Administrator, etc.,—*Plaintiff in Error*; GEORGE WIGHTMAN,—*Defendant in Error*.

The Defendant in an action having died intestate after interlocutory judgment, and a writ of inquest of damages executed; but before it was returned, the Plaintiff declared in *scire facias* against the administrator, who pleaded *plene administravit*, and set forth in his pleas divers specialties due and owing from the intestate, and charging the estate. The Plaintiff having replied, admitting the truth of the pleas, and praying judgment and execution of the goods of the intestate *quando acciderint*, entered up final judgment, "to have execution against the Defendant as administrator according to the force, form and effect of the said recovery;" no recovery having been before stated in any part of the proceedings on the record, and no final judgment having been given in the original action, and no provision being made by the judgment for the payment of the specialty debts.—*Held* that the judgment was erroneous, and it was reversed with costs.

George Wightman, in Michaelmas term, 1811, commenced an action of trespass on the case upon promises against the Honourable Vere Poulett, since deceased, by original writ of *Capias ad Respondendum*, returnable in the King's Bench, to recover damages against him for the non-performance of the several promises and undertakings whereof George Wightman in the declaration in that suit complained, and such proceedings were thereupon afterwards had in Hilary term then next, that it was considered by the Court that George Wightman ought to recover his damage on occasion of the non-performance of the said several promises and undertakings, and thereupon afterwards in that same Hilary term [139] a writ of inquiry of damages, directed to the Sheriff of Middlesex, was issued out of the Court returnable, etc., commanding the Sheriff by the oath of twelve, etc., to inquire what damages George Wightman had sustained, as well by means of the premises as for his costs, etc. After interlocutory judgment had been so given and the writ of inquiry of damages awarded, and also after the execution thereof by the Sheriff but before the return of the writ, namely, on or about the 15th day of March, 1812, the defendant in the action died intestate, whereupon administration of the goods, etc., was granted to the Plaintiff in error. And thereupon George Wightman sued out a writ of *scire facias*, reciting to the effect hereinbefore set forth; and that although the damages of George Wightman had been assessed to a certain amount, to wit £1800 besides his costs and charges, yet that final judgment still remained to be given, wherefore it was commanded to the Sheriff that, etc., he should make known to the administrator, etc. To this writ the Sheriff returned *nulla bona* and *non est inventus*. Whereupon an alias *scire facias* issued, and the Defendant having appeared, the Plaintiff declared upon the *scire facias* in the

usual form. To this declaration the Defendant pleaded *plene administravit*, reciting certain bonds and other debts by specialty to which the estate of his intestate as he pleaded was liable. The Plaintiff by his replication admitted the several matters pleaded to be true, and prayed judgment; and that execution might be adjudged to him, of the damages aforesaid, to be levied of the goods and chattels, which were of the said Vere at the time of his death, and which should thereafter come to the hands of the Plaintiff in error as administrator, to be administered according to the [140] force, form and effect of the said recovery. And afterwards entered up final judgment in the following words:

"Therefore it is considered that the said George have his execution against the said John, as administrator as aforesaid, according to the force form and effect of the said recovery, and the said John in mercy, etc."

Upon this judgment or award of execution, the Plaintiff in error brought a writ of error, returnable in Parliament, to reverse the judgment or award of execution, on the writs of *scire facias*, and assigned errors as follows:

First, That it is in and by the said award of execution set forth and alleged, that it is considered by the said Court, that the said George have his execution against the said John as administrator as aforesaid, according to the force, form and effect of the said recovery, when in fact no recovery is previously stated in any part of the said proceedings, or the record thereof, to warrant the said award of execution.

Second, That although the said George prays the said award of execution, yet it doth not appear that any final judgment hath been at any time given in the original action.

Third, That by the record aforesaid, it appears that execution was awarded to the said George against the said John Poulett, as administrator as aforesaid, of the damages in the said writ of *sci. fa.*, mentioned according to the form and effect of a certain supposed recovery therein also mentioned, although no such execution ought to have been awarded, neither is there any thing in the said proceedings, or the said record thereof, to warrant such [141] award of execution to the said George against the said John Poulett, as administrator as aforesaid.

Fourth, That by the record aforesaid, it appears that judgment was given that the said George Wightman should have his execution against the said John Poulett, as administrator as aforesaid, instead of such execution being awarded of the goods and chattels which were of the said Vere, at the time of his death, and which should thereafter come to the hands of the said John, as administrator as aforesaid.

Fifth, That it doth not appear in or by the said award of execution against the said John, as administrator as aforesaid, whether the said damages, whereof execution is so awarded as aforesaid, were to be levied of the goods and chattels which were of the said Vere, at the time of his death, and which should thereafter come to the hands of the said John, as administrator as aforesaid, to be administered after payment and satisfaction of the said specialty debts in the said pleas to the said writs of *sci. fa.* mentioned and set forth, or whether such damages were to be levied before payment and satisfaction of those specialty debts.

Sixth, That by the record aforesaid, it appears that execution was awarded to the said George of the damages in the said writs of *sci. fa.* mentioned, and which should thereafter come to the hands of the said John Poulett, as administrator as aforesaid, to be administered, no regard being had, in the said award of execution, to the debts by specialty, in the pleas to the said writs of *sci. fa.* mentioned, and to the previous discharge thereof.

[142] For the Plaintiff in error: The Solicitor General (Sir N. C. Tindal).

The proceedings, as detailed and set forth in the writs of *sci. fa.*, and the judgment and award of execution thereon, do not warrant such judgment or award of execution; on the contrary, such judgment or award of execution is illegal, and must manifestly work injustice to the Plaintiff in error: inasmuch as the legal effect and consequence thereof, is to fix him with payment of the amount of the damages mentioned in the award of execution, out of the assets which have, since such award of execution, come to the hands of the Plaintiff in error, as administrator, even though such assets may turn out to be insufficient to satisfy the specialty debts mentioned in the plea of the Plaintiff in error.

By the judgment and award of execution, the damages therein mentioned have precedence of the specialty debts enumerated and set forth in the plea of the Plaintiff in error, whereas the cause of action in the suit below being only a simple contract debt, the same did not constitute or create a charge on the estate of the intestate, legally entitled to priority over those specialty debts.

The judgment and award of execution of the damages ought not to have been framed in general terms, as against the future assets of the intestate, which after the giving of such judgment or award of execution should come to the hands of the Plaintiff in error, to be administered; but on the contrary such judgment and award of execution ought to have been confined to such assets as might come to the hands of the said Plaintiff in error, as administrator, after payment and satisfaction of the [143] specialty debts in the plea enumerated and set forth.

No Counsel appeared for the Defendant in error; and at the conclusion of the argument for the Plaintiff in error, the Judgment was Reversed, with £35 costs.*

[144]

ENGLAND.

(KING'S BENCH AND EXCHEQUER CHAMBER.)

BRICE WILLIAM FLETCHER,—*Appellant*: LEWIS RICHARD LORD SONDES,—*Respondent*.

[*Mews' Dig.* v. 1236. S. C. 3 Bing. 501; 5 B. and Ald. 835. Cited, on point as to binding authority of House of Lords' decisions (1 Bl. N. S. 249.), in *London Street Tramways Co. v. London County Council* (1898), A. C. 375. at p. 376.]

A bond, reciting that the patron of a rectory had, by an instrument of the same date, presented an incumbent, and that he had agreed to resign upon request of the patron, or the owners of the advowson for the time being, for the purpose of enabling him or them to present one of the two younger brothers of the patron, when capable of holding.

Held, (reversing the judgment of the Courts of King's Bench and Exchequer Chamber) that such a bond is simoniacal and void, on the ground that such an agreement is a benefit to the patron, and contrary to the statute 31 Eliz. c. 6. and (*semble*) the common law.

Held also, that from the recitals of such a bond, it must be intended that such presentation was made in consideration of the agreement to resign, and that it is not necessary to allege that fact in pleading.

This was an action brought by the Defendant in error, in the Court of King's Bench, against the Plaintiff in error, on his bond, dated on the 16th of November, in the penal sum of £12,000. The declaration was in the common form, not setting out the conditions of the bond. The Plaintiff in error suffered judgment by default, according to the statute 8th and 9th William and Mary, c. 11; whereupon the Defendant in error set out the conditions of the bond, alleging a breach of the condition, and praying a writ of inquiry to ascertain the truth of such suggestion, and assess the damages sustained [145] by the Defendant in error. The condition stated upon the record recited that "Lord Sondes was the patron of the rectory of Kettering, which had become vacant by the death of the late incumbent: and that Lord Sondes, by writing under his hand and seal, bearing equal date with the bond, had

* It is contrary to the practice of the House to give costs on the reversal of a Judgment: but the Lord Chancellor gave them in this case, because the Court below had not the power to reverse the judgment, and the Plaintiff in error had no means of relieving himself but by writ of error to the House of Lords.

For this information as to the grounds of giving costs, I am indebted to Mr. Courtenay, the clerk of Parliament.

presented Brice William Fletcher to supply the vacancy, and to be rector of the said rectory, in order that he might be instituted and inducted thereto by the proper ordinary; and further reciting that Brice William Fletcher had agreed to resign the rectory into the hands of the proper ordinary, upon such request or notice as thereafter mentioned, so as that the rectory might thereby again become vacant; to the intent, and for the purpose that the Lord Sodes, his heirs or assigns, or other the person or persons who should for the time being be the owner or owners of the advowson of the said rectory, might be enabled to present thereto anew either the Honourable Henry Watson, one of the younger brothers of Lord Sodes, or the Honourable Richard Watson, his youngest brother, when such of them to be so presented, should be capable of taking an ecclesiastical benefice.* The condition was, that if Brice William Fletcher should, upon the request of Lord Sodes, his heirs or assigns, or other, etc., or upon notice in writing to be left for him, by Lord Sodes, his heirs or assigns, or other, etc., at the rectory or parsonage house of the said rectory, and within one month after such request made or notice left, absolutely and effectually resign and deliver up the said rectory and parish church of Kettering, with the appurtenances, into the hands of the proper ordinary or guardian of the spiritualities, for the time being, whereby or so as that the said rectory and parish [146] church of Kettering should become and be absolutely vacant, and Lord Sodes, his heirs or assigns, or the person, etc., might be thereby enabled to present anew to the said rectory and parish church of Kettering, either the said Henry Watson or Richard Watson, when capable, etc., etc., then the obligation to be void, otherwise to be and remain in full force. The breach assigned was that Henry Watson, one of the younger brothers of the Defendant in error, on the 11th of October, 1820, became capable of taking an ecclesiastical benefice; that the Defendant in error was desirous that the Plaintiff in error should resign the living, that he might present the said Henry Watson, and requested him so to do, but that he had refused to make such resignation, to damage of the Defendant in error of £12,000.

Upon this suggestion, a writ of inquiry was executed before the Chief Justice, and a special jury assessed the damages at £10,000, for which judgment was entered up. Upon this judgment, the Plaintiff in error brought a writ of error in the Exchequer Chamber, where judgment was affirmed, without argument; whereupon a writ of error was brought in the House of Lords.

The case was argued with great learning and ability, by Mr. Shadwell and Spankie, Serjeant, for the Plaintiff in error, Bosanquet, Serjeant, and Pepys for the Defendant in error.*

After the argument the House directed the following question to be submitted to the judges:—"Whether sufficient matter appears upon the record to show that either by statute or common law, the bond upon which the action of the De-[147]-fendant in error was brought in this case, and stated upon the record to bear equal date with the writing of presentation therein mentioned, is void or illegal."

Upon this question the judges † not being agreed, gave their opinions *seriatim*:

Mr. Justice Gaselee (after stating the facts) proceeded as follows: The ground of objection which has been taken to this bond is that it is simoniacal, and not only contrary to the statute of 31 Eliz. c. 6., but, also, to the common law and public policy. But another question has been raised at the bar, whether, admitting this objection to be good, it can be taken advantage of in the present state of the record, or whether there should not have been a plea averring that the bond was given in consideration of the presentation? It will not be necessary to consume much time in the consideration of this question, because it appears to me to be impossible to read the condition of the bond without coming to the conclusion, that the bond was given in consideration of the presentation, and if so, it is unnecessary to introduce any specific averment of that fact.

I shall, therefore, confine my observations to the principal question, whether special resignation bonds, for the purpose of presenting particular persons when capable of taking the benefice, are legal, and whether the persons mentioned in this

* The points argued and the authorities cited are noticed in the opinions of the Judges.

† Bayley, Holroyd, and Littledale, Judges, gave no opinion.

condition are such in whose behalf such a stipulation may be made? Of course I confine myself to special resignation bonds, because, since the case of *Ffytche* and the *Bishop of London*, which was decided in this House in the year 1783, I am precluded from con-[148]-tending that a general resignation bond can, under any circumstances, be supported. Before the determination of that case by this House, there had been many cases in which it had been decided by the courts below that general resignation bonds were upon the face of them good, and were not to be avoided except by plea showing them to have been originally made upon some corrupt contract not appearing upon the bond itself, or that an ill use was endeavoured to be made of them, by attempting to put them in force for improper purposes; in which latter case the remedy was an application to a court of equity for an injunction to restrain their being put in suit. It is true that in some of the cases before *Ffytche* and the *Bishop of London*, doubts had been thrown out as to the validity of general bonds of resignation, but in most, if not all the cases, special bonds for legitimate purposes, among which the presenting the patron himself, his son, or, (as one of the cases has it.) his friend, were held to be good. And it is surely quite evident that there is a manifest distinction between general and special bonds of resignation, in as much as, if the patron wishes to sell the advowson, it is much more valuable by means of a general bond of resignation, the purchaser can at any time compel a vacancy. This cannot be in the case of a special bond like the present, but on the contrary, as in general the party intended to be presented is under age when the bond is given, the consequence of his being presented would be the putting in a younger life, which would generally render the advowson less valuable as an object of sale.

The first case with which I shall trouble your Lordships is *Johnes v. Lawrence* (Cro. Jac. 248. See also p. 274), which is thus re-[149]-ported by Croke, J., twenty-one years only after passing the 31st of Elizabeth: "Debt upon an obligation of 1000 marks conditioned: whereas the obligee had procured from Queen Elizabeth letters of presentation to the church of Strettham, and was to present Lawrence, intending when his son John should be capable to procure another presentation of him to the said church, if the said obligor, within three months after his request, upon his presentation, admission, institution, and induction to the said church, should resign his benefice absolutely: that then the obligation shall be void. The Defendant pleads that he was not requested; and issue joined thereupon and found for the Plaintiff, and moved in arrest of judgment: First that it appears by the condition of the bond to be a simoniacal contract, and against law, and therefore the obligation void, *sed non allocatur*, for there doth not any simony appear upon the condition. And such a condition is good enough, and lawful, wherefore it was adjudged for the Plaintiff. Afterwards a writ of error was brought upon this judgment in the Exchequer Chamber, and the principal error insisted upon was, that this condition is against law, for it appears upon the condition entered, that it was for simony, which makes the obligation void; but all the judges of the Common Bench and Barons of the Exchequer held, that the obligation and condition are good enough; for a man may bind himself to resign, and it is not unlawful, but may be upon good and valuable reasons, without any colour of simony: As to be obliged to resign if he take another benefice, or if he be non-resident for the space of so many months, or, as this case is, to resign upon request, if the patron will present his son thereto when he should be of age capable to [150] take it. But if it had been averred that it was *per colorem simonii*; viz. If he did not suffer the patron to enjoy a lease of the glebe or tithes, or if he did not pay such a sum of money, that had been simony, and it is possible might have made the obligation void. But as this case is, there doth not appear any cause to adjudge it to be void for simony; wherefore the judgment was affirmed."

The doctrine in the case of *Johnes v. Lawrence*, was adopted and acted upon in the subsequent case of *Babington v. Wood* (Cro. Car. 180, Hatt. 220, S. C.): "Debt upon an obligation conditioned: whereas the Plaintiff intended to present the Defendant to such a benefice, that if the Defendant, at any time after his admission, institution and induction, at the Plaintiff's request resigned the said benefice into the hands of the Bishop of London, that then, etc. The Defendant upon over of the condition, demurred generally. And this was argued by Grimston for the Plaintiff, and by Calthrop for the Defendant, who showed that the cause of demurrer was, for

that the condition of the bond being to resign upon request of the patron, it is simony and against law; so the bond void. But all the Court conceived that if the Defendant had averred, that the obligation was made to bind him to pay such a sum, or to make a lease or other act which appears in itself to be simony, then upon such a plea, peradventure it might have appeared to the Court to be simony, and might have been a question whether such a bond for simony should be void: but as it is pleaded by way of demurrer upon the oyer of the condition, it doth not appear that there is any simony: for such a bond to cause him to resign may be good, and upon good reason and discretion required by the [151] patron, viz.—If he be non-resident, or takes a second benefice by a qualification, or the like; and a precedent was shown in octavo Jacobi, betwixt Johnes and Lawrence, where such a bond was made to resign a benefice upon request, when the son of Johnes came to be twenty-four years of age, to the intent that he might be presented unto it: and it was adjudged good in the King's Bench, and affirmed on a writ of error in the Exchequer Chamber, and of this opinion was all the Court: whereupon judgment was given for the Plaintiff. Hatton, who reports the same case, says, that upon error brought in the Exchequer Chamber the judgment was affirmed (Jones, 220. S. C.) accordingly, and that it was affirmed in error upon viewing the precedent of *Johnes v. Lawrence*."

In that case it does not appear that the condition of the bond was to resign in favour of any particular person, but generally; but it is obvious that the case turns mainly upon *Johnes v. Lawrence*, which it treats therefore as an express authority.

In an anonymous case, reported in 3 Mod. 54, in which a general bond of resignation was held good, although Mr. Justice Powel states his opinion, "that when first the judges held these bonds good, if they had foreseen the mischief of them, they would have been of another opinion." Yet he considers that the patron having a son of his own, who may be capable of a benefice, it is an honest intent: and Justice Blincow says, "Here is a particular circumstance why it should not be thought simony; because it is a sum much above the value of the benefice; if indeed it had been for a sum of less value, it might be intended perhaps that the parson would rather pay it than resign;" and he it remembered, [152] Justice Twisden said, "he had known such a bond held good twelve times; so it would be hard to oppose it now, there appearing no simony in the condition, and the Defendant not averring any."

What proportion the penalty in this bond of £12,000, bears to the value of the living does not appear; but it must be taken for granted the bond was *bond fide* given for the purpose mentioned in the condition. If it were really colourable, and the real intention was that there should be no resignation, but that the patron should receive the penalty, it should have been pleaded, and that might have altered the case.

The case of *Williard v. Stapylton* (Equity Cases abridged) is thus reported: "The guardian of an infant presented to a living, and took a bond from the incumbent to resign within two months after request of the patron or his heirs, it being designed that he should have the living himself when capable. The patron afterwards died an infant at the University, leaving two sisters his heirs, who pressed the incumbent to resign, and for not doing it, put the bond in suit, and recovered judgment; and this bill was brought to be relieved against the bond and judgment. And it was proved in the cause that they had treated with the incumbent to sell him the perpetual advowson, and had said that if he would not give £700 for it, they would make him resign. The Lord Keeper said, the proof in this case lies on the Defendants' part, and unless they make out some good reason for removing him, he should certainly decree against the bond. Bonds for resignation have been held good in law. The statute of 31 Elizabeth against simony, made the penalty upon the lay patron; and he did not remember [153] any case of resignation bonds before that statute, and they have been allowed since only to preserve the living for the patron himself, or for a child, or to restrain the incumbent from non-residence or a vicious course of life; and if any other advantage be made thereof, it will avoid the bond: and where it is general for resignation, yet some special reason must be shown to require a resignation, or he would not suffer it to be put in suit. If it should not be so, simony will be committed without proof or punishment. A particular agreement must be proved to resign for the benefit of a friend who would be presented, and without such agreement the bond ought not to be sued, but for misbehaviour of

the parson, and here are proofs in this case of endeavours to get money out of the Plaintiff: and he decreed a perpetual injunction against the bond, and satisfaction to be acknowledged upon the judgment, and the Plaintiff to give a new bond, of £200 penalty, to resign, but that not to be sued without leave of the Court."

It is difficult to say why there should be a new bond, the party intended to be presented being dead. And in *Aubler*, 268, the Lord Chancellor is stated to have said, that the Lord Keeper went too far: but I cite the case to show that there was then no idea that a bond to resign, for a son or even a friend of the patron to be presented, was illegal: the only ground of applying to the Court of Chancery being the "ill use that had been made of it."

So in *Peele v. Capel* (1 Strange, 534). Capel, on presenting Peele to a living, took a bond from him to resign when the patron's nephew came of age, for whom the living was designed. When the nephew was of [154] age, instead of requiring a resignation, it was agreed between them all that Peele should continue to hold the living, paying £30 per annum to the nephew. Peele makes the payment for seven years, but refusing to pay any more, the patron put the bond in suit, and then Peele comes into the Court for an injunction, and to have back his £30 per annum. On the hearing the Chancellor granted the injunction, not (as he said) upon account of any defect in the bond itself, which he held good, but on account of the ill use that had been made upon it. And as to the money, it being paid upon a simoniacal contract, he left the Plaintiff to go to law for it.

These are all the cases respecting special resignation bonds which I have met with before the decision of *Ffytche v. the Bishop of London*. I proceed now to those which have arisen during the succeeding period of forty-three years. The first is *Bagshaw v. Batley* (4 Term Reports, 78), which was an action on a bond given by the Defendant on his appointment to the curacy of the free chapel of Wornhill, in the county of Derby, which, after reciting that the Defendant had agreed to be constantly and duly resident at the curacy house there: and in default of such residence, to resign and deliver up the curacy within one month after request or notice in writing, left at the curacy house, so that the patron might present anew, was conditioned for such resignation, in default of such constant and due residence, so that the patron, the obligee, might present anew, discharged of all charges and incumbrances done and suffered by the obligor, and for the not committing wastes or dilapidations upon the houses or [155] lands belonging to the curacy. To this the defendant pleaded several pleas: 1st. That he had resided at the curacy, and had not committed or suffered wastes or dilapidations. 2dly. That after his appointment to the curacy, he had a general license from the obligee to reside elsewhere. Replication: 1st. That the Defendant voluntarily absented himself from the 7th day of April, 1790, to the 8th of April in the year following, and that the Plaintiff had given him notice to resign, which he had refused to do. 2dly. That after the time when the supposed license was granted, viz. on 7th April, 1790, the Plaintiff countermanded and revoked the license, and that the Defendant absented himself, etc. as in the former replication. To both these replications there was a general demurrer. Sutton, in support of the demurrer, contended, first, that the bond was illegal and void: and secondly, that the license was general, and could not be revoked. First, the bond is illegal, because it placed the incumbent under the undue control of the patron, after the presentation, and after the relation between them had ceased, and a new relation had sprung up between the incumbent and the ordinary, to whom only he owed obedience. The right of presentation in the patron is a public trust, and not a mere private interest. The duties of the incumbent are prescribed by the municipal law, and the canons and ordinances of the church, and therefore it was not competent to the patron to impose any private condition of his own creating beyond those which the civil and ecclesiastical law have deemed it necessary to require. With respect to the residence required by the bond, that is carried much further than the law requires it, for the [156] statute of Henry VIII. only imposes certain penalties, much inferior to that imposed by this bond for non-residence: and besides, there may be various defences to an action on that statute, as amongst others residence upon another living by dispensation, whereas there can be no excuse under this unless the license of the patron be such. And further, in this case the living itself is to become vacant: again too in this case the penalty is to become due to the patron, in case of dilapida-

tions, in which he has no sort of interest, that being but the sole concern of his successor. The effect, therefore, of this bond, is to raise to the patron a special interest in the exercise of a public trust, which by law he was not invested with.—*Chambre, contra*, was stopped by the Court.—Lord Kenyon said, I cannot bring myself to entertain a doubt upon this case. It has been argued that the patron's right of presentation is a mere trust; it is so to some purposes, but not to all. It is a trust coupled with an interest, for it is a subject of a conveyance for a valuable consideration, which is not the case with a naked trust. As soon as the Defendant was presented to the living, he was bound to take upon himself all the duties of an incumbent; to reside upon the living, to take upon himself the cure of souls, and to keep the house in proper repair: now this bond was only entered into for the purpose of securing a performance of all these duties, which by law, and without the bond, he was bound to discharge. I avoid saying any thing respecting the case of the *Bishop of London v. Efyche*: when that question comes again before the House of Lords, they will, I have no doubt, review the former decision, if it should become necessary. It is sufficient for me, in decid[157]-ing the present case, to say, that it cannot be governed by that, for here the Plaintiff does not call for the resignation of the incumbent, but merely for a performance of those duties which in morality, religion, and law, he ought to do. I am therefore clearly of opinion, that a bond for the performance of these duties is not illegal.—Justice Boller said, I cannot find any immorality or illegality in this bond. It is the duty of the incumbent to reside on his living, and to be regular in the discharge of his duties. Now this requires nothing more: it only requires him to do what the law would have compelled him to do without it. Justice Grose was of the same opinion. Ashurst was absent.

Although in this case the bond was not for resignation to the patron, or to any relation, on his becoming capable and desirous of taking it, yet it amounts to a decision of the Court, that the giving of a special bond of resignation is not in all cases illegal.

The next case was precisely in point with the present. It is *Partridge v. Whiston* (4 Term Reports, 359). The condition of the bond, after stating the presentation of the Defendant to the rectory of Cranwick and the vicarage of Methwold, in Norfolk, recites an agreement to be personally resident in one or other of these parishes, or in Northwold, which is contiguous to both, without absence for eighty days in any one year: to serve the cure of these two parishes himself, if his health would permit; and not to serve the cure of any other parish while he held those: that as the two livings together were a comfortable provision for one clergyman, though neither of them separately was such, the Defendant had agreed [158] never to resign one without the other: that the Plaintiff had a son about fourteen years of age, who probably would take orders, and might be desirous of taking these livings; and therefore the Defendant had agreed, in that event, to resign both the livings, upon three months' notice to be given by the Plaintiff, in order that the Plaintiff's son might be presented thereto: the bond was conditioned to perform this agreement, and to keep in good repair the rectory house and chancel of Cranwick, and the vicarage house of Methwold. The Court, understanding that it was intended to carry this case up to the House of Lords, gave judgment for the Plaintiff, without hearing any argument. They said, as this case was not precisely similar to that of the *Bishop of London v. Efyche*, they were bound by the established series of precedents to give judgment for the Plaintiff. I do not find that the case was ever carried further.

The next case is not one for a resignation bond with respect to an ecclesiastical benefice, but I cite it for the purpose of showing the opinion of Lord Kenyon on the point now in question. It is the case of *Leyh v. Lewis* (1 East, 391), where the patron of a school had taken a general resignation bond on the appointment of the master. Lord Kenyon said, in the instance of ecclesiastical livings, every rector has a freehold in his rectory; yet it was never doubted but that resignation bonds for certain purposes, and up to a certain extent, at least, were binding, though they put an end to the freehold. Justice Lawrence doubted whether the appointment could be made otherwise than for life: but he says it is true that a bond may be taken to enforce the observance of [159] those duties which by law are required to be performed by the appointee of an office, but then it should be so expressed in the condition.

In 3 *Bosanquet and Puller*, 231, this case is reported in the Exchequer Chamber,

and judgment affirmed without argument, it not sufficiently appearing on the record that the office of schoolmaster was such as ought to be deemed a freehold office.

In *Newman v. Newman* (4 Maule and Selwyn, 66), upon a bond to pay certain sums of money on the conveyance of an estate, having an advowson appurtenant, to the obligor; and in case a living should become vacant during the life of the son of the obligee, and he should be qualified, to present him; and if he should be under age, and it should be necessary to present another, to procure such other to resign when the son should be of age; it became unnecessary to decide whether the latter part of the condition was good.—Justice Le Blanc says, the reason for making an exception in favour of a condition for presenting a son might be because it was not for a money consideration.—Justice Dampier says, if a bond to resign in favour of a particular person were necessarily void, the objection would have been good in *Johnes v. Lawrence*; but a stipulation to resign in favour of a specified person, does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent but a mere tenant at will to the patron. I know that since the case of the *Bishop of London v. Ffytche*, it has been considered that bonds to resign in favour of specified persons are not illegal.

In *Lord Kirkcubright v. Lady Kirkcubright* (8 Ves. 51), a [160] bond was given to pay £100 a year until the obligee should be instituted and placed in possession of a living in the Church of England, then to pay him so much as with the value of the living shall amount to £150. There was also an agreement by Lord Kirkcubright to enter into orders and take the living, and if he did not the bond was to be of no avail. The obligor having died intestate, the obligee filed a bill praying an account, and that the arrears of his annuity might be paid him. “The Lord Chancellor expressed great doubt as to the validity of the bond: observing, that it was void on many accounts: it is,” he says, “a corrupt agreement for taking holy orders such as the Court ought to decree to be delivered up. The policy of the ecclesiastical constitution of the country requires, that a man should take orders without any reference whatever to considerations of that nature. There is no objection to the bond itself except as connected with this agreement at the same time for a pecuniary consideration to take holy orders. Another objection to the bond is, that the father is put under these circumstances, that he is to solicit the benefit of patronage for this pecuniary consideration moving from himself; the policy of the law supposing the patron to look for persons the best that can be recommended to him, which excludes pecuniary considerations. The cause stood over in order that this point might be considered. It was ultimately decided that the obligee had not performed the conditions, inasmuch as he had only taken deacons’ orders, and had not answered whether he meant to enter into priests’ orders. That case contains no decision upon the validity of special resignation bonds, though the Lord Chancellor, speaking of resignation bonds in general, states himself to have [161] no doubt that they were generally against the policy of the law, and says, that the question of their legality would never have perplexed him if there had not been so many authorities.”

Another case has been referred to in the argument (*Dashwood v. Peyton*, in 18 Ves. 27), where a bond of resignation had been given in favour of a particular individual and not to accept a bishopric. The application was for an injunction, principally on the ground that the bond as to the resignation which had been given in consequence of supposed directions in a will, had been so given by mistake, it having been afterwards discovered that it was intended by the testator that the party should be presented without any such obligation. The Lord Chancellor said, it was very difficult, upon the pleadings in the *Bishop of London v. Ffytche*, to reconcile the distinction between general and particular bonds of resignation with the principle on which the House of Lords made that decision; but, he adds, “it would not however become me, having regard to what is the present state of the law on this subject, to interpose in a court of equity on the ground that this is a particular bond of resignation, although I agree that this Court, if it has a concurrent jurisdiction, is not bound to wait for the decision of a court of law, yet reasonable caution requires a court of equity not hastily to pronounce bad a bond understood to be good at law, and it would at least be proper to leave that question to be reconsidered at law. The injunction was refused.

The last case to be found on the subject is *ex parte Rainier, Rowlatt v. Rowlatt* (1 Jacob and Walker, 230). The father, on the marriage of his son, gave a bond to trustees, *inter* [162] *alia*, for performance of a covenant in the settlement, whereby he covenanted, that until the son should become the actual incumbent of the rectory of North Benfleet, or should be in the enjoyment of some other benefice or ecclesiastical preferment which he might hold during his life, of the yearly value of £600 at the least, or until his death, he would pay him an annuity of £200. The father became a bankrupt: the petition was presented by the son and his trustees to prove in respect of the bond. It appeared that the son had been presented to a living of £600 a year, but had given a bond to resign in favour of two sons of the patron, when either of them should be qualified and willing to be presented to it, and instituted and inducted. The eldest son took orders, and the living was in consequence resigned within two years after the presentation. It was contended, that the son having been presented the condition was satisfied: on the other hand, it was said, that having been presented on a condition to resign and a bond given to that effect, it was a benefice that could not have been retained for life. The Lord Chancellor said, still he might have held it for life, he might if he chose have kept the living and forfeited the bond: you may, however, if you like, take a case into the Court of King's Bench. The reporter says, the matter stood over for the Plaintiff to consider whether they would take a case, which they afterwards accepted, but it is understood that they have since declined to persevere in it.

I apprehend that case could only have been directed upon the ground that the Court of King's Bench might have held the bond legal: for if it was simoniacal, the party could not have held the living, even if he had paid the penalty. For the presentation [163] would have been absolutely void, and consequently not a satisfaction of the condition.

I have now gone through all the cases I can find respecting special resignation bonds, extending over a period of 200 years: in none of which has such a bond been held bad: in many it has been expressly determined to be good, and admitted to be so in most of those in which validity of general bonds of resignation has been disputed or denied. In one or two of the latest cases, indeed in the Court of Chancery, it has been stated to be very difficult upon the pleading in the case of the *Bishop of London v. Ffytche*, to reconcile the distinction between general and particular bonds of resignation with the principle on which the House of Lords made that decision. The main principle upon which the decision proceeded, appears to me to have been the enabling the patron to have made a greater profit on the sale of the advowson, and the converting the tenure of the incumbent into a tenancy at will. This I have already stated not to be applicable to the case of a bond to resign in favour of a particular person. The only objection applicable to a special in common with the general resignation bond appears to be the reducing the tenure from an absolute freehold for life to one for a less period, but however that might be available if the objection had been made for the first time, the practice as to special bonds appears to have been too long acted upon and acquiesced in now to call it in question.

Under these circumstances, therefore, can a court of law now adjudge that they are bad: particularly when it is considered that the consequence of holding them to be so must be to submit to two severe penalties those who have been acting upon a practice [164] of upwards of two centuries, and which has never yet been declared illegal, and in many instances expressly determined to be legal? Those penalties, if the bond be considered as illegal, under the statute of Elizabeth, extending to the forfeiture of the presentation and two years' value of the benefice.

The provisions of the statute apply "to any person, etc. who shall present or collate for any sum of money, reward, gift, profit, or benefit, whatsoever, directly or indirectly, or for or by reason of any promise or agreement, grant, bond, covenant or other assurance of or for any sum of money, reward, gift, profit, or benefit, whatsoever." It is not contended that this case comes within any of the words of the statute except the word BENEFIT, and it is said that a resignation bond in favour of a son is a benefit to the father, inasmuch as it relieves him from making any other provision for him, which he would otherwise be bound to do. To this I answer, that this is not the species of benefit which the statute contemplated. A general resignation bond may be so, as I before stated, as it enhances the value of the living if sold

during the incumbency, and amounts to a sale with the means of procuring an immediate vacancy. But if this be so considered, it would be equally a benefit when the father presents the son on a fair vacancy, or even where he presents himself; in either case it may be said he makes the presentation a means of providing for an expenditure he must necessarily incur; and therefore, circuitously, at least, a source of profit to himself. The statute has never yet been intended to operate to that extent; and the observation made at the bar, that upon looking at the 8th section the word benefit must be taken to mean a pecuniary benefit, and that the two [165] clauses ought to have a similar construction, appears to me to be entitled to considerable weight.

It might perhaps be urged, that in this case it does not appear that the patron was bound to provide for his younger brother, and therefore it can be in no sense a benefit to the patron, which it is but fair to consider the meaning intended by the statute to be applied to the word benefit, coupled as it is with the words sum of money, reward, gift, or profit. But it seems to me to be sufficient to say the act has never been held to extend to bonds of this description; that, on the contrary, they have been uniformly held good in Westminster Hall, and that it would be contrary to the principle universally acted upon with respect to penal law, viz. that they are to be strictly construed, now to extend it to them.

But it is asked, admitting a resignation bond in favour of a son to be good, to what degree of relationship and to what number of persons is it to extend? To this I answer, that it must, like many other cases, depend upon what shall be considered reasonable. With respect to the present case, such a bond, in favour of a more remote degree of relationship than a brother has been held good; for in the case of *Peele v. Chapel*, before cited, the bond was in favour of a nephew; and in *Rowlatt v. Rowlatt*, where the bond was in favour of two sons, when either of them should be qualified, no objection was taken on that ground; but, on the contrary, a presentation, accompanied by such a bond, was considered as a satisfaction of the condition to pay an annuity until the party should be in the enjoyment of a benefice which he might hold for his life. It is also to be observed that the statute of Elizabeth is not confined to bonds and securities, but extends to [166] any promise, agreement, grant, bond, covenant, or any other assurance. If therefore the bond in this case is illegal, and avoids the presentation, the same rule applies to every verbal promise or honorary engagement, expressed or perhaps only implied, surely then it is necessary to pause before a decision is adopted, which may, in its consequences, involve in the guilt of simony and the penalties of the statutes, parties, than whom none would be more abhorrent from such an offence, into whose contemplation it could never for a moment have entered that they were actually illegally, in making or accepting resignations, under circumstances sanctioned by the practice of centuries and the current of legal decisions, and who, from their peculiar station in society, would have been the last to put themselves in the smallest hazard of having it imputed to them for an instant, that they had concurred in or lent their sanction to any act, of the legality or propriety of which a doubt could be entertained.

Another objection taken to these bonds, is the oath upon institution, but this seems to me to be begging the question. The oath is, "I do swear that I have made no simoniacal payment, contract, or promise." Now, before the giving of such a bond can be considered a breach of the oath, it must be determined that such a bond is a simoniacal contract. Bishop Gibson (*Codex* p. 802) contends that this oath, whether interpreted by the plain tenor of it, or according to the language of former oaths, in the notions of the catholic church, concerning simony, is against all promises whatsoever; and he states that in the year 1391, in Archbishop Courteney's decree against *chappe churches*, the oath is—"Quodque obligati [167] non sunt, nec eorum amici pro se, juratoria aut pecuniaria cautione, de ipsis beneficiis resignandis vel permutandis." But I should conclude, by the omission of this part of the oath in the canons of 1603, it was intended that it should no longer be included, or at least that it was considered as not being included; for in the Irish canons, which were made thirty-one years afterwards, it was provided that if any clerk or other, with his consent, should seal any bond, or sell to any person or persons, with condition of resignation of his benefice, he shall be holden guilty of simony, and proceeded against according to the severity of the ancient canons in that behalf.

As another ground of objection to these bonds, it is asked what power is there after the resignation made, to compel the patron to present the person in whose favour it is made, or to compel such person to accept it, or having been instituted, to prevent his resigning the benefice to a vendee immediately afterwards? And it is said that neither the Bishop nor the Chancellor can compel such presentation to be made. To this I answer, that the resignation is to be made to the Bishop. Upon its being tendered, he has a right to inquire into the reason of it, and upon finding it is the consequence of a resignation bond, or any other engagement to resign, he may say he will not accept the resignation, unless the patron comes at the same time prepared to make the presentation: where the party who presented is under age, at the time when the engagement is entered into, and as soon as he comes of age procures himself to be admitted into priest's orders, it is a pretty strong proof of his readiness to accept the living. With respect to the second part of the offer to resign the living immediately, or within a very [168] short time after institution, is a pretty strong proof of the resignation being obtained from an interested motive, and would probably induce the Bishop not to accept it. But the legality or illegality of the bond cannot depend on what course the Bishop would pursue, and the probability is that he would not refuse to act according to what the courts of law had decided upon the question. If any real inconvenience should be found, it would be in the power of the legislature to enact that the resignation shall be conditional only, and be void if the persons in whose favour it is made be not presented within a certain period. It certainly has been determined that the party does all he can to comply with the condition, by tendering his resignation; yet if the Bishop refuses to accept it, the bond is forfeited. But upon this I would observe, that if where the incumbent has done all he can to perform the obligation, the bond is still put in suit, it can only be for an unlawful purpose: in that case I apprehend a court of equity would grant an injunction.

To the observation that it may be difficult or impossible to ascertain the fact; the answer is, that if there is any suspicion respecting it, a bill in equity may be filed for a discovery, and if the discovery does not render the party liable to penalties, it will be ordered. This was done in the case of the *Bishop of London v. Fytche* (1 Brown's Reports in Chancery, 96), and it is remarkable, that the noble and learned lord, who so ably, and so successfully, combatted the legality of resignation bonds, while he was in the profession, adopted the doctrine of Westminster Hall, and had, in that very case, over-ruled a demurrer which had been pleaded, on the ground that a discovery might expose the parties [169] to penalties, and which must have been allowed, had his lordship then been of opinion that the transaction was illegal.

I have cautiously abstained from entering into the question, how far bonds of this description are or are not consistent with public policy; and I have done so, because however proper, if the case were new and doubtful, it might be to take this question into consideration, yet if the case is not new, but such bonds have been held good for centuries, as it appears to me they have been, it is now too late to consider that question in a court of law, and if it is considered right to put a stop to them on the ground of public policy, the legislature are the proper persons to do so. Were the case new, I am not prepared to say it might not be proper to prevent the giving of these bonds; but if so, it seems to me that it would be the proper course to put an end to them altogether, and not to make a distinction in favour of those which it has been said are good because they only enforce the performance of those duties which are required by law to be performed. If the law requires the performance of a duty, why not trust the enforcing such performance to those authorities to which the law of the country has entrusted it, and who have the power of determining how far any regulations for the rigid performance may or may not be relaxed or dispensed with? Why is it necessary to call in the assistance of the patron, and give him the power of enforcing it by a more severe punishment than the law would inflict, and the inflicting of which would confer an advantage on the patron, which the ordinary process of the law would not give him.

With respect to one of the cases in which a bond [170] of resignation has been allowed, namely, that of non-residence, I am not sure that the case stated upon that subject, does proceed from so pure a motive as has been attributed to it. Take for instance, the case of *Whiston v. Partridge*, before cited. The condition is, that the party shall reside, without absence of eighty days in any one year. When it is

considered that at the period when this bond was entered into, absence of eighty days in the course of any one year put an end to any lease which might have been made of the tithes, or any part of the benefice, one is compelled to conjecture that there was some other reason for the insertion of that provision, than the good of the church, or the punctual performance by the incumbent of the duties of his situation.

I forbear, however, to say more upon this topic, because, as it appears to me, the practice of giving these bonds has too long prevailed, and has been too often recognized as legal, to permit it to be altered by any other than legislative authority. For these reasons, and upon the most attentive and full consideration I have been able to give to the authorities, I feel myself bound to state my humble opinion:—That sufficient matter does not appear upon the record to show that either by the statute or common law, the bond upon which the action of the Defendant in error was brought in the court below stated upon the record to bear equal date with the writing of presentation therein mentioned, is void and illegal.

Mr. Baron Hulloek: After much reflection and research upon the subject, I have arrived at a different conclusion from that which is the result of the deliberation of my learned brother. But I con-[171]-cur in the opinion which has been stated, and which I have reason to believe is the opinion also of all the learned Judges now present; that this record discloses sufficient matter to show, that the bond in question was given in consideration of, and as the price of the presentation of the Plaintiff in error to the rectory of Kettering. For a considerable time I felt much difficulty on this part of the case; because, although no plain unlettered man can peruse the condition of this bond without, as it seems to me, at once perceiving that such was the fact; yet still it appeared to me to be doubtful whether that conclusion was more than an inference which, however well warranted in ordinary cases of construction, was yet insufficient, in the absence of distinct and positive averment, to warrant a court of law in acting upon it, in a case where the question is, whether the parties to the contract have acted in contravention or violation of the enactment of a penal statute. In all cases in which the charge involves in it a breach or violation of a penal statute, it is essentially necessary that the act charged should be brought by express and positive allegations within the language and letter of the statute. I apprehend that if the Defendant below had, in this case, been advised to have pleaded specially, instead of suffering judgment to go against him by default, his plea would have shown by precise and positive allegations, that this bond was given in consideration of and for and as the price of the presentation, and that the presentation was made or conferred in consideration of and in return for the bond. A plea so framed would, if established in point of fact, have brought the case directly and unequivocally within the language of [172] the statute (31 Eliz. cap. 6. sec. 1. 5). Further reflection, however, and opportunities of conversing upon the subject, have satisfied me, that it is clear, from the language of the condition itself, that this bond was given in consideration of and for the presentation, and that the presentation was made in consideration of the bond: in short, that this instrument was the result of barter and contract between the obligor and the obligee, for and in respect of this living.

The condition of the bond commences with a recital, that the obligee is the patron of the rectory of Kettering, which rectory was then vacant by the death of the late incumbent thereof.—That the obligee, by writing under his hand and seal, bearing equal date with the bond, had presented the obligor to supply the said vacancy, and to be rector, in order that he might be instituted and inducted thereto; and that the obligee had agreed to resign the said rectory, upon such request or notice as thereafter mentioned, so as that the said rectory might thereby again become vacant, for the sole purpose, that the owner of the advowson of the said rectory might be enabled to present thereto one of two brothers of the obligee, therein specifically named, when the party to be presented should be capable of taking an ecclesiastical benefice.

Now can any person, after reading these passages, from the condition of the bond, have a doubt of the nature and character of this contract? Assuming, then, that it is sufficiently evident, by the matter appearing on this record, that the bond in question constituted the consideration for this presentation, is it an instrument avoided by the statute (31 Eliz.)? By the [173] fifth section of that statute, "If any person shall or do, for any sum of money, reward, gift, profit, or benefit, directly or

indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit, or benefit, whatsoever, directly or indirectly, present or collate any person to any benefice, with cure of souls; or give, or bestow, the same for or in respect of any such corrupt cause or consideration; that then every such presentation, and every admission, institution and induction thereupon, shall be utterly void and of no effect in law." And the Act then proceeds to subject the parties to certain forfeitures and incapacities.

By the word "corrupt," as used here, and as applied to this subject, it is quite clear, that every presentation, which is not gratuitous, is corrupt. By the former part of the clause, presentations, for money, etc., "are prohibited"; and by the latter part of this section, presentations, made for such corrupt cause, are avoided; clearly considering such cause, that is, a bond, etc., made for the presentation, to be a corrupt cause. And the statute was intended, (as appears by the preamble to the fifth section, which is printed incorrectly, at the end of the fourth,) for the avoiding of simony and corruption in presentations to benefices, etc.

It may be observed, that the statute does not in express words avoid the bond itself, but merely the presentation made in consequence of or under it. But still, upon general principles of law, I conceive it to be quite clear, that the bond made for the purpose of furthering an object prohibited by a statute is void, and can never be made the foundation of an action: and this doctrine is laid down in the clearest [174] manner, by Lord Holt, in *Bartlett v. Finner* (Carth. 252). In that case, that learned judge expresses himself thus: "Every contract, made for or about any matter or thing, which is prohibited and made unlawful by any statute, is a void contract; though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute: as, for instance, in the case of simony, the statute only inflicts a penalty by way of forfeiture, but doth not mention any avoiding of the simoniacal contract; yet it hath always been held, that such contracts, being against law, are void."

The inquiry then, will be, whether a bond of this description be a benefit, either directly or indirectly, to the patron; because, if it be, it will fall immediately within the words and operation of the statute; and any presentation made for such a bond will be void.

It is denied that this security is either a profit or a benefit in the true spirit and intendment of this clause of the statute.

If the judgment of the Court below is sustained, the obligee would be entitled to take out execution upon his judgment for the sum of £12,000, with his costs of suit. A right to enforce the payment of such a sum of money looks like a profit, like a benefit, it appears difficult to raise a serious doubt upon the question. The opportunity afforded by this species of bond of providing for a son, or a brother, or relation, must surely be considered a benefit to a patron. If it be a benefit, how has it been acquired? why by means of a corrupt bargain for the presentation.

But consider this contract in another point of view. It is not compulsory on the obligor to resign, [175] he has an option either to do so or to pay the penalty, and, as has been well observed by Eyre, B. (Cunningham, 52) in the *Bishop of London v. Ffytche*, "Is the chance that the obligor (who may) will so doct worth nothing to the obligee? The obligor may resign or pay the money, and the obligee cannot, at all events, compel him to resign. If that be so, what would be easier than the making of this species of contract the means of selling an advowson during an actual vacancy? The value of the living is calculated — a bond is given for the amount, conditioned to be void if the incumbent resigns on request, when a certain specified individual has become capable of taking the living. That event happens almost immediately by the nomination of a person who, if he lived, would, within a very few months, become capable of holding an ecclesiastical benefice. The incumbent is called on to resign: he refuses, but prevents a suit on the bond by paying to the obligee the amount of the penalty. Would not such a proceeding, if this bond be legal, operate a benefit to the patron for and in respect of his presentation; but whether the money or the resignation of the living is obtained, the obligee acquires to himself a benefit in every sense of that word for his presentation.

It has been however argued, as it was said in the *Bishop of London v. Ffytche*, that

the word "benefit" in the 6th section of the 31 Eliz. c. 6. cannot be construed according to its ordinary meaning, inasmuch as such a construction would have the effect of rendering the 8th section of the statute nugatory. The true answer to that sort of reasoning is given by Mr. Baron Eyre in the case of the *Bishop of London v. Ffytche*. It appears to me that the word "benefit" [176] in the 8th section of the act must receive the same meaning as it possesses in the 6th clause of the act. The word "benefit" in the 8th section means something *ultra*, something in addition to the value of the thing exchanged. In exchanges neither living can be considered as better or worse in legal indentment, because they are, in the estimation of those that make them, perfectly equal, however other persons may differ upon the subject. Mr. Baron Eyre puts the case thus: "A living in the air of Berkshire may be reckoned an equivalent for the difference in value of an incumbency in the Hundreds of Essex." That is a fair argument. Each man throws into the scale circumstances which establish a perfect equilibrium in cases of exchange between parties. In a case where there is not a single shilling passing, if there is any other extrinsic benefit whatsoever to the smallest amount, it is made a part in the consideration of such exchange, and there is no question that upon this Act of Parliament such exchange will be void. Since the decision in the *Bishop of London v. Ffytche*, we are bound to say that a general bond of resignation is bad in point of law. That decision must have proceeded either on the ground that such a bond was a benefit to the patron, and therefore prohibited by the statute, or that such a bond was void on grounds of public policy. It was contrary to the policy of the law to permit the incumbent of a living to be placed under such a control as must necessarily result from such an instrument. In *Legh v. Lewis* (1 East 398), Mr. Justice Le Blanc says, that the decision in the *Bishop of London v. Ffytche* against the validity of general bonds turned ultimately on the ground of their [177] being simoniacal and against the statute. If the decision alluded to proceeded on that ground, then I would humbly ask, on what principle or ground of reason can the effect of the bond now in judgment be distinguished from the effect of a general resignation bond? The benefit or value of the two bonds may differ in amount or degree: a special bond may not be so beneficial or so valuable as a general resignation bond, but that is a mere difference in the degree, not a difference in the nature, or essence, or character of the instrument. I am unable to comprehend any other way in which a difference can be predicated between these two descriptions of bonds. No ingenuity, no subtlety that can be employed on the subject, can succeed in establishing any other distinction between general and special bonds of resignation; and if the facts disclosed upon this record are adverted to, the absolute identity of these bonds in principle and operation will be most palpable. One of the nominees in the bond is now competent to hold an ecclesiastical benefice. But the patron cannot be compelled by any mode or way which any lawyer can point out, to make the request or give the notice mentioned in the bond. That being the case at the commencement of the suit below, the obligor stood precisely in the same situation as an obligor in a general bond would be in the moment after he had executed that description of bond.

If, then, general bonds of resignation were decided to be bad, as being contrary to the statute of Elizabeth on the ground of their operating as a benefit to the patron; it seems to me more than difficult to contend with success, that a special bond, operating in the same way, can be supported as an efficient instrument. If both species of bonds operate as [178] benefits to the patron, though not to the same extent in point of value, they still must operate equally in violation and contravention, of the provisions of the statute.

But it has been argued, that, admitting the case of the *Bishop of London v. Ffytche* to be law, yet, inasmuch as it was decided, as it has been strenuously alleged in direct contravention of a long train of decisions in the Court below: that case ought not to be carried beyond the strict letter of the decision, and that, therefore, your Lordships will restrict its operation to general bonds of resignation merely.

In confirmation of this view of the subject, it is said these special bonds of resignation have been holden valid and unimpeachable at several times, and by several judges, and in several decisions in the Courts below, since, and notwithstanding the determination in the *Bishop of London v. Ffytche*. It cannot be dissembled, that, since the decision so often referred to, resignation bonds with special conditions

have been treated on several occasions as legal instruments in the Courts below. It may be, therefore, material to advert to the modern cases in which this question has been agitated, and it will be found, and it is a most singular fact, that in no case since the determination in the *Bishop of London v. Ffytche*, has the construction of the statute of Elizabeth ever been the question before the Court.

The first case of which I am aware in which the *Bishop of London v. Ffytche* is mentioned is, *Bayshaw v. Batley*, Clerk (1 T. R. 78); that was a bond given by the incumbent to the patron on presentation to [179] reside on the living, or to resign it if he did not return to it after notice, and also not to commit waste, etc. in the parsonage-house, and it was held good. In giving judgment, Lord Kenyon said, "This bond was only entered into for the purpose of securing a performance of all those duties, which by law, and without the bond, he was bound to discharge." He then proceeded thus: "I avoid saying any thing about the case of the *Bishop of London v. Ffytche*; when that question comes again before the House of Lords, they will, I have no doubt, review the former decision, if it should become necessary. It is sufficient for me to say, that this case cannot be governed by that." Mr. Justice Buller said, "I cannot find any immorality or illegality in this bond. It is the duty of the incumbent to reside on this living, and to be regular in the discharge of his duty. Now this bond requires nothing more. It only requires him to do what the law would have compelled him to do without it."

The next case is *Partridge v. Whiston*, Clerk (4 T. R. 359); that was an action of debt upon a bond, conditioned;—to reside; to resign for the patron's son to be presented; and to keep the premises on the living in repair. In that case the Defendant pleaded two pleas to the bond; and the question now before your Lordships might, as it would seem, have been raised on the first special plea, which set out the condition upon oyer; and this in effect averred, that the presentation was given in consideration of the Defendant's entering into the bond to resign the living upon the Plaintiff's son taking priest's orders. To this plea there was a demurrer and [180] joinder. But the Court, understanding that it was intended to carry the case up to this House, gave judgment for Plaintiff without argument. They said, as this was not precisely similar to the *Bishop of London v. Ffytche*, they were bound, by the established series of precedents, to give judgment for the Plaintiff. In this case, therefore, the construction of the statute of Elizabeth is never once thought of.

The next case to which I call the attention of your Lordships, though not in order of time, is that of *Newman v. Newman* (4 Maule v. Selwyn, 66). That was debt on bond, conditioned;—to pay money to the obligee upon the conveyance of an estate to the obligor, and to present the obligee's son to the next avoidance of a church, the advowson of which belonged to the estate, if he were then of age to take it, or if not to procure the person who should be presented to resign, upon notice of the son's being qualified to take it, and to present him. These facts appeared on oyer of the bond, and were alleged to be simoniacal; there were a demurrer and joinder; and the Court decided that, as the bond was conditioned for the performance of several things, some of which were good, the bond was valid, although one of them might be void at the common law; after argument Lord Ellenborough said, "What the effect of a bond of resignation in favour of a son might be, was not, I believe, touched upon in the *Bishop of London v. Ffytche*, though, perhaps, it might be argued that there is no reason for any distinction, because a parent would be more open to prejudice and improper bias in favour of a son than of any other person." Mr. Justice Le Blanc said, "The [181] reason for making an exception in favour of a condition for presenting a son might be, because it was not for a money consideration."

Mr. Justice Dampier said, "A stipulation to resign in favour of a specified person, does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent a mere tenant at will to the patron. I know that since the case of the *Bishop of London v. Ffytche*, it has been considered that bonds of resignation in favour of certain specified persons are not illegal." In this case, the judgment is given on that part of the condition of the bond which was holden good, and no judgment was given on the part of the record applicable to this question, and the opinion of Lord Ellenborough seems rather against the

validity of special bonds of resignation as not distinguishable from general bonds. Mr. Justice Le Blanc's opinion proceeds entirely on the ground of a special bond of resignation not being for a money consideration, and therefore not bad. But the statute law is not confined to money considerations. Mr. Justice Dampier seems to consider special bonds good: but his reasoning is equally applicable to both descriptions of bonds; and if his reasoning be correct, this bond is bad, because clearly here the obligor is at this moment tenant at will, etc.

In *Legh v. Lewis* (1 East, 391), this species of bond was touched upon, though not the point in judgment. That was the case of a bond given by a schoolmaster, of an ancient public school, who had, as it was said, a freehold in his office, to resign at the request of his patron: the Court held the bond [182] good. The question arose upon a demurrer to a plea which after over stated all the facts on the record. In giving his judgment Lord Kenyon says, "I never can admit that at common law, a general resignation bond of an office is illegal, although a party may have a freehold in the office. In the instance of ecclesiastical livings that is universally the case; every rector has a freehold in his rectory, yet it was never doubted, but that resignation bonds, for certain purposes, and up to a certain extent, at least were binding, though they put an end to the freehold." Mr. Justice Lawrence expressed great doubts on this question. Mr. Justice Le Blanc agreed with Lord Kenyon, that the bond in that case was good: he thought it fell within the principle of the former determinations, that general bonds of resignation were good at law. I shall, however, have occasion to advert again to this decision.

I am not aware of any other case upon this subject. From this review of the modern cases, it is quite impossible to say that any question concerning the validity of special bonds of resignation has ever come neatly before any of the Courts below, with the exception of *Partridge v. Whiston*, in which a formal judgment was given in support of such a bond without argument, for the purpose of a writ of error. What became of that case I do not know.

It has been seen then that no well grounded argument in support of a special bond of resignation can be drawn from modern cases: and it will be found, I believe, that the more ancient ones are equally destitute of general reasoning on the subject. If any one will take the trouble of toiling through the old cases in this matter, he will not, I [183] believe, find any decision in which the validity of either species of bond has been discussed or argued on general reasoning, either on the statute or common law.

For these reasons, therefore, it appears to me that I ought to answer the question proposed to the judges in the affirmative: that sufficient matter appears upon the record to show that by the statute law the bond in question is void and illegal. But assuming that the decision in the *Bishop of London v. Ffytche* proceeded on the ground that the bond in that case was void, as being contrary to public policy, although it might not be a benefit within, or contrary to, the provisions of the statute of Elizabeth, I am disposed to maintain, that the bond in this case operates equally against public policy, and is therefore on that ground equally void and illegal.

Bonds of this description have no existence at the common law, because it was not until a period long subsequent to legal memory that the right of patronage, in the manner in which it now generally obtains, had its origin: but still these bonds, if they operate to the prejudice or detriment of the public interests, are contrary to the common law, inasmuch as every bond or contract which operates against the public convenience, or to the public prejudice, is, upon the principles of the common law, void and of no effect. This doctrine is familiar to every one, and is recognised and illustrated in the case of *Collins v. Blintern* (2 Wils. 348).

If no authorities could be found on the subject; if the question were *res integra*, few persons, I think, would contend that this species of instrument given in consideration of and for the presenta-[184]-tion to an ecclesiastical living, is capable of being supported on sound principles of law.

Before the *Bishop of London v. Ffytche*, numerous cases occur in the books upon the subject; but no one of them, as far as my researches enable me to speak, contains any reasoning or argument in support of these bonds. The authority of these cases seems to depend mainly upon tradition; certainly more upon positive authority

than good reasoning. In the latter cases, the judges, whilst they seem to admit that if the question were new, the validity of these instruments could not be supported, decide upon authority merely, and refuse to hear any argument upon this subject.

In 12 Mod. 504, 13 W. 3. Mr. Justice Powell expressed an opinion against resignation bonds, if the authorities had not bound him. He says, that when first the judges held these bonds good, if they had foreseen the mischief of them, they would have been of a contrary opinion. The same opinion is expressed on this subject by Mr. Justice Buller, in the *Bishop of London v. Ffytche*, when that case came before the Court below (see 1 East, 487 n. (a)); and afterwards, when that case was before your Lordships, the same learned judge says, that he had taken no small pains to find out upon what principle all the cases had gone, but without much effect; for after all the labour he had bestowed upon the subject, it seemed to him they were destitute of all sense, reason, and principle. And in *Legh v. Lewis* (1 East, 396), Mr. Justice Lawrence says, speaking of general resignation bonds, it must be admitted, that if it were a new question at this day, it would be very difficult to say upon principle, that such bonds could be legal, and [185] an opinion in accordance with those to which I have just adverted, has been oftener than once expressed by the highest living authority. On several occasions the noble and learned Lord to whom I allude, has expressed himself unfavourable to those bonds upon principle. He has declared, that the only perplexity he has experienced on the question has arisen from the authorities. No one who has taken the trouble of wading through the cases which are to be found in the books upon the subject of bonds of resignation will, I think, be disposed to question the accuracy of the conclusion at which Mr. Justice Buller states himself to have arrived from a perusal of those cases. That learned judge declared, that the cases appeared to him to be destitute of all reason, sense, and principle. Your Lordships are, however, vehemently called upon to found your decision upon the present occasion on the authority of such cases.

With respect, however, to general bonds of resignation, the more ancient cases no longer exist as authorities upon the subject, and upon what view of the subject can either the ancient or modern cases be considered as authorities in support of special bonds of resignation? I would ask, upon what principle can a special bond of resignation be sustained, I mean with reference to public policy?

It may be worth while to advert for a moment to the nature and extent of the estate and interest which a rector has in point of law in his rectory after institution and induction. Few lawyers will be disposed to deny that by institution and induction a rector becomes seised of a freehold estate for his life in the parsonage house, the glebe, and the tithes of his rectory. The authorities are numerous [186] and uniform on the point (Wils. 347; Gibs. 661; Cro. Jac. 367; Noy, 104), and distinctly stated by Lord Kenyon, in *Legh v. Lewis*, and by Lord Thurlow, in the *Bishop of London v. Ffytche*. In pleading, which is the best evidence of the law, a rector states that he is rector, etc. and as such rector that he was, and thence hitherto hath been and still is, seised in his demesne as of freehold, in right of his said rectory of, and in the tenements, etc. and being so seised, etc. If a rector, by virtue of institution and induction, acquires an estate for life, from whom does he derive it? Not from the patron, but from the ordinary. The patron has purely the right of nomination or presentment. That is the whole of the *jus patronatus*. The office is not in any sense conferred by the patron; it proceeds entirely from the act of the bishop. Then, upon what principle can it be justified at common law, that the patron shall be permitted to exact a security in derogation of this freehold estate, the effect of which will be the converting a life estate into an estate at will.

In the *Bishop of London v. Ffytche*, Lord Thurlow asks whether a bond of resignation, given by a judge or a master in Chancery, would be good. He says a master in Chancery is an officer appointed for life. Suppose the Chancellor has the appointment, and suppose such master gives a bond to resign when called upon, would that bond be good at common law? No, because it is not only contrary to the constitution of his office, but because the public have an interest in the independence of that officer, as being appointed for life, and a public law officer. His place is independent, it [187] being *quam diu se bene gesserit*. If he is an officer for life, how can any private man whatsoever, because it is his province to appoint him, take upon him to

render that officer's situation what the law says it shall not be? He apprehended it would be extremely difficult to justify those bonds. This reasoning is applicable *à fortiori* to bonds like those now under consideration; and the difficulty of supporting a bond of resignation, which, in effect, reduced a freehold office to a mere estate at will, is adverted to by Mr. Justice Lawrence, in *Legh v. Lewis* (1 East, 396). I have already had occasion to observe, that that was the case of a bond of resignation by a schoolmaster. There Mr. Justice Lawrence, after observing that it did not precisely appear on the pleadings, whether the office was a freehold office, says, that he had considerable doubts on the question, how far the person, who has the power of such appointment, could exercise it in a different manner from what the founder intended.

It may be added, that when the case of *Legh v. Lewis* (3 Bos. and Pul. 231) came on for argument afterwards, on a writ of Error in the Exchequer Chamber, the Court were clearly of opinion, that it did not sufficiently appear on the record, that the office of schoolmaster was such an office as ought for the sake of the public to be deemed a freehold office; and that therefore it was impossible to raise the important question which it was the intention of the parties to litigate, upon which question they declined giving any opinion. Hence it may be collected, that in a clear case of a freehold, (like the present case,) the invalidity of such a bond was considered, by the Court, a question of great difficulty and importance; and the [188] difficulty of establishing a bond to resign a freehold office, at the instance of the person making the appointment, is suggested in *Layton v. Paine* (Wilkes, 571). That case, it is true, arose on the statute of 5th and 6th Edw. 6. c. 15, against the sale of offices; but still the language of the Lord Chief Justice is extremely applicable to this subject. He says, "I think this is a void condition (a condition to resign the office of Registrar of the Archdeaconry of Wells); for the donor to oblige the officer to surrender whenever he requires it, is to reserve to himself an absolute power over his officer, which he ought not to do; besides, if this were allowed, there would be a plain method chalked out to evade the statute; for any one, by this means, might sell an office for its full value; and such indisputably would be the consequence of supporting the present bond."

In *Newman v. Newman* (1 Maule and Selw. 71), in speaking of a special bond of resignation, Mr. Justice Dampier observes, that such a bond does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent but a mere tenant at will to the patron. Now if that reasoning be sound, it applies directly to the facts disclosed on the record. It is averred, that one of the nominees in the bond has become capable of taking an ecclesiastical benefice, of consequence the time has arrived at which the obligee may call for a resignation, according to the condition of the bond; but the obligee is not, therefore, obliged to take that step; he may do so, or he may let it alone. If that be so at the time of the commencement of the action in the court below, the obligor was a mere tenant at will to the patron. If he be allowed to retain [189] the living, he would do so by the permission of the patron, and he would hold it on the tenure of the patron's mere will and pleasure. Can any one, then, seriously contend that the condition of this bond, which places the incumbent in such complete thralldom, under so absolute a dominion and restraint, can be supported upon any known or recognized principle of law? The inevitable consequences of such a state of things are too palpable and gross to be dwelt upon for a moment. Such a bond must necessarily operate to the prejudice, if not the total subversion, of the true and essential interests of religion.

Suppose the clerk should resign in conformity to the condition of a bond of this sort, what obligation is there upon the obligee to present the individual specified in the condition? None. He may give the living to a stranger; and if the patron should present a stranger to the living, would the obligor have any remedy, either at law or in equity, against the obligee, for the non-presentation of the nominee in the bond? I should be curious to learn the precise species of remedy or redress, to which an obligor would, under such circumstances, be entitled. Again, there is no obligation upon the nominee to accept the living if it should be offered to him.

How can a clerk, after entering into a bond of this description, honestly take the oath which is administered to him previous to institution? (Gibbs, 802, 810). How can he sign his resignation in the form usually adopted (Ib. 1518), if the ordinary permit him to resign, (which by the way he is not bound to do)? The words of

resignation, according to Gibson (Ib. 851. 1518), are [190] "*ex certâ scientiâ pure spontè simpliciter et absolute resigno.*"

If the acceptance of the ordinary be necessary to give effect to the resignation, the undertaking of a clerk to resign a benefice is an undertaking which he has no power of himself to perform, because it depends on the ordinary, whether he will accept the resignation or not.

Another objection arises, on the ground of general policy, to this species of instrument: the patron becomes thereby precluded from choosing the most proper individual for supplying the living. If he act in the presentation according to the condition of the bond, his choice is fixed long before the fitness of the object can be ascertained. At the execution of the bond the nominee may be at college, or perhaps at school, or perhaps in his cradle.

Numberless other objections might be pointed out to this species of bond; but having already occupied too much time, I will conclude by stating it to be my opinion that this bond is void and illegal.

The old cases, as to general bonds of resignation, were overturned by the final decision in the case of the *Bishop of London v. Ffytche*; and as there is not, as far as I am able to comprehend the subject, any rational distinction between the two descriptions of bonds in their operation and consequences, I conceive that special bonds of resignation are equally destitute of principle and authority. I therefore am bound to say that, in my judgment, sufficient matter appears upon the record to show that, by the common law, this bond is void and illegal.

Garrow, B.: I not only entirely concur in the conclusion to which my learned Brother who has last addressed your Lordships has arrived, but also [191] in all the reasons which he has submitted to your Lordships for the opinion which he has formed. The case of the *Bishop of London v. Ffytche* has settled that general resignation bonds are illegal and void; and it appears to me that bonds of the nature of that which is stated upon this record, differ only from general bonds of resignation in degree. It appears to me to be essential to the best interests of the community, to its religion and morals, and to the character of that useful and honourable class of men, the parochial clergy, that from the moment of induction to their livings, they should be during their incumbency, perfectly free and independent. To place them, in any respect or degree, under the control of any person whatsoever, except their ecclesiastical head, to whom they are accountable for their conduct, would be very much to diminish their usefulness, and to introduce mischiefs only in some degree less than would be occasioned by their absolute dependence upon their patron under general bonds of resignation. To me it appears that if there was any distinction as to the person from whose influence a rector of a parish ought more than any other to be free and independent, it would be that of a patron to whom he owed his presentation.

For these reasons, and for those which have been stated by my learned brother who preceded me, I feel myself bound to answer the question propounded by your Lordships to the Judges in the affirmative, and to state my opinion that sufficient appears upon the present record to render the bond therein stated illegal and void.

Burrough, J. delivered his opinion that the bond was valid.

[192] Park, J.: It is necessary to clear the way by considering one branch of the question first, namely, whether the matter complained of sufficiently appears upon the record to show that the bond was given in consideration of the presentation. Upon this point I believe we are all agreed, however we may differ on others. If this statement of the condition of the bond on the face of the record show it to be illegal it is not necessary to show it again by express averment, but it is sufficient without any allegation in pleading. I agree that you cannot avoid this bond under the statute, however it may be at the common law, unless it was given in consideration of the presentation. For the statute, I humbly conceive, does not in terms make the bond void, but it renders the presentation void. The bond is only avoided as a consequence of the other. It was therefore necessary to see whether the bond was a consideration for the presentation; and I think in reading these pleadings, it was impossible that the judges should be otherwise than unanimous.

In the first place, it is stated that on the very same day by writing under his hand and seal, bearing equal date with the above-written obligation, Lord Sodes had

presented; so that manifestly, these were concurrent acts, probably both signing and sealing at the same table in the same instant of time. But it does not stop there, for the consideration of the bond states that the said Brice William Fletcher has agreed to resign; speaking, therefore, in the past time, and prior to the execution of the bond, which only bore equal date with the presentation, and therefore it cannot be doubted that the one was given in consideration of the other: indeed it seems [193] impossible, and common sense revolts at the supposition that such a bond should be given, which is not in consideration of a presentation; for would any man carrying his reason with him, who has actually gotten a living in his possession, give a bond to resign it? I therefore pass from any further observation on this point.

This brings me to the great question in the case, whether this bond is void or illegal by the statute or by common law. In considering this case, I presume I am to understand myself as bound by the case of the *Bishop of London v. Ffytche*, and to treat that case as the foundation of my argument; if so, I then have no difficulty in stating my humble opinion to your Lordships to be, that the judgment below in this case cannot be supported.

That was the case of a general resignation bond in favour of one of two individuals. Now I should be glad to ask, where in principle is the difference between the one and the other? They vary in degree, but not in kind. If a bond to resign in favour of one of two individuals be good, where is the line to be drawn? Why may it not be in favour of one of three, of one of four, of one of five, of one of six, or till it becomes as general as if no name at all were mentioned, but stood simply and generally, as in Ffytche's case, to resign upon request? If good in favour of two sons or two brothers, as here, there can be no limitation whether the nominees are to be sons, brothers, cousins, friends, or mere acquaintances. In short, unless I greatly deceive myself,—and I have taken great pains to understand the case,—if evils of great magnitude were likely to flow from general bonds of resignation, I think it requires no great degree of penetration to discover [194] that all the mischiefs which were apprehended in the one case, if well grounded, will unavoidably result from the other. But it is said, though the case of Ffytche must now be taken to be law, yet that proceeded against the strong opinions of Westminster-hall, and that decision overturned a great many former decisions, and ought not to be carried further but by legislative enactments. I agree in much of this; I am old enough in Westminster-hall to remember that the decision of that case created a great sensation in the profession. Probably, upon a cool and dispassionate consideration of that case, it may not stand so devoid of authority, of sound principles of policy, for the interests of the church and of religion, as was supposed at that time; nor must it be taken for granted that the policy of allowing general bonds of resignation had never been doubted by very great judges in our courts of common law. For, besides some of those authorities which are to be found in Mr. Cunningham's collection of cases in simony, and in many of which the case had not been argued, and had not been decided upon, I have lately found, that Lord Chief Justice Willes certainly thought them bad; and he was no mean authority, for in Mr. Durnford's valuable edition of that learned Chief Justice's Reports, pages 574 and 575, where he is giving judgment on the validity of a bond given by the Register of an Archdeacon, to surrender whenever the person appointing chose, his Lordship says: "This case was compared to the case of simoniacal bonds; and to be sure the comparison is a very just one, for it has been holden that a bond given by a parson to his patron to resign generally is bad." His Lordship, it is true, excepts this case, [195] "and not to a particular person;" but I have only troubled your Lordships with this quotation, to show that the doctrine established in Ffytche's case was not so new as was supposed; and the case of a resignation to a particular individual was the only one excepted by Lord Chief Justice Willes. However this may be, I am not called on to re-argue Ffytche's case; it is established law; and I do not agree with the conclusion sought to be drawn from it by the bar, that that case is gone to its utmost verge, and ought not to be carried further but by statute. If the House were now called on to establish a new and uncertain principle, which had never been known or acted upon before; in that case legislation alone ought to administer the remedy required for the existing evil. But where, as I have presumed to say before, the principle is precisely the same, that all the mischiefs flowing from the one inevitably flow from the other; where they vary in

degree, but not in kind, I think the case no more requires legislative interference than one half of the cases every day occurring in Westminster-hall, where the old principle is applied to new combinations of circumstances, in order to circumvent the inclinations of those who ingeniously are endeavouring, by slight alteration, to defeat or evade the decisions of the Courts.

Is this, then, a case within the statute of Elizabeth? The bond is admitted to be the condition of the presentation: the words of the statute are, "that if any person or persons, for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant or assurance, present or collate, etc. such presentation shall be utterly [196] void, frustrate, and of none effect in law:" And consequently a bond, the condition of which is illegal, cannot be enforced. But it is said this is not a profit or benefit within the statute. If it be not, I cannot well tell what is or ever will be. This very case shows, if Lord Sodes succeed, he will have an actual pecuniary profit or benefit by the presentation, and may be considered as having sold it for £12,000. I am much at a loss to apprehend any case of a bond of resignation, general or special, which is not a profit or benefit even in the case most highly to be favoured by a Court, and perhaps the least guilty of all, a bond to resign in favour of a son: is not that a benefit? Suppose the son twenty-one, and the father allows him £400 *per annum* till he is of the canonical age of twenty-four, and that the living he intends for him falls vacant, and he fills it up for three years, taking a bond in £12,000 then to resign in favour of his son. If the incumbent resign, the patron puts his son into a living, perhaps, of eight hundred a year, derives the benefit from saving his own allowance of £400; or if the incumbent will not resign, finding the living cheaply purchased for £12,000, and pays the penalty, the patron gets all that money to settle on the son, and thus in effect he sold a void presentation. Depend upon it, my Lords, that if these special bonds, as they are called, be allowed, you will have every device put on foot by artful, designing and acute men in the lower departments of the law, to evade and elude the wholesome provision of this statute, and render it a dead letter on the statute book. Indeed I verily believe that special bonds of resignation, though known, never came into very general use till after. [197] and was a contrivance to elude the decision in *Ffytche's* case. It is too much to be feared that, if encouraged, these special bonds will be given as if intended for cases of resignation: but will be a mere device between a needy patron and a monied incumbent to pay a sum of money in two or three years as the apparent penalty for not resigning, when it never was intended he should, but only in this form he should secure a future, when the law clearly would not permit a present payment. In short, to my understanding, to say that where a bond is given under a large pecuniary penalty, by which the clerk is engaged to resign the benefice to the patron on a given event, is not a benefit to the patron, as well as where the resignation is to be on request, is a proposition revolting to common sense and to the apprehension of mankind. It must be a benefit: why then is it not a benefit within the statute? for there are no words of limitation on the generality of the term.

Your Lordships will observe, I have not troubled you with the long string of cases to be found in Cuninghame's Law of Simony, which have been all brought forward and commented upon by the learned counsel at your Lordships' bar. And I have purposely abstained from doing so, because I considered myself as standing upon the last decision in *Ffytche v. The Bishop of London*, which had closed all discussion upon general resignation bonds. I have thought it my duty to state to your Lordships my humble opinion and the reasons for that opinion, that most of the evils and inconveniences arising from general resignation bonds apply in kind, though perhaps not in species, to the description of bonds mentioned in this case, and being clearly of [198] opinion that this case falls within the statute of Elizabeth. I ought perhaps, here to relieve your Lordships from further hearing me, and I shall not trouble the House much longer; but I own it does seem to me that such bonds are against the general policy of the law of England. It is amongst the first things we learn in the law (1st Blackstone's Commentaries, 385), that a parson has, during his life, the freehold in himself, and of which he can only be deprived in five ways: by death; by cession in accepting another incompatible benefice; by consecration to a bishopric, unless by the favour of the Crown he is allowed to hold his benefice in

commendam: by resignation, if the ordinary will accept: and by deprivation for crime (Littleton, 528; Co. Litt. 120 a, 341 b, and 300 a and b). The Bishop cannot institute him for a less term, and yet the effect of resignation bonds, general or special, is to convert that office which by presentation, institution and induction, becomes an office for life, and in which the rector has the freehold into a term for years, of longer or shorter duration, at the pleasure of the owner of the advowson, according to the object he has in view. Therefore, any "Contract, Bond," etc. by which the incumbent undertakes to resign, being inconsistent with his actual situation as recognised by the law, and with that life estate, which, as Rector, he has in the living, must be contrary to law.

When your Lordships come to consider the Oath of Simony, as it is called, which every rector must take when instituted to a benefice, as prescribed by the Canons of 1603 (Canon 40), is it fitting that a patron on one hand, should have power to entrap the [199] conscience of a poor needy Clergyman, perhaps under the pressure of great poverty, or the cries of a starving family; or that such a miserable man be thus tempted to violate his duty to God, as his immediate servant, by taking God's holy name in vain, and to call upon him to witness a falsehood? can a man who deliberately swears "That he has made no simoniacal payment, contract, or promise, directly or indirectly, by himself or any other, to his knowledge, or with his consent, ^{or} for, or concerning the procuring, or obtaining, of this ecclesiastical dignity, place, preferment, office, or living, etc., so help him God through Jesus Christ," be fit to serve in the sacred offices of the Church of that God and Saviour whom he has dared thus solemnly to adjure and witness that he has not entered into any contract, when the ink is not dry, nor the wax cold, which have been used in the concoction of this unlawful instrument? Your Lordships will find from this observation, that I am in no respect advocating the conduct of the Plaintiff in error, either in the first instance, in giving such a bond, or in the last, in refusing to obey its conditions of it. His poverty may have seduced him into the first offence, but his conduct in the last must call down the reprobation of every honest man who has the cause of pure religion and sound morals at heart. The noble Defendant in error may not have known the nature of the oath which his presentee was to take, and I wish and hope that may be his excuse. But these bonds are, in my judgment, my Lords, fraught with still greater evils with respect to society: the moment a man is instituted and inducted to a Rectory, the law assumes, considers, and wishes him to be independent, and free from all control, except that of his ordi-[200]-nary, in the exercise of his high and spiritual authority: but these bonds must necessarily often have the effect of placing him under the control of the patron, in situations very improper and extremely unbecoming the clerical character. I wish not to enlarge on these points, because I think too highly of the clergy to suppose that many would yield to any very unreasonable requests: but my objections apply to the temptation of doing so being often great, where urgent calls may aid that temptation.

But it is said that Bishops may be trusted not to accept of resignations under improper circumstances. I am willing to admit this: but will persons who make no scruple of entering into such engagements, and who scruple not to call the God of Heaven to witness a falsehood, make any difficulty of keeping back from the Bishop every fact which would endanger his institution or his mandate for induction? And can a Bishop, without some information on which he can act, deal so uncharitably with his brethren, as to think it necessary to put such sifting questions to every Clergyman who comes to him for institution, as imply a belief, or even a suspicion, that he has sworn, or is coming to take a false oath? Or could he, without the same breach of Christian charity, suspect that every Clergyman who resigns a living into his hands, declaring thus, *ex certâ scientiâ purè spontè simpliciter et absolutè resigno*, has, notwithstanding, entered into a simoniacal bond to do so, when, at the same time, it is undoubtedly true, that he who would take such an Oath of Simony contrary to the truth, would feel no difficulty in asserting that his resignation was *purè et simpliciter*?

The case of *Bossley v. Bayshaw* (4 Term Reports, 78) has been [201] pressed upon your Lordships, which was the case of a bond to reside on the living, or to resign. The court upheld that bond, because it supported the cause of religion, by insisting on what is so essential to the good of the cause, namely, the residence of

the incumbent. My Lords, I am not called upon to say, whether such a bond thus abstracting from the authority and giving to the obligee of the bond the power of the Bishop would, in my opinion, be good; but it is different from this case: I believe it was quoted for the opinion of Lord Kenyon on Ffytche's case, but I consider that case not now open to discussion; and, after all, what is the *dictum* of Lord Kenyon in that case? (He was Counsel in that cause, and his mind might naturally be disposed to have considered it in a particular way.) But his Lordship only says, "when that question comes again before the House of Lords, they will, I have no doubt, review the former decision, if it should become necessary." This does not infer that there will be any difficulty in the case if it come before you.

There is another case of *Partridge v. Whiston* (4 Term Reports, 559), which was a special bond of resignation in favour of a son; but the Court heard no argument, and gave no opinion, except that it was not the same as that of Ffytche, and understanding that it was to go to the House of Lords, gave judgment for the Plaintiff. With respect to those Cases in Equity, in the time of Lord Chancellor Eldon, in which his Lordship has been supposed to hold the validity of special bonds of resignation, I take it his Lordship meant no more than this, that there being a general notion that such bonds were good, he would [202] not, as a single Judge, take upon him to decide upon their validity or invalidity, but he would put the question in such a shape as to obtain the judgment of this House upon it, and accordingly, his Lordship sent one of the cases to the Court of King's Bench, but I believe it was compromised. This I assume to be the extent of Lord Chancellor Eldon's intention in the Court of Chancery; and he, who is now present, best knows whether I have drawn the right conclusion from what he expressed. I understand the Lord Chancellor assents to my statement, and a case now has arrived for the opinion of this House.

I beg pardon for having trespassed so long on the attention of the House, but I conclude with stating my clear opinion, that sufficient matter appears upon this record to show, that by the statute law (and, for the reasons above given, I am strongly inclined to think, that by the common law also) the bond on which the action of debt was brought, and which bears equal date with the writing of presentation, is illegal and void.

Burrough, J.* I agree with Mr. Justice Gaselee, in thinking that the bond is valid. The case of the *Bishop of London v. Ffytche* turned upon the actual admission in the pleadings of the simoniacal contract. Being so admitted, the decision in that case could not possibly have been otherwise.

Mr. Baron Graham. My Lords, this is a bond for the performance of an agreement, and a breach assigned, under the 8th and 9th of William and Mary, cap. 11, sec. 8, which says, "that in all actions for non-performance of any covenants or agreements, in any indenture, deed, or writing con-[203]-tained, the Plaintiff shall assign as many breaches as he shall think fit, and the jury shall assess," etc. The Defendant in error has proceeded under this Act. Here the breach assigned is a breach of the condition of the bond; the condition therefore is the expression of the agreement of the parties. Your Lordships, therefore, must look to the form of the agreement as expressed in the condition of the bond, and must put a construction upon it. Looking at the simple expression of the transaction, and the occasion of it, I think that it appears by the plain and natural construction, that the presentation was acquired solely upon the terms of giving this bond; that is, that the bond was the consideration or the price paid for the presentation; why else are both these instruments of the same date? probably executed on the same day, the presentation being first executed, in the order and course of the transaction, as before the parson presented gives a bond to resign, he must have something to resign. It seems to me impossible to consider the presentation as a separate act, independent and unconnected with the bond. Suppose that, after Lord Sondes had executed the presentation, Mr. Fletcher had refused to execute the bond, would not Lord Sondes have refused to give validity to the presentation, and he had a power to revoke it? (2 Bolls Abr. 319). "If a man present his clerk to the Bishop, he may present another before the Bishop has received his clerk;" *a fortiori*, Lord Sondes might have cancelled his

* This opinion should have preceded that of Mr. J. Park. It is misplaced by accident.

seal before he sent the clerk to the necessary service of presentation to the Bishop. The language is, "whereas Lord Sondes has presented, [204] and whereas Fletcher has agreed to resign." What is that but to say, that Lord Sondes has presented, because Fletcher has agreed? The inducement of Lord Sondes to present, is the agreement of Fletcher to resign: in other words, the consideration of the presentation was the agreement to resign: for without it, by the terms of the agreement, the presentation would not have been made, nor *vice versa*. If this be the clear sense of the agreement, the question is, whether this bond is within the 31st of Eliz. cap. 4; that is, whether it is, directly or indirectly, a benefit within the true meaning of that statute.

Whether a benefit or not is best discovered by the use that is made of the bond: this view places the Defendant in error in a singular position. Arguments at your Lordships' bar were urged, to show that such a bond is not a benefit to the patron, within the true and approved meaning of that statute; but the use which he has made of the bond, and the record which is now before your Lordships, prove, that it is a benefit to the extent of £10,000. If it be said that this was not a benefit contemplated at the time, but was unexpected and remote, and the effect of the breach of good faith: I answer it was the object of the bond to secure, when required, a presentation, or to secure a compensation in case of such presentation being prevented. The bond secures a power to create a vacancy, or an equivalent for withholding that power: the equivalent is therefore the exact measure of the value of that power, and that, in this instance, is ascertained to be £10,000.

It is said, with a weight of authority which I respect, that these bonds, by contemporaneous decisions, long followed, have never been considered as [205] benefits within the statute: but that weight is much lessened by the discussions which took place in the *Bishop of London v. Ffytche*. That case has authorised us to look to this without the prejudices of past opinions, however high in estimation, or even past decisions: and I may be allowed to say, that not one of those decisions underwent that full discussion as to the effect of those bonds, which it received in the case to which I allude, or received that illustration which has been thrown upon the subject by the arguments at the bar, and the state of the record in this case.

It is said that this is not corrupt: though there may be no moral turpitude in taking an equivalent for a thing given, yet it may be called a corrupt contract. In this case, a right of presentation is given, which the law forbids: it is a gift which the law does not allow, and is therefore corrupt. But, my Lords, I humbly think, that bonds of resignation, general, or in favour of a son or other person, are void, on the fundamental principles of the common law. A parson has a freehold at law. Lord Coke (Co. Litt. 341) says, "In whom the fee simple of the glebe is, is a question in our books; some hold that it is in the patron, but that cannot be, for two reasons, etc.; some that the fee simple is in the patron and ordinary, but this cannot be, for the causes aforesaid, and therefore of necessity the fee simple is in abeyance, as Littleton saith. Upon consideration of all our books, I observed this diversity, that a parson or vicar, for the benefit of the church and of his successor, is, in some cases, esteemed in law, to have a fee simple qualified; but to do any thing to the prejudice of his successor, in many cases, the [206] law adjudgeth him to have, in effect, but an estate for life. *Causae ecclesiae publicis causis aequiparantur, and summa ratio est quae pro religione facit, and ecclesia fungitur vice minoris meliorem facere potest conditionem suam deteriozem nequaquam.*" I will not say more on this head: your Lordships are aware of the able manner in which that was urged as the ground of the opinion of a noble Lord, in the case so frequently alluded to: I therefore humbly offer my opinion, that the question ought to be answered in the affirmative.

The Lord Chief Baron (May 2, 1826). The question is, Whether sufficient matter appears upon the record, to show that the bond on which the action is brought, is void or illegal, either by the common law or statute? I am one of those who are of opinion that enough appears upon the record to show that the bond is void and illegal. It is not my purpose to enter at great length into this argument; I should be in danger of occupying the important time of your Lordships, by a mere repetition of what has been already very clearly and strongly urged. I shall confine myself to a brief exposition of the course of reasoning which has led me to the conclusion I have stated.

I am of opinion that the condition of the bond, which condition is narrated upon this record, sufficiently shows the nature of this transaction: it shows that the transaction was a stipulation for the bond, on one side, and the presentation on the other. The bond would not have been given without the presentation, nor the presentation without the bond: the whole is one contract, of which these are the corresponding parts: this is, I think, manifest, upon the face of the instrument itself: the instrument is [207] upon the record, and we are therefore able to reach the merits of the question. Next I am of opinion, that the decision in this House, in the *Bishop of London v. Ffytche*, would, if I were otherwise disinclined to it, compel me to answer to your Lordships' question, that this bond is void and illegal by statute: this conclusion follows necessarily from that decision: it is, as it seems to me, a strict consequence of it. I cannot distinguish, upon any tangible principle, between a general and a special resignation bond. All objections, of all descriptions, which exist fatal to the one, affect the other; somewhat softened and alleviated, it is true, by the patron's supposed object; softened, not eradicated: they exist still, exactly of the same nature and character.

These are the general grounds of my opinion: I proceed to explain them somewhat more in detail, yet still I trust briefly. Upon the first point, that is, whether the contract, which taints this instrument, is sufficiently apparent upon the record, I feel it to be the less requisite to detain your Lordships, because the Judges appear to be nearly agreed upon it; I shall only say, that legal sense is very remote from the common sense of mankind, if the mutual contract is not manifest upon the face of the document. By the condition of the bond recited in the record, it appears that the presentation and the bond bear equal date: it is there stated that the patron had made the presentation, and the clerk had agreed to resign upon request: would it not, in the common affairs of the world, be an insult to the understanding equally of the lettered and the unlettered, to tell them that these cotemporary acts and obligations, recited in the same instrument, bearing [208] date on the same day, having, from their nature, reference and relation to each other, were not the corresponding parts of one contract, but distinct and independent acts?

I would remind your Lordships of the words of Lord Mansfield, in the case of the *Bishop of London v. Ffytche*, upon this point, if it had not been done yesterday, by my brother, Mr. Justice Park. It is sufficient if the contract appears upon the bond: if it had not appeared, it might have been necessary to plead it; but in all the discussions at which I have been present upon this case, no reason has been stated, nor valid authority cited, to prove that that must be supported by averment, which is manifest without it.

I shall now proceed to explain why I think the order made by your Lordships' House, in the *Bishop of London v. Ffytche*, decides the present question. In the first place, I do not presume to examine that order further than is necessary to ascertain what it is that must be inferred from it, what are the principles on which it is founded, and what rule of decision it lays down for future Judges: to that extent I must examine it, because without such examination, I cannot apply it; but I ought to go further: it is not for me to inquire whether that resolution departed from the course of decision which had before prevailed in Westminster-hall, nor whether it is supported by those great principles of civil and ecclesiastical policy interwoven with the constitution of the state, as essential to its prosperity. These were topics properly brought into action when that case was under consideration: here, in my humble judgment, they are at least unnecessary. That cause is decided, and I am bound by it: there [209] I must look for the law upon this subject. To what source are we to look for what is called the declaration of the unwritten law of the land, if not to the decisions of the supreme judicature; and upon what principle are you to expect that your decisions shall bind your posterity, in the times that are to come, if you yourselves are not bound by what your predecessors have done in the times that are past? I take therefore the rules that necessarily flow from that decision, to be fixed and settled.

It follows from that decision, that a general bond of resignation is void and illegal: I say general. The issue, in that case, it is true, was not upon the validity of the bond, but it involved that question: the issue was upon the presentation; if the presentation was illegal, because of its connexion with the bond, the bond must have been illegal, because of its connexion with the presentation. If a

contract be void, either as prohibited by positive enactment, or as contravening the policy of the law, the engagements on both sides must be equally invalid: if the whole contract is void, every part must be so. I refer to the case cited by my brother Hullock, yet I will take the liberty of adding one *dictum*, on account of the great names from whence it comes: the Earl of Mansfield and Bishop Stillingfleet. Lord Mansfield, in the case of the *Bishop of London v. Ffytche*, is reported to have expressed himself as follows: "The next objection stated was, that the bond was good, but the presentation void: that is very extraordinary, and Bishop Stillingfleet treats it as a most absurd proposition,—that it was a good agreement in respect of the bond, and bad in respect of the presentation: and that that which was corrupt in itself, could be good in a bond and bad in a pre-[210]sentation." The opinion expressed in these words, appears to me to be so clear, that I feel entire confidence that no scepticism can doubt it, and no subtlety confuse it. I assume, therefore, that a decision against the validity of the presentation, in the great cause so often alluded to, was in effect, a decision against the bond of resignation, which had been there given, or, in other words, against a general bond of resignation. The case which is my guide, having settled that a general bond of resignation is invalid, it remains for me to consider whether, upon the same principles, I am to adopt the same conclusion, as to a special bond, with the provisions contained in that now in question.

The two points which appear to me to have conducted the House to the reversal of the judgment below in that cause, are, first, that the bond was a benefit to the patron within the statute of Elizabeth: and secondly, that it was in effect an abridgement of that estate for life in the benefice which the law deemed essential to the independence of the incumbent, to the due administration of the duties of his sacred office, and which was therefore conferred upon him by the admission, institution and induction, and which for the same reasons it would not permit to be abridged by any contrivance whatever: what it was agreed should not be done directly, it would not permit to be done indirectly. That these were the chief points in debate in that cause, so far as related to its substance and its merits, I collect partly from the questions put by the House to the Judges, and partly from the opinions reported to have been delivered by such of the Members of this House as concurred in the order of reversal ultimately pronounced. The question is, whether [211] either or both of these objections may not be equally stated against this bond? It appears to me that both may. I think that if a general bond be a benefit to the patron, this is so also. A general bond is an obligation to resign upon request made. It is general because there is no previous condition necessary to enforce the resignation other than the request. This bond is also an obligation to resign upon request. That is the contract: but there is annexed to it a condition that the request shall not be made until a person named be capable of accepting a benefice. Is that condition wholly destructive of the benefit? The benefit may be less in degree, because many circumstances must concur instead of one; but that does not alter the nature and character of the stipulation. It was argued in the *Bishop of London v. Ffytche*, that these bonds, if they were legal, afforded an easy mode of selling the presentation after the vacancy. The argument was this: Let the clerk give the resignation bond: when the request is made, let him refuse: let the action be brought, and let the patron recover: there is a sale of the presentation authorized by the law: is not this quite as open to the same contrivance? The obligation is precisely on the same terms, with this addition only, that some person named, you cannot confine it to a son or relation, it may be any body, shall be capable of accepting the benefice. How easy to insert a convenient name. The person named becomes capable: the request is made as was intended: it is refused: the action is brought: the money paid: and the living is legally sold. Is it not obvious, my Lords, that if the argument I have referred to had any weight against general bonds, it ought also to weigh against a special bond? I have stated that in this [212] bond the stipulation is the same as in a general bond. The contract of the clerk is to resign upon request. The nominee is introduced only to explain why the patron has exacted the bond, and to affirm that his object in requiring the resignation, will be to present the nominee. But when he has obtained the resignation, who can undertake that he will present the nominee, or that the nominee will accept? The

capacity to accept is the whole condition. Nothing more is required to authorise the request, and with the request to entitle the Plaintiff to recover.

It appears to me obvious that these circumstances do not alter the nature and character of the benefit derived from the bond, but only diminish the amount of the value, by converting that which in the general bond is a certain advantage into a contingent advantage. A man may dispute how far, in what degree, the contingency diminishes the benefit: but no man can say that it destroys it. No such bond as this can be given without putting it upon the cards, (if I may be allowed such an expression on such a subject,) that the patron may derive great benefit from it. In this case, for instance: sustain this bond; affirm this judgment; you decide that this bond is no benefit to the patron: and you prove it by transferring by force of the bond a large sum of money into his pocket. It were easy for me, my Lords, to multiply hypothetical cases in which the patron might derive advantage from such an obligation on the part of the clerk: I shall not, however, pursue it, having, as I humbly conceive, said enough to explain the course of reasoning which induces me to think, that if a general bond of resignation be a benefit to the patron within this statute, this also must be a benefit to him: not perhaps so highly [213] valuable, but still a benefit, and exactly of the same character and description. The other great objection urged against general resignation bonds is, if possible, more manifestly applicable to special bonds than that which I have just mentioned. It is, that they affect the degree of interest which the wisdom and policy of the law gives to a clerk in his benefice: that is, an estate for life.

In the argument of the *Bishop of London v. Ffytche*, it is thus put: The whole estate and interest of the clerk is derived from the bishop: no part of it from the patron. He has a bare power of nomination. The law gives him no authority to diminish or vary the estate or interest conferred; to do so indirectly, is in truth a fraud upon the law, adverse to its spirit, and destructive of its views; so it was argued by those Lords whose opinions prevailed in that cause. Does not this bond also quite as evidently vary and diminish the estate conferred by institution and induction? Can any distinction be suggested in this respect between general and special bonds? I venture confidently to answer, none. The incumbent's estate is liable to be determined on the person becoming capable of accepting a benefice, and upon request, so that that is a limitation upon an estate for life. When the first condition has happened, as in this case, the bond becomes void, and the estate of the incumbent hangs upon the request: If that circumstance, therefore, is fatal to general bonds, it must be equally so to the bond referred to in the question put to the judges.

The feeling to which the opinions I have stated are adverse, arises from the effect which these opinions have in diminishing the value of advowsons, and in somewhat embarrassing patrons in the object [214] of providing, by means of church preferment, for their friends or relations. Upon this I shall say only, it certainly has that effect: but in my humble judgment, that circumstance ought not to affect my opinion on the question put by your Lordships. It would be more material in a question of what the law ought to be, than in a question of what it is. Even then there are weighty considerations on the other side, but here the topic is misplaced. The answer which I give to the question put is, that I think the case decided by your Lordships rules this question, and that I must answer that this bond is illegal and void.

The Lord Chief Justice of the Common Pleas: I will not detain the House by any technical observations on the point, whether the supposed objection to the bond be raised by the pleadings in this cause, because if it had been expressly stated on the record that the Plaintiff in error was presented to the living of Kettering on the condition of his giving a bond to resign, to the intent and for the sole and only purpose (in the language of the bond) that the Defendant in error might be enabled to present one of his younger brothers, when such brother should be capable of being inducted into such living, in my opinion, the bond would not have been void either by the statute or the common law. But for the judgment of this House in the case of the *Bishop of London v. Ffytche*, I will venture to say, that there never was a lawyer, from the time when tithes were first granted to the church to the present, who would not without hesitation have given the same answer. It is now, however,

thought by some of my learned brothers, that resignation bonds in favour of particular persons, although sanctioned by judges, bishops, and chancellors, are void; [215] that the condition of resigning benefices is repugnant to the estate which incumbents have in them, and therefore bonds containing such a condition are void by the common law: that such bonds are benefits to the patron, and subject the givers and takers of them to all the penalties of the statute for the prevention of simony; that they cause the ministers of the gospel to take false oaths, and are therefore not to be endured in a Christian community. Although I most sensibly feel the weight of the authority to which my humble opinion is opposed; yet, supported by two of my learned brothers, I am vain enough to think we shall satisfy your Lordships, that such bonds are liable to none of these objections. The judgment in the *Bishop of London v. Ffytche*, has not decided, nor did the House intend in that case to decide, this question. But it has been insisted in argument, that the principle, which that case establishes, governs this. My first duty will be to show, that that case establishes no principle, which by fair legal reasoning can be applied to the present: I have not, therefore, to express the hope, which Lord Kenyon expressed, that your Lordships will review that decision: I have only to request that the principle on which that judgment rests may not be extended further than those who pronounced it ever intended it should be, and that it may not be applied to cases which cannot be productive of the evils which it was their object to remedy. Thus much I might ask, although disposed to admit what has always appeared to me repugnant to reason and authority, namely, that a supreme court of justice cannot undo what it has erroneously done. Although the courts below will not impugn your Lordships' judgments in cases *ad idem*, yet they do not hold [216] that they are bound by them beyond the point actually decided. The courts below truly say, we cannot know that the House of Lords would carry this determination farther than they have carried it. In the case of *Partridge v. Whiston* (4 Term Reports, 360), the Court of King's Bench said, "that a bond to resign in favour of the son of the patron did not raise a point precisely like that in the *Bishop of London v. Ffytche*, and they were bound by the established series of precedents to give judgment for the Plaintiff." This decision, although pronounced on a point appearing on the record, and therefore liable to be disputed in this House, was never disturbed.

In the *Bishop of London v. Ffytche*, the point decided was, that a presentation was void which was made in consideration of a bond given by the presentee to the patron, by which the former bound himself to the latter, absolutely to resign the living on request made to him by the patron to make such resignation. The question in this case turns upon a bond given by the presentee to the patron to perform an agreement made between them, that the former would resign the living to the latter, to the intent and for the sole and only purpose that the latter might present one of his brothers when such brother shall be capable of taking an ecclesiastical benefice. The question in the case of the *Bishop of London v. Ffytche*, regarded one particular description of bonds. In the present case it regards bonds of a very different kind.

If you reason from generals to particulars, the course is easy and safe: but if you rise from particulars to generals, or draw inferences from one particular to another, you must be careful that the [217] particulars, in every material respect, resemble each other, or your reasoning will be illogical, and the analogy will fail. This is strictly true in every science, and the Bishop of Landaff, who was eminently learned in many sciences, says, in the *Bishop of London v. Ffytche*, "A slight variation in circumstances vitiates the validity of a precedent: and the ground on which it vitiates it is, that we cannot tell whether this variation of circumstances, had it been contemplated by the court which first established the precedent, might not have operated so as to produce a different judgment." We are all sensible that when the mind is suspended as it were *in equilibrio*, by the equal prevalence of opposite reasoning, in cases of intricacy, what a little circumstance would cause it to preponderate; and this little circumstance by which any case differs from an adjudged case, lessens, if it does not annihilate, the weight of a precedent. I will presently show that special bonds in favour of particular persons cannot be used for the same corrupt purposes as general bonds, and that they differ from them more in substance than they do in form. The House, in the *Bishop of London v.*

Ffytche, did not go beyond the question raised by the pleadings in the cause. The question put to the judges in that case was, not whether all resignation bonds are void, but whether certain specified bonds are void! The language of the question is, whether an agreement whereby the incumbent undertakes to avoid the benefice at the request of such patron be not an agreement for a benefice to such patron? The answer of the learned Judge (L. C. J. Eyre), who was of opinion that the bonds spoken of in the question were illegal, is confined to general bonds to resign on request. [218] He says, "In this case the patron presented by reason of an agreement that the clerk should give him a general bond of resignation, which being a profit and benefit within the statute, his presentation is void." That is the general question on the plea. Again he says, "The form of these bonds facilitates to a great degree that buying and selling of benefices which Bishop Gibson says they were introduced for the purpose of effecting. The legal history of those bonds shows how generally they have been used for that purpose." Whether Lord Chief Justice Eyre's reasoning, that because the form of these bonds was calculated to facilitate the buying and selling livings, therefore (without proof that the bond in question was intended to be used for this purpose) all such bonds are to be holden to be simoniacal, be just or not, it cannot apply to the bond in the present case. Such reasoning cannot apply to bonds, the history of which does not show that they have been used to facilitate the sale of livings, and which can only be used for such a purpose in one case, namely, where the presentation is sold to a person incapable of being presented, whilst the church is void, and a bond is taken from the clerk presented to resign when the purchaser shall be in full orders. Cases of this sort can scarcely ever occur; they must be so rare, that it is impossible to make them the grounds of a general condemnation of such bonds. It is enough that the bond may be avoided when such a corrupt use of it is proved.

The reverend prelates who favoured the House with their opinions in the case of the *Bishop of London v. Ffytche*, although they expressed doubts of the legality of bonds in any form or under any circumstances, confined their judgments to general bonds, and all their reasoning went to prove the impolicy of [219] general bonds only. The Bishop of Bangor says, "I am inclined to think that bonds of resignation, whether the condition be special or general, are within the express letter of the statute of Elizabeth, because it is impossible to conceive how a presentee can in any instance give a bond of resignation to a patron from which the patron will not derive some benefit or reward directly or indirectly." This is but an inclination of opinion, not a decided judgment, and I would beg to observe, that if the principle of some benefit, direct or indirect, be adopted, (a principle altogether inconsistent with the legal construction of penal statutes,) many most conscientious patrons, as well ecclesiastical as lay, have committed the detestable crime of simony. The Bishop of Bangor says, "If a bond of any sort can be said to be without exception." Except these expressions of dislike of any bonds of resignation, all the observations of the reverend prelates are directed against general, and general bonds only. The Bishop of Salisbury says, "General bonds of resignation have usually been given, and from the instant they are given, the wretched presentee is taken from under the protection of that law which guards every other subject of the state: he ceases to be free, because he holds his living at the absolute will of his patron, subject to his caprice." The Bishop of Bangor speaks always of general bonds: "Suppose," says his Lordship, "that a patron presents a clerk to a benefice, without receiving any money, bond, or assurance for money, but the clerk enters into a bond to resign on six months' notice. As soon as he is in possession, the patron demands a lease of certain tithes at an under rent." His Lordship sums up his argument by saying, "the worst and most corrupt [220] practices may be carried on under general bonds of resignation." The Bishop of Landaff speaks of general bonds only. The Bishop of Gloucester says (Cunningham, p. 151), "A bond which conceals the consideration for which it was given, and which may easily be abused to the most oppressive and iniquitous purposes, affords a strong suspicion of a bad design. If the consideration was a good one, why is it not expressed, as in special bonds it always is, in plain words." Although these learned prelates, from a proper regard to the independence of the clergy, and a jealousy of what they thought interfered with the authority of their order, disliked all resignation bonds,

yet it is clear that they only decidedly condemned general bonds. The Bishop of Gloucester distinctly admits not only of the legality, but the propriety of some special bonds of resignation.

The reasoning of Lord Thurlow goes only to impugn general bonds. "Nobody," he says, "contends that the practice is not wicked, destructive, and pernicious to the discipline of the church, and contrary to the spirit of the law under which it was carried on." "He could produce evidence of an offer to sell an advowson, upon which the purchase-money was calculated and put on a general bond of resignation, (no such arrangement could be made on a special bond,) and he knew that instances of it were frequent" (Id. p. 156). Lord Thurlow had recently changed his opinion. When the *Bishop of London v. Ffytche* came before him in the Court of Chancery, that learned Lord said, "If there were no cases, I should think it clear that a mere bond for resignation could not be criminal, unless it were a profit or benefit to the patron. Many cases have determined that these [221] bonds are good. The effect of the determination is, that they are not simoniacal, nor against the policy of the law" (1 Brown, C. C. 98). His Lordship's argument in the House of Lords, so far from proving that bonds to resign in favour of a son or brother (which no reasonable man could say are wicked and pernicious to the discipline of the church, and could be made use of to enable sales of benefices) are illegal, shows that general bonds of resignation, although under circumstances voidable in Chancery, are not void at common law. He says, "The bond is not capable of being avoided, but by averments of bad consideration and use: if you cannot aver upon it in that manner, whatever the canon law may do with it, by the common law it cannot be rescinded" (Cunningham, 158). His Lordship then compares them to marriage brokerage bonds, and says, "abundant cases may be put to show that it is impossible to avoid those bonds at law, and refers to the case of *Hall v. Potter* (Id. 25), decided in this House, in confirmation of his opinion. If I understand this argument, it is not that every general bond is void at law; but, that it may be avoided if a bad use be made of it. Lord Mansfield says, "The case stands singly on this proposition, whether an agreement by a general bond of resignation in consideration of a presentation was, by 31st of Elizabeth, simoniacal, corrupt, and void!"

I hope I have clearly shown, from the pleadings, the questions put to the judges, and the opinions of the judges, and members of this House, in the case of the *Bishop of London v. Ffytche*, that the question now submitted to us by your Lordships, is not touched by the judgment in that case. It has been stated that special bonds differ only in form from [222] general bonds: that the condition to resign may be in favour of such as are neither the children nor relations of the patron: that if the names of two persons may be introduced into such bonds, the names of any greater number of persons may be inscribed. Put into a special bond as many names as you please, you can no more make it in form or substance like a general bond, than by adding equal to unequal numbers you can make the totals equal. You cannot by a special bond reduce the incumbent to the same state of dependence on the caprice of the patron as by a general bond. You cannot render it available to accomplish the sale of a benefice as you can a general bond. If a living be vacant, it cannot be sold; but if general bonds were permitted, the patron might present to the vacant benefice; take a general bond of resignation from the presentee; and when he has got his price for the benefice, call on the incumbent to resign; and thus, as Lord Thurlow says, "he may calculate the purchase-money on a general bond of resignation." The patron cannot make this calculation on a special bond, even if he be not obliged to present on the resignation of the incumbent the person mentioned in the bond, and on whose behalf the resignation is called for. If a special bond can be made use of to evade the penalties of the statute of Elizabeth, the taking it for such a purpose, if properly pleaded and proved, would render it void, and the insertion of an unusual number of names, and those persons not connected with the patron, would be evidence of such an intent.

I am not prepared to say, that the persons in whose favour resignations are required must be relations of the patron. He may honestly think that a person who, from temporary infirmity or absence, or from [223] his not yet being in orders, is incapable of being presented to the living, will, when the disability shall be re-

moved, be the fittest person to fill the church. But I think, my Lords, that a patron may be compelled to present the person, for the purpose of presenting whom he calls on the incumbent to resign, and that he may thus be prevented from making an improper use of the power given him by the bond, as my Brother Gaselee has said. The Bishop may refuse to accept the resignation until he has in his hands the presentation of him in whose favour the resignation is required, or the incumbent may make a conditional resignation: such conditional resignations have been made where livings have been exchanged. Sir Simon Degge gives us the form of such a resignation, in which the Bishop is expressly required not to admit the other clerk, unless the exchange be completed: but to consider that resignation as of no effect. This agrees with the common law. Lord Coke says, "If two exchange lands, and one die before the exchange is executed, it is void."

There are several instances in which courts of equity have interfered to prevent the making an ill use of these bonds. No case is to be found of an action at law: but as the loss of a benefice is the loss of a temporal advantage, (otherwise the Court of Chancery could not have interfered,) I should think that there could be no doubt that if a patron called on an incumbent to resign his benefice to the intent and for the sole and only purpose that he might present A. B., in favour of whom the patron had a right to call on the incumbent to resign, and after having obtained the resignation by such false pretence, he presented C. D., for whom the bond did not authorise the patron to require a resignation, compensation [224] for the injury the incumbent had sustained might be recovered in an action. If such an action be not maintainable, a man may through fraud sustain a temporal injury, and yet have no redress, which I apprehend would be inconsistent with the first principles of our law.

Although the validity of general bonds was supported in a great number of decided cases, there were some in which they were declared to be illegal. Lord Keeper North said he was not satisfied that such bonds were good in law. In the case of *Graham v. Graham*, such bonds were holden to be within the statute of Elizabeth by the Court of Common Pleas, in the 15th of James the 1st. Where authorities clash, a court of error, at the same time that it confirms some judgments, must over-rule such as are contrary to them: but where there is a long series of decisions, and no authority can be opposed to them, I think a court of law cannot overturn them. The legality of special bonds is supported by decisions both in common law courts and courts of equity from the time of Henry the Fourth to the present. In *Johns v. Lawrence*, it was recited on the bond that it was the intention of the obligee to preserve the presentation for his son when he should be capable of taking the living: the obligor bound himself to resign within three months after request. The King's Bench first, and afterward the Court of Exchequer Chamber, held, that a bond to resign on request if the patron will present his son thereto when he should be capable of taking the living is good. This is the decision of all the Judges in England in the 8th of James I. Lord Coke was then Chief Justice of the King's Bench, and in his reading on the statute of Elizabeth, he says, that he was in Parliament when that [225] Act passed, that he voted with the proceedings of the House, and he concurred with the other judges that such a bond was valid. Can your Lordships have so safe a guide to lead you to the true meaning of the statute as one of the most eminent lawyers that ever lived, who took a part in the making of the law, knew the evil that Parliament meant to correct, and the exact extent to which it was intended the remedy should be carried! In *Hillier v. Stapleton*, Michaelmas 1707, the Lord Keeper said, "Resignation bonds have been allowed since the statute only to preserve the living for the patron himself or for a child, or to restrain the incumbent from non-residence, or a vicious course of life." If the bond be general, his Lordship observes, a particular agreement must be proved to resign for the benefit of a friend that would be presented, and without such agreement, the bond ought not to be sued on.

In *Peele v. Cypel*, 9th George I., the bond was to resign when the patron's nephew came of age. Instead of the patron's requiring a resignation, an agreement was made that Peele should hold the living, paying the nephew £30 a year. This payment was made for several years, but was afterwards refused, and the bond put in force. The Chancellor granted an injunction, but said it was not on account of any

defect in the bond, which he held good, but on account of the use that had been made of it.

In an anonymous case, in 13 William III., Powell, J. concurred with Blencow, the only other judge in Court, in supporting a general bond, because he says it may be to an honest intent, as that the patron may have a son of his own capable of taking the benefice: but, says he, if this was the real motive, why should it not be expressed in the condition? [226] This very learned judge entertained no doubt of the legality of special bonds, or of the justice or policy of allowing them. In *Partridge v. Whiston*, the Court of King's Bench said, they were bound by an established series of precedents to give judgment for the Plaintiff in an action on a bond on a condition to resign in favour of a son of the patron. This case might have been carried to the House of Lords, for the question was raised on the record; but the judgment was never disputed. To these decisions no judgment of any court, no *dictum* of any judge, can be opposed. The overruling of so many authorities, by any power but that of the legislature, will destroy entirely the certainty of the law: no man can know what are his rights or duties.

We talk much of national faith; I hope, my Lords, it will ever be kept inviolable. National faith is not, however, confined to any particular compacts; it requires the strict observance of all laws, under the sanction of which any of the subjects of this empire have acquired any rights. The reversal of these decisions would be a breach of national faith to those who have been induced by them to purchase advowsons. Immense sums of money have been expended in buying advowsons, and presentations, upon the highest assurance next to that of an express declaration by the legislature, that, in case of livings becoming vacant before those on whom the purchasers intended to bestow them are capable of taking orders, they might present to such living and take the security of a bond from the presentees for the resignation of them, when the person for whom they are intended shall be in priest's orders. Many of these purchasers have no other provision for their children but the livings so purchased. Ecclesiastics [227] as well as laymen, have dealt in these bonds of resignation. Lord Mansfield says, "a Bishop of Salisbury, before his (Lord Mansfield's) time, frequently took them." This is not said of that right reverend Prelate by way of reproach, but to show that men of the highest character did not consider that the taking such bonds was improper.

If you decide that these bonds are within the statute of Elizabeth, you make those who have given and those who have taken them criminals. Both the Plaintiff and Defendant in error, and many other persons, as well clergymen as laymen, have, while acting under the sanction of the courts of Westminster, committed the scandalous crime of simony, and subjected themselves to all the penalties of the statutes of Elizabeth. This argument was answered in the *Bishop of London v. Effeche*, by saying that these consequences of the judgment could be prevented by an Act of parliament. Your Lordships cannot have forgotten the answer of Lord Mansfield to this observation: "What! pass a judgment to do mischief, and then bring in a bill to cure it!" I will add, will you condemn men by a judgment that has all the vice of an *ex post facto* law, and after confiscating their property, save them from further punishment by a statute pardon.

But let us forget for a moment that there are any decisions on the subject. The statute of Elizabeth cannot be holden to embrace this case, without setting aside rules which, since the Revolution, have been uniformly observed by all Judges, and which temper with mercy the justice of our criminal law. The statute of Elizabeth is a penal law: the rule to which I allude, requires that all penal laws should be construed strictly; that no cases should be holden [228] to be reached by them, but such as are within both the spirit and letter of such laws. If these rules are violated, the fate of accused persons is decided by the arbitrary discretion of Judges, and not by the express authority of the laws.

If general words follow an enumeration of particular cases, such general words are, by another rule of construction, holden to apply only to cases of the same kind as those which are expressly mentioned. By the 14th George II., cap. 1, persons who should steal sheep or any other cattle, were deprived of the benefit of clergy. The stealing of any cattle, whether commonable or not commonable, seems to be embraced by these general words, "any other cattle;" but by the 15th George II., cap. 34, the

legislature declared that it was doubtful to what sorts of cattle the former Act extended besides sheep, and enacted and declared that the Act was meant to extend to any bull, cow, ox, steer, bullock, heifer, calf and lamb, as well as sheep, and to no other cattle whatsoever. Until the legislature distinctly specified what cattle were meant to be included, the Judges felt that they could not apply the statute to any other cattle but sheep. The legislature, by the last Act, says, it was not to be extended to horses, pigs, or goats, although all these are cattle. Lord Chief Baron Comyn says, "a penal statute shall not be extended by equity, and the general words of a penal statute shall be restrained, for the benefit of him against whom the penalty is inflicted."

By the 31st of Elizabeth, cap. 6, sec. 4, for the avoiding of simony and corruptions in presentations, collations and donations, of and to any benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions, [229] and inductions to the same, it is provided, that, "If any persons or person shall, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, present or collate any person to any benefice, with cure of souls, dignity, preferment, or living ecclesiastical, the presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction, shall be utterly void, frustrate, and of none effect in law; and the person giving or taking the money, etc., shall forfeit double the value of one year's profit of the benefice, and the person accepting the benefice shall be for ever disabled from holding the same." The only words in this statute which can be so far stretched as to reach the bond which is the subject of the present action are "profit or benefit;" but these, according to the restrictive rules of construing penal statutes, mean only profits or benefits *ejusdem generis* with money, rewards or gifts, such as bills of exchange instead of money, leases of the tithes, or profits of the benefice, or loans of money, or other valuables, for a long or indefinite period of time, instead of immediate gifts of the same things. If this construction be not put on the words, no patron, either lay or ecclesiastical, can present or collate a son who is dependent on such patron, to any preferment in the church, without being guilty of simony. If a bond for the resignation of a living in favour of a son, be a benefit, the presentation of a son to a vacant benefice, must be a benefit, for the first is only a means of obtaining the second; [230] indeed there can be no doubt, that if a patron has a son, whom he maintains, it is generally a benefit for him to have a living to which he can present such son: for few persons would allow a son as much after he was in possession of a benefice, as he received before; but this was not that corrupt benefit which was contemplated by the legislature, when this statute was passed.

Whatever expressions are to be found in the Act, the object of the legislature was only to prevent simony; and such advantages as these were never thought to be simoniacal. Lord Chief Justice De Grey says (2 Blackst. 1052), "The statute has not adopted all the wild notions of the canon law, with regard to simony." But the giving or granting this bond would not amount to simony even by the canon law. The words that approach nearest to it, are those of the canon of 1229, *Nullo licet ecclesiam nomine dotulitatis ad aliquem transferre*. All the other canons are confined to the trafficking in presentations, and preventing the granting of leases and pensions by incumbents. One definition of simony, by a canonist, is, *Studiosa voluntas emendi vel vendendi aliquod spirituale vel spirituali annuum*. This definition can by no construction, be extended to special bonds of resignation, made to enable a patron to provide for his relation or friend. Another writer has defined simony to be *Spiritualium acceptio vel donatio non gratuita*. This word *gratuita* is used as the opposite to *oneraria*, and only applies to a corrupt bargain for money or other direct profit. In exchanges, each party proposes to himself some benefit; the one expects to get more profit, the other a more healthy or agreeable or advantageous residence. Yet exchanges are expressly [231] allowed by the statute of Elizabeth, because exchanges, though productive of temporal advantages to one or both parties, are not the vile corrupt contracts which were intended to be prohibited by the legislature.

But it has been said, by one of my learned brothers, this is a benefit and profit, be-

cause by means of it, money will be obtained: for if the judgments of the courts below should be affirmed, the Defendant in error will get £10,000. The performance of the condition of all bonds is enforced by pecuniary penalties, which may, in the event of a breach of the condition, be recovered. This is the case when bonds are given for the faithful performance of any office; yet such bonds have been enforced over and over again, and no such objection was ever made to them. If the intent of the obligee was to obtain the penalty of the bond, and not the resignation of the living, such intent would be corrupt, and the bond made to carry it into execution would be void. That would not be a resignation bond, but a money bond; all that was said about resignation, being a mere colour to cover the corrupt intent: but this corrupt intent not appearing on the face of the bond, must be pleaded. There is no such plea in the present case, nor is there the least reason to suspect that the defendant in error ever contemplated so mercenary and so base an object. He expected that the obligor would perform the condition of the bond, and then no money or other corrupt benefit could have been offered. Is it consistent with justice or common sense, that a man is to lose his right, because his opponent compels him, by a breach of his contract, to sue for a penalty which he neither expected nor desired? Mr. Justice Heath says, in *Ffytche and the Bishop* [232] of *London*, "The law construes bonds according to the intent of the parties, and in all bonds with a condition, the penalty is only considered as enforcing the condition:" so, although a patron can derive no pecuniary advantage from the presentation to a living, yet if his clerk be not admitted, the law permits him to recover damages in a *quare impedit*.

It has been insisted, that advowsons are pure trusts, and that patrons, in the execution of these trusts, have no right to consider their families, or adopt any means for reserving presentations for any of their children or relations. This opinion is founded on what Lord Coke says, that "a guardian in socage does not take a presentation to a living, because he cannot make money of it." This doctrine has led to the ridiculous ceremony of the guardian putting the pen into the hands of an infant in the cradle, and guiding its feeble hand while it signs a presentation. But executors and administrators of lay patrons present to livings which have become vacant in the lifetimes of their testators or intestates. Presentations are not pure spiritual trusts: if they had been so considered, the Bishops could never have allowed them to be disposed of by laymen; advowsons in gross or next presentations could never have been permitted to be sold: Archbishops could not leave options to their widows or other lay persons.

The learned Selden calls the right of lay patrons to present to church livings, "the interest of patronage which the lay founders challenged in their new erected churches." Lord Kenyon calls a right of presentation, "a trust connected with an interest." The founders of lay patronage, when they endowed the churches, reserved [233] the right of patronage, and the right of taking resignation bonds in favour of their children and descendants. The Bishops, by allowing the dedication of tithes to be made on these conditions, obtained a provision for many churches which would otherwise have remained without endowment. As the Bishops were to decide on the fitness of the persons to be presented, they wisely thought that the allowing patrons the privilege of taking such bonds could not injure the Church. On the contrary, from the exercise of this privilege, the younger members of the families of great land-owners were brought into the Church, and a connexion has been kept up between the landed interest and the Church, which greatly contributes to increase the security and influence of the latter: at the same time the members of great families are generally better educated, and from those family connexions, likely to be more respected in their parishes than any other clergymen that can be found. The practice of taking special resignation bonds, and the sanction that such bonds have uniformly received from the courts of Westminster, are the highest evidence that such bonds were allowed by the original compact made between lords of manors and the Bishops, when churches were founded. These were some of the interests which Selden says the patrons challenged in their new erected churches.

It has been said, that a clerk who has given one of these bonds, cannot subscribe the proper form of resignation, or take the oath administered on his institution. The unhappy men who have taken this oath, and resigned in consequence of bonds of resignation, have been even charged with perjury. This is a dreadful charge

[234] against the thousands of worthy persons who have given such bonds, and honourably performed the conditions of them. The objection as to the form of resignation assumes, that the words *spontè, parè, et simpliciter* are an essential part of the instrument of resignation. There is no particular settled form of words necessary in a resignation. In *Walron v. Pollard* (Dyer, 293 b.), the words are *animo deliberato, certâ scientiâ, et mero motu, et quibusdam causis justis et rationabilibus moventibus, ultrâ et spontè dedisse*; neither these words, nor any thing of the like import, are in the form of resignation given by Degge. But if a resignation, in this precise form were required, the only import of the words *spontè, parè, et simpliciter*, is that the clerk was not driven by unlawful violence or threats, or seduced by any corrupt agreement, to make the resignation; but that he made it willingly, and because he thought it his duty to make it. With regard to the oath, I admit that by Archbishop Courtenay's decree, persons presented are required to swear that "*obligati non sunt, nec eorum amici pro se, juratoriâ aut pecuniariâ cautione, de ipsis beneficiis resignandis.*" These words are not in the oath prescribed by the Council of Westminster, 1138, or that of the Council of Oxford, 1236. The insertion of them by the Archbishop into the oath required by his decree, shows that he and those who advised him, thought that the oaths previously taken, did not reach resignation bonds. The Archbishop had no authority to alter the oath, and if any Bishop was now to refuse to admit a clerk who declined taking this oath, he would render himself liable to damages and the costs of a *quare impedit*. [235] By altering oaths of office, you may alter the condition, duties and responsibilities of the officers. Parliament only can do this, in civil offices; and Councils of the Clergy, with the approbation of the King, in ecclesiastical. Lord Coke says, "a new oath cannot be imposed without the authority of Parliament." In 1603, a canon was made, prescribing a form of oath to be taken by persons presented to benefices, and this canon was confirmed by the King. The clergy who assisted at the convocation which made the canon, must have known of Archbishop Courtenay's decree, and yet they have omitted, in the form of oath, the words relative to bonds of resignation. How is this omission to be accounted for? Why either the clergy, or those who advised the crown, thought that bonds of resignation, if not abused, were legal and proper, and therefore they would not allow any oath to be administered to clerks, which should prevent them from giving such bonds. I have heard it said, Why will not patrons rely on the honour of clergymen? But if the clergy cannot give bonds, they cannot pledge their honour: if the one is a violation of their duty, inconsistent with the forms of resignation and their oaths, so is the other.

The last objection to the validity of these bonds is, that they convert an estate for the life of the incumbent, into an estate determinable on a particular event, during the life of the incumbent. Supposing that the clergyman's interests in his benefice be exactly the same as that of a lay tenant for life, there is nothing in the objection; for the condition to resign in the case of a benefice, forms no part of the instrument which creates the interest in it; it is made by a separate deed. Now if a tenant for [236] life were to give a bond to convey back his estate on the happening of a particular event, such a bond would not be voidable in law. The objection is to introducing into the instrument conferring the estate, a condition which is inconsistent with it, as when a deed conveys to B an absolute indefeasible estate for his life; and contains a proviso, that on a certain event, the estate shall determine in the lifetime of the party to whom it is given. There is more of technicality than reason in this distinction; but no two estates are less like each other, than that of a clerk in his benefice and a lay tenant for life; they are created with different objects. Conditions are annexed to one which are not annexed to the other; the clergyman, to preserve his estate, must perform the duties of his church; if he takes another benefice, without a dispensation, he vacates the first. These conditions arise from the original compact between the lay patrons of the Church and the clergy, which I have already referred to.

The judgment of this House, in the *Bishop of London v. Ffytche*, does not bear upon the question now to be decided. No principle can, by any just legal reasoning, be deduced from that case, which is applicable to this. Securing a benefit for a brother or friend, is not a profit or benefit within the meaning of the statute of Elizabeth. These general terms must, according to the true and established rules for

construing penal statutes, be restrained by the particular words that precede them, and holden to mean any benefits of the same sorts as those particularly specified. The taking these bonds is not an abuse of the right of patronage, as that right stands according to the common law, and they are not inconsistent with the estate which incumbents have in their benefices. These bonds appear to have been used from the earliest times, both by ecclesiastical and lay patrons, and have been uniformly supported by the judgments of the courts of Westminster.

The consequences of declaring these bonds void, will not be confined to the injury done to the long established rights of patrons; it will bring in a laxity in the mode of construing penal statutes which will deprive persons accused of crimes, of the benefit of that humane rule, which secures from punishment all whose offences are not clearly within the letter as well as the spirit of the law. The judgments of the courts of Westminster-hall are the only authorities which we have for by far the greatest part of the law of England. The overturning the long series of judgments, which declares the validity of these bonds, must introduce uncertainty and confusion into every branch of the common law. Can it be said that the law which governs these bonds is unjust? No, my Lords, the injustice is in destroying, without compensation, a vested right. Can it be said, that they are inconsistent with the policy of our laws? That policy encourages us to provide for our children, relations, and friends, and allows us to bestow on them offices for which they are duly qualified. In ecclesiastical benefices, the public have a security for the fitness of the person presented, which does not exist in other cases. The Bishops are to take care, that neither by friendship, nor natural affection, a clerk shall be put into a church, who is not duly qualified to do the duties of it. If a patron may give a living to his son, or relation, or friend, what objection is there, if it becomes vacant when the person for [238] whom it is intended is incapable of taking it, to his permitting some other person to hold it, until the incapacity of the first object of his choice be removed? It has been said, this can be done in the case of no other office. There are no other offices which have been created by patrons, and endowed out of their estates, and therefore there could be no legal origin for the right to take such bonds in any other offices. With respect to other offices, there are no judicial authorities to support such a right.

By holding these bonds to be void, you will not make patrons forget their faculties, and look out, unbiassed by affection or friendship, for the most worthy clergyman to fill the vacant benefice. Many of them will act, as some patrons have done, where a living, the presentation to which they are desirous of selling, becomes void before it is sold. They will present some old man. By which are the duties of an incumbent likely to be best performed—by a young man, in full health, under a bond of resignation, or by an old one, who has just enough of life left not to be liable to be objected to by a Bishop, on account of his imbecility? Many owners of manors, with advowsons annexed, will sell the advowsons from the manors. Those who pay large sums of money to purchase advowsons in gross, will not be the most likely persons to hold such advowsons as pure trusts, and in disposing of them to look only to the maxim—*detur digniori*. Such alienators of the church patronage will break the connexion between the landed interest and the clergy.

Young men of family are, from their education and habits, likely to make the best parish priests. From their connexion with the owners of lands in the parishes, all the inhabitants feel a respect for [239] them, which must add much to the effect of the instruction they give. Connexion with proprietors of the soil, gives to the clergyman the greatest interest in the happiness of his parishioners, and stimulates him to promote their spiritual welfare. Such persons will not take orders where the livings, which their ancestors founded, are severed from their families. I am aware these are rather considerations of policy than law; but, my Lords, if there be any doubts what is the law, judges solve such doubts by considering what will be the good or bad effects of their decision. I say, nearly in the words of one of the Bishops, in the *Bishop of London v. Fytche*, "That doctrine cannot be law, which injures the rights of individuals, and will be productive of evil to the Church and to the community."

The Lord Chief Justice of the King's Bench: The question appears to me to consist of two parts. First, whether enough appears on the record to shew that the

bond was given as the price or consideration of the presentation to the benefice? Secondly, supposing this to appear, then whether the bond is void by the statute or common law?

As to the first part of the question, I am of opinion, that enough does appear upon the face of the record to shew that the bond was given as the price or consideration of the presentation to the benefice. If the fact be manifest upon the face of the instrument, it is not necessary to aver it, in order to bring it to the notice of the Court, or within the meaning of the statute; and that the fact does so appear, it is only necessary to advert to the language of the condition.

In this case the statute mentions the act alone, without any epithet or qualification. The section [240] commences with this preamble, "for the avoiding of simony and corruption in presentations, collations and donations, of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions and inductions to the same, be it enacted, that if any person shall, or do at any time" (after such a period,) "for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, etc., of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly, present or collate any person, etc. to any benefice, that then such presentation shall be utterly void." It is to that section to which I would beg to call your Lordships' attention, from which it appears that the mere taking of any gift, profit or benefit, is in itself an avoidance of the presentation.

It is necessary, with respect to any question that may arise upon the statute of Elizabeth, or any question that may arise from the common law, to see what the fact is: the question being, Whether it is apparent upon the face of the instrument that the bond is given as the price of the presentation? It seems to me impossible for any person to read the condition of this bond as it appears upon the record, without taking it that it was given as the price of the presentation, and that the presentation was given as the consideration of the bond. It begins with reciting "that Lewis Richard Lord Sodes is the patron of the rectory, which rectory had become vacant by the death of the late incumbent." The next recital is, "that Lord Sodes by writing under his hand and seal, bearing equal date with the above written obligation, presented the above bounden Brice William Fletcher, to [241] supply the vacancy" from which it appears that the presentation and bond are connected together, and then it goes on, "And whereas the said Brice William Fletcher has agreed to resign the said rectory into the hands of the proper ordinary, upon such request or notice as hereinafter mentioned, so as that the said rectory may thereby again become vacant:" can any person read this and not conclude, that the presentation and the bond were concurrent acts: that they were founded upon a prior agreement to resign? This was undoubtedly the opinion of Lord Mansfield, in the *Bishop of London v. Ffytche*. That being so, for the reasons which I have just stated, I am of opinion, that there is enough upon the face of the record to show that this bond was given as the price of the presentation.

The second inquiry which arises is, whether such a bond, given as the price or consideration of the presentation, is void in law. Upon this question, I conceive the true inquiry to be only, whether this bond is within the rule and principle of the decision in the case of the *Bishop of London v. Ffytche*. I conceive that case to have established a rule and principle binding upon all jurisdictions, except that of your Lordships' house. It is true that the question there arose directly upon the presentation, and not upon the bond, but it is treated throughout as being one and the same: as the presentation and the bond are the price and consideration of each other, it seems impossible to say, that the one can be good and valid, and the other bad and void.

That case arose upon a presentation accompanied by a bond to resign upon the request of the patron; it was what is called a general resignation bond. [242] The present case arises upon a presentation accompanied by a bond to resign upon request, "whereby, and so as that the patron may be enabled to present one of his two brothers, (in the condition named,) "when such of them as is to be presented, shall be capable of taking an ecclesiastical benefice;" the agreement having been, that the presentee shall so resign, to the intent that the patron may present one of those two persons. This therefore is one of those that have been called special resignation bonds.

The declared object of the resignation, is the presentation of one of the two persons named; but as the resignation of the incumbent must precede the presentation of another clerk, I am at a loss to know how the presentation of the particular clerk is to be secured or enforced, or the incumbent restored to the benefice, if the patron, after having declared his intention to present one of the nominees, shall afterwards think fit to present another person. This would undoubtedly be a most dishonourable act, and I beg to be understood as not even surmising that the noble Lord, who is a party to this suit, would act in this manner. But, in deciding upon a question of law, your Lordships cannot look at the rank and character of particular persons. It has been said at the bar, that a court of equity may prevent an ill use from being made of such a bond. I do not presume to say that this may not be done, if the intention to make an ill use be known and ascertained before resignation. My difficulty is to see how this can be known and ascertained, unless a patron should be weak enough to avow it, and this cannot be presumed. If a person should act in the way I have supposed, and if after resignation the [243] patron should present another person, how could the ordinary refuse institution? Suppose the presentee to die in the interval between resignation and the new presentation, or that he should obtain a better benefice, and not tenable with this, and, on that, or any other account, refuse institution, how is the incumbent to be restored, though the objects of his agreement and of his resignation have failed? If these difficulties cannot be overcome, then the bond in question will enforce a resignation, whenever one of two persons named shall be capable of taking a benefice, leaving the patron at liberty, in many, if not in all cases, to present whom he will.

But, supposing these difficulties can be overcome, or be thought not really to exist, and the bond be considered as only enabling the patron to present one of his two brothers; still I am of opinion, upon the authority of the decision so often mentioned, that this bond is void in law. That decision may be considered as founded principally upon one or other of two reasons, or perhaps upon both the reasons; being either that the bond there mentioned was within the statute of Elizabeth, and so void by that statute, or that the effect of the bond was to convert into an estate at will, an office which the law considers to be freehold, and so the bond is void at common law.

I consider the bond now in question, to differ from the general bond in degree only, and not in principle or kind. If it be a benefit to a patron to be able to call for a resignation whenever he may choose to present any other person, it must, in my opinion, be a benefit, though, perhaps, a less benefit, to be able to command a resignation, in order to present a relation or friend, and if there be any benefit, the [244] degree of benefit must be immaterial, and the case will be within the statute. If the law will not allow a benefice to be held at the will of the patron, and voidable whenever he may choose to present any other person, the law cannot allow a benefice to be so held, as to be voidable when a relation or friend of the patron may be capable of taking it, and the patron may think fit to present him: for, in each case, the estate or interest of the incumbent will be less than a freehold, whereas a benefice is spoken of as a freehold in all our books, whatever it may have been in its origin, or first constitution, which are now lost in the obscurity of antiquity.

But further, it is not only required that a benefice shall be freely given, and freely taken, but if resigned, it must be freely and voluntarily resigned; *non metu coactus sed spontanea voluntate*, and how can a resignation be voluntary which is made in order to avoid the penalty of a bond, whether a patron has a right to impose the penalty at his pleasure, or only for a particular purpose? Ought the law to sanction an instrument which places a clergyman in a situation, either to subject himself to a demand which he may be unable to pay, or to make a solemn declaration contrary to his conscience, and to truth? In my opinion, the law ought not to permit this.

Again, my Lords, the bond in question enables the patron to command a resignation in favor of one of his two brothers. If such a bond should be held valid, where is the line to be drawn, or what limit is to be fixed? If it be good in favour of brothers, why may it not also be good in favor of cousins or more remote kindred, or of friends? If it be allowed [245] in favor of two persons, why may it not be allowed in favor of more than two; of twelve, of twenty, or even of a greater number? I am unable to discover any rule or principle upon which it can be said,

"thus far shalt thou go, but no farther." I infer, therefore, that no step must be taken towards the accomplishment of an object, which may reserve any benefit of this nature to the patron, or make the interest of the incumbent less than that freehold or estate for life, (to be forfeited only for misconduct, or by a regular judicial proceeding,) which the law supposes him to possess, and requires that he shall be permitted to enjoy.

For these reasons I am of opinion, that enough appears upon the face of this bond, to show that it is void and illegal.

The Lord Chancellor: Upon the first question which arises in this case, I am most clearly of opinion, that enough does appear upon the record, to enable your Lordships to say, whether the bond in question is void or illegal, either by statute, or common law. I feel very great satisfaction, that this question is now in the course of determination, by the highest court of judicature in this Kingdom; because that decision, speaking for myself, will greatly tend to relieve my mind from doubts, which I have entertained when applications have been made in the Court of Chancery, with reference to these special bonds of resignation; for I could never bring my mind to that satisfactory conclusion, which perhaps it was my duty to do. Before I should have proceeded to take any step in such a case, the question, with respect to these special bonds of resignation, should have been deliberately argued and deliberately adjudged, by a court of common law: for I cannot but very much doubt whether much attention ought to be paid to those decisions which have passed without argument at the bar, and which passed without a word having been said by the Court. Such was the case with respect to this very cause, in the court where it was originally considered, as well as in the inferior court of error; for I do not understand that a word was said upon it either by counsel or judges. That being so, a writ of error was brought to this House, and the question has been most ably argued at your Lordships' bar. After having heard that argument, it has been spoken to by the learned Judges, in such a manner as well justifies me in saying it was a subject which would have borne much debate in the court below; and therefore after it has been spoken to with so much ability by the different judges, who have had the opportunity of giving a year's consideration to it, I trust that your Lordships will not think it an unreasonable request, to ask that a few days more should be permitted to elapse, before the motion is made, calling upon the House to proceed with its judgment.

On Wednesday, May the 17th, 1826, it was moved and ordered, that the further consideration be adjourned to the next Session.

The Lord Chancellor.* This is a question of very great importance, a question not to be looked at merely with respect to the parties to this appeal; but because it may perhaps be thought expedient, if the judgment, which the House shall pronounce, shall declare the bond, the validity of which is in question, to be void, that some protection should be given by a law to those who have been led by pre-[247]-vailing notions to believe that bonds of this nature were valid.

(Here the Lord Chancellor stated the facts and pleadings.)

The case was first argued before the Court of King's Bench, (in the absence of the Lord Chief Justice,) before three of the judges, who stated that this was a case which did not fall exactly within the case of the *Bishop of London v. Ffytche*; that it was therefore fit to be heard upon writ of error in the House of Lords, and that Court did no more than give it due passage to the House of Lords, by giving a judgment without argument, in favor of the Defendant in error. This course of proceeding is not very satisfactory. The case then proceeded, by writ of error, to the Exchequer chamber, where the Court, consisting of eight judges, also gave judgment without argument, in favor of the Defendant in error, merely for the purpose of giving the case a passage to this House. The question we have now to determine is, whether this is a bond upon which the obligee can be effectually sued; whether it is such, regard being had to the principles laid down in the case of the *Bishop of London v. Ffytche*, looking at what is the actual Condition of this bond.

Addressing your Lordships as one of the Courts of justice, and not as a legislative body, it is my duty not to argue or state this case now on any other grounds, than grounds of law. If the state of the law upon this subject is such, that your Lordships, looking at it as legislators, deem it fit that an act should be passed to

* 9th April 1827

relieve against the law, that consideration ought not to affect, and therefore cannot affect your Lordships decisions as judges.

Before the decision in the *Bishop of London v. [248] Ffytche*, this bond might have been held to be legal. But I have no difficulty in saying, that after this House has declared and decided, as it did in the case of the *Bishop of London v. Ffytche*, as to general bonds, I conceive myself bound to apply the principles of that decision to this case, because it appears to me perfectly impossible to say it is any thing but a general bond. According to this bond, although A. or B. shall be capable of taking the living, looking at the legal effect of the condition, there is not one single syllable from the beginning to the end of it, which, after resignation, compels the obligee of this bond to present either A. or B. Some of the judges, who gave their opinions in favor of the bond, were so distressed by this, that the best answer they could make to it was, that true it is, that when the resignation is accepted, there is no obligation whatever upon the patron to present the clerk, but the Bishop must take care that the resignation and presentation shall go together. How the Bishop is to do that, is difficult to imagine; because, if the presentation is sealed and signed, before the resignation is complete, it is in law a void presentation; if on the other hand, it is to be signed and sealed after the resignation is complete, then I wish to ask, whether there be any Court of law, or any Court of equity in this country, which, after the resignation is complete, can compel the party to present either A. or B., because the professed intention of the resignation was, that A. or B. should be presented.

If this is a bond, which can be said to be of a special nature, it must be on this ground that the resignation is to have its effect, if A. or B. is presented. It has been decided in a case which has been reported that, if the clerk in possession execute an instrument of resign-[249]-ation, and there is expressed in it the condition that if A. or B. are not presented within six months the resignation shall be void, there is no valid resignation, because the resignation must be *puré, simpliciter, absoluté, et sine conditione* (see Burn's Eccl. Laws, *tit. Resignation*, and the books there referred to). The consequence of that is, that the resignation itself is void. And if this is so, what is expressed in the condition of the bond cannot be expressed in the Condition of the instrument of Resignation. I say further, that if the bond is invalid, unless the patron can be compelled to present one of these nominees, there is no Court that can oblige the patron to present either of these nominees; and if that be so, the consequence is, that in order to fill up that vacancy, he may present any clerk he thinks proper. If that be a correct view of the case, it falls absolutely and entirely within the doctrine of that case of the *Bishop of London v. Ffytche*. With respect to that authority, I apprehend that, whatever may have been thought of it out of this House, I may humbly state my opinion, and I have always thought that it is a sound decision. The doctrine established in that case was, I must admit, certainly never thought right by some great judges. Your Lordships, however, are bound by that decision, unless there be some special circumstances to take this case out of the principle of that case; and unless I am wrong in the representation I have made, the peculiar construction of this bond, instead of taking it out of the principle and application of that case, brings it directly within it.

If this bond be a simoniacal bond within the intent and meaning of the law, subjecting to harsh consequences the patron or parson, or both, it is our [250] business not to regard the consequences more than the law will allow us to attend to them; and we cannot pronounce against law to avoid the consequences of a decision, which is according to law.

I have looked attentively at the cases in the books on the subject. Those cases are not very well considered if the reports are correct, but stating them altogether, let us see what they amount to. One case decides, that resignation may be in favor of a son (*Johns v. Lawrence, quâ supra*), another authority supposes that you may have it for a kinsman or friend (see Wats. Incumb. c. 5. and *Billiard v. Stopleton*, Ca. Eq. Abr. 86. pl. 3). I want to know therefore, what is either the number or the character of the persons, in favour of whom such conditions can be said to be legal; if you can take it for a son, you may take it for a grandson, and for great grandsons; in short, you may take it on behalf of any body who stands within the relation that a son bears to you, and in the relation that a friend bears to you, and if you can name one son or one friend in the condition of the bond, I wish to know what is the

number of sons or friends that you may not name, and where the limit is to be placed? Some cases say, we doubt whether you can provide for a resignation in favor of a cousin or relation; but we think it must do for a son, because the father is bound to provide for the son. Is that a reason which is satisfactory in a case where the policy of the law, as it regards the ecclesiastical constitution of the country, forbids such a proceeding? What is the extent of the obligation? If, because I am under an obligation to provide for a son, therefore, I may take such a bond, being also under an obligation to provide for myself, can I take a bond to resign in favor of myself? If a bond of this sort [251] can be taken, this consequence must follow, that if there be a patron of age to contract, having a living to which, if he were of an age to take priest's orders, he could collate himself, on this notion of the duty of providing for himself, he might present a clerk, taking from him a bond to resign when he, the patron, is four-and-twenty. I apprehend that is not the law. Looking at the condition of this bond, independently of all the consideration that belongs to the cases prior to the case of the *Bishop of London v. Ffytche*, I say that the condition of this bond is, in the construction of the law, a condition, such as belongs to a general bond, and not to a special bond.

There are a great many other provisions in what are called special bonds, some very provident and commendable; but whether they are as clearly legal may admit of question, more especially if they give a sort of jurisdiction to a patron, which the law has vested only in the ordinary.

There was a good deal of argument, whether this bond can be considered as a benefit to the patron, within the intent and meaning of the statute of the 31st of Elizabeth. Now only consider what may be done with a bond of this kind in point of pecuniary benefit: I mean a bond with such a condition as this. If these bonds are lawful, when a living is vacant, a patron wishing to sell the next presentation, has nothing to do but to present a clerk, taking from him a bond to vacate the living whenever C. D. shall be inclined, or shall be able to take it; but yet containing nothing that could compel him to present C. D. The patron calls upon his clerk to resign the living; no, says he, I will not resign the living, because it is worth more than the penalty in the bond. The patron therefore, if resignation is refused, receives the sum mentioned in the penalty for the [252] presentation of a clerk who will not resign. He cannot sell the presentation to a living when vacant—but he may present a clerk, taking a bond of resignation in a large penalty, and the Church being full, he may then sell the next presentation, and call upon that clerk who had given the bond to resign. It must be ill managed if he does not baffle Courts of Equity. In both cases, therefore, with a little management in the shape of penalty or sale, he may secure a benefit to himself.

It must, however, be admitted, the case of the *Bishop of London v. Ffytche*, and this case, if it should be classed under the same principle, may have a serious operation upon many patrons, and many clerks; and where there has been a common error, although it cannot make law against the positive words of an Act of Parliament, I should concur in any measure to indemnify persons, who have been acting on the sanction of what may be called errors of lawyers and judges. This may be effected by some law giving a power to the owners of advowsons, to discharge those obligations which are contrary to law, and substitute others which may be legalised by a statute so framed as to express the number of persons in favour of whom the condition is to operate, and making it compulsory on the patrons to present those nominees. This should be effected without trenching upon the general principles of the ecclesiastical law of the country, further than the just claims of those, who are interested, and who are likely to suffer by such errors, may make it reasonable that you should trench upon it.

It is upon these grounds that I think that this bond cannot possibly be upheld; that it is void by statute if not by common law. With regard to the obligations of the common law upon this subject, it has always appeared to me to be a very singular thing, that when [253] you are discussing a case which is to determine what is the effect of the act of a clergyman, connected with that of a layman, the layman's act is not to be considered with reference to the question, whether the clergyman bound by his canons, can or cannot legally do the act, to which the layman is a party, taking the benefit of that act. The oath which the clergyman takes

when he is presented to a living, is material in the consideration of this question. I do not go so far as some judges of great authority, in saying that these are bonds which no honest clergyman would give, and no honest patron would take. We know that many very honest people have engaged in such transactions. I am content with representing that, according to my humble judgment, such bonds are illegal. Whatever may be the law with respect to bonds conditioned to do things which are but the performance of ecclesiastical duties, not being contrary to the policy of the law, but assuming in effect a jurisdiction which belongs to the ordinary and not to the patron, it is unnecessary on this occasion to call your attention to such cases. It is only to be observed, that such bonds are said to be in furtherance of the law, and not in violation of law. I have no hesitation, however, in stating, that it would not be impolitic by legislative enactment, to declare the law, and what it is as to such cases. I abstain from entering upon considerations of policy—as to such, referring only to the arguments of counsel, and the opinions of the judges in the case of the *Bishop of London v. Ffytche*.

Upon the grounds I have mentioned, it is my intention to move your Lordships to reverse this judgment.

9th April, 1827. Judgment reversed.

[254] After the judgment, the Archbishop of Canterbury, having observed that, according to the existing laws, a great number of patrons and incumbents, acting under an erroneous impression, had exposed themselves to severe penalties, brought in, and moved the first reading of a bill, the substance of which, was afterwards passed into a law, by the statute 7 and 8 Geo. 4. c. 25; which, reciting the statute 31st Elizabeth, c. 6, and that a practice had generally prevailed, of giving and taking special bonds or contracts for resignation of spiritual offices, and reciting the judgment of the House of Lords, that such bonds are within the meaning of the statute of Elizabeth, and that the parties to such contracts would suffer great hardship by the operation of the law; it is enacted, (see. 1.) that no presentation to any spiritual office made before the 9th April, 1827, should be void on account of any agreement to resign, when another person specially named should become qualified to take the office, and that the parties to the agreement should not be subject to any penalties, etc. on account of the agreement; and that (sec. 2.) engagements made before 9th April, 1827, for resignation in favour of one person named, or of two persons named, shall be valid, notwithstanding the statute. But (sec. 3.) the protection is not to extend to engagements not made *bonâ fide* for the purpose expressed in the preceding sections; and the statute is not to be construed as compulsory on the ordinary, to accept the resignation, and by (sec. 4.) it is provided, that if the person specially named in the engagement, be not presented within six months after resignation, that the person having resigned, shall be deemed to be in possession of the spirituality, and the resignation shall be void.

[255]

IRELAND.

(COURT OF CHANCERY.)

WILLIAM LOPDELL, Administrator of CHRISTOPHER LOPDELL, Deceased,—
Appellant; ROBERT CREAGH, a Lunatic, by his Committee,—Respondent.

[Mews' Dig. i. 351, vi. 1032.]

After an appeal against a decree of a Court of Equity had been presented to the House of Lords, and the cases printed, with an Appendix of evidence as entered in the Register's notes, of the proofs read on the hearing; an order was made upon motion in the Court below, expunging part of that evidence as entered by mistake. This order was reversed as irregular. In such case the proper course is to apply to the House, by petition, for leave to proceed in the Court below to rectify the mistake.

By the decree made on the hearing of this cause, on the 30th of June, 1823, it was ordered that the Appellant's Bill should be dismissed, with costs.

On the 16th day of February, 1824, the Appellant presented an appeal from the

decree; and printed copies of the case of the Appellant were prepared and delivered during the session. To the printed case of the Appellant was annexed an appendix of the Register's notes, containing the proofs made at the hearing of the cause, among which was an entry as follows:—"Order 23d July, etc. Creagh, a Lunatic, read: like 9th Nov. 1802, and 19th Nov. 1803 in same, read; affidavit, R. Creagh, sworn 14th Jan. 1812 in same, read, etc. Abstract receipts of R. Creagh, No. 16, read."

[256] The appeal was set down for hearing *ex parte* against the Respondent.

The Respondent did not prepare or deliver any case until the 16th of March, 1825, when, upon his petition he was permitted to lay the prints of his case upon the table. The printed cases were shortly afterwards exchanged between the Appellant and Respondent.

After the exchange of the printed cases, on the 16th of May, 1825, an application was made to the Lord Chancellor of Ireland, by way of motion, on behalf of the Respondent, that the notes made by the Register at the hearing of the cause, might be rectified by the Register, by striking out the words, "and on the 19th December, 1803 in same, read;" the words, "Affidavit of R. Creagh, sworn 14th January, 1812 in same, read," and also the words, "Abstract receipts of Richard Creagh, sixteen, read;" it being alleged that none of the documents alluded to were read at the hearing of the cause; whereupon, and on reading the pleadings and attested copy of the Register's notes on the hearing; the printed case of the Appellant, with the appendix thereto, as furnished for the hearing of the appeal in this cause;—an affidavit made by Barry Collins, Gent.;—an affidavit made by the Appellant;—and the three documents therein-before specified, as being read on the hearing of the cause, and hearing what was offered on the part of the Appellant, the Lord Chancellor was pleased to order that the notes be varied by the Register, by striking out the words, "and of the 19th December, 1803 in same, read;" the words, "affidavit of R. Creagh, sworn 14th January, 1812 in same, read;" and also the words, "abstract receipts of [257] Richard Creagh, No. 16, read," as was desired by the Respondent.

Against this order the Plaintiff appealed.

For the Appellant: Mr. Brougham, Mr. Merivale.

The documents were read and received as evidence at the hearing of the cause, and were then marked and entered by the officer of the Court, as having been read and entered. It was not competent to the Court to order the proofs so entered to be expunged, except upon a re-hearing of the cause.

If it was competent to the Court, upon any ground alleged subsequently to the decree, to order the documents to be expunged without a re-hearing, no such ground existed in this case, inasmuch as the documents were good evidence, and were fit and proper to be received as such by the Court at the hearing of the cause. After an appeal is presented, no alteration of the decree or entry of proofs as read in the cause, can be made without the permission of the Court of appeal.

For the Respondents: Mr. Sugden, Mr. Pepys.

The order appealed from, is not a judgment of the court below, from which an appeal ought to be entertained, but merely directions to the officer of the court below, respecting the manner in which the judgment of the court, on hearing the cause, ought to have been drawn up.

If the order had not been pronounced, it would have appeared as if the several documents had been read on the hearing of the cause, unobjected to on the part of the Respondent; and the cause would consequently have been heard on appeal upon evidence, not admissible in point of law against the [258] Respondent, and different in point of fact from that upon which the cause had been originally heard and decided by the Court of Chancery in Ireland.

The propriety of the order appealed from, depends upon the fact, whether the documents in question were or were not, read at the hearing of the cause; and that they were not read, is proved beyond all question, by the affidavit of Barry Collins, and by the attested copy of the notes on the hearing, and above all, by the recollection of the learned judge, by whom the cause was heard and decided.

The Lord Chancellor * (June 29, 1827): In the case of *Lopdell v. Creagh*, there

* Lord Lyndhurst. The judgment in this case was not delivered until after the hearing and judgment in the case next reported

was an appeal from a decree of the Lord Chancellor of Ireland, which was heard upon the merits some time back, and upon which your Lordships were of opinion, that the judgment of the Lord Chancellor of Ireland, should be affirmed. After that appeal was lodged in this House, and the printed cases were laid upon the table, an application was made to the Lord Chancellor of Ireland, to vary the notes which the Registrar had taken of the evidence which had been read upon the hearing, and the Lord Chancellor of Ireland, made an order expunging from the notes of the Registrar a part of the evidence which was supposed to have been read upon the hearing. From that order of the Lord Chancellor of Ireland, there was an appeal to the House of Lords, which came on to be heard at the same time when the appeal upon the merits was heard.

It was not necessary to decide this point of form previous to deciding the general question upon the [259] merits, but your Lordships were of opinion, that it would be convenient and desirable to consider what was the practice in cases of this description. I should submit to your Lordships, that after the appeal was lodged here, and while it was waiting to be heard, it was not competent for the Lord Chancellor of Ireland to make such an order, but that the regular course would have been, to have applied to the House, and your Lordships would, in all probability, on such application, have given leave to the party to apply to the Lord Chancellor of Ireland, and then the alteration would have been made by the Lord Chancellor, under the direction of this House. That not having been done, I conceive that that which was done is irregular, and that the appeal should be allowed: it is not at all material in its bearing upon the other case, but the proceeding was irregular, and the appeal should be allowed without costs.

Judgment reversed.

[260]

IRELAND.

(COURT OF CHANCERY.)

WILLIAM LOPDELL, Administrator of CHRISTOPHER LOPDELL,—*Appellant*;

ROBERT CREAGH, a Lunatic, by RODERICK CONNOR, his Committee,—*Respondent*.

[Mews' Dig. i. 52.]

A. having granted to B. a lease, with a covenant for payment of the rent of £90, and a clause giving a right of surrender to the tenant, dies, leaving C. his heir at law, who becomes seized of the lands subject to the lease. D. a near relative of C. having by some means acquired or assumed a title by indentures, dated in 1791, demises the lands to L. In 1793, C. is by inquisition, found to have been a lunatic from 1786. In 1797, upon a rental and account filed by the Committee of the lunatic, L. is returned as the tenant, and a sum of money is stated to have been received, and a sum of money to be due from him as rent. In 1802, D. is returned as tenant of the lands, by the receiver appointed in the lunacy. In 1811 an order is made in the lunacy, that £720 being due from D. as tenant, a distress should be levied on the lands. In 1817, the receiver died indebted to the estate, and his sureties were discharged from their recognisance on payment of part of their debt, by way of compromise.

In 1820, an ejectment was brought against D. to recover the lands for non-payment of rent, and a verdict and judgment obtained. In 1821, an action is brought upon the covenant in the original lease against the Appellant as personal representative of B. to recover £2340, being 26 years arrears of rent, to which action the Defendant pleaded a surrender, eviction, etc. upon which a verdict is found for the Plaintiff, and judgment entered. In 1822 a bill is filed by the Defendant in the action, stating a case of laches, and of

fraud and collusion between D. the relative of the lunatic, and his committees and receivers, and praying an account against the committees and receivers, (not being parties to the suit,) or if, from lapse of time, such account could not be taken, then a perpetual injunction against proceeding on the judgment. The bill was dismissed with costs upon the hearing in the Court below, and that decree upon appeal affirmed with costs.

[261] Peirse Creagh the Respondent's father, in 1762, demised lands to Christopher Lopdell, his heirs and assigns, for three lives, at the yearly rent of £90; the deed of release contained a covenant for the payment of the rent during the term, and also contained an annual clause of surrender after the expiration of the first three years.

Christopher Lopdell entered into, and continued in possession of the premises until the year 1790.

Peirse Creagh died in 1779, leaving the Respondent his eldest son and heir at law, who thereupon became seised in fee of the reversion of the premises, subject to the lease.

Richard Creagh, the brother by the half blood of the Respondent, having by some means acquired or usurped a right, or as the agent * of the Respondent, by an indenture dated in April 1791, demised the premises to James and Andrew Lysaght, for three lives, reserving a yearly rent of £100.

James and Andrew Lysaght were in possession of the premises from the date of the indentures, until eviction for non-payment of rent in the year 1821.

By an inquisition, bearing date the 21st day of August 1793, the Respondent was found to be a lunatic, and to have become so in the month of March 1786. In December 1793, Stephen Darcy was appointed committee of the estate of the Respondent.

In 1797, Stephen Darcy filed a rental and account of the Respondent's estate, in which James and Andrew Lysaght are named as tenants of the lands, at the yearly rent of £90; and in the account, rent is [262] stated to have been received, and rent also to be due from them.

Stephen Darcy died in 1801, and Stuart King, then one of the masters of chancery, was appointed committee of the estate of the Respondent, and continued to act as such until the year 1820, when he resigned his office of master, and Roderick Connor, who succeeded him as master, was appointed committee in his room.

In 1802, William Croker was appointed receiver of the estate of the lunatic, and continued to act until his death, in 1817, when George O'Callaghan was appointed in his room.

William Croker, in the accounts filed by him, returned Richard Creagh as tenant, and died indebted to the estate of the Respondent in respect of his receipts.

On the 23d of July, 1811, an order was made in the lunacy of the Respondent, that £720 being due from Richard Creagh, as tenant, a distress should be levied on the lands, for non-payment of the rent.

In 1812, Richard Creagh made an affidavit in the lunacy, that he never had been tenant, or in possession of the lands; and the order was not enforced.

William Croker, shortly after his appointment as receiver, entered into a recognizance with sureties, (who are since dead,) duly to account for his receipts, and to pay in the balances.

In 1817 Croker died indebted to the estate of the Respondent for rents received, but whether from the estates in question did not distinctly appear. In 1820, on the petition of the committee, an order was made, under which proceedings were taken against the sureties of the receiver; and in 1821, under [263] another order, a sum of money having been paid upon a compromise proposed by the sureties and approved by the master, the recognizance was vacated as to those sureties.

* An attested copy of the registered memorial of this lease was in evidence in the cause. It does not appear in the memorial that the lease was executed by Richard Creagh as attorney or agent.

In 1820, an ejectment was brought against Richard Creagh, for non-payment of rent, and possession of the lands was recovered.

In 1821 an action was brought in the name of the Respondent, against the Appellant, as administrator of the original lessee, C. Lopdell, to recover a sum of £2340, the amount of twenty-six years' rent of the lands. To the declaration in this action, the Defendant among other things put in pleas of surrender, eviction and *plene administravit*, on which issue being joined, the cause was tried in 1822, when a verdict was found for the Plaintiff on all the issues. Upon the trial, the counsel for the Respondent relied upon the conveyance to Christopher Lopdell, as having been a subsisting and binding instrument, until the eviction under the ejectment for nonpayment of rent, and gave evidence of his having obtained possession of the lands under the conveyance, and that he continued in such possession until the year 1790; and the Appellant having proved on the trial, a warrant of attorney to enter judgment on a bond dated the 12th of April 1790, executed by the Respondent and Richard Creagh, for a principal sum of £309 payable to Christopher Lopdell, as evidence that the Respondent had lucid intervals after the month of March 1786, the time at which he was found to have become a lunatic; the Respondent gave in evidence a judgment entered in pursuance of the warrant of attorney against Richard only, for the penal sum of £618, the principal sum of £309 being alleged to be the consideration agreed to be [264] paid by Richard Creagh to Christopher Lopdell, for the assignment of his interest in the lands. On the trial it was further proved on behalf of the Appellant, that Richard Creagh executed the indenture of 9th April 1791, to James and Andrew Lysaght, thereby reserving to himself and his heirs the yearly rent of £100; and it was further proved, that James and Andrew Lysaght paid to Richard Creagh a sum of £200 as a consideration for the conveyance.

The Appellant having made an application to the Court of King's Bench, to set aside the verdict, which the Court refused, in Trinity term 1822, judgment was entered.

The Appellant, in 1822, filed a bill in the Court of Chancery in Ireland, stating the facts before mentioned, and charging laches and collusion between Richard Creagh and the parties managing the estate of the lunatic, and particularly that no rent was demanded of the Lysaghts or C. Lopdell, or his representatives, nor enforced by the receivers against Richard Creagh, although there was always a sufficient distress upon the lands to recover the rents. The bill prayed that an account might be taken of what Stephen Darcy received or might have received out of the lands, and an account of what William Croker received or without wilful default might have received out of the lands, or what was received or without his wilful default might have been received by George O'Callaghan out of the lands, and that credit might be given for the same to Plaintiff, or if by lapse of time, or the contrivances of Stephen Darcy, William Croker or George O'Callaghan, such accounts could not be taken, then that Robert Creagh might be perpetually restrained, by injunction, from proceeding on the judgment obtained by [265] him for recovery of the rent found to be due by the jury before whom the action of covenant was tried.

The Respondent, by his committee, having answered the bill, the Appellant moved the Lord Chancellor, by way of appeal from an order of the Master of the Rolls, to continue the injunction until the hearing, and thereupon it was ordered that the injunction should be continued until further order, the Appellant undertaking to give security by his own recognizance before one of the masters, in the sum of £180 (the amount of assets found at law to have come to his hands,) conditioned to abide the decree to be made in the cause.

Issue having been joined, and witnesses examined, the cause came on to be heard on pleadings and proofs, on the 30th of June, 1823, before the Lord Chancellor, when the bill was dismissed with costs, and the injunction dissolved.

From this decree the appeal was presented.

For the Appellant: Mr. Brougham,* Mr. Merivale.

* In opening the appeal, Mr. Brougham submitted that it ought to stand over till the question which was the subject of the preceding appeal had been decided.

There is no evidence that Christopher Lopdell ever was in possession of the lands since the year 1791, or that James Lopdell as administrator, or the Appellant as administrator *de bonis non*, were ever called upon, from that time, until the time of bringing the action of covenant in Hilary Term, 1821, either under the covenants in the lease, or otherwise, in respect of the rent of the lands, although [266] such rent was, during the whole, or most of that period, in arrear, and unreceived; and James and Andrew Lysaght, and afterwards Richard Creagh, being successively, in the rentals filed, and accounts passed by the several receivers, named as tenants of the lands to the Respondent, and from the several other circumstances of this case, as proved on the part of the Appellant, a surrender of the lease of the 15th of April, 1762, ought to be presumed in favour of the Appellant. Notwithstanding the verdicts which have been obtained on the several trials of the action at law against the Appellant, it is competent for a Court of equity, which is not bound by the decision of a Court of law, in a case of this nature, to admit such presumption. It is no objection, against the admissibility of such presumption, that the Respondent is a lunatic, and has been found, upon Inquisition, to have been so since the month of March, 1786, at which time Christopher Lopdell is alleged to have been still in possession under the lease; because such finding is not inconsistent with the supposition that the lunatic might have had lucid intervals, and that during one of such lucid intervals, such surrender might have been accepted; and there is evidence in the cause, of the lunatic having had at least one such lucid interval; and even if such evidence were wanting, or if the fact were negatived, yet, the acceptance of such surrender not being an act in the discretion of the Respondent, it is not necessary for the presumption of such surrender to suppose that it was made during such lucid interval.

There was gross neglect on the part of the several committees and receivers, who were from time to time appointed to manage the Respondent's estate, [267] and to collect the rents, in suffering the rent to be in arrear, and in not resorting to the land for payment, although it appears by the evidence that there was at all times, or at least generally, a sufficiency of stock on the premises, in case they had thought fit to distrain; and, in consequence of no steps having been taken in pursuance of the order of the 23d of July, 1811; and also in consequence of the order for vacating the recognizance, entered into by William Croker, and his sureties, having been collusively obtained upon the petition of the representatives of the sureties, the Appellant is precluded from any remedy which he might otherwise have had against the estates of the sureties. These facts when coupled with the circumstances of relationship between the several parties, and with other facts of the case, afford strong ground for presuming fraud and collusion on the part of those to whom such neglect is attributable; the Appellant has been rendered liable to a demand in respect of the rent so suffered to be in arrear, to which, but for such gross neglect, he never would have been liable; the demand made is, under such circumstances, wholly unconscientious, and one against which, upon every principle of justice, a Court of equity is bound to afford relief.

The presumption of an assignment from Christopher Lopdell to Richard Creagh, (which presumption appears to be necessary, in order to repel the contrary presumption of surrender,) has been directly negatived by the affidavit made by Richard Creagh, in the lunacy of the Respondent, which was given in evidence on the part of the Appellant: it appears by that affidavit, and by the evidence, that Richard Creagh entered into possession of the lands, not as the assignee of Christopher Lopdell, [268] or claiming or deriving under him, but as the agent and manager of the estate of the Respondent, who was his brother by the half blood; and in the event of whose dying intestate, Richard Creagh, would be entitled, as one of the next of kin, to a distributive share of any monies to be recovered from the Appellant, on account of the rents of the lands; the entire rents of which lands, Richard Creagh had himself received already, and fraudulently converted to his own use, instead of paying or accounting for the same annually, to the different

But it was suggested by the Respondent's counsel, that in argument it might be assumed that the evidence was read as entered in the Register's note, and thereupon the appeal proceeded.

receivers in the matter of the lunacy, as the same became due; to which fraud or neglect of Richard Creagh in not paying or accounting for the same, it is owing, that the Appellant became liable at law to the payment.

For the Respondent: Mr. Sugden; Mr. Pepys.

The Appellant does not allege that Stephen Darcy, William Croker, or George O'Callaghan, ever received any money out of the lands; but on the contrary, the case made and relied on by the Appellant in his bill, is inconsistent with the fact of any such sum having been received. An account of what those several persons, or any of them, might, without wilful default, have received out of the lands, would be perfectly immaterial; for even if in fact it should appear that any such sum might have been received, the Appellant would not be entitled to credit for such sum, nor would his liability be in any way lessened in consequence. The accounts prayed by the bill could not be directed in the absence of George O'Callaghan, or of the representatives of Stephen Darcy and William Croker: who are not parties in the suit.

[269] Christopher Lopdell having by the indenture of the 15th of April, 1762, covenanted to pay the rent during the continuance of the term, he and his representatives were bound by the covenant during the term; and at all events, whether he and his representatives were so liable or not, and whether in fact the term did continue until the period to which the Respondent claimed the rent or not, were questions cognizable in a court of law, and have already been decided in favour of Respondent, by the proper tribunal. The Appellant has not established any facts sufficient to warrant a court of equity to interfere to protect the Appellant from his legal liability, and to deprive the Respondent of his legal right; for mere lapse of time, independent of any other circumstances, cannot create an equitable bar to a legal right, when the legislature has not thought fit to constitute it a legal bar; and in this case the Appellant has not proved any other circumstances, and has not shown that any collusion existed between the several persons charged therein with in his bill; and even if in fact any collusion did exist between them, it must have been for the purpose of defrauding the Respondent; and if a court of equity should now restrain the Respondent from enforcing his legal claim, it would in effect promote the object of that collusion, and lend its aid to the accomplishment of fraud.

If the Appellant has sustained any loss as Administrator, it has been occasioned by the neglect and want of good faith of Christopher Lopdell, who, when he transferred his interest in the lands to Richard Creagh, might have protected himself, by obtaining from Richard Creagh proper security for the performance of those covenants by which he was him-[270]self bound, and whose peculiar duty it was, considering the unfortunate situation in which the Respondent then was, to take good care that any person whom he might substitute as tenant in his own stead, should faithfully discharge his duty as such. Christopher Lopdell and his representatives were at all times primarily liable to the Respondent, and those concerned for the Respondent were not bound, in the first instance, to resort to any other person.

The Appellant cannot derive any equity from the recognizance entered into by the securities of William Croker having been vacated, inasmuch as the Appellant would not be entitled to have any part of the sum secured thereby, applied in discharge of the debt for which he is liable as such administrator, even if the whole amount of the recognizance should now be levied from the sureties, the same being only a security for what William Croker actually received out of the Respondent's estate; and William Croker never having received any sum out of the lands, or on account of the rent thereof, the Appellant could not in any event be entitled to have the recognizance enforced against the sureties for his benefit: for even if the recognizance should be deemed a security for such sums as William Croker might have received, yet inasmuch as Christopher Lopdell and his representatives were at all times liable to the Respondent for the rent of the premises, it was the duty of William Croker to have compelled the payment thereof by Christopher and his representatives; and although the sureties might be liable to the Respondent in consequence of William Croker's neglect, yet the Respondent might resort to those who were always liable to the payment of rent and from whom William Croker ought to have received the [271] same; and so far from Christopher Lopdell and his representatives having any right in such case to be reimbursed by

those for whom William Croker ought to have received the rent, the sureties would in case of default have a claim in equity against the Appellant, but the Appellant could not in any event have any claim against the sureties.

The Lord Chancellor (Lord Lyndhurst), in the course of the argument observed, that the questions of limitation of time, and presumption of surrender of the lease, were peculiarly questions for the decision of a court of law: that the affidavit of Richard Creagh was evidence only that such an affidavit had been made, not of the facts contained in it: that the receipts of Richard Creagh proposed to be introduced as evidence being mere abstracts of the original receipts copied from dictation, and not even compared with the originals, could not be admitted in evidence; and that notice to produce the originals having been served upon a person not a party in the suit, was wholly inoperative, and could not be admitted as a ground to receive the secondary evidence of copies. The Lord Chancellor also observed, that some equity had been opened by the Appellant's counsel, but no case proved; and thereupon the judgment was affirmed with £150 costs.

[272]

IRELAND.

(COURT OF CHANCERY.)

WILLIAM HENRY ARCHER.—*Appellant*; WILLIAM LITTLE.—*Respondent*.

By an Act of Parliament for the improvement of the city of Dublin, reciting that the cleansing of the streets before an Act passed in 1784, had been managed by the Corporation of Dublin, and the expense defrayed by them out of the tolls and customs of the city; and that since 1784, the Corporation had paid to certain intended Commissioners the sum of £2000 yearly, towards the expenses of cleansing the streets, it is enacted that, from the passing of the Act, the Corporation shall pay to the Commissioners of Paving, etc. appointed by the Act £2000 yearly, out of the revenue arising from the tolls and customs of the city.

The Corporation, according to the Act, paid the £2000 annually until 1818, after which, the payment being in arrear, the Commissioners, by their Secretary, under the authority of the Act, in Easter Term, 1819, brought an action against the Treasurer of the Corporation to recover £2000, being one year's instalment. After appearance, the Corporation represented, that the tolls and customs were insufficient to pay any part of the £2000, and proposed that the action should be stayed without prejudice to other proceedings. To this proposal the Commissioners acceded, and the action was discontinued.

In 1821, the Commissioners brought another action to recover arrears, among which, by the fourth count in the declaration, £6000 were claimed, as due on account of the arrear for three years' payment for cleansing the streets, to which the Defendants pleaded that during the three years in the count mentioned, no revenue had arisen to the Corporation out of the tolls and customs whereout the Corporation could have paid to the Commissioners, etc. In consequence of this plea, the Commissioners, in the name of their Secretary, filed a bill in Chancery against the Defendant in the action, stating the facts above-mentioned, and charging that the tolls were not deficient, and setting forth the particulars of various tolls and customs, claimed and received by the Corporation: that before and since 1784, the Corporation had let the tolls or some part of them upon leases at large rents; and [273] that since the year 1784, the Corporation had received in tolls every year, beyond the sum paid to the Commissioners, a surplus annually of £2000 at the least. Upon these statements, with interrogatories founded upon them, the bill prayed, in aid of the action a discovery and account of the revenue arising from tolls and customs, and of the leases granted, and the rents received and paid upon the same.

To this bill the Defendant demurred:—1st, as to so much as sought a discovery and account of the surplus of revenue received by the Corporation in every year since 1784, beyond the sum paid to the Commissioners; the cause assigned was, that such surplus was not liable to the payment of the arrears of future years; the second demurrer was to so much of the bill as sought a discovery of the leases of tolls and customs granted by the Corporation since 1784, and not subsisting since 1818; the ground of this demurrer was, that, the arrears had been paid up to 1818, and that the surplus of tolls before 1818, could not be applicable to the payment of arrears accruing after 1818.

The Defendant also put in a long answer in which he admitted that the Corporation and their lessees both before and since the year 1784, had demanded and received tolls on various articles, and that payments had been and were made upon ships entering the harbour and ferries; but contended that such payments were not liable under the Act to the payment of the £2000; and he set forth accounts in schedules, of tolls and customs and payments made for ships and ferries since 1818; insisting that since that time there had been no surplus monies received upon tolls and customs after defraying the expence of collection.

Held (affirming the judgment of the Court below) that the demurrers should be overruled.

The reasons for the judgment on the appeal were: first, because the demurrers were overruled by the answer; and secondly, because even admitting that the surplus of former years was not applicable to the payment of arrears of future years, the discovery of the revenues actually received in such years might be material to furnish presumptive evidence upon the trial of the action.

The Appellant was the Treasurer of the Corporation of the city of Dublin; the Respondent was Secretary to the Corporation called the Commissioners for paving, cleansing, and lighting the streets of the city of Dublin.

[274] By an Act of Parliament (47th George III.), entitled "An Act for the more effectual Improvement of the City of Dublin, and the Environs thereof," the Commissioners for paving, cleansing, and lighting the streets of the city of Dublin, were constituted a Corporation. The Act recited, that the Corporation of Dublin were, before the passing of an Act therein recited, (26th Geo. III.) liable to keep in repair certain parts of the pavements of the city, the annual expence of which was estimated to amount to £300, which sum was directed to be paid by them, as a compensation for the paving thereof. Upon this recital it is enacted, that the Corporation of Dublin should pay to the Treasurer of the Commissioners, the annual sum of £300, together with a further sum of £50 in every year, for the pavement round St. Stephen's Green, amounting in the whole to the sum of £350 per annum; and that in consideration of the payments so to be made, the Corporation of Dublin should be exonerated from all expenses of paving and repairing the pavements. The Act further reciting, that the Corporation were theretofore used to maintain several lamps at the Mansion-House, Tholsel, and Market-House, enacts that the Treasurer of the city should pay for such purposes to the Treasurer of the Commissioners, the annual sum of £20 in every year; and that, in consideration of such payment, the Corporation should be exonerated from all expenses of lighting those lamps.

The Act further reciting, that the cleansing of the streets, and other places in the city of Dublin, before the passing of a certain Act, (23d and 24th Geo. III.,) was conducted under the direction of the Corporation, and the expenses thereof defrayed by them out of the revenue arising from the [275] tolls and customs of the city; and that since the passing of the 23d and 24th Geo. III., the Corporation had paid to the Commissioners or Directors intended to manage the paving, lighting, and cleansing the city, the sum of £2000 yearly, towards defraying the expenses of cleansing the streets; enacts, that the Corporation of Dublin shall, from the passing of the Act, pay, and continue to pay to the Commissioners, the annual sum of £2000 out of the revenue of the city, arising from the tolls and customs of the city, by equal half-yearly payments to be made on the 25th day of March, and

the 29th day of September in every year: and it is further enacted, that in case any body corporate should neglect or refuse to pay any rates to be assessed by virtue of the Act, the Commissioners, or their proper officers or officer, might recover the same by action, or other legal proceeding instituted against the Treasurer of such body corporate, in the name of the Secretary to the Commissioners.

The Corporation of Dublin, from time to time, and up to the year 1818, paid the annual sums of £350, £20, and £2000.

On the 25th of March, 1819, an arrear being due to the Commissioners, they, in Easter Term, 1819, commenced an action in the King's Bench, in Ireland, in the name of the Respondent, as their Secretary, against the Appellant, as Treasurer to the Corporation, for the recovery of the arrear. The Appellant having entered his appearance to the action, it was alleged by the Corporation, that the annual sum of £2000 was payable only out of the revenue of the city of Dublin, arising from the tolls and customs of the city, and that such revenue was unproductive, and insufficient to pay the whole or any [276] part of the sum of £2000, for which the action had been brought: and thereupon a proposition was made by the Appellant on the part of the Corporation, that the Commissioners should accept of the arrear of £20 and £350, without prejudice to any proceedings they should think fit to adopt for the recovery of the £2000. The Commissioners, believing the representation as to the tolls and customs of the city being unproductive, to be true, acceded to the proposition: and received the two sums of £20 and £350, leaving the sum of £2000 still in arrear.

On the 25th day of March, 1821, further arrears became due, amounting to the sum of £4610, in addition to the £2000, and making altogether an arrear of £6610; and the Commissioners, in Easter Term, 1821, commenced another action. As to the arrear of £6000, which was claimed by the fourth count of the declaration filed in the action, as the compensation payable under the Act for cleansing the streets, the Defendant pleaded, that he did not owe the same, or any part thereof: and, that during the three years in the fourth count mentioned, ending the 25th March, 1821, no revenue arose to the Corporation out of the tolls and customs of the city, whereout the Corporation could have paid to the Respondent, or to the Commissioners, the sum of £6000, and that the Corporation had not received out of the tolls and customs of the city the sum of £6000, or any part thereof.

In December, 1821, the Commissioners filed a bill in Chancery, stating the facts above set forth, and charged, that the Respondent could not go to trial in the suit at law without a discovery; that the tolls were not deficient, as alleged by the Corporation; and that, if they were so, such deficiency was [277] occasioned by the misconduct of the Corporation; that the Corporation had made illegal demands for tolls and customs: that they were in the receipt of various tolls and customs arising from the public markets, which were properly chargeable with the payment of the annual sum of £2000, that such markets in some cases had been let at considerable annual rents, particularly the markets in Halston-Street, or the Little Green, and Mary's-Lane: that large tolls and customs were collected from the market at Smithfield and Kevin-Street, and at the Burgh-Quay, at Stoney-Batter, the Grand Canal Harbour, and Frances-Street, and particularly for weighage and cranage; that the Corporation used divers public cranes, which yielded considerable rents; that the Corporation received a customary payment for ships entering the port of Dublin: that there were divers ferries and a bridge over the Anna Liffey, for which they received certain payments; together with large sums for pontage, murrage, passage, stallage, peckage, and weighage.

The bill further stated, that a market-house in Thomas-Street yielded large customary payments; that the Market-House being required for the use of the public, the Commissioners for making convenient streets in the city of Dublin, purchased of the Corporation the Market-House, and all their interest arising therefrom, and the tolls and customs there collected, at the price of £1000, which sum had been received by the Appellant, as Treasurer of the Corporation, since the 25th March, 1819, and applied to the use of the Corporation, and that no part thereof was paid to the Commissioners, in discharge of their demand, upon the foot of the annual sum of £2000, or any part thereof; that [278] the sum of £1000 was awarded by a jury, and that some part thereof was so awarded on account of the

loss which the Corporation would sustain in the tolls and customs of the Market-House; in evidence of which loss, proof was given before the jury, of what the Corporation had theretofore made by the Market-House, and the tolls and customs arising therefrom, and what they were thereafter likely to make in respect thereof; that the materials of the Market-House, and the scite thereof, were comparatively of little value, but that in consequence of the loss which would arise to the Corporation by their being thus deprived of the market, and of certain valuable tolls and customs, and also of the rent or sums paid for stallage and stands within or about the same, the sum of £4000 was awarded by the jury.

The bill farther stated, that in, or shortly previous to, the year 1784, the Corporation demised the tolls and customs of the city at the yearly rent of £4050, since which time the Corporation had made various other demises of the tolls and customs for considerable rents, and that the whole of the revenue arising from tolls and customs, was vested in the Corporation, for the purpose of paying and cleansing the streets of Dublin, as appeared from the charters of the Corporation, and also from the Report of a Committee of the House of Commons, made in or about the year 1784; that since the year 1784, the Corporation had never in any one year, paid to the Commissioners more than the sum payable by the Act of the 47th Geo. III., (that is to say), the sum of £2370 in the whole; and that the Corporation had received in every year since the year 1784, over and above the sum paid to the Commis-[279]-sioners, an annual sum of £2000, at the least,* out of which, if there was at the time of filing the bill a deficiency in the tolls and customs received within the last three years, the Commissioners were entitled to satisfaction of the arrear due, or to so much thereof as the annual receipts of the tolls and customs for the said three years should appear to be inadequate to discharge.

The bill charged that the toll receivable by the Corporation was toll thorough; and that the consideration given by them for the same prior to the passing of the Act of the 23d and 24th Geo. III., was by their paving and repairing certain parts of the city, which had since been performed by the Commissioners.

The Bill prayed, that the Appellant, as Treasurer of the Corporation might, in one or more schedule or schedules to be annexed to his answer, set forth a full, true and perfect account, of all and every the revenue of the city of Dublin, arising from tolls and customs, or customary payments, including petty customs of every description, and pontage, murage, passage, stallage, package, weighage, and cramage, and including the tolls, customs, and petty customs relating to, and payable out of, the several public markets and cranes, ferries and bridges, in the city of Dublin, distinguishing which of the several tolls, customs, petty customs, and customary payments, had been available since the 25th day of March, 1818; and might also, in such schedule or [280] schedules, set forth a full and accurate account of the several sums of money, which the several tolls and customs, petty customs, and customary payments respectively, had yielded quarterly since the 25th of March, 1818, and down to the time of filing his answer; and of the several and respective sum and sums of money which the Corporation, or their Treasurer, or other officers, had received thereout respectively since the 25th day of March, 1818; and that the Appellant should, in such schedule, distinguish how much of the tolls and customs, petty customs, and customary payments, had been received by the different officers, servants, farmers, or lessees of the Corporation, and how much had been paid to the Treasurer of the Corporation, and the difference between the sums received and the sums paid to such Treasurer; and that the Appellant should also set forth a full and accurate account (stating the date, term, tenants' name, and the considerations paid), of the several leases (if any) made by the Corporation of the tolls and customs, customary payments, or petty customs aforesaid, or of the markets, cranes, or other places, wherein the same are collected by virtue of such lease or leases, and of the rents reserved upon each lease, and the payments made

* Upon this allegation of the bill an interrogatory must have been framed, which is the subject of the first demurrer. The interrogatories are not set forth in the printed cases: nor is the fourth Count of the declaration on which the case turns. The Lord Chancellor complained of the omission as too common in Irish cases. See *post* p. 298.

on account of such since the 25th day of March, 1818; and that the Appellant, before he answered the bill, should inspect the books of account of the Corporation, which could give him any information upon the subject, so that he might be enabled to make full answer to the Respondent's bill; and also that the Appellant should state whether he had so done; and should also consult any officer or servant of the Corporation, with regard to such matters and things, [281] for the purpose aforesaid; and that he should state whether he had so done.

The Appellant put in demurrers to part of the bill, and a very long answer to the remainder.

The demurrers filed by the Appellant, are as follows:

"As to so much of the said bill as seeks a discovery whether the Lord Mayor, sheriffs, commons, and citizens of the city of Dublin, have or have not in each and every year since the year 1784, and prior to the year commencing on the 26th day of March, 1818, received an annual sum of £2000 at the least, or any other, and what annual sum, over and above the sum paid to the Directors or Commissioners appointed by Act of Parliament for paying, cleansing and lighting the streets of Dublin; and what sum the said Corporation of the Lord Mayor, sheriffs, commons, and citizens of the city of Dublin received in each and every year, particularly from the said year 1784, down to the end of the year expiring on the 25th day of March, 1818, out of any tolls and customs of the said city, over and above the annual sum paid to the said Directors or Commissioners; and how much such surplus sums in the whole amount to: and as to so much of the said bill as calls upon this Defendant to set forth in a schedule or schedules, or otherwise, any account of any revenue of any description, payable to or received by, or arising to the said Corporation of the Lord Mayor, sheriffs, commons, and citizens of the city of Dublin, in any year previously to the year commencing on the 26th day of March, 1818.—this Defendant doth demur thereto, and for cause of demurrer, this Defendant shows, that it [282] appears and is stated in and by the complainant's bill, that all sums of money due or payable by or from the said Corporation of the Lord Mayor, sheriffs, commons, and citizens of the city of Dublin, to the said Commissioners for paying, cleansing and lighting the streets of Dublin, up to and for the said 25th day of March, 1818, in respect of the annual sum of £2000 in the bill mentioned, have been fully paid, satisfied and discharged by the said Corporation to the said Commissioners; and the Defendant humbly submits and insists, that no sum or sums of money received by the said Corporation as part of the revenue of the said city, arising out of the tolls or customs of the said city or otherwise howsoever, upon, or at any time prior to the said 25th day of March, 1818, is, or ever was, or could be, by law subject or liable to the payment of any alleged arrear of the said annual sum of £2000, accrued, or alleged to have accrued or become payable or due to the said Commissioners by the said Corporation, subsequently to the said 25th day of March, 1818, and therefore that the complainant is not, nor are the said Commissioners, entitled to any discovery with respect to any revenue or receipt whatsoever, of the said Corporation, during any year prior to the year commencing on the 26th day of March, 1818, either from this Defendant or the Corporation of the Lord Mayor, sheriffs, commons, and citizens of the city of Dublin. Wherefore, etc.

"And as to so much of the bill as seeks a discovery of any lease or leases, demise or demises, of the several tolls and customs in the bill mentioned, or any of them, or any part thereof, or any other [283] lease or leases executed by the said Lord Mayor, sheriffs, commons, and citizens of the city of Dublin, and not subsisting and in force subsequent to the 25th day of March, 1818, this Defendant doth also demur thereto, and for causes of demurrer this Defendant shows, that it appears, and is stated in and by the complainant's bill, that all sums of money due or payable by, or from the said Corporation of the Lord Mayor, sheriffs, commons, and citizens of the city of Dublin, to the said Commissioners for paying, cleansing, and lighting the streets of Dublin, up to and for the said 25th day of March, 1818, in respect of the annual sum of £2000 in the bill mentioned, have been fully paid, satisfied and discharged by the said Corporation to the said Commissioners; and the Defendant humbly submits and insists, that no sum or sums of money received by the said Corporation as part of the revenue of the said city, arising out of the tolls and customs of the said city or otherwise howsoever, during any year prior to the year commencing on the 26th day of

March, 1818, is, or ever was, or could be, by law subject or liable to the payment of any alleged arrear of the said annual sum of £2000 accrued, or alleged to have accrued or become payable to the said Commissioners by the said Corporation subsequently to the said 25th day of March, 1818, and therefore that the complainant is not, nor are the said Commissioners, entitled to any discovery with respect to any such lease or leases, demise or demises, as herein before last-mentioned, either from this Defendant or the said Corporation of the Lord Mayor, sheriffs, commons, and citizens of the city of Dublin. Wherefore, etc."

[284] The Appellant by his answer, admitting the Act of Parliament, (47th Geo. III.) and that the Respondent was secretary to the Commissioners; and the payment made by the Corporation to the Commissioners up to the 25th March, 1818, in consequence of a judgment obtained by the Commissioners, and also the arrear due on the 25th March, 1819; submitted that no sum was then due to the Corporation on account of the annual sum of £2000 inasmuch as the funds liable thereto had been unproductive.

The answer farther admitting the sums of £350 and £20 to be due, and the action commenced in Easter Term, 1819, and proceedings therein, stated the proposal made on the part of the Corporation, and that the proposal was agreed to on the part of the Commissioners, in consequence of their being satisfied of the truth of the Appellant's representations, and, that in order to satisfy the Commissioners upon the point, an account of the revenue was furnished to the Commissioners.

Admitting also the action commenced by the Respondent in Easter Term then last, and that it was then depending and the pleas pleaded by him to the action, the Appellant by his answer denied that the Corporation had at any time subsequent to the 25th of March, 1818, any funds, whereout to discharge the arrears of the annual payment of £2000, inasmuch as the expenses of collecting the tolls and customs had exceeded the receipts; he denied that the Corporation alleged that the tolls and customs had not been at all paid since the 25th March, 1818, but admitted that it had been alleged that they had not been sufficient to defray the costs of collecting them; he denied that [285] the deficiency was occasioned by the misconduct of the Corporation, and said, that if any illegal practices existed, they were wholly unauthorized by the Corporation; that the tolls and customs collected since the 25th March, 1818, were the same as existed at the time of the passing of the Act of the 47th George III.; that in 1818 there was a general disposition in Ireland to resist the payment of tolls and customs; and that since the 25th March, 1818, persons who previously paid tolls and customs without opposition, refused to pay them; he submitted, that if the demand of tolls and customs were illegal since the 25th March, 1818, they must have been so at the passing of the Act of the 47th Geo. III., but insisted that the tolls and customs were legal. He admitted that, in consequence of the refusal to pay tolls and customs, the Corporation had been compelled to commence legal proceedings to enforce payment of them; but did not believe that, if the Corporation had acted as in the bill stated, the payment of the tolls would not have been evaded. He insisted that the tolls and customs received at the time of passing the Act of the 26th Geo. III., were reasonable, and would not have been objected to, except under the circumstances. He denied that such tolls had been, prior to the passing of the last mentioned Act, paid only after the sale of the commodity.

The Appellant by his answer farther admitted, that since the passing of the Act (26 Geo. III.), as well as from time immemorial theretofore, the Corporation or their lessees demanded and received tolls and customs on various articles, matters and things passing into the city, and before the same were sold; and which articles, with the rates of toll respectively charged thereon, he set forth in the first schedule to the answer annexed; [286] but whether or not such demands were contrary to law, or whether any immemorial usage would be necessary in order to warrant such demands, the Appellant could not state; but he believed that the Corporation rested their claim to the tolls and customs not merely upon their charters, but upon immemorial custom and prescriptive right. The Appellant also admitted, that the annual sum of £2000 was directed to be paid to the Commissioners by the Act (47th Geo. III.) out of the revenue of the city, arising out of the tolls and customs of the city, payable in respect of corn and other tollable articles passing into or out of the city, as specified in the first schedule to the answer annexed; but out of no other revenue. The

Appellant submitted that such revenue means the surplus, if any, arising to the city out of the receipts of the tolls and customs in the Act mentioned, after defraying the expenses incurred in the collection thereof; and that such last-mentioned revenue was the only fund intended by the Act (17th Geo. III.) to be charged with the payment of the annual sum of £2000: he therefore denied that the Corporation then was, or at any period since the 25th of March, 1818, had been, in the enjoyment of any tolls or customs contemplated by the Act (17th Geo. III.) so as to form the revenue of the city justly chargeable with the payment of the annual sum of £2000 to the Commissioners.

The Appellant by his answer farther admitted, that the Corporation had not during the last-mentioned period, accounted for or paid over to the Commissioners, any sum out of the tolls and customs charged with the annual sum of £2000, such receipts not having been in any one year during [287] that time equal to the expenses of collecting such tolls: he admitted, that there were in the city divers public markets, wherein, or in some of which, tolls and customs were collected, but of what description in particular, he did not know: for he stated that none of such markets were, to his knowledge or belief, held by the Corporation, though the Lord Mayor of the city had the superintendence thereof, by virtue of his office of clerk of all markets in the city; but whether or not tolls or customs, or any payments therein made, did in point of law belong to the Corporation, or whether or not the Corporation at any time demised the markets, he could not set forth as to his belief or otherwise: but he believed that the Corporation had never received any tolls or customs thereout.

The Appellant farther stated by his answer, that he did not believe that there were in Halston-street, or the Little Green in the neighbourhood thereof, or in Mary's-lane, in the city of Dublin, different public markets, though he admitted that there had been for many years, and that there was then, a public market held at the Little Green, in the city of Dublin, and extending to Halston-street, and Little Mary-street, in which commodities were sold; but that he could not set forth whether the same did or not belong to the Corporation: but he stated that the market had never been held by the Corporation, but by one William Clarke, and that payments were therein made in the nature, as the Appellant supposed, of tolls and customs: but what such tolls and customs were, or what they included, he could not set forth as to his belief or otherwise, excepting that he did not believe that such tolls and customs were of the annual value of £2000, or any such [288] value, or that they produced, or for the three years in the bill mentioned had produced, that or any such sum, nor what sum in particular: but he did not believe that any sum had been received therefrom, to the use of the Corporation, or that the market, or any profits thereof, or in respect of the soil thereof, had ever been demised or let by the Corporation.

It was denied that any markets whatever in the city of Dublin had been demised by the Corporation, or any fines or annual rents paid in respect thereof.

It was admitted that there were, at the places mentioned in the bill, public markets: but contended that those markets did not belong, or produce any emolument, customs or tolls to the Corporation, nor did the same ever compose any part of its revenues.

The Appellant by his answer farther said he believed that there were in the city divers public cranes: but that none of such cranes, then or at any time since the 25th day of March, 1818, yielded any fees or emoluments to the Corporation, nor did any such fees or emoluments ever form any part of the revenue of the city, arising from tolls and customs: nor did such public cranes belong to, nor were they ever demised by the Corporation, nor ever yielded to the Corporation any rents: for that the only crane with which the Corporation had any connexion by way of profit, was a crane situate in Bridge-Fort-Street, the soil or ground and warehouses whereof had been demised by the Corporation at the rent of 100 guineas per annum, which rent was payable only in respect of the ground whereon the crane stood, and not as an equivalent for the profits arising from weighing thereat, for that such profits had never belonged to the Corporation.

[289] It was admitted, that for all ships entering the port of Dublin a customary payment was made to the Corporation: but contended, that such customary payment was not any part of the revenue arising from tolls and customs contemplated by the Act (17th Geo. III.), and thereby rendered liable to the payment of the annual sum

of £2000. It was admitted, that such last-mentioned customary payments had been received by the Corporation since the 25th of March, 1818, and had yielded to them some, but not a considerable income, which the Corporation had applied to their own use, and the same had not been paid over by them to the Respondent or the Commissioners.

The Appellant, in the second schedule to his answer, set forth the amount of the revenue arising from the customary payment on ships since the 25th of March, 1818: he admitted, that there were divers ferries in the city, over the river Anna Liffey, the rent of which belonged to the Corporation: but he submitted, that those rents formed no part of the revenue arising from the tolls and customs of the city, subjected by the Act (47th Geo. III.) to the payment of the annual sum of £2000, though he admitted that the Corporation had been in the receipt of the rent of the ferries since the 25th day of March, 1819, and that the rent was paid to the Corporation by the lessee of the ferries, as an equivalent for such profits as in the answer stated; but that no separate rent was paid to the Corporation in respect of the bridge.

In the same schedule he also set forth the sums received by the Corporation in respect of the rent of the ferries, including the bridge, since the 25th March, 1818: and he admitted that the [290] same had not been applied in payment of the annual sum, but to the use of the Corporation: but the Appellant denied that any fine had been received by the Corporation for any demise of the ferries or bridge, since the 25th March, 1818, or that the Corporation received any sum or sums of money whatever for tolls, or customary payments for pontage, murage, or passage, though he could not set forth whether the Corporation were or not entitled to any such last-mentioned tolls or customs: but he believed that the Corporation had not received any such payments since the 25th day of March, 1818, nor were the Corporation, as the Appellant believed, entitled to any weighage, stallage, or package, independently of the several tolls and customs in the bill and answer before enumerated. He admitted, that no sum derived from any of the several last-mentioned sources was ever paid by the Corporation to the Commissioners for paving, cleansing, and lighting the streets of Dublin.

It was further admitted, that there was in Thomas-street, in the city, a public market-house belonging to, and built by, the Corporation: that the ground upon which the same stood was the property of the Corporation: that the market-house was used for certain purposes in the answer stated: and that persons paid, for standing under the same, certain weekly sums to the Corporation, but not as tolls or customs, nor were the Corporation entitled to, nor did they receive, any tolls or customs for grain sold at the market-house, since the 25th of March, 1818. The Appellant also admitted, that the market-house, together with the scite thereof, was sold for such reasons, and to such persons, and for such sum, as [291] in the bill mentioned: but he denied that any part of the interest of the Corporation in any tolls or customs there collected was included in the sale.

It was admitted, that no part of the purchase-money had been paid by him or the Corporation to the Commissioners, in discharge of the annual sum of £2000 or otherwise, the purchase-money forming no part of the revenue of the city, which was liable to the payment of the annual sum of £2000, or any part thereof. The Appellant also admitted, that the purchase-money was ascertained in the manner in the bill mentioned: but he denied that any part thereof was awarded in respect of any loss which the Corporation would sustain in respect of any tolls or customs arising from the market-house, or that evidence of such loss adduced before the jury, determined the amount of the purchase-money: but he said that the evidence was confined to those subjects only in the answer particularly mentioned.

The Appellant denied, that the materials of the market-house, or the scite thereof, was only of such value as in the bill mentioned, or that any such facts were given in evidence before the jury, the purchase-money being, as the Appellant believed, the fair value for the scite and the materials of the market-house, and of the profits which the Corporation derived from the storage of corn in the lofts thereof, and for weekly payments made to the Corporation, and also of the future profit which might accrue to the Corporation, by applying the market-house in future to other uses.

The Appellant by his answer further stated, that the only demise made by the

Corporation, of the tolls and customs mentioned in the Act (47th Geo. [292] III.), since the 25th of March, 1818, was a demise of the tolls and customs to Alderman John Claudius Beresford, at such rent, for such term, and made with such view as in the answer mentioned; but that nothing had been received in respect of the demise since the 25th of March, 1818. The Appellant denied that it appeared from any of the charters of the Corporation or otherwise, that the whole of the revenue of the Corporation arising from tolls and customs was vested in the Corporation, for the purpose of paving or cleansing the streets of the city, though the Appellant had been informed and believed that it was so stated in a Report of a Committee of the House of Commons.

The Appellant further stated his belief, that since the year 1784, the Corporation had never in any year paid more to the Commissioners for paving, cleansing, and lighting the streets of Dublin, than the gross amount of the several annual sums payable by the Act (47th Geo. III.), that is to say, the sum of £2370 in the whole. The Appellant said that he could not state whether the toll to which the Corporation was entitled, and which was by the last-mentioned Act subjected to the payment of the annual sum of £2000, was or not toll thorough; but admitted, that since the passing of the Act 23d and 24th Geo. III. the duty of paving and repairing had been performed by the Commissioners.

The Appellant submitted to the opinion of the Court, whether the Commissioners were or not entitled in the first instance, before any application of any part of the revenue of the city arising from the tolls and customs in the Act of the 47th Geo. III. mentioned, should be made, to full or any payment or satisfaction of their demands; insisting that the only [293] revenue arising from the tolls and customs, applicable to the payment of their demand, was the surplus arising from the receipts of the tolls and customs, after defraying the expenses of collecting; and that no such surplus had been received by the Corporation since the 25th of March, 1818.

The Appellant, in the third schedule to his answer, set forth all sums of money received by him or by the Corporation, from the 25th of March, 1818, to the filing of the answer, for or on account of the tolls and customs, in and by the Act (47th Geo. III.) mentioned, and made liable to the payment of the annual sum of £2000, together with the expenses of collecting the same, and the names of the persons by, and through whom such payments were made; but said that he could not state whether there was any difference between such sums as were actually received by the several persons appointed to collect the tolls and customs, and the sums which they accounted for. In the second schedule to his answer annexed, he set forth an account of the sums received by him or the Corporation since the 25th of March, 1818, out of the profits of ferries, and also of all payments made by ships in the bill mentioned, and the several sums, and the manner in which such payments had been made.

The two demurrers were argued before the Master of the Rolls, on the 26th and 29th days of June, 1822, and the 1th, 6th, and 18th days of July following; and on the 18th day of July it was ordered, that the first demurrer should be overruled, with liberty to the Appellant to make such application as he should be advised, for the purpose of taking the demurrer off the file, and to demur [294] and answer again. The second demurrer was allowed, with liberty to the Respondent to amend his bill, as he should be advised; and it was ordered, that each party should pay his own costs.

The Respondent, on the 16th of December, 1822, presented his petition to the Lord Chancellor of Ireland, praying that the two demurrers might be set down for re-argument before him; which being ordered, the two demurrers were re-argued on the 6th, 15th, 17th, and 18th days of February, 1823; and by order, on the 18th of February, both the demurrers were over-ruled.

From this order the appeal was made.

For the Appellants, Mr. Sugden and Mr. Pepys.

The two sums of £350 and £20 are made payable generally out of the revenues of the Corporation, and not yearly out of the tolls and customs, as in the provision respecting the £2000. That one of the demurrers should be good and the other bad, as decided by the Master of the Rolls, is impossible, from the nature of the case. The bill admits that all arrears to 1818 had been paid, yet demands an

account from 1784. The reasons of the Respondents resolve themselves into two classes. The main proposition is, that if the income of the Corporation is insufficient at any period to pay the allowance, it is payable out of the surplus income of former periods. This is a proposition of general application, relating to all such charges upon a particular fund. This case does not depend upon general principles, but upon the construction of an Act of Parliament. The Act recites the duties to be performed, and gives, as an equivalent, a certain sum yearly out of the tolls and customs of the city. [295] The discovery and account as to the tolls and customs received since 1818, is not within the scope of the demurrer. If the bill does not show a right to discovery, the demurrer is good: as, if it appears on the face of the bill that the action at law is untenable, the Commissioners having no right to payment out of the tolls received before 1818, how can they be entitled to discovery (Redes. Tr. p. 152; 3 Ves. 494; 13 Ves. 240)? The discovery sought in this case will be useless at law. Yet this is one great argument for the right of discovery. To induce a jury to presume the amount of income in 1818, from proof of the amount in 1784, would be tempting them to rush to an erroneous conclusion: and if this is a proper ground to ask for a discovery, it should have been stated in the bill.

As to the objection, that it is a speaking demurrer, it alleges no fact which is not to be found in the bill, and uses no argument arising out of extraneous facts. The reasons arising out of the facts stated in the bill are always set forth, as appears by the form of demurrers.

The argument, that the demurrer is over-ruled by the answer, is untenable. The demurrer extends only to one interrogatory: that which relates to the discovery of tolls before 1818. The answer gives the discovery as to tolls since 1818.

For the Respondents, The Attorney General, and The Solicitor General.

The discovery sought is material and relevant in support of the Respondent's case at law: and, even if that were matter of doubt, the discovery would be enforced in equity, leaving the legal question to be determined by the court of law.

[296] Upon the true construction of the Act of the 47th Geo. III. c. 109. sec. 51., and the Irish Act of the 23d and 24th Geo. III. therein recited, it is manifest that the revenue arising from tolls prior to 1818, over and above the annual sum of £2000 made payable to the Commissioners for paving, if discovered, would be properly applicable to make good the deficiency in that annual sum subsequently to the year 1818, particularly as that deficiency has been occasioned by the misconduct and improper management of the Corporation of the city of Dublin.

Taking into consideration the original liability of the Corporation of the city of Dublin, as trustees for the public, to apply the whole of the revenue arising from tolls and customs in cleansing the streets of Dublin, as recited in the Act of the 47th Geo. III., and the Irish Act of the 23d and 24th Geo. III., it is at least a doubtful and arguable question, whether such surplus revenue received prior to 1818, is not applicable to subsequent deficiencies, caused by the mismanagement of the Corporation of the city of Dublin: and under such circumstances a Court of Equity should not stop the inquiry *in limine*, but should leave such question, involving the consideration of questions of law arising upon these acts of Parliament, to the consideration of the Court of Law where it originated, and where other questions of construction upon the same acts are depending between the parties in the same action.

Even though the surplus revenue, prior to 1818, were not applicable to make good subsequent deficiencies, still the discovery of the annual receipt of the sum of £1000 by the Corporation of the city of Dublin, down to and for the year 1818, would be [297] evidence to go to a jury, to show *primò facie* the receipt of a like revenue subsequently to the year 1818, which would be clearly applicable to the payment of the Respondent's demand.

The discovery of any lease or demise of tolls and customs made by the Corporation of the city of Dublin prior to 1818, though the same might expire in that year, would be evidence *primò facie* before a jury, to charge the Corporation of the city of Dublin with the receipt of tolls and customs, to the extent, in value, of the rent reserved in such lease or demise: and this, though the revenue prior to 1818 were not applicable to subsequent arrears.

The demurrers are argumentative, and do not sufficiently distinguish the particular parts of the bill demurred to; so that the Court must look over the whole bill to ascertain the parts in question.

The Appellant, by answering to certain facts or parts of the bill purporting to be covered by his demurrers, overrules the demurrers.

In the course of the argument, the Lord Chancellor made the following observations:

It is contended that the answer overrules the demurrer,—in what part has not yet been pointed out. Independently of that objection, is it contended that the action is maintainable even without proof of the alleged misconduct of the Corporation as to the management of the tolls and customs? Can they go to this extent? The Act creating the right passed in 1807, the bill seeks a discovery from 1784. If this can be maintained, might they not ask for a discovery in 1907? It is on this view of the case [298] that I desire to know on what ground the Master of the Rolls gave leave to both parties to amend!

The Defendants do not demur to the discovery as to matters between 1818, and the filing of the bill.

As to the argument urged from the analogy of mortgages, annuitants, or grantees of a rent-charge, it is a misapprehension. Such incumbrancers could have no discovery as to by-gone rents and profits. The ordinary security is, first to distrain, then to enter, then a term; but as to by-gone rents, not a shilling could be recovered.

If the bill had asked what is the amount of the revenue actually in the hands of the Corporation, it might have been difficult to avoid answering; but to ask for discovery from such a remote time is a different thing. To seek a disclosure of all the affairs of the Corporation from 1784, is one thing; the question, what have you in your hands to pay the arrears of the £2000 per annum, is another.

Perhaps the Master of the Rolls, in giving leave to amend, had a view to this distinction. If the Plaintiff is entitled to payment out of any revenues arising before 1818, it might be desirable to give leave to amend.

It is hard upon the judges of the Courts below, and in the Court of Appeal, that cases should be decided without knowing the reasons upon which the judgments are founded.*

As the judges in the Court below have not agreed in their opinions as to this case, it is a respect due to their judgments, that the House should take time [299] to consider the question, and to obtain, if possible, the reasons of their judgment.

The Earl of Eldon,† after having stated the subject-matter of the appeal, the clauses of the Act of Parliament out of which the question arose, the facts, the pleadings, and proceedings in the case, continued thus:

The demurrers came on to be heard, first, before the Master of the Rolls in Ireland, who pronounced an order which was afterwards made the subject of appeal to the Lord Chancellor of Ireland, who, by his decretal order, overruled both demurrers, differing in opinion from the Master of the Rolls. When the appeal was heard in this House, measures were taken for the purpose of obtaining information, and reconciling the different opinions which had so been expressed: but more than one inquiry have not enabled me to state to your Lordships upon what grounds either the one or the other proceeded. The question now before you is, whether the judgment of the Lord Chancellor of Ireland, overruling these demurrers, is right or wrong? If you look at the reasons which are stated on the part of the Appellants, contending that the judgment is wrong, you will perceive, that all of them apply to this sort of representation, namely, that £2000 a year have been fully paid and satisfied, down to the 26th day of March, 1818; that it does not signify what was the state of the revenues previous to the 26th March, 1818, and that according to the true construction of the Act of Parliament, the Corporation [300] is obliged *de anno in annum*, to expend the whole of their revenues, paying £2000 to the Commissioners. Whether or not that is the true construction of the

* The Lord Chancellor also observed, that, in Irish cases particularly, it was desirable, that accurate copies of the pleadings should be printed. See ante p. 279.

† The case having been heard by Lord Eldon while he was Lord Chancellor, the judgment was delivered by him after he had retired from the office.

Act of Parliament, I desire it may be understood that I do not presume to state my opinion: because, I do not think that is a question which it is necessary to decide; and not being necessary, it appears to me that it would be improper to decide it. The true question is, whether regard being had to all that is stated in the answer, and to the fact, that this is a bill called a discovery bill, these demurrers ought to be overruled.

Upon an attentive perusal of the matter of the answer which is part of the record, in the first place, I have formed an opinion (in which I am confirmed by a very attentive consideration given to this case by a noble and learned Lord (Lord Redesdale) that, as a demurrer cannot be good in part and bad in part, which a plea may be, there is enough in this answer to overrule the demurrer: and I am farther of opinion, that, supposing (for the present, and desiring not to prejudice the question by the supposition,) that the Corporation are as right as probably they may turn out to be, in contending, that having satisfied the annual payment to these Commissioners up to a given time, all the rest of the revenue belongs to them, and that they are not bound to apply a surplus of revenue in one year to a deficiency of revenue in another year: still I am of opinion that the persons filing this bill as a bill of discovery have a right to know, what they desire to be discovered, how the account actually stands: because the state of the revenue antecedent to that period, may afford very considerable evidence with respect to many of [301] the questions which arise out of this record: considerable evidence upon the trial of the issue which is joined at law.

Upon these grounds it is, that I offer my humble, but very confident opinion, that the Lord Chancellor of Ireland has rightly decided the case: and therefore, upon the motion, which is according to your forms the usual motion to be made, that this order should be reversed, my advice is to say, "Not Content" to that motion, for the purpose of affirming the judgment.

Judgment affirmed.

[302]

ENGLAND.

(COURT OF EXCHEQUER.)

JOHN GLEGG, EGERTON LEIGH, JAMES BAYLEY, THOMAS PARKER, JOSEPH NIXON, and THOMAS WHYMAN.—*Appellants*; RICHARD LEGH.—*Respondent*.

JANE GLEGG and others, (personal representatives of JOHN GLEGG,) etc.—*Appellants*; T. R. W. FRANCE and THOMAS MAWDSLEY, (Executors of RICHARD LEGH.)—*Respondents*.

[See *Norbury v. Meade*, 3 Bli. 211. 261.]

In a suit for tithes by an impropriate rector against occupiers, where the Plaintiff by the answer is put to the proof of his title, it is sufficient, 1. As to personal ownership, to prove that he is the beneficial owner of the tithes subject to terms vesting the legal estate in trustees, and creating charges on the rectory, but which charges being annual are satisfied up to the date of the suit. 2. As to general title, it is sufficient to prove, a recent perception of tithes, with occasional payment of composition and leases of the tithes taken by the occupiers.

The Respondent Richard Legh claimed to be entitled as tenant for life under the will of Charles Legh, to the impropriate rectory of Prestbury in the county of Chester, consisting of various townships or hamlets: and as such impropriator to receive from the occupiers of the several farms and lands lying within certain townships in the rectory, all manner of great tithes, and particularly the tithes of hay in kind.

[303] The Appellants in the original appeal, respectively held farms and lands lying within the townships specified, and within the rectory.

The Respondent Richard Legh, in Hilary Term, 1817, filed a bill in the Exchequer against the Appellants in the original appeal, stating his title as rector; and that the Appellants had taken tithes of hay, clover, and other grasses, and had refused to pay or account for the same, and praying an account of the tithes during the year 1816, and payment, waiving penalties.

The Appellants put in separate answers to the bill, and thereby severally admitted themselves to be occupiers, and to have mown and carried away hay; but stated that the Respondent had never received title of hay, or any satisfaction for such tithe; and claimed to be exempted by a modus, and without specifically answering the allegation in the bill, that the Respondent was seised of or entitled to the rectory. The defendants severally stated, that they did not know of their own knowledge, but believed, that the Respondent was not, at the time stated in the bill, seised or entitled for his life or to the legal estate or interest in the rectory, and therefore, as to that fact, left the Respondent to such proof as he should be able to make.

The Appellant Thomas Whyman, in 1818, filed a cross bill against the Respondent Richard Legh, for the purpose of proving that he had no title to the rectory.

To this bill the Respondent put in two answers.

The cause was heard in June, 1820, when the Respondent read passages from the answers of the several Defendants, admitting their having severally occupied farms within the rectory, and having severally taken hay from their respective farms, and having, [304] in 1816, severally paid a composition for tithes to the Respondent. The Respondent also proved payment of tithes to him as impropriator, or some person for his use.

There was also proof that leases of the tithes had been taken by the Appellants, as occupiers of land within the parish.

The Appellants, to make out that the Respondent had not such an interest in the rectory as entitled him to sue for the tithes, read from the answers of the Respondent to the cross bill, filed by the Appellant Thomas Whyman, passages admitting the existence of certain terms of years in the rectory, and that the same were outstanding in certain trustees; but in the passages admitting the existence of such terms, and from other passages in the answers, it appeared, that the terms were created and subsisting merely as collateral securities for the payment of certain annual sums, the whole of which, so far as the same were payable, had been paid to the time of the filing the answer, and that the Respondent was in the uninterrupted possession of the rectory and receipt of the tithes, and that none of the trustees of such terms had ever interfered with the Respondents receiving the tithes of the rectory.

The Defendants endeavoured to prove the modus laid in their respective answers, but failed in such proof.

A decree, bearing date the 8th day of July, 1820, was thereupon made in favour of the Respondent, and the Appellants were decreed to account in the usual manner for the title of hay taken by them within the rectory.

From this decree the appeal was presented.

After the petition of appeal had been lodged, and the cases on both sides printed, the Appellant John [305] Glegg, and the Respondent in the original appeal cause died; whereupon the appeal cause was revived by their respective representatives.

For the Appellants: Mr. Agar, and Mr. Duckworth.

For the Respondents: Mr. Shadwell, and Mr. Spence.

Upon the argument in chief, the case was put by the Appellant's counsel upon the defect of title, because the legal estate was outstanding in trustees upon a term unsatisfied. But in the reply it was urged, on the authority of *Norbury v. Meach*, that the title of a lay impropriator was not proved by the mere perception of tithe, and that the grant from the Crown and recent possession were indispensable proofs of title.

The case was argued in Nov. 1826, and stood over from that time for consideration. (It was decided at the same time with the next following case.)

On the 18th of May, 1827, the Judgment was affirmed.

Judgment affirmed.

[306]

ENGLAND.

(COURT OF EXCHEQUER.)

HENRY CHERRY.—*Appellant*: RICHARD LEGH, (since deceased,) WILBRAHAM EGERTON, and THOMAS WILBRAHAM TATTON.—*Respondents*.

DANIEL SANDBACK and JOHN MILLER, Executors of HENRY CHERRY.—*Appellants*: THOMAS ROBERT WILSON FRANCE, and THOMAS MAWDESLEY, Executors of the said RICHARD LEGH.—*Respondents*.

[See *Norbury v. Meade*, 3 Bl. 211, 261.]

A lay-impropriator, who is in possession of a Rectory and in perception of the tithes, subject to charges by way of mortgage, and for raising portions, (inasmuch as such mortgagees, etc., having permitted the possession, cannot claim the bygone rents,) has a title sufficient to sustain a suit against occupiers for an account of tithes.

Upon a bill filed by such a lay-impropriator against an occupier, who had taken a lease from the rector, of the tithes of corn and grain, but expressly without prejudice to any question as to the title of lay, and who, by his answer, set up, but did not prove, a modus as to the small tithes.—*Held*, that proof of the perception of some tithes by a lay-impropriator, without evidence of a grant from the Crown, gives a title to other tithes, of the perception of which there is no actual proof.

If the occupier shows a colour of title to the tithes not rendered, a court of equity will not interfere, but leave the plaintiff to his remedy at law.

The Respondent Richard Legh claimed to be entitled for life (subject to certain trust-terms and to a mortgage) to the impropriate Rectory of Prestbury, and, as such, to receive all the tithes, both great and small. The Respondents, Egerton and Tatton, were trustees, in whom respectively two several terms of the Rec-[307]-tory were vested for securing two several annuities. The Appellant, Cherry, was an occupier of land within the Rectory.

In 1820, a bill was filed in the Exchequer by the Respondents, in the original Appeal against Cherry, stating their title as impropriators, and praying against Cherry, as an occupier who had subtracted tithes of lay and small tithes, an account and payment, waiving penalties. The Appellant, Cherry, by his answer admitting occupation and the taking of tithes, put the Respondents to the proof of their title, and set up a certain custom as to the title of lay, and divers moduses as to the small tithes.

The cause was heard in 1821, when proof was given of payment of tithes by Cherry to Legh, as beneficial owner, in actual possession, of the Rectory; and, as an exhibit, an agreement was proved between Legh and the parishioners by whom it was signed, and among others by Cherry, to let and take respectively, at a rent for one year, the title of grain: but it was expressed to be made without prejudice to any question or claim as to the title of lay.

On the part of Cherry, evidence was read to sustain the defence, but it failed as to the modus; and with respect to the title, proved only that the legal *estate* in the rectory was conveyed to and outstanding in persons having charges upon it: but a decree for account was pronounced, according to the prayer of the bill.

The Appellant, Cherry, and the Respondent, Legh, died pending the Appeal, which was revived by their representatives respectively.

For the Appellants: Mr. Agar and Mr. Duckworth.

[308] For the Respondents: Mr. Shadwell and Mr. Spence.

On the part of the Appellants in this case, (as in the case of *Gigg v. Legh*.) the objection to the decree, as argued in the court below, and in the printed papers, rested upon the question of *modus*, and the defect of title in the Respondent, because the legal estate was vested in trustees for incumbrancers; but finally, in the Court of Appeal, the case was argued chiefly on the authority of *Norbury v. Meade* (*ante*, vol. 3, p. 261). And it was said in argument, that this case was stronger against the title, because in *Norbury v. Meade* there was an admission of title as to all the lands of

the rectory, except one farm, and that case, in the Court below, was argued on the ground of the presumption of a grant to the occupier; but, in the House of Lords, the case of *Norbury v. Meade* was decided on the defect in proof of title by the Plaintiff. It was further argued, on the part of the Appellants, that if mere perception of tithes was sufficient proof of title, there had been no payment made to the rector by the appellant, except in respect of the tithes of corn and grain.

On the part of the Respondent, it was argued, that the perception of tithes is a proof of title, as well in the case of lay-rectors as of ecclesiastical persons; and that in this case the payment of tithes was admitted and proved. The case was said to be clearly distinguishable from that of *Norbury v. Meade*, as in that case the Defendants, being occupiers of a distinct farm, claimed a title to the tithes of that farm, and they denied that the Plaintiff was entitled to the small tithes, on which point there was great doubt whether there had been a valid impropriation at all inasmuch as no vicar had been endowed: that in this case, no such matter was raised by the pleadings: that in *Norbury v. Meade* a case was made by the pleadings, to which the evidence for non-perception might apply: in this case, the denial of title was general; not confined, as in *Norbury v. Meade*, to the particular tithes claimed. That the moduses set up by the answer, were an admission of the title by inference, the party being described as rector, and the allegation not being that he is not entitled to the title of hay, but that he is not entitled to it in kind.

In reply, it was observed on this latter argument, that the moduses were an admission of payments due to some ecclesiastical person, but not of an impropriation.

The Lord Chancellor, at the conclusion of the argument, made the following observations: This is a case of too much importance, to give judgment immediately; and I doubt whether judgment can be given upon the record as it now stands, without affecting a great many other cases which have been decided by this House. This proposition has been decided in the Exchequer, that if there is a lay-rector who proves that he has received all the tithes that have been paid, the Court would hold him entitled, as they would a spiritual rector, to tithes that have not been paid; but, on the other hand, if, in respect of those tithes that have not been paid to a lay-rector, there is a color of title by deeds in the hands of a layman, upon which he may claim those tithes which have not been paid the Court of Exchequer, applied to as a Court of Equity, will not interfere. The former of these propositions, I do not recollect ever to have been decided one way or the other in this House; and if the pleadings will call upon this [310] House to look at what has been decided in the Court of Exchequer, one of the most important considerations in this case is how far the judgment of this House shall or not bear upon those decisions. What I am now alluding to was discussed in the case of *Scotch v. Airey* (3 Gwill. 1174), in which I was counsel. In that case, the rector of Simonbourne claimed all the tithes in that great parish, which is now divided into six. He proved himself to have received all the tithes of the parish, except the tithes of a particular farm which belonged to a family of the name of Airey. The Court of Exchequer, in that case, held that, having received the tithes of all the rest of the parish, he was entitled to receive the tithes of that farm, unless the Airey family could shew that they had a colourable title to the tithes under their title-deeds. That they did shew, and thereupon the Court of Exchequer refused to determine the effect of those title-deeds, holding it to be a case in which the parties must go to law for the decision of their rights. I believe no case has been decided in Equity contrary to that, as yet at least; nor do I believe there has been any decision at law upon the subject. Undoubtedly it is very difficult to reconcile with that doctrine all that Lord Redesdale has said in the case of *Norbury v. Meade*; but I believe you will find no judgment in which this House has dealt with that case so as not to support the doctrine of the Court of Exchequer.

The Earl of Eldon: In the two cases of *Glegg v. Legh*, and *Cherry v. Legh*, which stand for the judgment of the House, the question is, whether the Court of Exchequer was right in the decrees which they made in these causes respectively, for [311] an account of tithes. Two grounds of objection and appeal were taken in these cases: one was, that the owner of the impropriate rectory held it subject to terms of years for raising money portions, and likewise subject to some mortgages. He is proved to have been in possession as far as the mortgagee is concerned, and there can be no doubt that the mortgagee has no right to call for the past rents and profits; and

again, with respect to any other incumbrances, I apprehend that where persons are entitled, under terms for raising sums of money, whether portions or charges, it is impossible to say that the person who is the tenant in fee, or the tenant for life subject to such charges, is not in the enjoyment of the tithes, or that such enjoyment would not be a sufficient protection against the claims of persons who should afterwards resort to the estate in respect of those incumbrances.

Another ground of defence in this case rests upon the existence of a *modus*,—a *modus* very singular in its nature, upon which I observe the Court of Exchequer hesitated in giving an opinion, whether it is worth any thing in point of law. It does not appear to me necessary to call your attention to the question, whether it is good in point of law, because, though there is some semblance of proof, there is nothing like that sort of proof which is sufficient to establish the fact of its existence. It appears to me, therefore, that, in both cases, the judgment of the Court of Exchequer is right; and unless upon looking at the petitions of appeal, any thing further should occur upon them for observation, I should propose to your Lordships that both those judgments should be affirmed. (The case was not afterwards mentioned.)

18th May 1827.—Judgment affirmed.

[312]

IRELAND.

(COURT OF CHANCERY.)

The Right Hon. WILLIAM CUNNINGHAM PLUNKETT, his Majesty's Attorney-General for Ireland, at the relation of JOHN McMULLEN, and others,—*Appellant*. The MAYOR, SHERIFFS, COMMONS, and CITIZENS of DUBLIN, and WILLIAM HENRY ARCHER, their Treasurer.—*Respondents*.

[*Mews'* Dig. i. 28; iii. 221; iv. 606, 999. On question as to charitable trusts considered in *A.-G. v. Eastlake*, 1853, 11 Hare, 205, at pp. 217-223. Commented on in *Beaumont v. Oliveira*, 1869, L. R. 4 Ch. 309, at p. 314; *In re St. Botolph Without Bishopsgate Parish Estates*, 1887, 35 Ch. D. 142, at p. 150; and see *Goodman v. Mayor of Saltash*, 1882, 7 A. C. at p. 642; *In re Christchurch Inclosure Act* 1888, 38 Ch. D. at p. 531. On question as to jurisdiction of the Court, considered in *Incorporated Society of Musicians v. Richards*, 1844, 1 Dr. and War. 258, at pp. 314, 317; *A.-G. v. Liverpool Corporation*, 1835, 1 My. and Cr., 171, at p. 201.]

The Corporation of Dublin having, before the year 1777, supplied water to the inhabitants of the city from works which they had constructed, but the rents which they received being inadequate to the maintenance of the water-works; by the Irish Act 15th and 16th Geo. III. the owners or occupiers of houses were compelled to provide branch-pipes from the mains of the company to the houses, and the Corporation were empowered to charge the owners or occupiers with certain fixed annual rates or rents, in order to construct new mains and extend their works, to borrow money for those purposes, and to mortgage the rates for the repayment of the money so borrowed.

Under the authority of this Act, the Corporation from time to time borrowed, on the credit of the water-rents, various sums of money, which in 1809 amounted to £67,800.

In that year the Corporation obtained a new Act of Parliament (49th Geo. III.) by which they were empowered to borrow, at stated annual periods, a further sum amounting to £32,200, and to charge the debt upon the rates granted by that and the former Acts. The Act further required, that the interest of the money borrowed under that Act, should be retained out of the rates thereby granted, as well as a further sum of £2000 to be appropriated as a sinking-fund to pay off the whole debt for money borrowed under that and the former Acts. The Act further directed, that distinct accounts should be kept of the rates received under the Act, and that the surplus, after providing for the interest of the whole debt, should be applied in laying down iron or metal main and service pipes, in the general improvement and extension of the

water-works, and to increase the sinking-fund; and it was declared, that the rates, being granted only for such purposes, should not be subject to deductions, except for collection, nor be deemed rates for the supply of water as for sale.

The Act then provided that the Corporation should furnish annually, to be laid before Parliament, an account of the sums received by them under that and the former Acts, and of the manner in which the same had been expended and applied. Finally, a further provision was made by the Act for the appropriation to the sinking-fund of any further surplus out of the rates.

In 1823, an information and bill was filed on behalf of the inhabitants of Dublin paying water-rates, against the Corporation, which, stating various acts of mismanagement and misappropriation of the funds arising from the rates; submitting that the Corporation were trustees under the Act, of rates thereby given, for uses which were charitable in their nature; and charging that the conduct of the Corporation amounted to a breach of trust, prayed (among other things) a declaration and execution of the trust, and that accounts might be taken of the rates received by the Corporation, and the application thereof; of the sums annually applied to the sinking-fund, of the money borrowed and due on the credit of the rates, and which had been applied in payment of the principal and interest of the debt.

To this information and bill the Defendants put in an answer, by which, after admitting many of the principal facts, and setting forth various accounts, they submitted that they were not trustees, that the purposes specified in the Acts were not charitable uses, that the Act required the accounts to be furnished annually to the Lord Lieutenant to be laid before Parliament; which having been done, it was a bar to the jurisdiction of the Court, of which matter they prayed the same benefit as if they had pleaded to the bill.

Held (reversing the judgment in the Court below) that the Court had jurisdiction to entertain the information and bill.

In what particular form a Corporation shall account, and to what extent they shall be made responsible upon a breach of trust, *Quære*.

The question as to interest, whether simple or compound, at what rate, and from what times, to be charged upon monies which ought, according to the trust, to have been applied or reserved, at given periods, is a matter to be reserved for further directions.

The Corporation of Dublin for a great length of time possessed, as private property, a watercourse from the river Dodder to the city of Dublin, upon [314] which they constructed a basin or reservoir, and other works for supplying the inhabitants of Dublin with water.

The Corporation having thus provided a considerable supply of water for the city, and their property in the watercourse, reservoir, and water-works being indisputable, they, previous to the year 1777, furnished water to those inhabitants who applied to them; but no inhabitant was obliged to purchase a supply of water from the Corporation, and few persons incurred the expence of laying leaden branches from their houses to the mains.

The rents which were received by the Corporation before the year 1777, for supplying water, were uncertain and inadequate to defray the expenses of supplying it.

By the Irish Act (15th and 16th Geo. III. c. 24), commonly called the Pipe Water Act, which was made for the purpose of providing an adequate supply of water for the increased population of Dublin, the legislature compelled all owners or occupiers of houses in the city of Dublin to provide one branch or leaden pipe, to convey the water from the main pipes belonging to the Corporation into the houses; and empowered the Corporation, in order to construct new mains and extend their works, to exact from all owners or occupiers of houses certain fixed annual rates or rents; to make regulations for the advantage of the water-works; and to mortgage the rates for the repayment of the money which it might be necessary to borrow for their improvement and extension.

Soon after the passing of the Pipe Water Act, the Respondents began to set apart for their own use a certain sum annually, as a compensation for the past benefit the

[315] city of Dublin had derived from the use of the waterworks, which, previous to the passing of that Act, had been the exclusive property of the Corporation; and they continued this annual appropriation from March 1777 to March 1809. They also continued from time to time, to borrow large sums of money on the credit of the water-rents, which, in the year 1809, had become subject to a debt of £67,800.

In the year 1809, the Corporation obtained an Act (19th Geo. III. c. 80.) commonly called the Metal Main Act, the chief objects of which were to substitute cast-iron metal main and service pipes, instead of the timber pipes then in use, and to enable the Respondents to exact the water-rates therein specified, in order to defray the extraordinary charges which would be thereby occasioned.

Soon after this Act had passed, great dissatisfaction began to prevail among those proprietors and occupiers of houses in Dublin who were subject to the water-rates imposed by it, respecting the manner in which the Respondents managed the funds entrusted by the Act to their care, and the means adopted by them for carrying into execution the purposes for which (it was contended) the trusts were created. In the year 1822, a select committee of the House of Commons was appointed for the consideration of this subject, among others connected with the local taxation of Dublin, and a report was made and printed. In 1823, the select committee of the house being re-appointed for the same purposes, after a laborious inquiry, came to the following resolution:—

“That it is inexpedient to examine witnesses respecting the pipe water and metal main taxes, as it appears, by the reports of the Commissioners for auditing Public Accounts, that continued misapplica-[316]-tions of public money are considered by the Commissioners to have occurred; and that it is necessary, on the part of the public, that immediate proceedings should be taken at law for the purpose of bringing this matter to a close, and ascertaining what sums remained due on the foot of those accounts; and what right or title the Corporation possess in the pipe-water estates.”

By the Metal Main Act, (sec. 11.) the Corporation was empowered to borrow at interest, upon the credit of the rates granted by the Act and the Acts therein recited, such sums of money as they should from time to time find necessary for the purposes therein mentioned, and to demise or mortgage the rates, or any part thereof, as a security for the sums so borrowed; but the Corporation were not allowed (sec. 12.) to borrow, for the purposes of the Act, more than certain limited sums annually, from 1810 to 1814, and amounting in the whole to £32,200.

By sec. 13, after reciting that there then was a debt of £67,800 secured by the rates granted in the therein recited Acts, and that it was expedient to provide a fund for redeeming and discharging the same, together with the sums which might thereafter be borrowed by virtue of the provisions of the reciting Act, it was enacted, that it should be lawful for the Treasurer of the Corporation and his successors, who were thereby required annually to retain out of the rates thereby granted, which should come into their hands, the sum of £2000 together with such sums of money as should be equal to the interest of the sum and sums which should be borrowed under the provisions of the Act; which sums of money so to be retained by them should be appropriated as a sinking-fund to pay off the £67,800 and sums of money so [317] to be thereafter borrowed, and to be applied from time to time in purchasing in the securities granted for such debts; and the treasurer to the Corporation for the time being was thereby required from time to time to retain all such interest as should become due upon all such securities and sums of money so purchased in or paid off, and to apply the same from time to time to the further aid of the sinking-fund in the same manner as the sum of £2000.

By sec. 14, it is enacted, that the treasurers for the time being shall keep, or cause to be kept, a distinct and separate account of the receipt and amount of the rates granted by virtue of the Act, and should apply the balance thereof, after retaining a sum sufficient to answer the interest of the money then due or thereafter to be borrowed, in laying down cast-iron or metal main and service pipes, or in making additional alterations and improvements to the works, and in increasing the sinking-fund thereby created. And it was thereby declared that the additional rates being thereby granted for such objects only, the same should not be subject to any deductions or per-centage whatsoever (save for collecting the same), nor be deemed rates for supplying the inhabitants of Dublin with water, as for the sale thereof.

By sec. 15, it is enacted, that the Corporation should, once in every year furnish or cause to be furnished, unto the Lord Lieutenant or other Chief Governor of Ireland, to be by him laid before Parliament, a full, true, and distinct account of the several sums of money received by them, or on their account, by virtue of that Act and of the Acts therein recited, and of the manner in which the same hath been paid, expended, and applied.

[318] By sec. 16, it is enacted, that if there should be any surplus of the several sums of money so received by the Corporation or on their account under the Act and the recited Acts more than should be duly expended by them as aforesaid, then, and as often as the same should exceed the sum of £500, such excess should from time to time be applied in the same manner as the annual sum of £2000, until the whole of the sums of money so due and thereafter to be borrowed should be discharged; and that the rates should stand as a security for all sums of money theretofore borrowed by the Corporation on the credit or account of the pipe water-works, and the interest due and to grow due thereon, as fully and effectually as if borrowed under the provisions of the reciting Act.

In 1823, an information and bill was filed by the Attorney General, at the relation of John McMullen, etc., on behalf of themselves, and all other the inhabitants of Dublin subject to the payment of the water-rates, stating the facts above-mentioned, and the clauses of the Metal Main Act, and submitting that it was the intention of the Legislature that the Respondents should be trustees of the rates thereby given, for the uses and purposes therein mentioned, and that such uses were charitable in their nature.

The information and bill further stated that, by virtue of the power by the Act (sec. 12.) given to them, the Respondents immediately proceeded to levy the rates thereby granted, and that it appears by the Corporation books of the Respondents, that the rates so levied by the Respondents and paid to their treasurer amounted, in the year ending in September, 1810, to £2291 5s.—in the year ending [319] in September, 1811, to £10,013 0s. 8d.—in the year ending in September, 1812, to £11,082 15s. 7d.—in the year ending in September, 1813, to £10,317 7s. 7d.—in the year ending in September, 1814, to £12,135 1s. 10½d.—in the year ending in September, 1815, to £10,993 2s. 4½d.—in the year ending in September, 1816, to £11,409 6s. 9d.—in the year ending in September, 1817, to £9176 16s. 9d.—in the year ending in September, 1818, to £7863 9s. 9d.—in the year ending in September, 1819, to £8188 2s. 6d.—in the year ending in September, 1820, to £11,111 12s. 6d.—and in the year ending in September, 1821, to £9593 1s. 11d.—making altogether the sum of £111,865 9s. 3d.

It was further stated, that the rates so collected, together with the rates for pipe water which the Respondents were theretofore empowered to levy, and which they did in fact levy during the said years, were abundantly sufficient to answer all the purposes of the Metal Main Act and other Acts therein recited, and to have provided for the inhabitants of Dublin more durable mains for the conveyance of water through the streets thereof, than those theretofore used, whereby the inhabitants would have had an almost uninterrupted supply of water, had the said funds been properly applied; whereas, it appeared from the books of the Corporation, and the fact was, that the original estimated length of the metal main required for the purposes aforesaid, was about 56 English miles; but that the Respondents, notwithstanding the large funds thus at their disposal, had, in the month of September, 1817, laid down only eighteen miles, four furlongs, Irish measure; and that for the two following years, which ended in September, 1819, they laid down only two miles, [320] four furlongs, Irish measure; and that for the year ending September, 1820, they laid down only one mile, four furlongs, thirty-four perches, and three yards; and for the year ending September, 1821, they laid down but two miles, twenty-eight perches, four yards, Irish measure; leaving on the 29th September, 1821, to be completed of the said work, twenty-four miles, four furlongs, three perches, and three yards, English measure, of which residue scarcely any had been executed:

That at the time of passing the Metal Main Act, John Carlton, an alderman of the City, and one of the Corporation, was treasurer, and so continued till the year 1814, when the Respondent, William Henry Archer, also an alderman and a mem-

ber of the Corporation, was appointed treasurer, and has continued treasurer ever since:

That the Corporation being, by the Act, empowered to borrow certain sums of money, did in the year 1810, borrow £20,000, although they should have only borrowed £12,000, and in the year 1811, borrowed a further sum of £6000, and in the year 1812, £4000, and in the year 1813, £2200, for which said several sums the Corporation issued 325 debentures, and paid as a premium on the debentures issued in the year 1813, £36 9s. 7d., making together the sum of £32,236 9s. 7d., being £36 9s. 7d. more than the Respondents were entitled to borrow.

That, by the Act, the sinking-fund required to be created for the purposes therein mentioned, should have been formed from the four separate sources therein specified, that is to say, 1st. By an annual sum of £2000, which the treasurer should have retained out of the rates and rents. 2ndly. By a sum equal to the interest payable on all sums of [321] money which should be thereafter borrowed under the provisions of the said Act, which the said Treasurer was in like manner directed to retain. 3rdly. By a sum equal to the interest of all the securities or sums of money which the Treasurer should purchase in or pay off, which sum the Treasurer was in like manner directed to retain; and 4thly. If there should be any surplus of the sums of money to be received under the Act, or any of the Acts therein recited, more than should be duly expended for the purposes of the Acts, the same so soon and often as it should exceed £500 should be added to the sinking-fund.

That the Respondents, in the years between 1810 and 1821, omitted to reserve the sums directed by the Metal Main Act to be set apart for a sinking-fund, leaving a deficiency of the sinking-fund of £10,670 2s. up to September, 1821, and diverted a large proportion of the rates, applicable by the Act for the special purposes therein mentioned, to their own use, and to objects entirely unconnected with their trust:

That immediately after the passing of the Metal Main Act the Respondents increased the rent or compensation, which they had before the year 1809 appropriated to their own use, from £1500 per annum to £2500 per annum; and also raised the salaries of the several officers who had been employed in the management of the pipe-water-works; and that this misapplication of the funds was also accompanied by a total deviation from the order in which the metal main rents were directed by the Metal Main Act to be applied, and the result was, that the most important object of the Metal Main Act, which was the creation of a sinking-fund for [322] the liquidation of the debt of £100,000, was disregarded, and the duration of the tax was thereby indefinitely prolonged:

That the Respondents, further availing themselves of their power over the funds committed to them by the Metal Main Act, and in order to relieve their private property from its proper charges, by an Act of Corporation Assembly, voted to the Lord Mayor of the City the sum of £1000 yearly, and to the City Treasurer a like sum of £1000 yearly, to be charged proportionably on the city and pipe-water funds, as salaries in lieu of poundage; although it is by the Metal Main Act expressly enacted, that the rates being granted for the objects therein mentioned, should not be subject to any deduction or per-centage whatsoever (except for collecting the same):

That as the rates collected for pipe-water have not averaged £12,000 a year, the poundage on which would not exceed £600 a year, the substitution of a salary of £1000 a year in lieu of poundage, on a principle of economy, was totally unwarrantable.

That the Respondents alleged that such salary was to be in lieu of poundage, and charged proportionably on the city private funds and pipe-water rents; but that in fact the salary was charged by Respondents equally on both funds, though the city private funds must have been considerably greater than the pipe-water rates, inasmuch as a charge of £2000 per annum on the two revenues could not have effected any saving, unless the joint revenues had amounted to more than £40,000 a year; but as the pipe-water rates did not exceed an average of £12,000 a year, it was unjust to charge against such funds a yearly sum of £1000:

[323] That the Respondents for the first three years after the passing of the Metal Main Act considered such poundage, or commuted salary, in lieu of pound-

age, as sufficient remuneration for the services of their Treasurer; but in 1812, the Respondents thought proper to allow him, as an accomptant, an additional salary of £300 sterling per annum; and he having desired that he should have such additional salary from the commencement of the Metal Main Act, the same was paid to him accordingly out of the rates, until the year 1815, when the same was discontinued:

That in the accounts of the Respondents, in addition to the yearly rent of £2500, the sum of £1000 a year in lieu of poundage, and the yearly salary of £300 a year to their Treasurer as an accomptant, there are also contained various other items, such as a yearly sum of £312, being for interest on a sum of £5200, exceeding the debt of £67,800, recognised and provided for by said Metal Main Act; a sum of about £75 yearly expended on a tavern entertainment; excessive charges for interest; and other charges not connected with any of the objects of the Metal Main Act, and which, if allowed, would have the effect of creating a perpetual burden on the inhabitants, by postponing to an indefinite period the accomplishment of its object:

That although the Treasurer of the Corporation is required, by the Metal Main Act, to keep separate and distinct accounts of the rates thereby granted, and to apply the balance thereof, (after retaining the several sums of money therein mentioned for the creation of the sinking-fund,) in payment of interest, in laying down metal main and service pipes, and making additional improvements in the works; yet, [324] down to the year ending September, 1821, so far was the Treasurer for the time being from complying with the provisions of the Act, for keeping distinct and separate accounts of the rates thereby granted, that, to that year inclusive, the account of those rates had been blended with the rates granted by the several other Acts:

That the said several unjust charges introduced into the respective yearly accounts of the Respondents, amounted in the year 1821, to £39,464 17s. 10d., exclusive of the sum of £960, which the Respondents deducted from the nett receipts of the metal main rates for each year, for salaries of officers; whereas the charge of £960 was not warranted under any of the provisions of the Metal Main Act, and, in fact, the salaries charged were not paid to the officers:

That the Respondents have not in any manner settled nor passed their accounts of the rates levied under the Metal Main Act, but that such accounts still remain open and unsettled:

That the Respondents wilfully, and for the purpose of making the balance appear to be in favour of themselves, and not in favour of the relators and other persons liable to such rates, in the account of each of the years enumerated, introduced various false and erroneous items of the several amounts mentioned; and that the Respondents, having become at length sensible either of the impropriety of so doing, or their mistake, had at length consented to give up in future some of those erroneous charges, and had then ceased to introduce such into their accounts:

That the right of the Respondents to levy the rates could not be resisted at common law, inasmuch as a general form of avowry is given by the Act, [325] to the persons who levy the same, and no mode whatever is provided by which the persons rated and bound to pay the rents can require an account of the application thereof:

That the accounts of the Corporation to the year 1821, had been submitted for examination to the Commissioners of imprest accounts, who had disallowed, as erroneous and improper, charges claimed by the Corporation, to the amount of £39,461 17s 10d.; and that the accounts contained charges improper and erroneous, besides these declared to be so by the Commissioners.

Upon these allegations and charges the information and bill prayed: That the Respondents might be declared trustees of the rates and rents mentioned in the Act of the 49th Geo. III., for the uses and purposes therein declared, and that the trusts thereof might be carried into execution; and also that an account might be taken of all the monies received either by John Carlton, or by the Respondents, William Henry Archer, or by the Corporation, or any other person or persons appointed by them in each year, from the passing of the Act, in respect of the rates or rents granted by the Act, and of the application thereof, in each of those years,

and of the expenses incurred in each year, in laying down cast iron or metal main and service pipes, or otherwise making additional alterations and improvements in the works; and also an account of the sums yearly applied in and towards the sinking-fund, from the time of passing the Act, and of the debts yearly paid off; and that an account might be taken of the money borrowed by the Corporation under the provisions of the Act, and due on the credit of the rates thereby granted, and of the money applied in the payment of the [326] interest of the debt of £67,800, and of the money so borrowed; and that the balance of rates or rents after deducting the expense of laying down cast iron or metal main and service pipes, or otherwise making any additional alterations and improvements in the works, might be ascertained, and applied as directed by the provisions of the Act exclusively; and if it should appear that the money produced by the rates of rents so borrowed on the credit thereof, had been applied to purposes not warranted by the Act, then, that the Corporation and William Henry Archer, or such of them as it should seem right, might be decreed to replace such money to the account of the rates or rents; and that some proper person might be appointed to receive the rates or rents granted by the Act as aforesaid; or that the person or persons who then received the same, might pay the same into Court to the credit of the cause.

The Respondents, the Corporation of Dublin, under their corporate seal, and the Respondent William Henry Archer, their Treasurer, on the 10th of February, 1824, filed their joint answer to this information and bill.

They denied that they were trustees of the rates; contending that there was nothing in the Act, which in any manner interfered with, or controlled the absolute property which the Respondents theretofore possessed in the water-course and works; and that not only the ancient works, but the new and improved works to be completed through the medium of the metal main rates, were to be, and are the property of the Respondents, unfettered by any trust whatsoever; and they submitted that the uses and purposes specified in the Act are not charitable uses.

They insisted that, having furnished to the Lord [327] Lieutenant all accounts of the rents, up to and for the 28th September, 1821, pursuant to a clause in the Metal Main Act, and in the manner therein prescribed, the same are a bar to the jurisdiction of the Court, to call for the account prayed by the Appellant's information, or for any such accounts; and they claimed to have the benefit of the objection at the hearing of the cause, as if they had pleaded the matter in bar to the discovery and relief, or either the discovery or relief, prayed by information, or to the information itself.

They denied that the sums received by them, or by the Respondent William Henry Archer, had been misapplied, or that the purposes for which the Act was passed had remained unaccomplished, there being upwards of 38 English miles of metal main work laid down.

They admitted that the metal main rates were still levied from the Relators, and the persons liable to pay the same; and said that they did not know whether the right of the Respondents to levy the rates could be resisted at law; but were advised that the circumstance of a general form of avowry being given by the Act, is no bar to the right of any party to contest his liability.

They said it was not true that no mode was provided by the Act, by which persons rated thereunder could require an account of the application of the rates, it being provided by the Act, that the Respondents should account to the Lord Lieutenant; and therefore they were advised that it was unnecessary and improper in the Appellant to have come to the Court for such account, and they insisted that no jurisdiction existed in the Court to call for such accounts.

[328] They admitted the receipt of rents since the passing of the Act; but, denying the truth of the allegations in the bill, as to the sums borrowed, and the receipts, expenditure, and appropriation of the funds, set forth various accounts referring to schedules.

They admitted that their accounts, up to 1821, were submitted to the control and inspection of the Commissioners for auditing Public Accounts, and believed that the Lord Lieutenant directed the same to be submitted to the Commissioners.

They said that the Commissioners, in each of the accounts, disallowed certain charges and items particularly specified in the 6th schedule to their answer; but

not the charges or items in the information specified; and that the Commissioners did not declare the balance of each year of accounts to be such as in the information stated; but that at the end of the first year only they struck a balance, which was brought forward to the next year, and so added to the alleged balance for all the years, and for the particular balances they referred to a schedule.

They denied that the accounts contained any charges improper or erroneous, except those disallowed by the Commissioners.

They insisted that, notwithstanding the opinion of the Commissioners, the charges were not improper or unreasonable charges; and that the opinion so expressed by the Commissioners was unfounded; which they would be able to show by referring to the provisions of the Metal Main Act, which the Respondents considered to have been misconceived, or at least inaccurately stated, by the Commissioners.

They denied that such disallowed items had been [329] introduced into the accounts, from the impure and improper motives unwarrantably imputed to the Respondents by the Appellant's information; and denied that any sum or sums of money received by them, as far as they were aware, as or for either metal main or pipe-water rates, had been in any respect misapplied or converted to the use of the Respondents, or to any use or purpose unconnected with the objects of the Act.

They admitted that they had persevered in collecting the rates, which they, the Respondents, submitted they could not, and ought not to abandon, so long as any of the purposes contemplated by the Metal Main Act remained to be accomplished; and they admitted that they had not passed or settled the accounts of the rates otherwise than by furnishing the same, pursuant to the Act, to the Lord Lieutenant, and said that they were not aware of any other mode of passing or settling the accounts, which they ought to have adopted.

They denied the jurisdiction of the Court, to investigate the accounts, or to call the Respondents to account for their administration of the funds, there being another tribunal pointed out by the Act, to which alone the Respondents were in this respect responsible; and they submitted that, under all the circumstances, they were not to be considered trustees of the rates, so as to be subject to the control or jurisdiction of the Court; and insisted that the Appellant was not entitled to call for, nor the Court competent to administer, such relief as in the information prayed; and they objected to such jurisdiction, as if they had pleaded thereto, or demurred to the Appellant's information.

The Appellant having replied to the answer, the [330] Respondents having rejoined, and issue being joined, witnesses were examined for the Appellant. No witnesses were examined for the Respondents; but one of the Appellant's witnesses was cross-examined by the Respondents, with respect to some documentary evidence.

The cause was heard on the 21st and 22d of July, 1824. The Respondents' counsel proposed, at the hearing, to read the depositions of the Appellant's witnesses, in order to prove that the Respondents' accounts had been audited by the Commissioners for auditing Public Accounts in Ireland. The Appellant objected to this course, on the ground that the effect of it would be to set up a defence for the Respondents, incompatible with that made by the Respondents themselves in their answer. The objection was over-ruled, and the counsel for the Respondents having insisted that the Respondents were not trustees of the rates, and that the uses for which the same were granted were not charitable in their nature, the Court decreed that the information should stand dismissed with costs, for want of jurisdiction.

Against this decree the appeal was brought.

For the Appellants: Mr. Shadwell and Mr. Sugden.

The objects of the Irish Act 15th and 16th Geo. III. c. 21, and the 19th of Geo. III. c. 80, especially the latter, are charitable; and the interests thereby created, of which the Respondents are the trustees, are charitable in their nature, and consequently subject to the jurisdiction of a Court of Equity.

That the objects of these two Acts, and especially of the Metal Main Act, are charitable, is manifest, both [331] because the general purpose is, by means of a heavy tax of temporary duration, to discharge a large subsisting debt, and afford a permanent supply of a necessary article of life to all future inhabitants of Dublin, at a comparatively trifling expense; and also because no houses are chargeable to the metal main rates, which do not pay to the amount of five shillings annually of

Minister's money : and all the occupiers of such houses as pay to a less amount, which are extremely numerous, derive benefit from the Metal Main Act, without cost, and strictly in the way of charity.

If the uses of the Metal Main Act are of a charitable nature, the jurisdiction over them which is inherent in a Court of Equity could not be taken away by implication. It must continue to exist, unless it has been excluded by a positive declaration of the legislature. No such exclusion can be pointed out by the Respondents. There neither has been any direct exclusion of the jurisdiction of a Court of Equity, nor has any exclusive jurisdiction been given, directly or indirectly, either to Parliament or the Imprest Commissioners. No judicial jurisdiction was given to Parliament by the Metal Main Act, which requires the Respondents annually to furnish their accounts to the Lord Lieutenant, to be by him laid before Parliament, for the information of the members thereof ; but it is incompetent for the Houses of Parliament, or either of them, to adjudicate upon, or correct, prospectively or retrospectively, any mistakes or misconduct of the Respondents, which the inspection of these accounts may disclose ; nor was it the intention of the legislature, in ordering such accounts to be laid before Parliament, that the two Houses, or either of them, should have, nor have they thereby received, any power of dealing judicially with the same, or of preventing Courts of Equity from dealing with them in the same manner as with other trusts of a charitable nature. With respect to the Imprest Commissioners, no exclusive cognizance of these accounts can be pretended to be given to them ; and unless it were, a Court of Equity must, under any supposition, be entitled to exercise with them at least concurrent jurisdiction.

As the Respondents have, by their answer, disclaimed the authority of the Imprest Commissioners to examine, and finally settle, the Respondents' metal main accounts, it was not competent to the Respondents at the hearing of the cause, in contradiction to their answer, to endeavour to withdraw the examination of their accounts from the jurisdiction of a Court of Equity, by showing, from the depositions of the Appellant's witnesses, or in any other manner, that the Imprest Commissioners are exclusively entitled to examine the Respondents' accounts, and that, by them, these accounts have been already examined and settled.

Even if it were admitted that the Imprest Commissioners possessed exclusive jurisdiction in examining and settling the Respondents' accounts, on its being proved that these Commissioners, upon examination and settlement thereof, found a misapplication of trust-funds to have taken place, which they have ascertained to have taken place to the amount of £37,000, as is admitted by the 6th schedule to the Respondents' answer, a Court of Equity ought so far to have entertained the present information, as to have exercised the same jurisdiction it would have done on a Master's report,—to have secured the sums misapplied, and to have given all proper directions respecting the application thereof, as well as to prevent the future mismanagement of the fund.

[333] For the Respondents : The Attorney General and Mr. Pepys.

The Act of the 49th Geo. III. has established a jurisdiction to which the Respondents are expressly directed to submit their accounts of the revenue received by virtue of that Act of Parliament, and the several other Acts therein recited ; and the accounts which, by the information, are prayed to be taken under the decree of the Court of Chancery of Ireland, have accordingly been duly submitted to, and have been finally settled by, such jurisdiction.

The purposes to which the revenue is directed to be applied, are not charitable uses, nor are the Corporation trustees of the revenue, and the Respondents are not liable to render any account of their revenue in the Court of Chancery, at the suit of the Attorney-General, or any other relator or person whomsoever.

If the Court of Chancery had any jurisdiction over the accounts in the information mentioned, yet it would be contrary to the principles and practice of the Court of Equity, to open accounts finally settled by a competent authority : particularly when, as in the present case, no errors are proved to exist in the accounts so settled.

The Lord Chancellor in the course of the argument made the following observations :

If the reference of the account to Parliament takes away the jurisdiction of Chancery, I have acted without jurisdiction in many cases. As to the supposition

that the jurisdiction is transferred to another tribunal, there is an express clause in the Metal Main Act, which incorporates the former Acts. What [334] might have been done under those Acts, may be done under this.

The case of the *Attorney General v. Brown*, whether ill or well decided, was not decided solely upon the ground that it was a charitable use. Upon reflection, I thought it so; but the judgment rested upon other grounds.

The Lord Chancellor (at the conclusion of the argument): I cannot advise the House to proceed to judgment immediately. It is a case of very great importance to the parties, and more so as to the general doctrine to be established or overturned.

Only two cases have been mentioned which bear directly upon the main question in the cause.*

In the *Attorney General v. Brown*, the question was much argued, whether the fund was to be applied to a charitable use? After the argument, it appeared to me that it was a charitable use. But that was not [335] the ground of the judgment in that case, whether it was well or ill founded; because I was of opinion that the Court of Chancery had jurisdiction in that case, whether it was or was not a charitable use.

The case of the *Attorney General v. Heelis*, weakens the authority of the *Attorney General v. Brown*; because much of the doctrine of the Vice Chancellor in the former case is not reconcileable with the principle of the decision of the *Attorney General v. Brown*.

But in neither of those cases did the Court look sufficiently into the old law upon the subject.

The research which has been made by a noble Lord (Lord Redesdale) into the old books as to the writ of account, rather confirms my decision in the *Attorney General v. Brown*, than the judgment in the *Attorney General v. Heelis*. But, without looking to the power in the common law to enforce the account, the jurisdiction being established in the Courts of Equity, it will be necessary, in reviewing the judgment of the Court below, to consider, 1. The law of the case according to the doctrines of a Court of Equity, if no special facts except the case out of the ordinary rule. 2. Supposing the Courts of Equity to have jurisdiction in such cases, whether any of the Acts of Parliament passed for the purposes in question destroy the jurisdiction of the Courts of Equity upon the subject: that is, whether such powers are given by the Act as expressly, or by necessary implication, displace the jurisdiction? The question of jurisdiction is the more material, because the Lord Chancellor of Ireland has not shown distinctly what his opinion would have been, if he had been accurately acquainted with the cases of the *Attorney General v. Brown*, and the *Attorney General v. Heelis*. He takes notice that two judges in England have differed upon the question, and says that if the *Attorney General v. Brown* is right, it proceeds upon the ground that there is no other jurisdiction. But I do not admit that the *Attorney General v. Brown* proceeds upon that ground.

In the course of the argument, Lord Redesdale asked how the law stood in the case of Road Bills, where it was directed that the accounts should be returned to Parliament: whether such a provision took away the ordinary jurisdiction to enforce an account with the directions usual in a Court of Equity?

* *The Attorney General v. Brown*, 1 Swanston, p. 265; and the *Attorney General v. Heelis*, 2 Sim. and Stuart, p. 67. In the latter case the Vice Chancellor said, "Funds derived from the gift of the crown, or the gift of the legislature, for any legal, public, or general purpose, are charitable funds, etc. It is the source from which the funds are derived, and not the mere purpose to which they are dedicated, which constitutes the use charitable, etc. Where an Act of Parliament passes, for paving, lighting, cleansing, and improving a town, to be paid for wholly by rates or assessments to be levied upon the inhabitants of the town, the funds so raised being in no sense derived from bounty or charity, in the most extensive sense of the word, are not charitable funds to be administered by the Court."

Quære as to that class of cases, where funds exist, which have been immemorially applied to purposes apparently charitable, but the source from which the funds have been derived is lost in antiquity? *Quære* also, whether rates, levied by authority of Parliament, for improving a town, are not funds derived from the gift of the legislature, and applicable to legal public purposes, within the terms of the definition?

At the end of the argument, the following observations were made by

Lord Redesdale: There has not been in this case a sufficient investigation of the ancient law and practice on the subject of account. It seems to have been conceived that the common law had provided sufficient means for calling to account all persons liable to account. But it was found by experience, that the writ of account was a very imperfect and inefficient mode of proceeding.

In the case of an individual, there can be no doubt, that if a person had received the rents of an estate belonging to a minor for which he would be accountable, the law provided a writ to call such person to account, and to compel payment of what should be found due upon the account. Yet it is every day's practice, although the common law has provided this remedy, for Courts of Equity to take upon themselves the investigation of accounts on behalf of infants suing by their next friends. The [337] writ of account at common law, did not exclude, but rather was superseded by, the jurisdiction of the Courts of Equity on this subject; because the proceeding in Equity was found to be the more convenient mode of calling parties to account,—partly on account of the difficulty attending the process under the old writ of account, but chiefly from the advantage of compelling the party to account upon oath, according to the practice of Courts of Equity.

There is, on this subject, a writ in the Register (Reg. Brev., p. 138), which recites, that the King had been given to understand that his predecessors had granted certain rates on all merchandise brought into a town, to be applied to the walling of the town; and the inhabitants having complained that the rates collected had not been duly applied, the writ proceeds in the nature of a commission for taking the account. Under such circumstances, an information at this moment would lie at the suit of the Attorney General for taking such account. The practice of proceeding by information rather than by the writ of account has prevailed, in consequence of the difficulty of proceeding under the writ. That persons under such circumstances should be rendered accountable by virtue of the writ, is said to be according to the law and custom of England.

The practice of proceeding by information or by bill filed in a Court of Equity has arisen from the difficulties attending the process by writ. The King, as *paterfamilias*, may institute a suit by his Attorney General. It is not essential that Relators should join in the suit; but it is the common course to join them in the suit, in order that the Defendants may not be oppressed, without remedy, by vexatious suits, [338] the Relators being liable to costs, which are never paid by the Crown.

The main question in this case is, whether any other mode of proceeding is exclusively provided by the statute.

As to the Acts for taking accounts of public money, it will be found, upon examination, that they cannot apply to the subject. Those Acts only substitute Commissioners for the Auditors of Imprest, and direct that in certain cases in which public money is advanced in the nature of imprest, the commissioners should take such accounts. This must be confined to the cases enumerated in the Acts, otherwise there is no purpose to be answered by enumeration. A larger construction would extend the Acts to many cases which never could have been within the view of the legislature in passing the Acts; and in such a sense, any inposition by Act of Parliament might be called public money.

As to the provision for laying the account before the Houses of Parliament, can it be considered as an effective account? They can neither take such account, nor order payment of the balance, nor compel the proper application of the money.

To effect such purposes, the two Houses could only proceed by Act of Parliament; and if they had independent and distinct powers, one House might draw the result of one balance—the other House might come to a different result. In such a case, which of these conflicting balances should be paid? Could either House appoint a committee to examine the account item by item, or require vouchers? Suppose them competent so to do, and that process being adopted, they should discover an improper application of the public monies or trust funds: [339] what could they do but order the Attorney General to file an information against the parties? The subject requires mature consideration: for if this House should determine that Courts of Equity have no jurisdiction upon the subject, it will remain to be considered what effective remedy parties will have in cases of this description.

If the necessity for raising the rates had ceased under the provisions of the Act,

there is a power to resist, by common law, the payment of the money; but that fact is the result of an account, and can only be shewn by taking the account and ascertaining that the incumbrances are discharged.

The Act directs the application of the revenues to reduce the principal debt: but in the case of a misapplication of the funds to purposes not authorized by the Act, the debt might have remained undischarged, and then the remedy at common law would not have arisen. It was said that the proceeding was premature: but it was necessary to enforce the proper application of the funds, and was in the nature of an injunction to stay waste. If, from the probability of the misapplication of the funds, the incumbrances were likely to be prolonged, a case arose in which it was proper to apply to a Court of Equity in order to ascertain the facts and prevent the misapplication. In the case of a deed of trust, if the trustees, being directed to keep down the interest of incumbrances, and also out of the trust funds to pay off the principal of incumbrances, the parties interested under the deed might apply to a Court of Equity, and complain that the funds being available for that purpose, were not applied to the discharge of incumbrances, and that the interest upon the incumbrances was therefore [340] continued without necessity. Whether the incumbrances were, or were not discharged, the parties interested have a right to be informed of the fact by proceedings in a Court of Equity.

As for the Auditors of Imprest, it is clear that they are unable to grant relief: they could not order the specific application of any money; they could only order payment into the Exchequer. They might declare that the Corporation had been guilty of misapplication, and might declare them to be liable: but could they charge them with the default, and provide a remedy for the misapplication?

But even if the account could be effectively taken by the Auditors or the Commissioners of Public Accounts, or by Parliament, I doubt whether the jurisdiction of the Court of Chancery would be excluded. It is important to ascertain, how far such Corporations are liable to account in Courts of Equity. As to the cases where Courts of Quarter Sessions are authorized to take accounts, it is purely a matter of account debtor and creditor; and if a balance bearing interest is ascertained to be in the hands of one of the accounting parties who is chargeable, there is no jurisdiction to compel the payment. It is an important question, worthy of serious consideration, whether the jurisdiction in these cases is to be limited to the mere matter of account, excluding the power of correcting malversation and misapplication; as where, under a trust for the purpose, the funds have not been applied to the payment of debts bearing interest. In the case of hospitals and other public institutions, where money for specific purposes has been granted by Parliament, or money borrowed to erect buildings, or for other purposes under the authority of an Act, if it should appear [341] upon the taking of an account, that the debt has not been extinguished in consequence of a misapplication of the funds, a mere account to be rendered to Parliament would not remedy the evil. In such cases, is the jurisdiction of the Court of Equity excluded? is the justice extended to individuals, refused in the case of public bodies?

It is expedient, in such cases, that there should be a remedy, and highly important that persons in the receipt of public money should know, that they are liable to account, in a Court of Equity, as well for the misapplication of, as for withholding, the funds. Suppose even the case of a public accountant clearly within the Act, who, having embezzled or misemployed the public monies, had rendered accounts which were imperfect or fabricated—could not the Attorney General, upon discovery of the fact or the fraud, proceed by information to recover the monies so fraudulently withheld or misappropriated? It has been said, by high authority, that such a right vests in the Attorney General by virtue of his office, and that the Court of Exchequer, upon such information, has jurisdiction to order such person to account and pay the money. A similar remedy is applicable, as I conceive, to any other person having the trust and management of public money; any public accountant of any description.

As to the remedy before the Commissioners of Public Accounts, they can only take the account as it is presented before them by the accountant. They have only the ordinary means of calling the party to account. If a defective or fraudulent account is passed before them, does no remedy exist for such an abuse? The case now before the House is so important in all its bearings, involving so much of the

great principles of the general administration [342] of justice, that it is highly necessary the House should enter fully into the question of jurisdiction.

Lord Redesdale: This is an information which was filed by His Majesty's Attorney General in Ireland, in consequence of an investigation which had taken place respecting certain duties which were to be levied upon persons who are house-holders and owners of houses in the city of Dublin, and the liberties of that city, for the purpose of paying the Corporation of Dublin a remuneration for the supply of water, which was to be afforded to the citizens of Dublin. It is unnecessary to enter into the whole subject: the question which is now before your Lordships being properly merely a question whether a proper mode of proceeding has been adopted in this case for the purpose of compelling the Mayor and Corporation of Dublin to account for certain rates which they are entitled to receive under the authority of an Act of Parliament, and to apply them according to the terms of that Act of Parliament, or whether the persons who have instituted this suit have not mistaken their remedy, because another jurisdiction is supplied by the Act which authorized the establishment of those rates and duties, or by a more general Act which directed certain public accounts to be taken in a particular way. Looking into a note with which I have been furnished of what was the judgment of the Lord Chancellor of Ireland, I find that he thought fit to dismiss this information as being improperly instituted, and that judgment seems to be founded upon an idea that there was another jurisdiction, and that that jurisdiction was before the Commissioners of Public Accounts. It has been contended at your Lordships' bar, that there is no jurisdiction, in consequence of the Act [343] which creates these duties having directed that the Mayor and Corporation of Dublin should lay their accounts before the two Houses of Parliament. It seems to me most singular, that directing the accounts to be laid before the two Houses of Parliament, who are perfectly incompetent to take the accounts, who never act in the character of a Court of Justice for any such purpose, that the mere laying those accounts before the two Houses of Parliament, should defeat every jurisdiction which would have a right to take those accounts if that provision had not been made. I do not find that the Lord Chancellor of Ireland so considered it; he conceived that the accounts might be properly taken under the Commissioners for examining and taking the public accounts, as they are called. The Act passed for the purpose of taking and directing the manner of taking the public accounts; that is, accounts relating to the public monies applied for the public purposes of Government, which may be for special purposes directed by the Government of the country; proceeds, it is true, to give to the Commissioners of Public Accounts a jurisdiction with respect to certain establishments to which either the Parliament of Ireland, whilst it was a separate Kingdom, or the Parliament of the United Kingdom after the Union, had granted certain sums of public money in assistance of their funds; but all those are specially enumerated in the Act, and distinguished from what are called public accounts, it being the clear construction of the Act, that what are called public accounts are the accounts of the application of public money—that money which belongs to the State, and not the application of money not belonging to the State. If a general jurisdiction of this description had been intended, the Act of [344] Parliament would unnecessarily have mentioned these particular establishments. There was no occasion to mention them, according to the argument in this case: but by mentioning them specially and particularly, it is clear that the Act of Parliament did not intend by the words "public accounts," to include any accounts of this description. I take it therefore to be perfectly clear, that the Act of Parliament for taking the public accounts does not extend to this case. But there is a power given in the Act of Parliament, in certain cases, to the Lord Lieutenant to order certain accounts to be taken by the Commissioners of Public Accounts: those are special cases, and this is not one of those special cases. But suppose it had been one of those special cases, here the Lord Lieutenant did take upon himself to order the Corporation of Dublin to account before the Commissioners of Public Accounts, and the Commissioners of Public Accounts proceeded, though imperfectly, to take the accounts, and in the course of taking those accounts, they reported a misapplication by the Corporation of Dublin to a very considerable amount. What was to be done upon the Report, supposing that they were authorized to make the Report? Suppose the Lord Lieutenant had

authority, and had authorized them to make the Report, what could be done upon it but that which has been done; namely, to institute a suit in the name of the Attorney General for the Crown to compel the application—the proper application of that money which the Commissioners of Public Accounts had stated to be misapplied. Look at the Act of Parliament for taking public accounts of any kind, either the public accounts relating to the public money, or those particular cases which are specially mentioned in the Act, in which a juris-[345]-diction is given to them. If those Commissioners report any balance or misapplication, what is the mode of proceeding? The Act of Parliament says, it shall be by information, by proceedings on the part of the Attorney General, according to the ordinary course of proceeding, for the purpose of compelling those who have money in their hands which ought to have been applied to a particular purpose, to apply it either to that purpose, or to pay it into the Exchequer, in the manner in which, according to the result of this transaction, the money ought to be applied. Does it not show, with respect to accounting for any part of the public revenue, that proceedings must be had to enforce the payment of that money, or the execution of that which the Commissioners of Public Accounts should report ought to be done. I therefore confess that I cannot conceive what objection there can possibly be to the mode of proceeding which has been adopted in this case, because there never should be a wrong without a remedy. Our law will not allow such a defect of justice: our law has provided certain modes of proceeding in different cases, and the ancient law generally proceeded by certain regular forms, which were writs contained in a collection called the Register of Writs, which writs were renewed according to certain cases which had occurred, by the persons authorized to frame the minutes.

It was specially enacted by a very ancient statute, that if the forms which had been provided were insufficient for particular purposes, the persons authorized by the Act should devise new writs for the purpose. But circumstances (which we see by referring particularly to them) induced the persons who had that authority to be very sparing in the exercise of it, and in consequence of that practice, [346] the particular writs which were actually framed either by the ancient law or under the authority of this particular law, were not always adapted to the purposes for which they were designed; but if no new writ was framed for the purpose, the Courts of law were content to use the writs, such as they found them, and apply them, though in some cases not exactly conformable to the exigency of the writs, and the reason given was, that no other writ was provided, and the wrong must not be without a remedy.

The law of Ireland is founded upon the law of England, by the adoption of the law of England in Ireland; and in the establishment of the Courts in Ireland, the same law which remains in England with respect to the Court of Chancery, the Court of King's Bench, and the Court of Exchequer, became the law of Ireland; and, therefore, if in this country a remedy was provided by writ, a remedy by writ might also be had in Ireland. Looking into the Register of Writs in this country, it seems to me that the remedy which was provided by the ancient law was an imperfect remedy, but a remedy was provided by the ancient law for a case of this kind. In early times, our Kings took upon themselves by prerogative to grant certain duties very much resembling these duties, for the benefit of towns and cities: to wall towns, to pave towns, and for various other purposes. There are, in the Register, writs expressly adapted to that purpose, reciting the grant, by some remote ancestor of the King, of certain duties which were to be applied to the walling of towns, or paving towns, or other public purposes; and that those duties so taken had not been so applied; and not having been so applied, the writ authorized certain persons to call before them the persons whose duty it was to [347] account, and to direct whatever should be in their hands to be applied according to the original intention of the grant, until the whole should be applied according to the intention of the grant.

We are referred to the statute of Elizabeth [7 App. Cas. 642, 38 Ch. D. 531], with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction, it created no new law; it created a new and ancillary jurisdiction; a jurisdiction borrowed from the elements which I have mentioned; a jurisdiction created by a commission to be issued out of the

Court of Chancery to inquire whether the funds given for charitable purposes had or had not been misapplied, and to see to their proper application: but the proceedings of that commission were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery, as it existed before the passing of that statute, and there can be no doubt that, by information by the Attorney General, the same thing might be done. While proceedings under that statute were in common practice, (as appears in that collection which is called Duke's Charitable Uses,) you will find it stated, that in certain cases, although a commission might issue under the statute, an information by the Attorney General was the better remedy. In process of time, indeed, it was found that the commission of charitable uses was not the best remedy, and that it was better to resort again to the proceedings by way of information in the name of the Attorney General. The right which the Attorney General has to file an information is a right of prerogative; the King, as *parens patriæ*, has a right, by his proper officer, to call upon [348] the several Courts of Justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases: the case of lunatics, where he has also a special prerogative to take care of the property of a lunatic; and where he may grant the custody to a person who, as a committee, may proceed on behalf of the lunatic; or where there is no such grant the Attorney General may proceed by his information.

I take this case to be one which falls precisely within the description that I have mentioned. I apprehend it is one in which, according to the practice of the ancient law, such a commission as this which is to be found in the Register, might have issued; because the persons who collect these rates are to account for the application of them, and to apply them accordingly. In this case, one part of the question arises from a provision in the Act of Parliament, that when a certain sum should have been discharged, a part of the duties should cease: that then they should be no longer levied. For the purpose of effectuating this, there were different provisions in the Act of Parliament, and amongst others a direction for the application of a certain sum in the reduction of this debt, a fund constituted for the purpose of more effectually relieving and putting an end to this debt as soon as the collection of rates would admit, and when that debt was perfectly satisfied, then the rates themselves were to cease. It has been objected, that if these rates had actually ceased by the payment of the debt which they were appropriated to pay, then the persons upon whom the rates had been levied, or against whom they were sought to be levied, might proceed at common law for the pur-[349]-pose of defending themselves against the rates, and if the rates had been improperly levied, to recover back what was so levied; and they urge that it is not pretended that the debt is actually extinct, but that the funds had not been applied in such manner as they ought to have been for the purpose of the extinction of the debt. Supposing the debt not to be extinct by the collection, have not the persons upon whom the rates are levied, and has not the Crown on behalf of those persons from whom they may be in future levied, a right to see that the funds are properly applied according to the directions of the Act? Now how were they to be applied in the gradual extinction of the debt? In paying certain portions of it; in creating a fund which should operate by degrees to the extinction of the principal of a portion of the debt, lessening consequently the interest that was to be paid out of the same fund, and then gradually to extinguish the whole.

If persons are entitled to the benefit of a trust of any description; for instance, persons who are interested in a fund which for a certain period is to be applied to the extinction of a debt: are they not to have a right to call from time to time for an account, for the purpose of seeing that every sum as it has been received, should be applied according to the exigency of the particular trust, as in the extinction of so much of the principal of the debt to which it could be applied, and consequently in extinction of so much of the interest, reducing the amount of the interest by degrees, and thus effecting the earlier reduction of the principal of the debt? Even suppose the Court of Commissioners of the Public Accounts have a right to take the accounts, and they find that monies to the amount of near £10,000 have [350] not been applied according to the terms of the Act of Parliament, is it the

same thing merely to call for the account to ascertain the default of that sum of £40,000, and to compel the proper application, even with interest? because, if it had been applied according to the directions of the Act of Parliament, it would have operated so much quicker to the extinction of the debt.

Under these impressions, I confess I am at a loss to conceive upon what ground the account now sought by this information can be resisted. That it is a case in which the Mayor and Corporation of Dublin, are accountable persons;—in which an Act of Parliament has provided particular directions for the manner in which they should apply what they should receive under the authority of that Act, is not a question. The accounts which they are ordered to render to the two houses of Parliament, are mere accounts upon which nothing can be done but as the two Houses of Parliament might think fit to direct, when one House of Parliament might proceed one way, and the other House another way. And, after all, if one House were to appoint a Committee to examine into these accounts, and to inquire of the persons who are about to come before them, as it were, rendering those accounts, and they rendered those accounts, what could the House do when it had taken the accounts? could it order payment? and is that a part of the jurisdiction of the House of Commons, or of this House, proceeding as a House of Parliament, and not as a Court of Justice? We should be acting against the constitution of the country, if we assumed any such authority. It would be rather extraordinary [351] doctrine to hold that either House of Parliament, independent of the other House of Parliament and the Crown, can act for any legislative purpose, or for any purpose except so far as this House is constituted a Court of Judicature, in which capacity it must act as a Court of Judicature. The House of Commons, for certain purposes, is capable of acting as the public accuser, but the House of Commons might just as well attempt to try and condemn a person whom, according to the usage and practice of Parliament they thought fit to impeach, as proceed in the manner in which it is suggested in argument they might proceed. Those who constitute the House better understand the constitution of the Government of this country, than to attempt any such proceeding. There was a time when such proceedings were attempted, but the result was the overthrow of that constitution of which the House of Commons formed a part.

I conceive, therefore, that with reference to this case, there can be no doubt but that, in default of any other jurisdiction, the Court of Chancery in Ireland had the jurisdiction by the information of the Attorney General, with or without a Relator; for the Attorney General might have filed this information without a Relator. The Relator is introduced properly by the Attorney General, that there may be some person responsible for the costs of the proceedings, if finally there should be an opinion in the Court that the information has been improperly instituted, or if in the course of the proceedings it should be in any manner improperly conducted. It is for the benefit of the subject that the Attorney General in all those proceedings provides persons to [352] be responsible as Relators in the information, that the Court may award against them what the Court cannot do against him.

Under these impressions, it seems to me that it is your Lordships' duty to reverse the decree which has been pronounced; that the accounts which have been taken before the Commissioners of Public Accounts, have been taken by persons who had no authority to take the accounts; that the result of the investigation upon the subject, amounts to nothing, except as it affords information upon the subject. If, in fact, the Commissioners had jurisdiction upon the subject, still I conceive that, upon this information, the Court of Chancery originally might have proceeded to order, that that which the Commissioners of Public Accounts report, should be carried into execution; for I know not how any report of the Commissioners of Public Accounts, can be carried into execution, but by means of the ordinary courts of justice. In the Act framed for passing the public accounts before the Commissioners of Public Accounts, even with respect to the public revenue, the proceedings to enforce the payment of any thing that may be due in relation to the accounts, must be by the ordinary proceedings in a court of justice. I therefore think your Lordships ought now to proceed to reverse the judgment (dismissing the information, and ordering the Relators to pay the costs) which has been given by the Court of Chancery in Ireland, and to direct, on the contrary, an account to be taken of the receipt and application of the

duties in question, according to the exigencies of the particular case; following nearly the terms of the prayer of the information. I reserve the [353] consideration of costs, until it shall appear what is the true result of that account; and in so doing, your Lordships, I apprehend, must direct, as to the several sums of money which have been received by the Corporation for the duties in question, that an inquiry shall be made, whether they have been applied according to the terms of the Act of Parliament; particularly in creating what is called a sinking fund, and in the application of the money, first to the payment of the interest, and then in the reduction of the principal, in the very words provided for by the Act of Parliament. If the result of that inquiry should be, that the Corporation of Dublin have not applied the funds according to the Act of Parliament, it will remain to be considered in what manner the Court of Chancery in Ireland should then have jurisdiction upon the subject, and would be able to proceed to do justice. In what I propose to your Lordships to do, I propose to prevent further injustice, supposing injustice to have been done. How far, upon the report of the accounts to be taken in the Court of Chancery, the Corporation of Dublin can be compelled to do now retrospectively, what they ought to have done, from time to time, as the funds came to their hands, may be a question of considerable difficulty, considering the nature of a Corporation, and the funds which may belong to a Corporation; but if it were the case of an individual—if an individual, being a trustee for the payment of a debt, and receiving funds for the payment of that debt, with a provision, clear and distinct, in the deed creating the trust, that out of the funds so reserved, a certain sum should be applied until the extinction of the debt, or carried to a [354] sinking fund, or applied in any particular way, and that person so intrusted, did not think fit to observe the directions of the trust under which he acts, but retained that money in his own hands, or applied it for purposes to which it was not applicable; it would be a consideration, according to the circumstances of the case, in what manner justice should be done to the persons who were injured by such a misapplication of the funds? It might be in the shape of an action for damages, or in the Court itself charging the trustee with compound interest, according to the nature of the particular case, in such a manner as to do justice to the persons who were injured by his misconduct. That is a subject which can only be properly entered into after the account shall have been taken, and it shall be shown what is the misapplication which is complained of. The proceeding appears imperfect upon the report of the Commissioners of Public Accounts, and, indeed, the Commissioners of Public Accounts seem to have felt they were not competent to the undertaking, although the Lord Lieutenant had thought fit to refer the account to them, and the Corporation of Dublin choose to come before them. They seem to have felt themselves not competent; and besides that, the Corporation of Dublin did not conceive they were bound by the account, for in their answer to this bill, they object to the account. How then can it be said, that that account is to bar these proceedings? And yet that is the ground upon which, as I understand it, that information was dismissed.

It will require some little time to frame an order for your Lordships to make upon the subject; but I think that this decree ought to be reversed, and [355] that directions ought to be given upon the information filed by the Attorney General. I also think that it may be a subject of inquiry and of a good deal of consideration, in what manner the order to be pronounced, should be framed. A precedent cannot be obtained, and therefore the House must endeavour to act upon that which the justice of the particular case requires, without the assistance that might be derived from other similar cases. In that case * of a proceeding under a special Act of Parliament, which your Lordships thought did not give the authority assumed in the case, the Court of Chancery certainly proceeded upon the idea of making a Corporation responsible for the acts which had been done; and although the Corporation itself had derived no benefit from those acts at all correspondent with the sum of money which had been reported to be due from them, in consequence of

* *The Corporation of Ludlow v. Greenhouse*, in which Lord Redesdale expresses a doubt whether a Court of Equity can award compensation in the nature of damages for a breach of trust. Ante, p. 58.

what had been done, they were charged with that amount as the consequence of those acts.

I cannot but consider this as a proper proceeding, and that it is within the regular jurisdiction of the Court of Chancery, and that it is a case in which the Corporation of Dublin might be charged out of their general funds, to make good the loss to that particular fund by the misapplication complained of. It appears to me, that the subject ought to be reserved for future consideration. The account ought to be simply directed according to the provisions of the Act of Parliament, reserving all further directions, until the result of the account shall be ascertained.

[356] The Lord Chancellor.—I propose to postpone the further consideration of this case till Monday next. It appears to me to be extremely desirable that my noble and learned friend would be pleased to sketch out, in some degree, the order which ought to be pronounced; because one great difficulty I have had in the consideration of this case has been, what we are to do in enforcing the payment of what shall appear to be the balance of the account taken with respect to the Corporation. My noble and learned friend seems to think that we ought to reserve the question whether we can, or cannot, effectuate our decree. That is a point which is deserving of some consideration before we make the decree.

The Earl of Eldon: The mere question here is, whether the Lord Chancellor of Ireland did right in having dismissed this information, and having dismissed it with costs. There was no place for much argument on the question, whether, regard being had to the nature of the case stated in this information, the Court of Chancery had, or had not, a jurisdiction. The Lord Chancellor of Ireland being of opinion, that if the Court of Chancery had jurisdiction independently of the circumstances which formed the ground of the decision, yet there are peculiar circumstances in the case that would deprive the court of its jurisdiction.

When this case was argued at the bar, two cases were cited, which had been heard in the Court of Chancery in England, one before myself, the case of *The Attorney General v. Browne*, and another, I believe, by the present Master of the Rolls, *The Attorney General v. Heelis*; and it is but fit to state that although I was of opinion, in that case of *The* [357] *Attorney General v. Browne*, that the purpose for which certain tolls were appropriated, was a purpose that made the establishment of those tolls, an establishment for a charitable use, I was of opinion it was not necessary that it should be a charitable use, to give the Court of Chancery jurisdiction upon the subject. But my judgment in that case proceeded upon this ground: that the court had a jurisdiction to call upon persons intrusted with the application of those tolls, which were granted for the purpose of supporting banks to protect the land from the inroads of the sea. I thought that the Court of Chancery had a right to direct an account of those tolls to be taken. The authority of that case is considerably weakened by the opinion given by the present Master of the Rolls, then Vice Chancellor, in the case of *The Attorney General v. Heelis*, inasmuch as the reasons on which he proceeded, were considerably different from those on which the judgment was founded which I thought myself bound to give, in the prior case of *The Attorney General v. Browne*.

The Lord Chancellor of Ireland, in the present case, was of opinion that, inasmuch as the Act of Parliament had directed the accounts to be laid before the Lord Lieutenant of Ireland, and before Parliament or before the Commissioners of Public Accounts, that such a direction constituted another jurisdiction, and that, therefore, the Court of Chancery had no jurisdiction upon the subject. To the industry of a noble and learned Lord (Lord Redesdale), we are indebted for having established, in what he stated for your Lordships' consideration, that old authorities justified him in saying that a writ of account [358] might be brought, according to the old forms of the law, for the purpose of calling such parties to account, and he reasoned satisfactorily, at least to my humble judgment, that if a writ of account could have been maintained, a suit in Chancery would be also capable of being maintained, unless the jurisdiction of the Court was expressly, or by necessary implication, taken away.

The Lord Chancellor of Ireland, advertng to that case of *The Attorney General v. Browne*, stated, that according to the facts embodied in the report of the case, it appeared that there was no other jurisdiction, and that the Court of Chancery in England probably was induced, by that circumstance, to think there must be a

remedy somewhere, and that therefore the Court of Chancery was competent to decree the account which, in that case, the Court directed to be taken. I am most clearly of opinion, that, admitting the Act of Parliament ordered this account to be laid before the Lord Lieutenant, who is to lay the account before Parliament, and that the Commissioners of Public Accounts, have some authority likewise in taking such accounts, that this provision does not oust the jurisdiction of the Court of Chancery, because that jurisdiction cannot, in my judgment, be taken away but by express words, or by words creating a necessary implication to that effect; and, in every view which I can take of this case, I cannot imagine why the direction that the Lord Lieutenant should be informed of the state of the accounts, and that the Commissioners of Public Accounts should look into these matters, and that Parliament should have the accounts laid before them, should have such an effect. It appears to me that those are measures [359] rather ancillary to the jurisdiction of the Court of Chancery than measures to oust the Court of Chancery from its jurisdiction. Upon the whole, I cannot entertain a doubt that, in this case, the Court of Chancery has a jurisdiction which has not been taken away by any enactment contained in this Act of Parliament regulating those institutions to which it refers. My opinion is, that in this case the Court of Chancery having jurisdiction, the bill ought not to have been dismissed.

I have prepared, with the assistance of my noble and learned Friend, some minutes of the judgment which I propose to your Lordships to pronounce. I have likewise been furnished by the parties with other minutes, in which notice being taken that the costs which were given by the Lord Chancellor have been paid into the Bank, those minutes provide for the repayment of those costs, which certainly ought not to have been paid if the bill ought not to have been dismissed, and they further provide for the costs of this appeal. With respect to the former costs, I do not apprehend it is necessary for your Lordships to say any thing upon the subject, because if you reverse the Lord Chancellor's decree, it will be of course on application that an order will be made to have those costs paid back again. With respect to the costs of this appeal, it being an appeal from the decision of the Lord Chancellor of Ireland, it is not according to the usage of your Lordships' House to give such costs. I should, therefore, upon the whole submit to your Lordships, that the minutes which I have now in my hand should form the judgment of your Lordships. For the purpose of taking care that there should be no alteration hereafter, [360] perhaps it will be proper that the parties should have an opportunity of seeing these minutes which are now put upon your Lordships' table; and, in case nothing is said in the course of the morning to induce your Lordships to alter them, I propose, with the leave of the House, to-morrow, to move that the decree should be reversed, and that the judgment of this House should be conformable to those minutes.

Lord Redesdale: Having already given my opinion with respect to this case at length, I will not trouble your Lordships further upon the subject. My opinion perfectly concurs with that of the noble Lord who has just addressed you. With respect to the costs in the cause, your Lordships often, in reversing a decree, are in the habit of giving further directions to the Court of Chancery, and, in order to carry your order into execution, to direct the repayment of costs. The minutes which have been proposed are framed with a considerable degree of particularity from the Act of Parliament under the authority of which the particular revenues were raised. They are very minute, and therefore, I think it is proper that the parties should have an opportunity of looking at them before they are finally made the order of the House, because it is possible, in going through an Act of Parliament containing a vast variety of provisions, something may have escaped notwithstanding the attention I have given to the minutes, and they may not be expressed with perfect accuracy. My object was to make an order for the purpose of carrying into execution the particular provisions of the Act of Parliament as I found them in the Act.

[361] Ordered and adjudged (11th May, 1827), that the decree complained of be reversed, and it is declared that, by the terms of the Act of 49th Geo. III. intituled, "An Act for the better supplying of the city of Dublin with Water," the Respondents are bound to account for and apply the several rates and rents in the said Act mentioned in the manner expressed in the said Act, so far as the said Act relates to such rates and rents respectively. And, it is further ordered, that it be referred to one of

the Masters of the Court of Chancery in Ireland to take an account of all sums of money received by the said Respondents, or by any person or persons by the order, or for the use, of the said Respondents in each year, from the time of the passing of the said Act, for or in respect of the rates and rents granted by the said Act, and of the application thereof respectively in each year, and particularly of the expenses incurred by the said Respondents in each year, in making reservoirs and laying cast iron or metal main and service pipes, or other alterations and improvements authorized by the said Act, and to state the balances of such account appearing at the end of each year respectively; and also an account of all sums of money which the said Respondents borrowed at interest upon the credit of the rates and rents granted by the said Act, and by the Acts therein recited, and which were necessary for the purpose of making such reservoirs and laying such cast-iron or metal main and service pipes; and also an account of the several demises or mortgages of the said rents, or any parts thereof for such purposes, and of the costs of such demises or mortgages, and to whom such demises or mortgages have been made, and for what sum or sums respectively; and whether such sum or sums of money so borrowed exceeded or fell short of the several sums authorized by the said Act to be borrowed in the several years therein mentioned respectively. And it is further ordered, that the said master do inquire and report the nature and particulars of the debt of £67,800 in the said Act mentioned, and to whom such debt was due and how incurred, and at what rate or rates of interest, and whether a fund has been duly provided according to the directions in the said Act for redeeming and discharging the same, and all such further sum and sums and [362] money as have been borrowed for the purposes and within the several periods authorized by the said Act; and whether the treasurer and treasurers for the time being of the said Respondents have annually retained out of the rates or rents granted by the said Act, the sum of £2000, together with such sum or sums of money as would be equal to the interest on all such sum and sums of money as have been borrowed under the provisions of the said Act; and whether all such sum and sums of money by the said Act directed to be so retained have been appropriated and applied as a sinking fund to pay off and discharge the said sum of £67,800 and all such other sum and sums of money as have been borrowed under the provisions of the said Act; and whether all such sum and sums of money so directed to be retained and appropriated have been for such purpose laid out in purchasing securities granted or passed for the debt and debts in the said Act mentioned, or any of such debt or debts; and whether all such interest money as have become due and owing on all the securities, sum and sums of money so purchased in, paid off, or discharged, has and have been applied in aid of the said sinking fund, according to the directions of the said Act, or whether the whole or any and what part or parts of such sum and sums of money has or have not been applied as directed by the said Act, and how the same respectively has or have been applied. And it is further ordered, that the said Master do inquire and report whether the treasurer and treasurers of the said Respondents has or have kept such separate and distinct accounts as directed by the said Acts of the receipts and produce and amount of the rates and rents granted by the said Act, and received under and by virtue thereof, and has or have paid and applied such part or balance thereof as from time to time remained after the retention of the several sum and sums of money directed to be otherwise applied, as in the said Act mentioned, in payment of the interest from time to time due on the money mentioned in the said Act to be then due and owing or borrowed under the authority of the said Act, and in laying down cast-iron or metal main and service pipes, or otherwise making such additional alterations and improvements in the works in the said Act mentioned, and in increasing the sinking fund created [363] by the said Act; and whether any deduction has been made from the said rates and rents, save for collecting the same, and, if any, what deduction and on what ground; and whether any surplus has been at any time or times, and when, received by the said Respondents, or on their account, more than had been from time to time duly expended as directed by the said Act; and whether such excess has at any time or times, and when, exceeded the sum of £500; and whether such excess has been from time to time added to the sinking fund created by the said Act, and paid and applied in like manner as the said annual sum of £2000 is by the said Act directed to be applied; and whether the whole of the sum and sums of money due, as in the said Act mentioned, and borrowed under the authority of the

said Act, has been fully paid and discharged; or whether any and what parts or part thereof remain or remains due and owing, and to what amount, and why the same have or has not been paid or discharged. And it is further ordered, that the said Master do take an account of the costs, charges and expenses, in preparing, drawing, obtaining, and passing the said Act, and certify whether the same have been paid and discharged, and when and in what manner; or whether any and what parts or part thereof remain or remains due and unpaid, and for what reason. And it is further ordered, that the said Master do inquire and certify whether the several additional works and improvements intended to be provided for by the said Act have been completed, or whether any and which of such works and improvements have not been completed, and why the same have not been completed, and what remains to be done in respect thereof. And in case any of such works and improvements have not been completed, it is further ordered, that the said Respondents be at liberty to lay before the Master such statement as they may be advised to make respecting the same; and that the said Court do all such things as shall be necessary to carry this Order and Judgment into execution; reserving to the said Court the consideration of further directions, and the costs of the suit, until after the Master shall have made his Report.

[364]

IRELAND.

(COURT OF CHANCERY.)

WILLIAM MONTGOMERY,—*Appellant*; JAMES MILES REILLY, and EMILY GEORGINA SUSANNA, his Wife, JOHN REILLY, EMILY MARIA CATHERINE REILLY, JAMES MILES REILLY, the Younger, JANE HESTER REILLY, and THEODOSIA HARRIET REILLY, (Infants, by the said JAMES MILES REILLY, their Father and next Friend,) the Honourable GEORGINA CHARLOTTE EMILIA HANNAH MONTGOMERY, Widow, the Reverend EDWARD MONTGOMERY, Clerk, ARTHUR HILL MONTGOMERY, JOHN CHARLES MONTGOMERY, FRANCIS OCTAVIUS MONTGOMERY, GEORGE AUGUSTUS FREDERICK SANDYS MONTGOMERY, WILLIAM EDMOND REILLY, and the Right Honourable ROBERT WARD, —*Respondents*.

[*Mews' Dig.* xii. 837. S.C. 1 Dow and Cl. 62; Hay and J. (App.) liv. See *Hammersley v. De Biel*, 1845, 12 Cl. and F. 45 at p. 65; *Jorden v. Money*, 1851, 5 H.L.C. 185.]

A, being a younger child, becomes entitled, upon the death of her father, by his appointment under a marriage settlement, to £[4000], as a portion charged on lands, and to £1500 under his will, charging only his personalty. The other younger children became entitled to similar portions and bequests. The widow was entitled to a jointure under the settlement, and plate and household furniture under the will. B., (as eldest son,) enters upon the estate under the limitations of the settlement, and being in possession, carries on a correspondence on the subject of an increase of the jointure of the widow, and the portions of the younger children, with W., a common friend of the family, acting as the agent of B. as well as the widow and younger children. In the course of this correspondence, he proposes, by letter, on certain conditions to increase the portions of his brothers and sister, and the jointure of his mother, and gives directions to one [365] of his brothers to pay the increased jointure, and the interest upon the increased portions, which is done accordingly. After the interest had been paid for one year, a treaty of marriage was commenced between A. and C., who applied to the common friend to ascertain the amount of A's fortune, and was informed by him of the correspondence with B., and that he had authority to state, that £4000 was the amount of A's portion, to be secured on B's estate. Upon the faith of this communication, A. and C. intermarried. The interest upon the increased

portion was paid by the agent of B., to A. and C., for three years after the marriage. B., in the mean time, had possessed, in consequence of the correspondence, part of the personality which belonged to the widow and younger children under the will; and had received, without objection, accounts from his agent, including the allowances paid to the widow and to younger children by way of interest upon the increased portions.

Upon a bill by A. and C. to enforce the payment of the increased portion, to which the widow and the other younger children were defendants, and, by their answers, submitted to perform the conditions on which the increase of portion and jointure was proposed.—*Held*, that the effect of the correspondence, with all the circumstances of the case, amounted to an agreement which a Court of Equity ought to enforce.

In the letter on which the husband and wife relied as the agreement in consideration of marriage, B. says:—"I can never be reconciled to the marriage, etc." Then he proceeds to speak of the arrangement between him and his family, and repeats his part of the agreement as to the younger children:—"£1000 each to be secured on certain lands; my sister's to be secured to herself for life, then among her children, etc." After stating the conditions for this increase of portion, he concludes:—"This, I think, is an abstract of the agreement, and when put into the form of a deed, if assented to by them, I am ready to execute at any time." And he adds:—"I will not entangle myself with Mr. J. R. (the husband.) If this match goes on, I will neither meddle nor make with it or their settlements."

Whether such a letter, written before the marriage to W., the common friend, and in the circumstances before mentioned, could be enforced as an agreement in consideration of marriage.—*Quære*.

Hugh Montgomery, being seised in fee of lands in the county of Down, by indentures dated [366] the 1st of June, 1782, and executed previously to his intermarriage with the Respondent, Georgina Charlotte Emilia Hannah Montgomery, limited the lands to the use of himself for life, with remainder to his first and other sons in tail; and by the settlement reserved to himself a power of charging the lands, by will or deed, with a sum of £5000, as a provision for the younger children of the marriage, and a further power of charging £800 for the same purpose.

The marriage took effect in the year 1782, and there were issue of the marriage, living at the death of Hugh Montgomery, eight children; namely, the Appellant, his eldest son and heir at law; the Respondents, Emily G. S., the Reverend Edward Montgomery, Arthur Hill, John Charles, Francis Octavius, and George Augustus Frederick Sandys, and Hugh Bernard (since deceased); of whom Francis Octavius and George Augustus Frederick Sandys were infants at the time when the cause was heard, but Francis Octavius is since of age.

Hugh Montgomery, on the 29th day of September 1801, made his will, and thereby gave to each of his younger children, £1500 to be paid by his executors, without interest, on the day of their respectively attaining the age of twenty-one years; and, after reciting that his estate of Rosemount stood charged with the sum of £5000 for younger children, he directed that the said sum should be equally divided among them, share and share alike; and, after reciting that he had a power to charge his estate with £800, he directed that the same should be divided among them, share and share alike; and also that the overplus of the rents and profits of the estates which he held in fee, after paying the interest [367] of his bond and judgment debts, should be paid to his wife, for the education and maintenance of his younger children, until they should respectively attain their majority, when the interest of the £1500 should be paid, out of the surplus, to each of them; and he bequeathed all the plate and household furniture he might die possessed of, to his wife, and declared, that it was his intention his personal property should go in discharge of his debts in the first instance, except the bequest to his wife. This will was attested by two witnesses.

In the year 1807, after making his will, Hugh Montgomery purchased lands, the purchase-money for which was £15,750. This having made an alteration in the nature and circumstances of his property, he determined on making a further provision for his younger children by a charge on this lately-purchased estate, and es-

pressed his intention of doing so to his friend, William George Wakely. He died, however, without having fulfilled his intention, on the 31st day of March, 1815, leaving his children before mentioned, and his widow, surviving.

At the time of the death of Hugh Montgomery, the Appellant, and Hugh Bernard, the Respondents Emily G. S., Edward and Arthur Hill, were adults; all the other children were minors.

The Appellant, immediately on the death of his father, entered into possession of the settled and unsettled estates; the former (exclusive of the mansion-house, demesne, and some in the Lough of Strangford) were of the yearly value of about £2825; the latter of the yearly value of £2275.

Shortly after the death of Hugh Montgomery, William George Wakely (who was an intimate friend of the family) communicated to the Appellant [368] the intentions of Hugh Montgomery relative to his younger children; and the Appellant on that occasion expressed his determination to carry his father's intention on that subject into effect, and to make up the fortunes of his younger brothers and sister £5000 each.

This led to a correspondence on the subject between the Appellant and W. G. Wakely, in the course of which letters were written containing passages to the effect following:

On the 25th July, 1816, Mr. Wakely addressed a letter to the Appellant, who was then in London, in which he says, "Your letter did not reach me as soon as it might: you need make no apology to me for writing freely on your family affairs. Before I have any communication with Grey Abbey, let us first completely understand what is to be done and expected: then I shall be able to answer the questions put to me. You expect your mother, brothers and sister, to convey to you their claim on Lord Bangor's money: * do you mean the whole of it present and to come? Suppose this agreed on, how are you to manage with the minors? Your first determination was [369] £800 a year for your mother, and £5000 each for younger children." He requests him to be explicit on the subject, and states that the Appellant's mother had expressed her surprise that he had not executed a deed according to his first proposal. He then presses for a final adjustment of the business, and says, "It is natural that your family should wish the business finally settled as far as it can be; delay to your sister would be very prejudicial;" and adds, "you are now the father of your family, and it is well; for God has blessed you with a clearer understanding than falls to the lot of most people, which will help you to settle these matters as nearly as possible in the way you wish." And he concludes by saying, "I do not mean to write to the North till I hear from you, as I never understood, from any of the family, that you had fully explained your wishes and intentions to any of them. I think I understood you myself; but your answer to those questions will remove all possibility of doubt."

To this the Appellant replied by a letter, dated "London, 29th July, 1816," in which he says "Your kindness emboldens me to make one proposal to you, which I trust will convince you of my readiness to come to a conclusion, and to do every thing that is fair and honourable towards my family. As you are now fully acquainted with all my feelings and guides of conduct, if you will be so kind as to desire Arthur to send you a correct copy of my rent-roll, specifying the bad or rather insolvent tenants, as also a full statement of my debts, and any other paper you may require; if you then will be so kind as to compare and balance these, making allowance [370] between actual net income and paper rent-roll, which from experience I feel

* The Appellant's mother, the Respondent the Honourable Georgina Charlotte Emilia Hannah Montgomery, was the youngest of the three sisters of Lord Bangor: in the event of his dying intestate, and without issue, (an event which from his advanced age, and having been forty-five years a lunatic, was almost certain) she would, if she survived him, be entitled to a distributive share of his personal property. The amount of that personal property appeared at the time of the examination of witnesses in this cause, to be about £300,000: and that the share of that sum, to which the Respondent, Georgina Charlotte Emilia Hannah Montgomery would be entitled, was one-sixth, with the chance of being increased by the death of either or both of her two surviving unmarried sisters, to one-fifth or one-fourth.

you are very capable of doing, and am sure are aware is no small sum, even in the best paid estates; if you will trouble yourself with all this, and decide between my family and me, I hereby engage to sign whatever deed may be tendered to me, certified to have been drawn up under your directions." He then mentions several arrangements he had previously in contemplation on the subject, and further adds, "my estate is heavily burdened, in addition to the claims of the family; but if an arrangement could be made to give me a certain prospect of future relief, I would not hesitate a moment reducing myself to the most limited income, and at once settling the whole business. The minors certainly offer difficulties; but if the family, who are now of age, sincerely put their shoulder to it, and, in short, are determined, both now and hereafter, to act an honest and equitable part, I think it might be arranged by your kind interference. Might not a trust be raised? I am willing to allow my whole estate to be so vested; but I will suggest nothing, but leave every thing to your kind arrangement and discretion; again repeating, do you, my dear Sir, with my estate what you please, so as it is kept together; for I well know my father never would submit (*have submitted*) to its dismemberment;" and he inclosed in this letter a statement and calculation to assist Mr. Wakely in forming an opinion on the subject.

On receiving this letter, Mr. Wakely immediately went to Grey Abbey, the family mansion, in order to obtain the necessary information; and, having done so, he addressed a letter to the Appellant, dated Grey [371] Abbey, 17th October, 1816, which contains the following passage:—"My dear William, I fear you think by this time, that I have neglected you and your last letter; but I found it impossible to get a sufficiently explicit account, by letter, either of the property, or of what the parties concerned would be at. I have seen the rent-roll, etc. etc. Your mother thinks your father's will valid, with respect to the legacy to her of the furniture, stock, etc.; that they were well worth £2000, and more indeed; that therefore you should add £200 a year to her jointure of £600, making a clear sum for her of £800 a year, without the interference of any one. She intends to take with her, when going, the spoons and forks; nothing more. She most readily and freely offers you as follows; to secure to you your share of Lord B.'s fund, and to add to it £1500; both to be paid to you immediately on the death of Lord B. We both think that the young people should secure to you the £1500 in case your mother dies before Lord B.; this is a material point in your favour. As you mention that your means will not allow you to do what you first intended, it is now proposed that you pay £4000 (four thousand pounds) to each of the young people, at the death of Lord B.; till that event takes place, to pay them £250 a year each, as they come of age; this to be so settled now, as that each of them, as they come of age, will be legally entitled to it, and be able to make settlements at marriage, or dispose of their shares by will or otherwise; that, on the marriage of your sister, she should be at liberty to call for the £4000, if it should be thought expedient to get the money. [372] instead of the £250 a year. You allowed £200 a year for the boys at school, and said you would allow £150 a year to Charles, to manage for himself: in this there can hardly be any change; as, though £200 a year may be more than Francis and Sandys cost at present, yet hereafter it will not; it is not intended that they shall be any further expence to you, even for pocket money. As far as I can judge, your rent roll amounts to £5176 11s. 5½d. exclusive of the demesne and islands; some of this is uncertain, and you will see on the other side an allowance for it. In the roll the slate quarries are put down as producing £200 a year; this may not be too high an income for them, as I hear they have produced £150, or nearly, a year, formerly.

"This is a statement of what I have said, and what you are to pay.

To your mother	£800	0	0	a year.
1 of age	1000	0	0	
3 others	350	0	0	
2 annuities	132	0	0	
interest of debt	1516	8	9½	
	£3798	8	9½	
Balance in your favour	1378	5	8	
	£5176	14	5½	

From this balance take off £178 5s. 8d. which, as far as I can see, will fully cover the uncertain part; then you have for yourself £1200 a year, a good demesne, and a house well furnished. I do not say more than, with good management, you might contrive to live in it. I see that part [373] of your income is an annuity from Mr. Echlin: his life ought to be insured for what the annuity cost."

This letter appears to have reached the Appellant on the Continent; and he immediately replied thereto by a letter without date, but which appeared, from the post mark and the testimony of Wakely, to have been received by him on or about the 16th of November, 1816: this letter contains the following passages:—"I do not know how to thank you for the trouble you have taken, and the unexampled kindness of settling the affairs between me and my family. I trust you have the satisfaction to have left them contented. Had your decision been unfavourable to me, you may rest assured I should have been satisfied. All I looked for was strict justice, and from your hands I have received it. As to my mother's claims, I must make one or two observations. The will as to the chattels has not certainly the defect which renders it invalid as to the freehold estate—admitted: but I deny its being, by any possibility, beneficial to any of the legatees, because the debts, both simple contract and others, that did not affect the freehold, except on a deficit of assets, amounted in total to a much larger sum than the produce of any chattel property of which my father died possessed. On my taking upon myself the responsibility of those debts, surely in common justice, all chattels became mine: in short, without going into particulars, there was an arrear of interest, on one sum alone, of above £3000, and different smaller ones, amounting to at least another thousand: to which add book debts and servant's wages: £5000 would not be beyond the total, but in my opinion considerably within it. As that would exceed all proceeds of assets, I need [374] not say that, had I put them to the will, and confined them to take under it, I could have added all bond debts upon which no judgment was entered, and not a penny of which was I liable to, as long as there was a pin of chattels. Upon those grounds I deny my mother's claims, as a right; for which reason, and that they may all fairly understand that what they take I might have withheld, I shall certainly make no objection to my mother having the use of the spoons and forks you mention, or indeed any remainder of the plate she may choose for her life, reversion to me or my heirs. The value is but small; of the reversionary of course nothing: but there are limits at which I must stop in justice to myself. There are stories come to my ears in London about Emily: indeed so openly talked about, that I was asked if it was not actually the case; but as you say nothing of it, though her never having written to me since May last, makes me very suspicious, I would fain hope it is not true; namely, that she is going to be married to James Reilly. She long knows my opinion; an opinion drawn from me by herself; and, if she is going to act contrary to that opinion which she professed to me she would be guided by, in short if she marries J. R., I can never consider her otherwise than having acted most deceitfully towards me: it will be a marriage I can never acknowledge: she must bid farewell to Grey Abbey for ever. I do not pretend to any right of interference: but as she has an opinion in writing of mine, not expressed in the gentlest terms, I cannot forgive the deceit of drawing out an opinion by pretending to hold the same, when she must have been, if this report is true, which I fear much it is, mentally [375] determined, the first opportunity, to act contrary to it. As to my not being able to live on £1200 a year, I trust I shall always be able to reduce my expenses to my income, when all other control over my purse is removed. £200 a year is certainly a high average for the quarries: I am not aware of their ever netting £450. I never will myself count them in my rent roll, considering them as only making up for and equalising the bad or waste parts of the demesne; they never were averaged at more than £200 at their best times, and last year were a losing concern. I should like to know what the bogs were put at; they never realised their calculated average, but it is a matter of no essential consequence."

In the autumn of 1816, a treaty of marriage was entered into between the Respondents James and Emily. In a letter of the Appellant's to the Respondent James, dated the 24th December, 1816, he declares he will never recognise the Respondent James as a brother, but does not intimate an intention of withholding the portion he designed for his sister.

On the 6th of January, 1817, the Appellant addressed a letter to Wakely, in which, alluding to the expected intermarriage of the Respondents James and Emily, he says, "A few posts ago I received your kind letter of the 10th of December, and would have answered it immediately, but for the unsettled state I was, and am still in, about this to me horrible match of my sister's; it is in vain to try. I can never be reconciled to it, or induced in any manner to receive the gentleman as my brother." And after stating that he was himself about to be married, he proceeds as follows: "I am thus explicit, because you have at all [376] times taken such a kind interest in all the affairs of our family; and to show to you that my marriage will not in any manner affect the arrangement you have so kindly undertaken between me and my family, the manner of putting which into execution, to prevent mistakes, I shall now repeat: £4000 each to be secured upon certain lands, principal not payable till after the death of Lord Bangor; interest to commence to each on their coming of age; my brothers' to be settled on marriage, in the manner most agreeable to the parties concerned; my sister's to be secured, first to herself for life, then share and share alike among her children; but in all cases, in failure of issue, reversion to my estate. My mother to have £800 a year, secured to her for life, and the use of the plate which she has chosen for her life; also I am to be secured my share of Lord Bangor's dividend by my mother, as also £1500 over and above that sum, for the payment of which latter sum my brothers and sister are to become bound, as my mother might die before Lord Bangor; and, to sum up all, they are to assign to me all title or claim which they may have, or fancy they have, upon my father's chattels, or the estate, either in virtue of his will, marriage settlement, or any other claim whatsoever. This, I think, is an abstract of the agreement; and when put into the form of a deed, if assented to by them, I am willing and ready to execute it at any time. I will not entangle myself with Mr. James Reilly; if this marriage goes on, I will neither meddle nor make with it or their settlements. What Emily gets from me, she shall take under the same deed as the rest of my family; it shall be therein strictly settled, and Mr. J. R. or any other [377] person she may choose to marry, shall have nothing to say to it."

To this Mr. Wakely replied by letter bearing date the 25th of January, 1817, in which he endeavours to prevail on the Appellant not to insist upon having his brothers' portions settled as intimated in his letter of the 6th January. On the subject of the marriage between the Respondents, (J. and E. Reilly) he writes thus: "The writings are preparing by Keown, relative to your sister, and James R.; I communicated your decision as mentioned in your's of the 6th, to your mother, as to what you would give Emily, and the terms, etc. Reilly settles £1000 (one thousand pounds) in money on your sister, in case she survives him, and a jointure of £260 a year; her own of course is to be as you determined." And on the subject of his brothers, he proceeds thus: "But as to your brothers, this alteration of yours is a very serious one, and probably was not in contemplation when you wrote your last of the 6th instant. If their fortunes are only to be paid on their marriage, and to revert to your estate in case of failure of issue, what are they but poor annuitants! how are they to advance themselves, on any occurrence? they could not be possibly put into a more awkward predicament. The plan I sent you from Grey A., did not contain such an arrangement, your consent to which I communicated to the parties concerned. Put yourself, by supposition, into the situation of a younger brother, similarly circumstanced as yours will be, if they are to be annuitants, and you may easily guess what must be the sensations of Hugh, and Edward, and Arthur, on [378] hearing that so very great a change is to take place. I took particular pains that the plan I sent from Grey A., should be clear, but I really do not think you meant this when you wrote last; at all events it is but right that you should immediately explain yourself. Whatever your brothers are to have they should have the power over, when they come of age. Consider the matter, and I am certain you will decide as you ought. I am neither afraid of your head or heart."

To this the Appellant replied by a letter dated the 19th of March following, by which he relinquishes the purpose of having his brothers' portions brought into strict settlement, but insists on it as to his sister's. His words are, "As you say you

cannot see the business in the same light with me. I most willingly consent to your construction of the agreement, as far as relates to my brothers; but as to my sister, I cannot bring myself to alter one tittle; she must abide the consequences of her unkind conduct towards me."

At the commencement of the marriage treaty between the Respondents James and Emily Reilly, the Respondent James applied to Mr. Wakely, as the person acquainted with the particulars and in the confidence of the family, who informed him that the fortune of the Respondent Emily was not £5000, but only £4000, to be settled on her brother's estate; that her brother had promised by letter to execute a deed to secure that sum, and that he had authority to say so, and he read to the Respondent James extracts from his correspondence with the Appellant. In the course of the treaty it was suggested by Mr. Wakely that [379] as the Appellant wished to have the £1000 charged on particular lands, not then ascertained, it would be better not to mention the same in the Respondent's marriage settlement.

In the instructions drawn under the direction of Mr. Wakely, to be laid before counsel, is contained the following paragraph: "Miss Montgomery's fortune, it is presumed, need not be mentioned in this settlement: it is £4000, charged by her brother, or rather to be charged on his estate for her life, with remainder to her issue, failing which, to merge into Mr. Montgomery's estate."

These instructions were sent to counsel, and according to the desire expressed by the Appellant, to reserve the right of ascertaining on what part of his estate the portion should be charged, and the wish expressed in his letter of the 6th of January, 1817, that the limitations to which that sum was to be subject, should be made in the deed by which such charge was to be made, it was left out of the settlement, which contained only the limitations of the property of the Respondent James. This settlement was executed on the 4th of February 1817 and thereby an annuity, by way of jointure, of £260 a year, during life, in case the wife survived her intended husband, and a further sum of £1000, to be paid immediately on his death, was provided for her, with a covenant to secure to her and her executors, without the interference of her husband, any sum she might become entitled to by the death of Lord Bangor.

The Respondents, James and Emily Reilly, were married on the 4th day of February, 1817.

Before the Appellant went abroad in the year [380] 1816, he gave written instructions to his brother and agent, Arthur Hill Montgomery, directing him to pay to his mother £1000 a year, to the Respondents Emily, Hugh, and Edward, £250 a year, and to retain to himself £300 a year. These annual sums were paid, by Arthur Hill Montgomery, to the several persons mentioned in the instructions (including the sum of £250, paid to the Respondents James and Emily Reilly, until the year 1820) and still continue to be paid to all the parties now living, mentioned in the instructions, excepting the £250 per annum to the Respondents James and Emily.

The Appellant on the other hand, according to the agreement, took the stock, plate, household furniture, books, pictures, wine and money at Grey Abbey; was permitted to retain property which his mother, brothers, and sister, were entitled to under the marriage settlement and will of their father; and to take for his own benefit, the personal property of Hugh Bernard Montgomery, who died unmarried, intestate, and without issue, on the 1st of May, 1817. The Appellant was also permitted to retain for himself his brother Hugh's share of the younger children's fortune, charged on his estate.

During the absence of the Appellant on the Continent, his agent, Arthur Hill Montgomery, furnished him with accounts; and, in the year 1820, when the Appellant returned to Ireland, he investigated the state of his affairs, and settled all his accounts with his agent, Arthur Hill Montgomery; in all which accounts, as furnished from time to time, the annual sums paid to his mother, brothers and [381] sister, under the arrangement, were credited to the agent without objection. But, on the 10th August, in the same year, the Appellant wrote to the Respondent a letter, of which the following is an extract: "From a statement of the payments which have been made on my account at different times to your wife, since my father's death, they appear to me to exceed the total amount of her claim upon my estate:

the sum, which appears to be paid up to 1820, is £1071 10s. while her share of £5000, settled as younger children's portions, together with interest, as directed by my father's marriage settlement, at five per cent., amounts to £883, less a few shillings. As, therefore, it is my anxious endeavour to exonerate my estate as soon as possible from all charges, I have now to request that, as soon as convenient, there may be transmitted to me your joint receipt, in full of all claims upon my estate, together with an engagement that, should counsel, at any future period, advise any further security or form of discharge as necessary, you will satisfy it without further expense to me. Until the above-mentioned receipt, with its accompanying undertaking, be singularly signed and transmitted to me, I must withdraw any allowance which I may be inclined to give my sister, and shall give directions accordingly : " and accordingly he gave directions to his agent not to make any further payment to the Respondent.

The Respondent having written to the Appellant to remonstrate, and state that he was advised not to give such a discharge as the Appellant required ; and having called upon the Appellant to perform his promise, received another letter from the [382] Appellant, dated Florence, October 2, 1821, in which he says : " It is merely necessary to premise, that a greater insult cannot be attempted than the accusation of a desire to evade a promise. I have invariably purposed to charge my estate with £4000 for each individual of my father's younger family ; but this sum not to be in addition to any other claim by settlement or otherwise, which they might have against that estate, but it is to be released from all such charges. That £4000 is a sum more than fourfold their legal right, I believe not one of them will pretend to deny ; and that it is twice what my father intended for them, I believe they are all equally aware ; and it is highly probable that you, long ere this, are conscious of the fact. Thus I cannot but consider that the interference of a court of Equity, so far from being to my injury, would be my ultimate resource in case of subtle hostility : though, indeed, I consider the remedy almost as bad as the disease, not being silly enough to suppose the expense of law to be all upon one side : finally, I do not see how, either in law or equity, I can be prevented from arranging the detail of my own free gift."

In July, 1822, the Respondents James and Emily Reilly filed, in the Court of Chancery in Ireland, the original bill in this cause, against the Appellant William Montgomery, and the Respondents Georgina Charlotte Emilia Hannah Montgomery, the Rev. Edward Montgomery, Arthur Hill Montgomery, John Charles Montgomery, Francis Octavius Montgomery, George Augustus Frederick Sandys Montgomery, William Edmond Reilly, and the Right Honourable Robert Ward, (the last named Respondent having [383] been made a defendant pursuant to an order dated 18th November, 1822) : stating in substance the facts before mentioned, and particularly the arrangement by which the Appellant was to have given each of the younger children £5000, but admitting that sum to have been afterwards reduced to £1000, and stating that, as the sum upon the faith of which the marriage was contracted,

The original bill prayed, that the Appellant might be compelled, by the decree of the Court, specifically to perform his agreement with the Respondents James and Emily ; and that it might be referred to one of the Masters of the Court to approve of a proper deed to be executed by the Appellant, to charge his estate with the sum of £5000, or that the Appellant might be compelled to pay the same, with all interest due thereon, the Respondents James and Emily being willing, and thereby offering, specifically to perform the said agreement on his or their part ; and that on the Appellant's paying the sum of £5000, with all interest due on the same, or on his executing a deed charging his estates with the same, they were ready to execute a proper release and discharge to exonerate his estates of and from all and all manner of claims and demands, under or by virtue of the marriage settlement, or under the will, or in anywise whatsoever, except by the charge ; or that, in case the Court should be of opinion that the Respondents James and Emily were not entitled to such relief, then that it might be referred to one of the Masters of the Court to approve of a proper deed, to be executed by the Appellant, to charge his estates with the sum of £1000, and that the Appellant might be compelled to pay the same, with all interest [384] due thereon : the Respondents James and Emily being willing, and thereby offering, specifically to perform the last-mentioned agreement on his and their part : and

that, on the Appellant's paying the sum of £4000, with all interest due on the same, they were ready and willing to execute a proper release and discharge to exonerate his estate from all and all manner of claims and demands, under or by virtue of the will, or in any way whatsoever, except such charge: or in case the Court should be of opinion that the Respondents James and Emily were not entitled to such relief as last aforesaid, then that the trusts of the marriage settlement, so far as related to raising the portions of the younger children, might be carried into execution, and performed, (the Respondent James being ready and willing, and thereby offering, as one of the executors of the surviving trustee, to do any act that might be deemed necessary on his part for that purpose), and that the estates in the marriage settlement, or a competent part thereof, might be sold: and that all proper parties might join in such sale: and in order thereto, that the marriage settlement, and the title-deeds and writings relating to the estates might be produced, and might be brought in and lodged in the Bank of Ireland, together with all letters, as well from the Respondent James, as from William George Wakely, addressed to and received by the Appellant on the subject: and that the will of Hugh Montgomery might be established, and the trusts thereof performed: and that an account might be taken, by and under the decree of the Court, of the legacy due to the Respondents James and Emily, and of their distributive share of the intestate Hugh Bernard Mont-[385]-gomery's personal estate, and of all debts which were owing by the testator, and the intestate Hugh Bernard Montgomery, at the time of their respective death or deaths, and which still remained unpaid: and that an account might be taken also of the testator's and of the intestate's personal estate and effects, received by or for the use of the Appellant, and that the personal estate and effects of the testator and of the intestate Hugh Bernard Montgomery might be applied in payment of their debts, in a due course of administration: and that as much of the testator's personal estate as should remain after payment of the testator's debts, might be applied in or towards the payment of the said legacy so due to the Respondents James and Emily as aforesaid: and in case it should appear that the whole or any part of the said testator's personal estate had been or should be exhausted or applied in or towards the payment of his specialty debts, and that the residue thereof was not sufficient to answer the simple contract debts and legacies of the testator, then that it might be declared, that the Respondents James and Emily, ought to stand in the place of the testator's creditors, by specialty, who had had, or should have a satisfaction for their debts, out of the personal estate, and might have satisfaction out of the real estate, for so much of their legacy as his personal estate, after payment of his simple contract creditors, should be deficient to answer, by reason of the same having been exhausted or applied in or towards the payment of his specialty debts: and that the same might be decreed accordingly: and that the real estates, so descended unto the Appellant, as heir at law of the testator, might be sold or mortgaged for that purpose: and that all proper parties might be decreed to join in such sale or mortgage: [386] and that the money to arise from such sale or mortgage, might be paid to the Respondents James and Emily accordingly: and that the bequest of the sum of £800, amongst the younger children of the testator, might be declared a good and sufficient execution of the power vested in the testator by the marriage settlement, to charge his estates with a sum not exceeding £800: and that the same might be raised and applied accordingly: and that a proper person might be appointed by and under the decree of the Court, to receive the rents, issues and profits of the estates of the Appellant, and to apply the same in keeping down the interest of the several incumbrances, affecting the estates or otherwise, as the Court should direct: and that the Appellant might, before he answered the bill, view in the hands of the Plaintiff's six Clerk or Commissioner, according to their mode of answering, the letters, bearing date the 10th of August, 1820, addressed to James Reilly, esquire, and signed "Wm. Montgomery:" and the letter, bearing date the 2d October, 1821, addressed to James Reilly, esquire, 62 Blessington-street, and signed "Wm. Montgomery:" and also two other letters, bearing date respectively, the 10th May, 1821, and the 27th March, 1822, and addressed to James Reilly, esquire, Blessington-street aforesaid, to be by him produced, and that he indorse his name thereon, and set forth in his answer to the bill, of whose handwriting they, each of them and every part of them are, to the best of his knowledge and belief.

The Appellant, by his answer to this bill, which was put in on the 14th day of April, 1823, and by his further answer, which was put in on or about the 10th of June, 1823, in consequence of exceptions [387] taken by the Respondents James and Emily to the former answer of the Appellant admitted frequent conversations with Mr. Wakely, on the subject of his family affairs, but he denied the agreement stated, and relied on in the bill; but although he denied that any agreement ever existed, he admitted, that, shortly after his father's death, he expressed, in a casual conversation with Mr. Wakely, an intention of increasing his sister's and younger brother's fortunes, but that he was then ignorant of the state of his affairs, and of the extent of the incumbrances affecting his estates. He admitted the directions given to his brother Arthur, but represented them as payments by way of voluntary annuity, to his mother, brothers, and sister; and denied that it was to be paid as interest, or in consequence of any agreement.

He said, that he wrote several letters to Mr. Wakely, in order to learn, through him, the exact state of his affairs, and the particulars of Lord Bangor's property; that he received that information from Mr. Wakely by letter, dated the 17th of October, 1816, stating his rent roll at £5000, the interest of the debts on his estates at £1500, and other particulars in answer to his inquiries; that Mr. Wakely, in this letter, proposed to Appellant, to increase his mother's fortune to £800 a year, and to give his sister and each of his brothers £4000, payable at Lord Bangor's death; and in the mean time to pay them each £250 a year.

The Appellant admitted that, with reference to Mr. Wakely's proposal, he wrote to Mr. Wakely a letter dated the 6th January, 1817, in which he declared that the sum he intended for his sister should be secured to herself, first for life, then share and share alike for the children; and the principal not [388] to be payable till Lord Bangor's death; but he required to be secured his share of Lord Bangor's property by his mother, with other conditions appearing by the letter: he denied that Wakely had any authority to make any arrangement on his part, as to the marriage settlement, but admitted a correspondence with the Respondent James, on the subject of his marriage. He insisted that Wakely had no authority from him to interfere in the marriage settlement.

The Appellant, by his answer, further insisted that his mother and the several other members of his family were bound on their parts to have performed and fulfilled the terms contained in Wakely's letter of October, 1816, and the Appellant's letter of the 6th of January, 1817, if they required or expected from the Appellant such settlement as was proposed by those letters; yet they had never done so, nor offered to do so; and, on the contrary, both his mother and the Respondents James and Emily, had refused to do so. In his further answer to exceptions taken by the Respondents, the Appellant insisted that, as Wakely could not by any letter of his, bind the Appellant's family to any engagement on their parts, nor did he by any of his letters pretend to do so; and as none of Appellant's family, by letter or otherwise, ever entered into any written or even verbal engagement or agreement with the Appellant respecting the subject of his correspondence with Wakely, or respecting any family arrangement whatsoever, the Appellant was not bound by any letters written by him to Wakely, which were voluntary, private, and confidential, and not intended for exposure, and did not authorise Wakely, by any declaration of his, to bind the Appellant.

[389] The Appellant, by his answer, further said that, although he considered himself discharged from any offer he had made, yet that in June, 1822, he had sent to and informed the Respondent, James, that he was ready, then, to fulfil the terms of his letter of the 6th of January, 1817; and, notwithstanding the bill filed by Respondent, did, to purchase his peace, about the 29th of October, 1822, cause a deed to be prepared, which he signed and tendered to Respondent for execution, agreeing to pay to trustees £1000 to the uses of Respondent's marriage settlement; but that Respondent refused to accept of or execute the same; whereupon the deed was cancelled.

The Appellant subjoined to his answer schedules, setting forth the specialty and simple contract debts of his father, and his personal estate.

The several other defendants put in answers agreeing to fulfil on their parts the terms of the arrangement as to Lord Bangor's property, and in all other respects.

The Respondents James and Emily afterwards filed an Amended Bill on the 8th of November, 1823, noticing the several objections raised by the Appellant, especially that in respect to the arrangement being conditional, and founded on the stipulation that the Appellant should be secured as to the share of Lord Bangor's property; and, by their amended Bill, the Respondents stated, that all the members of the family were ready to make good their part of the arrangement; and referred to their answers offering to do so.*

[390] By this Bill also some further letters of the Appellant were put in issue, so as to complete the chain of correspondence, from which the agreement was to be collected. With respect to the allegation that the communication to Mr. Wakely was merely intended as a private and confidential one, the amended Bill referred to some of the Appellant's letters, in which the Appellant states his reason for wishing to be explicit, "to prevent mistakes," and stipulates for the £4000 being settled.

The Appellant filed his answer to this amended bill on the 12th of February, 1824, in which he stated that any letters written by him, either to his brother or Wakely, were written in contemplation of a family arrangement which never took place, nor was definitively settled; and he insisted that such a correspondence could not form any ground of relief for the Plaintiffs in their present suit; and that he was not bound to comply with the terms of any letter written by him to Wakely, in answer to his letter of the 17th October, 1816, or otherwise. He insisted further, that the Plaintiffs did not, by any original or amended bill, found any part of their equity upon that letter; and that the letter amounted only to a proposal for a family arrangement which could not be carried into effect, except by all the members of the family ratifying it, which they never did; but on the contrary some of them, and particularly his mother, refused to do so.

The Respondents replied to the answers of the Appellant to the original and amended Bill; and the cause being at issue, and evidence having been produced on both sides:—the cause came on to be heard, on Wednesday the 30th of June, 1824; and to be further heard on the 2d, 5th, and 6th of July, 1824: [391] on which last day, it having been urged in argument, by the counsel of the Appellant, that the infant children of the Respondents James and Emily ought to be parties to the suit, the Lord Chancellor ordered, that, on the Respondents, James and Emily, undertaking to procure the agreement in the pleadings mentioned, to be duly stamped, and to pay the necessary duties and expenses consequent thereon, the cause should stand over, with liberty to the Respondents James and Emily to amend, by making the minor children of the Respondents James and Emily, parties in the cause, as the Respondents James and Emily should be advised; and on the 8th of the same month, the Respondents James and Emily, having procured the agreement to be duly stamped, and having paid the duties thereon, amended their Bill by making the infant Respondents John Reilly, Emily Maria Catherine Reilly, Jane Hester Reilly, James Miles Reilly the younger, and Theodosia Harriet Reilly, the minor children of the Respondents James and Emily, by the Respondent James Miles Reilly, their father and next friend, parties, Plaintiffs.

By a further order, made in the cause, bearing date on the 8th day of July 1824, it was referred to Thomas Ball, one of the Masters of the Court, to inquire and report whether it would be for the benefit of the minors that the cause should be heard as to the minors, upon the pleadings and proofs already made, as if they had been parties in the cause from the beginning; and that, if the Master should report that it would be for their benefit, then the cause should come on to be heard during the then present sittings. By a report, bearing date the 9th of July 1824, the Master reported that it [392] would be for the benefit of the minors that the cause should be heard, as to the minors, upon the pleadings and proofs already made, as if they had been parties in the cause from the beginning; and the cause came on accordingly to be heard on the 12th of July, and stood over until the 19th of the same month, on which last mentioned day the following Decree was pronounced, viz:—

* The pleadings are not set forth in the Appendix to either case, and it does not appear from the statements in the body of the printed cases, that the Appellant's letter of the 6th of January, 1817, was distinctly stated, as the ground of the plaintiff's equity.

"Whereupon, the Plaintiffs, James Miles Reilly and Emily Georgina Susanna Reilly, otherwise Montgomery, his wife, undertaking to release the estates real and personal of the Reverend Hugh Montgomery, clerk, deceased, in the pleadings in this cause named, from all title or claim under the will of the Reverend Hugh Montgomery, deceased, or by virtue of the marriage settlement of the Reverend Hugh Montgomery, or otherwise; and as to the sum of £1500 in the pleadings mentioned; and the Plaintiffs also agreeing to secure the same to the Defendant William Montgomery, in the event of Georgina Charlotte Emilia Hannah Montgomery, the mother of the Defendant William Montgomery, dying in the life time of the Right Honourable, Nicholas, Lord Viscount Bangor, a lunatic, according to the terms of the agreement in the pleadings mentioned; and the Defendants, the Honourable Georgina Charlotte Emilia Hannah Montgomery, widow, Edward Montgomery, clerk, Arthur Hill Montgomery and John Charles Montgomery, esquires, being willing and offering to perform the agreement mentioned on their respective parts; it is decreed, that the Plaintiffs are entitled to a specific performance of the agreement as to the principal sum of £4000 in the pleadings mentioned to be raised after the decease of [393] Nicholas Lord Viscount Bangor, and the interest thereof payable during the life of Nicholas, Lord Viscount Bangor; and it is further ordered, etc. that it be, etc. referred to Thomas Ball, one of the Masters of this honourable court, to settle and approve of a proper deed or deeds to be executed by and between the Plaintiffs and Defendants for carrying the agreement into execution, according to the true intent and meaning thereof: and it is further ordered, that the Master do audit and state an account of the sum due to the Plaintiff Emily Reilly on foot of the interest on the sum of £4000: and it is further, etc. referred to the Master to inquire and report whether it would be for the benefit of the minor defendants Francis Octavius Montgomery, and George Augustus Frederick Sandys Montgomery, the younger brothers of William Montgomery, that the agreement as to them should be carried into execution; and if the Master shall be of opinion that it would be for the benefit of the minor defendants, then, etc. the minors are hereby also decreed entitled to the benefit of the agreement, and bound by the terms thereof: and thereupon it is referred to the Master to settle a proper deed or deeds to carry the agreement into execution, so far as relates to the minors: such deed to be executed by them on their attaining their respective ages of twenty-one years: and it is further ordered, adjudged, and decreed, that the Master do make a separate report upon the last-mentioned reference respecting the minor Defendants before the passing of this decree."

Against this decree the appeal was presented.

[394] For the Appellant: The Attorney General and Mr. Shadwell.

The order to amend and the decree can only be founded on the letter of the 6th of January, 1817, for it is only under that letter that the minor plaintiffs could have any interest in the subject matter of the suit. But that letter forms no part of the case made by the bill—on the contrary, the case made by the Bill is in contradiction to it; and on the Bill as now amended, the minor Plaintiffs appear to have no interest in the subject matter of the suit.

The decree gives the plaintiffs a relief not prayed by the Bill, on an agreement not stated in the Bill, but on a letter stated by the answer of the Defendant, and materially differing from the agreement stated in the Bill, and by which letter the defendant insisted he was not bound; and it is against the principles and practice of a Court of Equity to decree against a defendant upon an agreement stated by him, differing from an agreement stated by a plaintiff, unless the defendant submits to perform the same.

Even if the Plaintiffs had by their Bill founded their case on the letter of the 6th of January, 1817, and that it could amount to an agreement under any circumstances, they should have shewn by their Bill that it was assented to by the Defendant's family, and have offered to perform the terms of it on their parts.

The decree assumes, contrary to the fact, that the Defendants Georgina, Edward, Arthur, and John Charles Montgomery, had, *by their answers*, offered to perform the agreement decreed. Whereas, they did not, by their answers, mention or allude to it, or offer to perform any agreement but the agreement [395] stated in the Bill, and which agreement is negatived, as well by the evidence as by the decree.

Wakely, who wrote the letter of the 17th of October, 1816, and to whom the letter

of the 6th of January, 1817, was addressed, had no authority to bind or contract for the Appellant's family, nor did he profess to do so.

The letter of the 6th of January, 1817, was on the face of it only a proposal, and conditional in its nature, amounting only to a treaty which never was completed.

That letter was voluntary, and without consideration, and as such ought not to be enforced in a Court of Equity.

The Appellant never promised, nor authorised any person to promise or represent, that he would give his sister, the Respondent Emily, £4000, or any other sum, on her marriage with the Respondent James Reilly.

The Respondents, James Reilly, and Emily, his wife, have not shown that their marriage was contracted on the faith of any promise or representation made by the Appellant in writing, or by any person lawfully authorised by him to do so.

For the Respondents: Mr. Horne and Mr. Sugden.

The agreement stated in the correspondence between the Appellant and Mr. Wakely, is sufficiently precise and definite in its terms to be carried into execution by a Court of Equity.

This is not merely a voluntary agreement, but for valuable consideration. The Appellant was to receive in exchange, first, the sum of £5800, charged by the will and settlement of his father; secondly, furniture, plate, stock, crop, books, pictures, all the moveables at the mansion-house of [396] Grey Abbey, together with arrears of rent, money in the house and bank, and debts due, amounting altogether, by the Appellant's admission, to a sum of £8,167 7s. 10d. actually received: and although the Appellant's father owed debts, chiefly by judgment and specialty, to the amount of £25,000 or thereabouts, the creditors ought to resort to the fee simple estate, which descended to the Appellant, and the assets would be marshalled in favour of Mrs. Montgomery, who was a specific legatee of the plate and furniture; and, thirdly, £1500 more than an equal share of the fund, expectant on the death of Lord Bangor, is secured to the Appellant: the present amount of this (if Lord Bangor were now dead) would be to the Appellant upward of £8642, with a reasonable prospect of its being further increased to £10,071 by the death of either of Lord Bangor's unmarried sisters, in the lifetime of the said Lord Bangor; and to the sum of £12,214 in the event of the death of both of the said sisters, during the joint lives of Lord Bangor and Mrs. Montgomery, together with the chance of its being further increased by the death of any of Mrs. Montgomery's children, in her life time; and, as a further advantage, in case of the Appellant's sister dying without issue, the sum charged was to merge in his estate. This appears to be not only a valuable, but an adequate consideration for the sum to be charged by the Appellant on his estates. At the time of the agreement, there were four of the younger children adults; the sum to be charged certainly on the Appellant's estate, therefore, must be at least £16,000, £4000 of which might revert to him; and whether it should ever exceed that sum, must depend upon whether the minor brothers of the Appellant should live to attain the age of twenty-one years.

[397] There is, therefore, in this case, such consideration as would entitle the Respondent, Emily, to have the agreement carried into specific execution, as against the Appellant, even if she were still unmarried, more particularly when the relative situation of the parties is considered, the Appellant having been at the time *in loco parentis* to his younger brothers and sister; and, as it is said, the Court does not weigh in very nice scales the consideration for family agreements, if they be fair and reasonable.

Even supposing this agreement to have been originally purely voluntary, the marriage, which has been contracted on the faith of it, forms a consideration of the highest kind in the contemplation of a Court of Equity (*Brown v. Carter*, 5 Ves. 862, see *Dundas v. Dutens*, 1 Ves. J. 199). The parties would not have placed themselves in this situation, if they had not calculated on the wife's portion of £4000 as part of the provision for the family; and it is in evidence that Mrs. Montgomery would not have given her consent to this marriage, if she had not considered that the Respondent Emily was to have a fortune of £4000 charged by her brother on his estate, and which, by his letter, he insisted upon being made the subject of strict settlement, so as to secure it as a provision for her and her children.

The agreement has been in part performed: the Appellant has been permitted

to retain the household furniture, plate, linen, books, etc. in the mansion-house of Grey Abbey. Since his father's death, he has never been called upon for any account of his mother's, brother's, or sister's claims under the will or settlement of his father: he has never been called [398] on for any account of the personal fortune of his brother, Captain Hugh Bernard Montgomery, who died intestate in the year 1817: and, on the other hand, he has paid his mother and brothers, the annual sums stipulated by the agreement, and continues to pay them to the present day: and he, in like manner paid the Respondent Emily, under this agreement, until the year 1820. The Appellant does indeed allege (for the first time in his letter to the Respondent James, of the 10th August 1820), that the payment of £250 per annum to the Respondent, was in discharge of the claim which he alleges they had under his father's will and settlement: but it would be a fraud in the Appellant to permit the Respondents to act under the delusive impression that they were receiving an annual income, without diminishing the principal sum, or to anticipate the capital of the Respondent Emily's fortune, without apprising them that they were doing so. The Appellant cannot be allowed to put that construction upon his own acts, which would impute fraud to himself: and the payment of £250 per annum to the Respondents James and Emily, must be considered as in part performance and execution of the agreement.

Here is no defect of mutuality, for the receipt of the £250 a year by the Respondents bound them to the performance of the agreement.

At the conclusion of the argument, the Lord Chancellor said:

There might be two questions, 1. Is it maintainable as an agreement in consideration of marriage? 2. Is it maintainable as a family arrangement? But a preliminary question is, whether there is any final decree to appeal from? The decree requires that [399] there should be a separate report from the Master as to the interest of the minors before the decree should pass. If there has not been any such report, (and none is stated or suggested) how can the decree be final? Suppose the Master should report that the settlement is not for the benefit of the infants, is the decree to be operative? It must be considered whether the cause should not stand over till the report has been made. The Chancellor of Ireland may then determine whether the decree should pass. There cannot be an appeal from a decree which is conditional, and has not finally passed. The first thing to be done is to make out that there is a decree.

The Earl of Eldon: This is a case in which it is impossible for me to state to your Lordships that there is not very considerable difficulty; a difficulty which it would not be very easy to overcome, if your Lordships were to look at it as a case in which the question arose, and on which it must be determined alone, on what is called the marriage agreement, considering what the law of the land requires as evidence to give effect to such an agreement, and looking to the different cases in which different opinions have been given: some in which it has been said that there must be writing to make out such an agreement antecedently to the marriage, and other cases in which it has been thought that a parol promise followed by marriage and written evidence after the marriage, was sufficient (see *Randall v. Morgan*, 12 Ves. 67, and the cases there cited. 1 Fonbl. Tr. Eq. 312). But I think your Lordships may consider the case, with a view to all the circumstances, not merely what took place previous to the marriage, but whether, with reference to all which took [400] place as to the effect of the bargain, and all which has taken place between these parties, this agreement is an agreement which ought to be carried into execution; and upon the best judgment I can form upon this, which I at the same time acknowledge to be a very difficult case, it appears to me that you may be safely advised to affirm the judgment.

That judgment ought, in my opinion, to be affirmed with some costs; but, under all the circumstances, it does not appear to me that it should be with the infliction of all the costs which have been incurred at your Lordships' bar, and my motion will therefore be, that the judgment should be affirmed with £100 costs.

Judgment affirmed, with £100 costs.

[401]

ENGLAND.

(COURT OF EXCHEQUER.)

JOHN MORGAN and BRIDGET his Wife, and ELIZABETH MORRIS, Widow,—
Appellants: THOMAS EDWARDS and THOMAS BEYNON, Clerk,—*Respondents*.

[*Mews' Dig.* v. 1545: S. C. 1 Dow and Cl. 104: 13 Price, 782: McCle, 541. Discussed in *Worthington v. Wiginton*, 1855, 20 Beav. 67, at p. 76: and see *Dillon v. Parker*, 1833, 7 Bli. N.S. 325, at p. 349.]

A being possessed of a term in lands for ninety-nine years, if she, and B, and C, and D, her daughters by a deceased husband, should so long live, intermarries with E, whereupon a settlement is made of the property of A, including the term which is assigned in trust for A and E during their joint lives, remainder to the survivor, his or her executors, etc. E dies in the lifetime of A, by his will treating as his own the term of years in settlement, and bequeathing it to A for life, remainder to B for life, remainder to C for life, remainder to D for the residue of the term. He also by his will bequeaths the residue of his personal estate to A, and leaves her sole executrix. A proves the will and administers to the estate, and dies, having made a will bequeathing all her personal estate to B, whom she appointed sole executrix. B, having married X, proved the will. X, in the right of B, entered and held possession of the lands until her death, when he gave up the possession to Y, who took possession as in the right of C, whom he had married. But afterwards B filed a bill against Y and C, and also against D, stating that he was ignorant of the settlement when he gave up possession of the premises, and had lately discovered its existence, and the right of B, his deceased wife and testatrix under it; and praying restoration of the possession, and an account of rents received, and payment of them, or an occupation rent during the wrongful possession.

By the answer to this bill, the defendants relied upon the will of E, and the acceptance by A of benefits under it amounting to an election. They also filed a cross bill against X, [402] stating the will of E, and that A, being appointed executrix under it, had proved the will, and acted under it, paying the debts, and retaining a large residue, and praying that it might be declared that A was bound to elect, and had elected, to waive her right to the term, and to take the benefit given to her by the will of X, and that they were entitled to the residue of the term, according to the will of X: but the cross bill did not make the personal representative of A in that character a party, nor pray any account of the personal estate of E possessed by her. Under these circumstances it was held in the Court below, and affirmed on appeal, that no election by A had been proved in the cause, and that X, in right of his wife, was entitled to the possession of the term under the will of A, supposing the term to have passed by the terms of her will.

By indenture bearing date the 16th of February, 1756, and made between Bridget Bevan of the one part, and Gwenllian Jones of the other part, Bridget Bevan demised to Gwenllian Jones the messuage, barn, stable, garden, and fields, therein described, to hold to Gwenllian Jones, her executors and administrators, for ninety-nine years, if Gwenllian Jones, and Margaret, Bridget, and Elizabeth, her daughters, or either of them, should so long live, at the yearly rent of £22.

By indenture or deed of marriage settlement, bearing date the 31st of January, 1758, and made between Thomas Thomas of the first part; David Edwards and John Harries of the second part; Gwenllian Jones of the third part; and Margaret Jones, Bridget Jones, and Elizabeth Jones, infant children of Gwenllian Jones by William Jones, her former husband, deceased, of the fourth part; reciting a marriage then intended to be had between Thomas Thomas and Gwenllian Jones: it was wit-

nessed that in consideration of the marriage, and for making provision for Margaret Jones, Bridget Jones, and Elizabeth Jones, the infant children of [403] Gwenllian Jones, all and every the leasehold messuages, lands, tenements, and hereditaments whatsoever, of Gwenllian Jones, and which she was entitled to or held by lease or leases, from any person or persons whatsoever and wheresoever, were assigned to hold to David Edwards and John Harries, their executors, administrators, and assigns, to hold from thenceforth for the residue and remainder of the term or terms of years in and by the lease or leases granted and then to come and unexpired, in trust, for Gwenllian Jones, her executors, administrators, and assigns, until the marriage, and after the solemnization thereof, upon trust, to permit Thomas Thomas and Gwenllian Jones, during their joint lives, to receive the rents and profits of the leasehold estates, and likewise to have the use and enjoyment of all the rest of the personal estate and effects of Gwenllian Jones, and the produce and increase thereof; and from and after the decease of either of them, to assign and transfer the leasehold estate and effects to the survivor, and the executors, administrators, and assigns of such survivor.

Shortly after the execution of the indenture or deed of marriage settlement, a marriage took effect between Thomas Thomas and Gwenllian Jones.

John Harries, one of the trustees, died in the year 1782, leaving David Edwards surviving; whereby David Edwards became the sole surviving trustee.

David Edwards, the surviving trustee, died in the year 1794, and the Respondent, Thomas Beynon, and Peter Dubuisson, deceased, were the executors of, and proved his will; Peter Dubuisson died in December, 1812, leaving the Respondent, Thomas Beynon, surviving executor of the will of John Harries.

Thomas Thomas died in the year 1776, leaving Gwenllian, his widow, surviving. By his will, dated [404] in 1769, he made the following provisions; "I give all the estate which I hold by lease from Mrs. Bevan to Gwen, my dear and beloved wife, for and during the term of her natural life; and from and after her decease to Margaret Jones, (the wife of the Respondent Thomas Edwards,) for the term of her natural life; and immediately from and after her decease to Bridget Jones, (the Appellant, Bridget Morgan,) for and during the term of her natural life; and immediately from and after her decease to Elizabeth Jones, (the Appellant, Elizabeth Morris,) for and during the remainder of the term granted in the said leasehold estates." And he gave and bequeathed to Gwenllian his wife all the residue of his personal estate, goods, chattels, furniture, cattle, implements of household and husbandry, and all his stock and effects, for ever, if she continued his widow, and appointed her sole executrix of his will.

Margaret Jones, in 1785, intermarried with the Respondent, Thomas Edwards; Bridget Jones intermarried with John Morgan in 1778. Gwenllian Thomas died in 1790, having made a will, dated in 1785, by which she bequeathed to Margaret Jones "*all her money in the funds, and all the rest of her personal estate, of what nature or kind soever, for her own use,*" and appointed her sole executrix. Upon the decease of Gwenllian Thomas, Margaret Edwards, with the concurrence of the Respondent, Thomas Edwards, proved the will in the proper Ecclesiastical Court; and thereupon the Respondent, Thomas Edwards, and his wife, entered into the possession of the leasehold estate demised to Gwenllian Thomas by Bridget Bevan.

In 1818 the Respondent, Thomas Edwards, filed a bill in the Exchequer, against the Appellants, and [405] Thomas Beynon, which bill was afterwards amended. The bill stated the facts before mentioned, except the will of Thomas Thomas, and then proceeded to state that Thomas Edwards, at the decease of his wife, was ignorant of the existence of the indenture of settlement, and that the Appellants, John Morgan and Bridget his wife, represented to Thomas Edwards, that they were entitled to the leasehold estate, by virtue of a will made by Thomas Thomas; that he, being deceived by such representations, and ignorant of his right, yielded up the possession of the leasehold premises to John Morgan and Bridget his wife; that they had ever since continued in possession, and in receipt of the rents and profits of the leasehold premises; and that he, Thomas Edwards, had then lately discovered the existence of the indenture of marriage settlement.

The prayer of the bill was, that John Morgan and Bridget his wife might deliver

up to Thomas Edwards the possession of the leasehold premises, and the deeds relating thereto, particularly the indenture of marriage settlement, bearing date the 31st of January, 1758, and the indenture of lease bearing date the 16th of February, 1756; and that John Morgan and Bridget his wife might also account for, and pay to Thomas Edwards, the arrears of rent for the premises, or the value of the premises to be let for the time during which they had been in the possession of the same: and that such account might be taken by and under the decree, order, and direction of the Court: and that in the mean time a receiver of the rents and profits of the premises might be appointed, by and under the decree, order, and direction of the Court: and that the Respondent, Thomas Beynon, might, under the decree, order, and direction of the Court, assign the leasehold premises to the Respondent, Thomas Edwards.

[406] John Morgan and Bridget his wife, in their answer to the bill, admitting most of the facts, set forth the will of Thomas Thomas as before stated: and farther stated, that Thomas Thomas died in 1776, without altering or revoking his will: and that Gwenllian Thomas, upon the death of Thomas Thomas, proved his will in the proper Ecclesiastical Court, and took upon herself the execution thereof, and by virtue of the probate copy of the will, possessed herself of the testator's personal estate and effects to a considerable amount, and thereout paid and satisfied his funeral expences and debts: after which there remained a very large surplus, which was of much greater value than the leasehold estate: and that Gwenllian Thomas, after the death of her husband, entered into possession of the leasehold estate, and continued in such possession to the time of her death.

The answer further stated that Gwenllian Thomas died in the year 1790, and that thereupon Thomas Edwards and his wife entered into possession of the leasehold estate demised to Gwenllian Thomas: that Thomas Edwards, long before the death of his wife, well knew of the existence of the indenture of settlement: and that upon the death of the Respondent, Thomas Edwards' wife, in the year 1807, the Appellant, John Morgan, in right of the Appellant, Bridget his wife, entered into the possession of the leasehold premises, with the permission of the Respondent, Thomas Edwards, and had ever since been and then was in the possession and receipt of the rents and profits thereof, and that the Respondent, upon the death of his wife, voluntarily delivered up the indenture of lease to the Appellant, John Morgan, and soon afterwards delivered notices to some of the tenants of the leasehold premises, signed by him, requiring [407] such tenants to quit their holdings at Michaelmas then next ensuing, and admitted the Appellants were entitled to the leasehold estates by virtue of the will of Thomas Thomas: that although by the terms of the marriage settlement the leasehold premises were assigned to the trustees therein named, upon trust, after the decease of Thomas Thomas and Gwenllian his wife, to assign and deliver up the same to the survivor of them, and the executors and administrators of such survivor: and although Gwenllian Thomas survived her husband, and thereby, under the settlement, became entitled to the leasehold premises: yet that Thomas Thomas, by his will, took upon himself to dispose of the leasehold premises as his own, and that he also gave to Gwenllian Thomas the residue of his personal estate and effects, to the amount of £2000 and upwards, and that the same was of much greater value than the lease: and that Gwenllian Thomas accepted such bequest, and took under the will benefits of greater value than the leasehold premises, and frequently declared that the leasehold premises, after her death, would go to her daughters in succession, one after the other, and therefore it was submitted that Gwenllian Thomas must be considered as having made her election to take under the will, and to have thereby confirmed the bequest of the leasehold premises: and that the Appellants ought not to be compelled to deliver up the possession of the leasehold premises, nor the deeds relating thereto, nor the lease of the 16th day of February, 1756, nor to account for and pay to the Respondent, Thomas Edwards, the arrears of rent of the premises, nor the value of the premises.

The Appellant, Elizabeth Morris, also put in her answer to the bill, which was to the same effect as the answer of the other Appellants: and the Re-[408]-spondent, Thomas Beynon, also put in his answer to the bill.

In 1822, the Appellants filed against the Respondents a cross bill, stating the

substance of the answer to the original bill, and praying that it might be declared that Gwenllian Thomas was bound, on the death of Thomas Thomas, to make election, and that she did elect to take the benefit of Thomas Thomas's will, as to his residuary personal estate, and that she thereby relinquished the benefit of the indenture of settlement, as to the leasehold estate and premises; and that it might be declared that John Morgan and Bridget his wife, in her right, were entitled to the leasehold premises, during her life; and that Elizabeth Morris would become entitled to the leasehold premises, immediately from and after the death of Bridget Morgan, during the existence of the lease; and that the Respondent, Thomas Beynon, might be decreed to execute a proper assignment of the leasehold premises to the Appellants, according to the will of Thomas Thomas.

Thomas Edwards by his answer to the cross bill stated that he had heard and believed it to be true, though he did not know the same of his own knowledge, that Gwenllian Thomas possessed herself of all or some of the estate and effects belonging to Thomas Thomas, at the time of his death, and to a considerable amount in the whole, and more than sufficient to pay, and that she did thereout pay and satisfy his debts, funeral and testamentary expenses and legacies, and that the clear residue of the personal estate, excluding therefrom the leasehold estate and premises, remained in the hands of Gwenllian Thomas, and that she was beneficially entitled thereto, under the will of Thomas Thomas, as his residuary legatee; and that Gwenllian Thomas ap-[409]plied the whole of the clear residue to her own use and benefit, and that she accepted of the bequest thereof made to her by the will of Thomas Thomas.

The answers in both suits having been replied to, witnesses were examined in the first-mentioned cause of *Edwards v. Morgan*, both on the part of the Appellants, John Morgan and Bridget his wife, and Respondent, Thomas Edwards.

The evidence on the part of the Appellants proved declarations by Gwenllian Thomas, that after her death the leasehold premises would go or belong to the Appellant, Bridget Morgan, and that upon the death of Bridget the same would go or belong to the Appellant, Elizabeth Morris.

The evidence on the part of the Respondent, Thomas Edwards, only proved notices to produce deeds.

Both the causes were heard on the 8th of November, 1824, when it was decreed that the Appellants, John Morgan and Bridget his wife, should forthwith deliver up to the Respondent, Thomas Edwards, the possession of the leasehold premises, in the pleadings mentioned, and that the indenture of lease should be forthwith delivered up by the Appellant, John Morgan, to the Respondent, Thomas Edwards, or such person as he should appoint to receive the same, together with any other title-deeds, papers, or writings, in the possession, custody, or power of the Appellant, John Morgan, relating to the title of the leasehold estate; and that the Respondent, Thomas Beynon, should forthwith deliver up to the Respondent, Thomas Edwards, or to such person as he should appoint to receive the same, the indenture of settlement, and should execute to the Respondent, Thomas Edwards, or to such person as [410] he should appoint, a proper deed of assignment of the lease, etc. And it was thereby referred to the Master to take an account of the rents and profits of the leasehold premises possessed and received by the Appellant John Morgan, since Hilary Term, 1818, the time of filing the original bill, down to the time when the Appellant should deliver the possession up to the Respondent, Thomas Edwards; and in case it should appear that the Appellant, John Morgan, had been in the actual possession and enjoyment of the leasehold premises, or any part thereof, then the Master was to settle a fair occupation rent for the same during the time of such occupation. And it was further ordered, that what the Master should find to be the amount of such rents and profits of the leasehold premises, should be paid by the Appellant, John Morgan, to Thomas Edwards. And it was thereby referred to the Master to tax Thomas Beynon his costs of the original suit, which costs, when taxed, were to be paid by Thomas Edwards to Thomas Beynon, or his clerk, in court; but the Court did not think fit to give costs to any other party to the original bill. And it was further decreed, that the cross bill filed by the Appellants against the Respondents should be and the same was thereby dismissed out of court with costs.

Against this decree the appeal was presented.

For the Appellants: The Attorney General and Mr. H. Martyn.

It is clear that the will of Thomas Thomas raised a case of election on the part of Gwenllian Thomas, as to the leasehold premises, and to the residuary personal [411] estate of Thomas Thomas; and it having been admitted by the answer of the Respondent, Thomas Edwards, that Thomas Thomas died possessed of personal property more than sufficient to pay his debts, and that his residuary personal estate and effects was possessed by Gwenllian Thomas, and applied by her to her use, it must at this distance of time be inferred and presumed, that Gwenllian Thomas elected to take under the will of Thomas Thomas, and to give effect to his will in regard to the bequest of the leasehold premises.

If Gwenllian Thomas did not intend to give effect to Thomas Thomas's will, so far as regards the bequest of the leasehold premises, it was incumbent upon her to have kept accounts of the personal estate of Thomas Thomas possessed by her, and of her payments out of such personal estate, and to have ascertained the residue of such personal estate, so that the Appellants, Bridget Morgan and Elizabeth Morris, might be compensated out of such residue for the loss they sustained by Gwenllian Thomas not giving effect to the bequest of the leasehold premises contained in their favour in Thomas Thomas's will. The length of time since the death of Thomas Thomas, rendered it now impossible to ascertain the amount of the residuary personal estate of Thomas Thomas.

Even assuming that it is not to be inferred or considered that Gwenllian Thomas did elect to take under Thomas Thomas's will, and to give effect to such will, so far as regards the bequest of the leasehold premises, yet the Respondent, Thomas Edwards, claiming the leasehold premises under Gwenllian Thomas, is bound to make compensation to the Appellants, Bridget Morgan and Elizabeth Morris, for the value of the interest they took in such leasehold estates under the [412] will of Thomas Thomas; and the decree does not give or provide for such compensation. *Butrick v. Broadhurst* (1 Ves. J. 171). *Andrew v. Trin. Hall, Cambridge* (9 Ves. J. 525). *Brown v. Monk* (10 Ves. J. 609). *Tibbitts v. Tibbitts* (19 Ves. J. 656).

For the Respondents: Mr. Shadwell and Mr. Selater.

The will of Thomas Thomas did not raise a case of election; and even if it did raise a case of election, in all cases of election, a party having two claims has the option of either, and cannot be held concluded by equivocal acts performed in ignorance of the value of the funds, or in ignorance of the necessity of electing. It cannot be held, that Gwen. Thomas did in her lifetime elect to renounce her absolute right to the tenements in question, there being no evidence that she was apprised of any necessity to make election.

As to the dismissal of the cross bill with costs, all the facts and circumstances of the case were sufficiently disclosed by the pleadings in the original suit, and it was competent for the Appellants to have proved their case (if it had been capable of proof) by evidence in the original suit, and the trustee, by his answer to the original bill, submitted to assign to such party as the Court should declare entitled; at all events the costs of the cross suit are properly directed to be paid by the plaintiffs therein, as the cross bill could, in any case, only be necessary as a bill of discovery. The cross bill did not pray any account of the personal estate of Thomas Thomas, alleged to be possessed by Gwen-[413]-llian Thomas, and there was not any personal representative of Thomas Thomas or of Gwenllian Thomas made a party to the original bill or the cross bill. *Dillon v. Parker* (1 Swan. 381). *Stratford v. Powell* (1 Ba. and Be. 1). *Boytton v. Boynton* (1 B. C. C. 445). *Newman v. Newman* (1 B. C. C. 186). *Wake v. Wake* (1 Ves. J. 335). *Whistler v. Webster* (2 Ves. J. 367). *Gritton v. Howard* (1 Swan. 409).

In the course of the argument, the Lord Chancellor made the following observations:

It must be taken for granted, that the words of the will passed leaseholds (see *Woollam v. Kenworthy*, 9 Ves. J. 137); if not, there is no representative as to that property before the Court, and it would be necessary to have an administration *de bonis non*.

It is said, that if the widow has not elected, her representatives must account for the personal estate. But how is the account to be taken? the personal representative is not before the Court. The bill should have prayed in the alternative either a

declaration that the widow elected, or an account against her representatives. The former only is prayed. The prayer for general relief would have comprised the account, if there had been a representative of the widow before the Court.

The Lord Chancellor (at the conclusion of the argument): The property at stake in this appeal is of little value, but the doctrine brought into question is of great importance, as it may affect other cases. I have a strong impression what ought to be the decision in this case; but, considering the [414] importance of the doctrine to be established, I propose to adjourn the question for consideration.

On the 25th of May, the judgment was affirmed without farther observation, but without costs.

Judgment affirmed.

[415]

ENGLAND.

(KING'S BENCH AND EXCHEQUER CHAMBER.)

JOSIAH TAYLOR, —*Plaintiff in Error*; JOSEPH WILLANS, who, etc. —*Defendant in Error*.

[Mews' Dig. v. 956. S.C. 1 Dow and Cl. 19.]

Under the penal Statute, 9 Anne, c. 14, enacting penalties against gambling, and giving half the penalty to the poor of the parish in which the offence is committed, a declaration, stating that W. at the parish of St. J. in the county of M. at one sitting, by playing at, etc. lost to T. £25. and then and there paid the same to T. is sufficiently certain. 1. (*semb.*) as to the allegation of the parish, although it appeared, *alimunde*, that there was another parish of St. J. in the county of M. and at all events such objection, if sustained, should be taken before, and is bad after, verdict: and the parish, entitled under the Act, may recover half the penalty from the plaintiff. 2. From the allegation that "W. by playing lost to T." it is a necessary implication that W. was playing with T. in a case where the statement of facts excludes the supposition of a loss by betting.

If in the assignment of errors it is alleged, that it appears by public Acts of Parliament, that there are two parishes of St. J. in the county of M. the plea of *in nullo est erratum* is not an admission of the truth of the allegation.

Joseph Willans, the Defendant in error, in Mich. Term, 1823, brought an action of debt in the Court of King's Bench, against Josiah Taylor, the Plaintiff in error. This action was founded upon the statute of the 9th of Anne, c. 14, s. 2, by which it is enacted, "That from the 1st of May, 1711, any person or persons whatsoever, who shall, at any time or sitting, by playing at cards, dice, tables, or other game [416] or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose, to any one or more person or persons so playing or betting, in the whole, the sum or value of ten pounds, and shall pay or deliver the same, or any part thereof, the person or persons so losing and paying, or delivering the same, shall be at liberty, within three months then next, to sue for and recover the money or goods so lost and paid, or delivered, or any part thereof, from the respective winner and winners thereof, with costs of suit, by action of debt, founded on this Act, to be prosecuted in any of her Majesty's Courts of Record, in which actions or suits no essoin, protection, wager of law, privilege of Parliament, or more than one imparlance shall be allowed: in which action it shall be sufficient for the Plaintiff to allege, that the Defendant or Defendants are indebted to the Plaintiff, or received to the Plaintiff's use, the monies so lost and paid, or converted the goods won of the said Plaintiff to the Defendant's use, whereby the Plaintiff's action accrued to him, according to the form of this statute, without setting forth the special matter: and in case the person or persons who shall lose such money or other things as aforesaid, shall not, within the time aforesaid, really and *bonâ fide*, and without covin or collusion, sue, and with effect prosecute, for the money or thing, so by him or them

lost and paid, or delivered as aforesaid, it shall and may be lawful, to and for any person or persons, by any such action or suit as aforesaid, to sue for and recover the same, and treble the value thereof, with costs of suit against such winner or winners as aforesaid, the one moiety thereof to the use of the person or persons that will sue for the same, and the other moiety to the use of the poor of the parish where the offence shall be committed."

[417] The declaration consisted of thirty-eight counts, and the several penalties demanded amounted to the sum of five thousand four hundred and sixteen pounds. The material counts were the third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh. In the third count it was stated, that one William Willans, on the 20th of March, 1822, at the parish of St. James, in the county of Middlesex, did, at one and the same sitting, by playing at a certain game called Rouge et Noir, lose, to the said Josiah Taylor, the sum of twenty-five pounds, and did then and there pay the same to the said Josiah Taylor; and that the said William Willans, did not, within three months next after the time he so lost and paid the said money, sue, or with effect or otherwise prosecute for the same; and that the space of three months had then elapsed, whereby and according to the form of the said Act of Parliament, made and passed in the ninth year of the reign of Queen Anne, an action had accrued to the said Joseph Willans, (who sued as aforesaid,) to sue for and recover, of and from the said Josiah Taylor, the said sum of twenty-five pounds, and treble the value thereof, making, together, the sum of one hundred pounds, parcel of the said sum of five thousand four hundred and sixteen pounds, above demanded.

The other counts were the same in substance and effect.

In the declaration it was averred, that Josiah Taylor had not paid or rendered the sum of five thousand four hundred and sixteen pounds, or any part thereof, to the poor of the parish of St. James, in the county of Middlesex, (being the parish where the several offences were committed,) and to Joseph Willans, or to either of them, but refused to do so; and, therefore, as well for [418] the poor of the said parish as for himself, the said Joseph Willans brought his suit.

To this declaration, Josiah Taylor pleaded that he did not owe to, or unjustly detain from, the poor of the said parish and the said Joseph Willans, the said sum of five thousand four hundred and sixteen pounds, or any part thereof, in manner and form as the said Joseph Willans had above complained against him, and of this he put himself upon the country, etc. and the said Joseph Willans did the like.

The action was tried on 21st of January, 1804, before the Lord Chief Justice of the Court of King's Bench, when a verdict was found for Joseph Willans, as to the several sums of money demanded in the third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts, making, together, the sum of six hundred and eighty pounds, and for Josiah Taylor, as to the residue of the sum of five thousand four hundred and sixteen pounds demanded by the declaration: Whereupon it was, amongst other things, considered by the Court of King's Bench, that the said Joseph Willans, who sued as aforesaid, should recover against the said Josiah Taylor, for the poor of the said parish of Saint James, in the county of Middlesex aforesaid, and for himself, the said Joseph Willans, the said several sums of money, in the third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts of the said declaration respectively mentioned, making the said sum of six hundred and eighty pounds, parcel of the said sum of five thousand four hundred and sixteen pounds above demanded; and that the said poor of the said parish of St. James, in the county of Middlesex, should have one moiety thereof to their own use, and that the [419] said Joseph Willans, who sued as aforesaid, should have the other moiety thereof to his own use, according to the form of the statute in such case made and provided.

A writ of error was brought, returnable, in the Court of Exchequer Chamber, at Westminster, by Josiah Taylor, from the judgment of the Court of King's Bench: upon which Josiah Taylor assigned the same errors as those hereinafter set forth, and the judgment of the Court of King's Bench was affirmed in the Exchequer Chamber.

From these judgments a writ of error was brought, returnable, in Parliament, whereon Josiah Taylor assigned the following errors:

That the declaration aforesaid, and the matters therein contained, are not sufficient, in law, for the said Joseph Willans, who sued as aforesaid, to have or maintain his aforesaid action thereof against the said Josiah Taylor.

That although it appears by public Acts of Parliament, that there are only two parishes of Saint James in the county of Middlesex aforesaid, that is to say, one parish called the parish of Saint James, Clerkenwell, otherwise called the parish of Saint James at Clerkenwell, and another parish called the parish of Saint James, Westminster, otherwise called the parish of Saint James within the city and liberties of Westminster, in the county of Middlesex; yet it does not appear by the record aforesaid, whether the said Joseph Willans sued as well for the poor of the said parish of Saint James, Clerkenwell, otherwise called the parish of Saint James at Clerkenwell, or for the poor of the parish of Saint James, Westminster, otherwise called the parish of Saint James, within the city and liberty of Westminster, in the county of Middlesex aforesaid, as for himself in that behalf.

[420] That it does not appear by the record aforesaid, whether the supposed offences in the third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-seventh, and thirty-seventh counts of the said declaration mentioned, or any or either of them, were or was committed in the parish of Saint James, Clerkenwell, otherwise called the parish of Saint James, at Clerkenwell, or in the said parish of Saint James, Westminster, otherwise called the parish of Saint James, within the city and liberty of Westminster, in the county of Middlesex aforesaid.

That it does not appear by the record aforesaid, that the said William Willans, at the respective times in the third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts of the said declaration mentioned, did lose, to the said Josiah Taylor, the said several sums of money in those counts respectively mentioned, or any or either of them, by playing with the said Josiah Taylor, at the said game called Rouge et Noir, in those counts respectively mentioned.

That it does not appear by the record aforesaid, that the said Josiah Taylor, at the said respective times in the said third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts of the said declaration mentioned, did play with the said William Willans, at the said game called Rouge et Noir, in those counts respectively mentioned.

That it does not appear by the record aforesaid, that the said William Willans, at the respective times in the said third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts of the said declaration mentioned, did, at one and the same sitting, by playing at [421] the said game called Rouge et Noir, lose, to the said Josiah Taylor so playing, the said several sums of money in those counts respectively mentioned, or any or either of them.

That it does not appear by the record aforesaid, that at the respective times in the said third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts of the said declaration mentioned, the said William Willans did lose, to the said Josiah Taylor, the said several sums of money in those counts respectively mentioned, by their playing together, or with each other, at the said game called Rouge et Noir, or by betting on the sides or hands of such as did play at the said game.

That by the record aforesaid it appears, that the judgment aforesaid, in the form aforesaid given, as to the several sums of money in the third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts of the said declaration mentioned, making, together, the said sum of six hundred and eighty pounds, parcel of the said sum of five thousand four hundred and sixteen pounds, above demanded, was given for the said Joseph Willans against the said Josiah Taylor; whereas, by the law of the land, the said judgment, as to those several sums of money, ought to have been given for the said Josiah Taylor against the said Joseph Willans.

That the judgment aforesaid was affirmed in the Court of our Lord the King of Exchequer Chamber, at Westminster, before the Justices of the Common Bench and the Barons of the Exchequer, whereas no such affirmation of the said judgment ought to have been given thereupon, but by the law of the land the said judgment ought to have been reversed.

[422] Joseph Willans joined in error thereto, and said, that there was no error, either in the record and proceedings aforesaid, or in giving and affirming the judgment aforesaid.

For these and other errors in the record and proceedings Josiah Taylor sued out a writ of error, praying that the judgment might be reversed.

For the Plaintiff in error, Mr. Broderick.

It is essential to describe, with accuracy, the parish in which offences against the 9th of Anne, c. 14. are alleged to have been committed, otherwise the poor of that parish cannot recover the moiety of the penalties for which the verdict may be given; but it is uncertain, upon the present record, whether the offences were committed in the parish of St. James, Clerkenwell, or in the parish of St. James, Westminster, which are the only two parishes of St. James in the county of Middlesex. The Statute of the 9th of Anne, c. 14. which is a penal statute, and must be construed strictly, extends only to the cases of parties who lose and win above ten pounds, by playing together at any unlawful game, or by betting together on the sides or hands of persons who are playing at such unlawful game; but it is not alleged upon the present record, that William Willans and Josiah Taylor, the parties who are stated to have lost and won the money, were either playing together at any unlawful game, or were betting together on the sides or hands of persons playing at such game. No intendment can be made of that which is not expressly averred in a penal action, unless it be a necessary inference. *Lynall v. Longbottom* (2 Wils. 36. b.). It is not averred, that William Willans was play-[423]-ing at any unlawful game with Josiah Taylor, nor that he was playing at such unlawful game with any other person, and betting with Josiah Taylor, nor that he was betting with Josiah Taylor upon the sides or hands of any persons who were playing at such game: and it is doubtful whether the words of the Act would extend to a case where A. is playing and bets with B. who is not playing.

It being assigned upon the record for error that it appears by Acts of Parliament that there are two parishes of St. James in Middlesex, the Defendant in error by pleading *in nullo est erratum* admits the fact so assigned upon record, *Edmunds v. Probert* (Carth. 338. and see Bac. Abr. Error K. 2.). To avoid this consequence the Plaintiff should have demurred for duplicity.

For the Defendant in error, Mr. Patteson.

The Court cannot take judicial notice of the names of all the parishes in the county of Middlesex, and cannot therefore know, as matter of law, whether there be or be not a parish called the parish of St. James in the county of Middlesex. After verdict, it must be intended that there is a parish called the parish of St. James in the county of Middlesex, in as much as the Plaintiff could not have obtained a verdict without proving the offences mentioned in the declaration to have been committed in that parish. The misnaming of the parish, if it be misnamed, is an error in fact, and not in law, and cannot be assigned together with other errors. The misnaming of the parish, if it be misnamed, is matter of form only, and cannot by law be assigned for error. It sufficiently appears by the allegation in the declaration, that William Willans did play with [424] the Plaintiff in error, in as much as it is averred that William Willans did, at one and the same sitting, by playing at Rouge et Noir, lose to the Defendant a certain sum of money, which could not have been the case if he had not played with the Defendant. Such averment is at all events sufficient after verdict.

The plea *in nullo est erratum* is in substance a demurrer. At the utmost it only prevents advantage being taken of misjoinder in the assignment of errors. It is still open to say that the error alleged is not well assigned. The case of *Edmunds v. Probert* (2 Wils. 36. b.; the cases are collected in 2 Bac. Abr. qua. sup.) is no authority. It is argued that *in nullo est erratum* admits the fact. So does a demurrer. Such a plea is a demurrer. *King v. Gosper Yelverton*, 58. *Morris v. Fletcher*, Cro. Car. 53. So in the case in Carthew, it was held, that joining error in fact with error in law would be bad on general demurrer. So in *Jeffrey v. Wood*, 1 Stra. 439. *Burdett v. Wheatley*, 2 Raym. 883. Error in fact and error in law cannot be assigned together, because they require different modes of trial. In *Hudson v. Banks* (Co. Jac. 28) it was argued, that *in nullo est erratum* admitted an allegation of facts made upon the assignment of errors, but it was held otherwise because it was contrary to

the record. It appears by the record that the parish of St. James is in the county of Middlesex. The error assigned cannot stand because it contradicts the record. The assignment speaks of Acts of Parliament; those Acts should have been shewn. If the description of the parish is wrong, the objection should have been taken at the trial for a variance. It may be argued that it could not be the subject of a nonsuit. If it is rightly described and there are two such [425] parishes, the subject matter is incapable of distinction. *Doe v. Harris*, 5 M. and S. 326. (See *Doe v. Salter*, 13 East. 9. *Taylor v. Hooman* 1 Moore 461.)

If it be admissible as error in fact, the allegation is not substantively that there are two parishes, but that it appears by Acts of Parliament upon which no issue can be taken; for Acts of Parliament are in the breast of the Legislature.

In the course of the argument the Lord Chancellor made the following observations:

Upon that part of the argument in which it was said to be doubtful whether the Act would extend to a case where one of the parties playing betted with a party not playing,—

The Lord Chancellor said: If the bet was on the game, he must be betting on one side.

Upon the argument that there was no averment, that Taylor was playing with Willans, that the allegation was that he lost by playing, the Lord Chancellor observed, that the allegation was of loss "to another person" by playing, and he added, "How can one man lose to another but by playing or betting with him." Is there any authority which decides, that where A. is playing with B. and bets with C. the case is not within the Act. "If the fact is necessarily implied from what is stated, it is sufficient. The question upon this argument is, whether it is not a necessary implication from the facts alleged that there was a playing with Taylor."

The Lord Chancellor (at the conclusion of the argument): I am not sure that I know the precise objection. Is it that St. James should be distinguished by the addition of Clerkenwell? If St. James is the proper name, it is indifferent, whether it [426] is in Clerkenwell or Westminster. As to the argument that the distinction in pleading is necessary, in order that the poor may have their share of the penalty; if the Plaintiff recovers the whole, the parish entitled to the moiety may recover over from the Plaintiff. Is it necessary that the whole matter should appear on the record? Suppose there are two parishes of the same name in a county, is it not sufficient in pleading as to one of them, to describe it generally? What authority is there for the contrary position? If the parish of St. James is not the proper name, that was matter of nonsuit, and you cannot take advantage of such a variance by writ of error. It appears that St. James is the proper name, and that the rest is only matter of superfluous description. If the name is not properly stated in the declaration, advantage should have been taken of it upon the trial. It cannot now be alleged as an error in fact.

As to the second point, it is not possible for a person playing to lose to another (except by betting, which is not this case) unless he is playing with him.

Judgment affirmed without costs.

[427]

IRELAND.

(COURT OF CHANCERY.)

The Right Honourable THOMAS LORD BARON TRIMLESTOWN, *Appellant*,
 EVAN LLOYD, Esquire, a Lieutenant-General in His Majesty's Army, and
 ALICIA LADY BARONESS TRIMLESTOWN, his wife; also, ROSALIE
 COUNTESS D'ALTON, PETER COUNT D'ALTON, her Husband, RICHARD
 D'ALTON and EDWARD D'ALTON, Minors, by the said PETER COUNT
 D'ALTON, their Father and next friend, — *Respondents*.

[Mews' Dig. xv. 234 (*Trimlestown v. D'Alton*): S. C. 1 Dow and Cl. 85. Cited (i.) on point as to undue influence (1 Bli. N. S. at pp. 475, 476) in *Haddock v. Trotman*, 1857, 1 F. and F. 32; and see *Allen v. M'Pherson*, 1845, 1847, 1 H. L. C. 191; (ii.) on point as to depositions (1 Bli. N. S. at p. 452) in *Colvin v. Fraser*, 1829, 2 Hagg. E. R. at p. 278.]

T. from time to time during his life prepares instructions for his will, and causes drafts to be prepared upon those instructions. At his death he leaves various testamentary papers, executed so as to pass his property; under which papers his son by a first wife, and the issue of that son: his widow, (a second wife,) his daughter with her children, and ulterior remainder-men, might severally claim interests. By the last of these testamentary papers the provision for the widow and the daughter and her children was considerably increased. The Testator died in 1813. In 1814 the daughter, with her husband and children, filed a bill in Equity to establish the last will, and effectuate the charge in their favour. In the same year the widow filed a bill in the same Court, to establish the same will and her interests under it. In 1816 the son and heir filed a bill in the same Court, impeaching the will as obtained by fraud and the improper influence of the widow, and praying a declaration of its invalidity, and an issue at law to try the question.

In the first of these causes, (the suit on behalf of the daughter and her children,) by a decretal order, an issue was directed to enquire by a trial at bar whether the last testamentary paper was the will of T. [428] The widow with her husband were to be the plaintiffs in the action, the son and heir to be the defendant, and the daughter with her husband were to be at liberty to appear in the action and defend their rights and that of their children. Upon the trial of the issue the Jury found a verdict for the defendant. In the course of the trial several of the testamentary instruments executed by the Testator were produced in evidence; but the only point submitted to the consideration of the Jury was the general question of the validity or the invalidity of the last testamentary paper. Application being made to the Court of Equity for a new trial upon the grounds, 1. that the evidence given by two of the witnesses upon the former trial had been improperly admitted; 2. of misdirection by the Judge; 3. that the verdict was contrary to evidence; the Lord Chancellor having required of the Judges who tried the issue a report of only part of the evidence; the Judges returned a report confined to the evidence of two witnesses; upon consideration of which the Court refused the application to set aside the verdict.

Against this decision there was an appeal to the House of Lords, who remitted the cause to the Court below, with directions to call for a full report of the notes of the Judges upon the trial of the issue. In consequence of this remit, a full report having been required and returned, the application for a new trial was reconsidered, and thereupon a new trial was granted and the issue was varied by adding to the original inquiry "whether the testamentary paper" (the subject of first issue) "was the last will of the testator," a farther inquiry "whether any and what paper writing is the last will of etc." Against this new order the son and heir appealed to the House of Lords.

Held that the variation of the issue not resting upon any allegation in the pleadings of any other testamentary instruments but that which was the subject of the first issue, was unauthorized; that the issue was defective in not directing a specific inquiry whether any part of the last testamentary paper, e.g. that under which the daughter and her children took interests, was valid, although the provision for the wife was void; which point ought to have been submitted to the Jury by the Judge at the trial, but was not so; that the order was erroneous in directing that the widow should be the plaintiff in the issue, leaving to the daughter the Plaintiff in the cause in which it was directed only liberty to appear and defend, etc. that the order and the issue were defective for want of parties taking interests under the several testamentary [429] papers; that the issue ought to have been directed upon a decree in the three causes; and that whether the new trial was granted or refused, no effective decree could be made in the cause in its actual state. Upon these and other

grounds the cause was remitted to the Court below, with directions to enable the Court and parties to rectify the proceedings.

The Appellant was the only son of Nicholas Lord Trimlestown by his first marriage. The Respondent, Lady Trimlestown, was the widow of Lord Nicholas, afterwards married to Respondent General Lloyd. The Countess D'Alton is the only daughter of Lord Nicholas, and the other Respondents were her two sons.

Lord Nicholas, in August, 1797, intermarried with the Respondent Lady Trimlestown. Upon that marriage, he received, as a portion with his wife, £2000, and settled a jointure of £800 a year upon her for life, charged upon his Dublin and Meath estates.

In December 1797, by a will duly executed, Lord Nicholas confirmed the jointure of £800 a year, settled upon the Respondent Lady Trimlestown, and charged the same upon additional estates; and subject thereto he devised the whole of his real estates (except a small part which he directed to be sold for payment of debts) to the Appellant for life, with remainder to the Appellant's son, Thomas Barnewall, and his issue male, in strict settlement; remainder to any future sons of the Appellant, in tail male, with remainder to any future sons of the Testator, in tail male, remainder to Appellant's daughters for life, remainder to Testator's daughter, the Respondent Rosalie Countess D'Alton, for life, with several remainders over in favour of her children and their issue, remainder to his own right heirs. The will contained powers of leasing, jointur-[430]-ing, and charging, with portions, and gave a legacy of £400 to the Respondent Lady Trimlestown, and £50 to the Countess D'Alton. All the residue of the property was given to the Appellant.

In the year 1802, Lord Nicholas became intitled to the Turvey or Kingsland estate, as heir of his cousin the late Viscount Kingsland; and shortly afterwards gave instructions to have a codicil prepared, whereby he proposed to revoke the devises in remainder made by his will in favour of the Countess D'Alton, and her children and their issue, and to entail his estates so that they might attend the title of Trimlestown; and by the same codicil he proposed to devise the Turvey or Kingsland estate to the Appellant and his male descendants. A codicil was prepared according to these instructions, and revised by Mr. Butler; but it was not executed, Mr. Butler having stated his apprehensions that it was defective, and recommended a new will to be made, incorporating the codicil.

On the 3d of November, 1802, Lord Nicholas executed a codicil, whereby he revoked the limitation of his real estates to his daughter the Countess D'Alton, and limited the same to go with the title. In other respects he confirmed the bequests of the will as to his daughter, and gave her an annuity of £800 for life, if the estates should descend to etc. In addition to the bequests of the will, he also gave to his wife £200 per annum for life, with diamonds and furniture. The Turvey or Kingsland estate he devised to the Appellant his son, of whom he spoke in terms of great affection, and directed that when a certain annuity then charged upon the Turvey estate should be extinct, a further annuity of £200 should be paid to his wife. This codicil was found with the signature and seal torn.

[431] In 1804 the draft of a codicil was prepared by Lord Herbert Stewart, the friend of Lady Trimlestown, which she was led to believe, by a stratagem of Lord Nicholas, that he had executed, when in fact it never was executed.

By a will dated on the 1st of July, 1805, and which was duly executed, Lord Nicholas gave a rent charge of £100 to the Respondent Lady Trimlestown, in addition to her jointure of £800 a year, so long as she should remain single, declaring that if she should not remain single she would marry some person of rank and fortune, so as to make this £100 a year no object to her; he also bequeathed to her a legacy of £500; and he devised all his freeholds except the Turvey estate to the Appellant for life, remainder to Thomas Barnewall his (the Appellant's) son for life, with remainder to the first and every other son of Thomas Barnewall in tail male; with remainder to such person as should possess the title and dignity of Baron Trimlestown; and in case only of the extinction of his title, to the children of the Respondent Rosalie Countess D'Alton; and Lord Nicholas thereby limited the Turvey estate to trustees for the same uses as the other freeholds, and empowered the Appellant to charge his Turvey and Kingsland estate with £20,000, to discharge incumbrances upon his other estates; and he bequeathed all the residue of his property, of what

nature or kind soever, to the Appellant. By this will he also gave an annuity of £300 to the Respondent Countess D'Alton, charged on his estates.

Of this will of the 1st of July, 1805, Lord Nicholas executed duplicates, one of which he left with Mr. Addis, the other he lodged in the hands of his relation Robert Barnewall, but both the parts in September 1810, were given up to Lord Nicholas by his desire.

[432] On the 25th of July, 1805, Lord Nicholas executed a codicil to his will, whereby he revoked the appointment by his will of 1805, of Mr. James Nangle, and Mr. Thomas Kemmis, as his executors and trustees, and appointed the Earl of Fingall, and Robert Barnewall, his trustees and executors.

On the 28th of September, 1810, Lord Nicholas executed a codicil to his will, by which he gave to the Countess D'Alton an annuity of £620 during her life, charged upon his estates in Dublin, etc.: a legacy of £5000 to her daughter, Henrietta D'Alton: £400 to her son the Respondent Richard D'Alton: and £100 to her son the Respondent Edward D'Alton: and by the same codicil, he gave to Lady Trimlestown his house in Portland-place, and all the rest, residue, and remainder, of his personal estate; he also devised to her during her life, his house at Turvey, with the use of the gardens thereto belonging, and thirty acres of land immediately adjoining to the house.

On the 2d of August, 1812, Lord Nicholas executed another codicil to his will, in which reciting that he had made his last will and testament, and different codicils, (which he thereby confirmed, of whatever date they might be,) and had thereby devised his estates in the King's County, and County of Meath, but had made no disposition of his estates at Turvey, in the county of Dublin, counties of Longford, Roscommon, and Kildare, he devised to Lady Trimlestown, for her life, the house and demesne lands of Turvey, then in his own occupation, and containing about fifty-eight acres; and, after her death, the same were to go to the Appellant for his life: to whom he also devised the remainder of the Turvey estate, with remainder to the Appellant's son, Thomas Barnewall, [433] for life, with divers remainders over in strict settlement. This codicil then recites that he had *by his will* given to his daughter an annuity of £600 a year, which he confirms, and, if she should die before her husband, £300, part of the annuity, was to go to her son, the Respondent Edward D'Alton (in this codicil called Edward Thomas Nicholas D'Alton), during the life of the Count; and he gives a legacy of £3000 to the Respondent Richard D'Alton (in this codicil called Richard Charles D'Alton), charged upon his King's County estate: and ratifies and confirms his will and codicils, and all the gifts, devises, matters, and things therein contained, and he revokes the appointment of the executors in his former will and codicil, and appoints Colonel O'Shee an executor.

Lord Nicholas was asked by Mr. Kemmis, who prepared this codicil, to produce his will and codicils, but he *declined doing so, telling him that they were in England*, and Mr. Kemmis made a memorandum on the back of the draft of the codicil prepared by him, that he had not seen the will and codicils thereby referred to.

The draft of this codicil, as prepared by Mr. Kemmis, began as follows:

"Whereas I, Nicholas Lord Baron of Trimlestown, have made my last Will and Testament, in writing, bearing date the _____ day of _____ in the year of our Lord _____ and have thereby devised my estates in the King's County and County of Meath, *but have made no disposition of my estate at Turvey, etc."*

Lord Nicholas altered the draft, by drawing his pen through the words, "*in writing, bearing date the _____ day of _____ in the year of our Lord _____*," And instead thereof, [434] he inserted, after the words "my last will and testament," the following sentence, "*and different codicils which I hereby confirm upon whatever date they may be.*" But he did not correct the recital of his having made no disposition of the Turvey Estate.

On the 15th of November, 1812, a letter signed by Lord Nicholas was transmitted to Mr. Kemmis, containing the following inclosure in the handwriting of Lord Nicholas.

"Instructions to Mr. Kemmis for preparing my will.

"1. To revoke all former wills and codicils made by me.

"2. To direct that I may be buried, in a private manner, in the family vault at Trimlestown.

" 3. To entail all my real estates in the county of Meath and King's County on my son John Thomas Barnewall, and my grandson, his son, Thomas Barnewall, and their issue male, (*subject, however, to my debts, and to the following legacies;*) and all my family pictures, together with the Turvey Estates, after my beloved wife Lady Trimlestown's demise: all which I intend to entail strictly on my son and grandson, and their issue male, with a power to make a provision of £2000 a year on any future wife that they may have, and a power to charge the estates with a sum not exceeding £40,000 as a provision for younger children that may be born from such future marriages: with all the usual limitations with respect to the grant of leases customary to entailed properties: and in failure of issue male in my son and grandson, I wish to entail the estate of Trimlestown upon the heir male of my family, who is next in succession to my title, as M. Barnewall of Fyansstown, and his issue male: and the King's County [435] estate, and the reversion of my Turvey estate, after Lady Trimlestown's demise, I wish to entail on my daughter Countess D'Alton, and her heirs male, in succession: by which I mean her son Richard: and in the event of their succeeding, they are positively to take the name and bear the arms of Barnewall, and in failure of my daughter, and her heirs male, above mentioned, I wish to entail these estates on my own heirs male above mentioned.

" 4. I wish to bequeath to my beloved wife, Lady Trimlestown, all my personal property of every description, save and except my family pictures, which are to be entailed, as before mentioned. I also leave to Lady Trimlestown my wife, the house, demesne, and estates of Turvey, with all the property thereunto belonging in the Counties of Kildare, Roscommon, and Longford, and Dublin, to enjoy during her natural life, in as full and complete possession as possible, with power to eject tenants and grant leases, as is usual in such cases. And I also bequeath to Lady Trimlestown, my wife, £5000, to be secured to her on the King's County estate.

" 5. I wish to bequeath to my daughter Countess D'Alton £600 a-year during her natural life, for her sole and separate use, independent entirely on her husband Peter D'Alton: and to my grand-daughter Henrietta D'Alton £5000; to my grandson Richard D'Alton £3000; and in the event of Count D'Alton's outliving my daughter, I wish to leave my grandson Edward D'Alton, £400 yearly, during his father's life.

" I wish to name my cousin Colonel John O'Shee, and my brother-in-law Colonel Henry Eustace, to be the trustees and executors of this my will.

" TRIMLESTOWN."

[436] Upon these instructions a long correspondence followed between Lord Trimlestown and Mr. Kemmis, respecting the details of the will.

In pursuance of the instructions a will was drawn up and executed on the 8th of December, 1812, by which Lord Nicholas revoked all former wills and codicils, and then devised all his real estate to Colonel O'Shee and Henry Eustace: as to the *King's County estate, subject to the jointure of £800 a-year to Lady Trimlestown, and charged with the payment of all his debts and the legacies thereafter bequeathed*, to the use of Thomas Kemmis for 200 years, in trust for better securing the several annuities of £600, £100, and £100 thereafter respectively given to the Countess D'Alton and her sons Richard and Edward D'Alton: and upon trust also to raise money for the payment of all the testator's debts and legacies; and subject to the said term and the trusts thereof, to the use of William Kemmis and his heirs, during the life of the Countess D'Alton, in trust to pay her £600 a year during her life, and after her decease, in case her son, Richard D'Alton, should survive, and should not be her eldest son, then to the intent he should receive £400 a year during his life: and if Peter Count D'Alton should outlive the Countess D'Alton, then Edward D'Alton should receive £400 a year during his father's life: and he devised the Turvey or Kingsland estate to Lady Trimlestown for her life, without impeachment of waste. The estate in the County of Meath, called the Trimlestown Estate, he devised, "subject to the payment of the annuities to the Countess D'Alton, Richard D'Alton, and Edward D'Alton, and interest upon his debts and legacies, in aid and to supply any deficiency arising from the failure of the rents of his [437] King's County estates, until the subsisting leases thereof should expire;" together with the said King's County estate, subject to the several charges and annuities aforesaid, and the said Turvey and Kingsland estate, after the death of Lady Trimlestown (who was younger than the Appellant), to the use of the Appellant for life, with remainder to the Appellant's son,

the Hon. Thomas Barnewall *for life, with remainders over to his sons severally and successively in tail male*, with remainders to any future sons of the Appellant, severally and successively in tail male; and in default of such issue, the King's County and Turvey estates were given over to the Countess D'Alton, and her children; and the Meath or Trimlestown estate to the Barnewalls of Fyansdown, with divers remainders over. And Lord Nicholas, by the said will, gave to the Appellant, and his son Thomas Barnewall, respectively, as and when they should respectively be in actual possession of the King's County, Meath, and Turvey estates, powers of jointuring with £2000 a year, and charging with £40,000 for the portions of daughters and younger sons. And he charged the King's County estate with a legacy of £5000 for Lady Trimlestown; £5000 for Henrietta D'Alton, to be paid on her marriage; and a legacy of £3000 for Richard D'Alton; and he bequeathed to Lady Trimlestown the whole of his personal estate (except his family pictures) *exempt from the payment of his debts*; and he appointed *Colonel O'Shee and Henry Eustace his Executors*.

Lord Nicholas died on the 17th of April, 1813, in the 87th year of his age, and was succeeded in his title by the Appellant.

The will was proved in the Ecclesiastical Court by [438] Colonel O'Shee, without opposition; but the Appellant afterwards instituted a suit (which is still depending) in the Ecclesiastical Court in Ireland, to recal the probate of the will.

On the 23d of April, 1814, the Respondents, Peter Count D'Alton and Rosalie, with Thomas Kemmis and William Kemmis, filed a bill in the Court of Chancery in England, against the Appellant, and Lady Trimlestown, the Hon. Thomas Barnewall, and others, seeking to have the will of the 8th of December, 1812, established, and an account taken of the debts and other incumbrances affecting the King's County estate; and also an account of what was due to the Countess D'Alton, in respect of the annuity of £600 given to her by the will, and praying that, in case it should appear the King's County estate was not equal to the payment of the annuity of £600, then that it might be decreed a charge on the Testator's estates generally; and that, in the mean time, a receiver might be appointed over the King's County estate, and directed to pay the annuity.

To this bill the Appellant put in an answer, whereby he disputed the validity of the will.

On the 29th June, 1814, Lady Trimlestown filed a bill in the Court of Chancery against the Appellant, the D'Altons, and others, praying (amongst other things) that the articles executed prior to her marriage, dated 8th August, 1797, whereby the said jointure of £800 a year was settled upon her, and also that the trusts of the will might be carried into execution; and that an account might be taken of what was due to her on the foot of the jointure, and also on the foot of the legacy of £500 given to her by such will, and the interest thereof; and that the Appellant might be de-[439]-creed to pay what should be due, by a certain day, or else that a competent part of the *King's County estate might be sold for payment thereof*; and that a receiver might be appointed in the mean time.

To the last mentioned bill also, the Appellant put in an answer, also disputing the validity of such will.

In the month of July, 1814, Lady Trimlestown intermarried with the Respondent Evan Lloyd, and shortly afterwards the bill filed by the Respondents Peter Count D'Alton and Rosalie his wife, and their trustees, was amended, and Evan Lloyd made a party defendant thereto; the Respondents Richard and Edward D'Alton were also made defendants thereto; and the Respondents, Evan Lloyd and Alicia (Lady Trimlestown) his wife, filed a bill of revivor for reviving the suit so instituted by the Respondent Lady Trimlestown, and which had abated by her marriage, and the same was revived accordingly. This bill was afterwards further amended by striking out the names of Thomas and William Kemmis, and making Richard and Edward D'Alton Co-Plaintiffs.

On the 19th July, 1816, the Appellant filed a bill in the Court of Chancery in Ireland against the Respondents and others, praying, amongst other things, that the will of 8th December, 1812, might be declared fraudulent and void, and be set aside accordingly, and that proper issues might be directed for the purpose of trying the validity of such will; and that the Appellant might have the necessary commissions for examination of witnesses out of the kingdom, and also of witnesses, *de bene esse*.

The suit instituted by the Respondents Peter Count D'Alton and Rosalie his wife, came on for hearing on the 18th June, 1817, when, with the con-[440]-sent of the Respondents, Evan Lloyd and Lady Trimlestown, it was ordered, that they the last named Respondents should commence a feigned action in the Court of King's Bench in Ireland, against the Appellant, with the usual further directions, in order that a trial might be had between the parties by a special jury of the county of Dublin, at the bar of the Court, during the sittings at the then next Michaelmas term, to try the following issue, viz. "*Whether the paper-writing, bearing date the 8th December, 1812, in the pleadings mentioned, be the last will and testament of Nicholas Lord Trimlestown, deceased, or not.*" And it was further ordered, that the Respondents Peter Count D'Alton and Rosalie his wife should be at liberty to appear in the action to defend their rights and those of their children, the Respondents Edward D'Alton and Richard D'Alton.

On the 6th June, 1818, the Lord Chancellor of Ireland made an order, entitled in the three causes, that the parties to the issue should be at liberty, on the trial of such issue, to make use of the depositions made by the witnesses examined abroad by them respectively, on commissions issued for that purpose.

The issue came on for trial on the 11th of June, 1818, in the Court of King's Bench, before Lord Chief Justice Downes, and Judge Mayne, and a special jury of the County of Dublin, and counsel appeared as well on the part of the Respondents Evan Lloyd and Lady Trimlestown, as of the Respondents Peter Count D'Alton and Rosalie his wife. The trial continued for fourteen days, when the jury not agreeing upon their verdict, *a juror was withdrawn* by consent of the Plaintiffs and Defendant in the issue.

* On the 21st November, 1818, the Respondents made an application to the Lord Chancellor of Ireland for a [441] new trial of the issue, and thereupon it was ordered that the new trial should be had at the bar of the Court of Common Pleas in Ireland, *by a jury of the County of Dublin*; but before the order was drawn up the *venue* was changed on the application of the Appellant, and it was ordered that the new trial should be had before a jury of the county of Kildare.

On the 22d February, 1819, the issue came on to be tried in the Court of Common Pleas, before Lord Norbury, Mr. Justice Fletcher, and Mr. Justice Moore, and continued on trial from that day until the 6th day of March, 1819, when the jury after having retired for twenty-eight hours, brought in their verdict, "*That the paper-writing of the 8th December, 1812, in the pleadings mentioned, was not the last will and testament of Nicholas Lord Baron Trimlestown, deceased.*"

After the trial, Henry Eustace married Henrietta D'Alton, and claimed the legacy of £5000 given to her by the will.

The Respondents, being dissatisfied with the verdict, gave notice, on the 7th May, 1819, of moving for a new trial, on the ground, first, of inadmissible evidence having been received on the part of the Appellant; secondly, of the Judges who presided having misdirected the jury at the trial; and, thirdly, on the ground of such verdict having been given contrary to law and the weight of evidence.

The motion came on to be heard upon the 7th of July, 1819, when the Counsel for the Respondents required the Lord Chancellor to call for the full report of the Judges who presided at the trial; but his Lordship was pleased to declare his intention to call for the notes of the learned Judges as far only as respected the objection made by the Respondents' counsel as [442] to the admissibility of the evidence given by Edward Jerningham, and John Joseph Dillon, on the trial. The Lord Chancellor declined calling for any further report from the learned Judges than that before mentioned, and stated as a further reason for such his refusal, that he had conferred with the three learned Judges before whom the issue had been tried, two of whom (Mr. Justice Fletcher and Mr. Justice Moore) expressed their entire approbation of the verdict, and the other (Lord Chief Justice Norbury) stated that he saw no good reason for granting another trial.

On the 11th day of July, 1819, the motion upon argument was refused.

The Respondents appealed to the House of Lords from the last mentioned order, and contended, that such order ought to be reversed, principally on the grounds, first, that the Judges who presided at the trial had admitted the evidence of Edward Jerningham and John Joseph Dillon, and had dwelt upon it in their charge to the

jury: and, secondly, that the Lord Chancellor ought not to have refused their motion for a new trial, without having previously called for and read the Judges' report of all the evidence given on the said trial.

The appeal was heard on the 23d of June, 1823, when the House declared, that *not having before them, in a case in which a feme covert and infants were parties materially interested, any report which they could deem authentic of all the evidence given at the trial, the Lords were unable to determine whether the verdict complained of by the motion for a new trial ought or ought not to be deemed conclusive*: and therefore the order of the 14th July, 1819, complained of in the appeal, was reversed: and the cause was [443] remitted to the Court of Chancery in Ireland, to rehear the motion for a new trial, upon a full report from the Judges, of the whole evidence given at the trial before them: the Lords *deeming such report necessary in a cause in which such parties were interested*.

The Respondents accordingly, on or about the _____ day of _____ 1824, gave notice of a motion, and also petitioned the Lord Chancellor of Ireland, to set aside the verdict, on the grounds of inadmissible evidence having been permitted to be given on the part of the Defendant, the misdirection of the learned Judges who presided at the trial, and that such verdict was given contrary to law, and the weight of evidence: and also grounded on the learned Judges' reports of the whole evidence produced on the trial, and the order of the Lords. Whereupon the Lord Chancellor called upon the Lord Chief Justice of the Common Pleas, and Mr. Justice Moore, the two surviving Judges who presided at the trial of the issue, to furnish him with a copy of their notes of the evidence given on such trial; and the two surviving Judges accordingly delivered copies of their notes to the Lord Chancellor.

The motion was heard on the 26th April, 1824, and was debated on that and the five following days, and it came on again on the 24th May following, when the Lord Chancellor ordered, that the verdict found on the trial in the Court of Common Pleas, on the issue formerly directed, should be set aside: and that the issue directed by the order of the 18th June, 1817, should be varied: and his Lordship further ordered, that the issue to be tried should be, "Whether the paper writing, bearing date the 8th December, 1812, be the last will and testament of Nicholas Lord Trimlestown, deceased, or not: and if not, *whether [444] any and what other paper writing or writings is or are his last will and testament*." And his Lordship further ordered, that such issue should be tried at the law side of the Court of Exchequer in Ireland, at the sittings after the then next Trinity Term, *by a special Jury of the county of the city of Dublin*, and that the Plaintiffs in the issue should pay to the Appellants the costs of the former trial in the Common Pleas.

Against this order the Appeal was presented.

For the Appellants, Mr. Horne, Dr. Lushington.

For the Respondents, the Attorney General and Mr. Scarlet. (and Mr. Parry.)

The Lord Chancellor*: There are in truth two issues.

In this state of the record on the trial, what other paper or writing was there to form the subject of a distinct issue?

This House may arrange its proceedings in such manner as is convenient and just. What occasion is there for us to trouble ourselves with the question, whether that will which was the only will on which the order was made is a will or not, or what ought to be the verdict with respect to that will: if you mean to say there is some other will or paper, which might supersede the necessity of trying whether that will which is to be mentioned in the present order ought to be considered as a testament at all. What is the other will or paper which this second order of the Chancellor [445] refers to? If there is any other will or paper to set up, could that be the right issue? If the appeal from this order goes to the whole contents of it, and this order is wrong in directing the other issue, then it must be sent back again.

What other will or paper is meant to be referred to in this second order we do

* The judicial observations above reported occurred in the course and arose out of the argument, the substance of which is, in some instances, shortly incorporated with the observations. In some instances where they appear connected in the report, they were in fact separated by intervals of argument. The arguments themselves could not conveniently be reported on account of their length.

not know. The House may confine the objection to the issue, for the present to the point that there is no other paper or will referred to in the pleadings, and that therefore this second issue cannot be right. The Appellant would then have a right to ask that the cause should be remitted, unless this House was to confine the trial of the issue to what was the matter to be tried on the issue first directed: and then if there be any other will or paper which can be set up, we ought to know what that is. To authorize the direction of a new issue, there should be a petition of rehearing to vary the decree.

Lord Redesdale: I have a suspicion that there is a mistake in framing this order. Upon the former appeal one doubt suggested was this, whether supposing that the evidence would have the effect of destroying the instrument which was then produced, so far as Lady Trimlestown took interest, it could have the effect of destroying the instrument, so far as the Countess D'Alton and her family took any interest under it; that was one important part of the case on the former hearing. The Jury found generally against the will. The evidence, as far as it appeared before us, was, that the will had been obtained by the influence of Lady Trimlestown. But it does not follow, although the influence of Lady Trimlestown has given her a certain interest under the will, which the heir at law has a right to contest, that therefore the disposition contained in the will, so far as it related [446] to the Countess D'Alton and her family, could be impeached: and if there is no other instrument mentioned in the pleadings, I should rather suspect that this was intended to embrace that case; but it does not do it; and upon the motion for the new trial of an issue which had been directed by the decree, I should have had a doubt whether a new issue could be directed without a petition for a rehearing.

The Lord Chancellor: In strict practice, it could not; sometimes parties are not turned round on such an objection: but if the object of the Lord Chancellor in Ireland was such as the late Lord Chancellor of Ireland (Lord Redesdale) supposes, the issue is wrong, because then it ought to be whether the whole of the paper or what part of it contains the will of Nicholas Lord Trimlestown.

The House has a right to know (if it is open to a question whether only a part of the order is wrong) on what ground that part, with reference to which we have never had in any record that has been before us, any ground whatever for directing it, on what ground the Court directed that latter part of the issue. We are not to go into a long examination whether the Jury were right or wrong upon the issue as it stood before, but why the new matter is now introduced. I take it to be clearly within the competence of the House to say, that unless it be for the convenience of parties, they will not suffer the issue to be altered.

Lord Redesdale: The Jury might have found on the former issue, that so much of the will as related to Lady Trimlestown was not the will of Lord Trimlestown, but that so much of the will as related to the Countess D'Alton and her family was the will of Lord Trimlestown.

[447] I remember a case where the Jury found that the whole of the will was not the will of the testator. It was a case in which Lord Erskine particularly exerted himself. The person who framed the will had introduced himself as the ultimate devisee; the Jury found the rest of the will to be the will of the testator, but that ultimate devise which the person who framed the will had inserted they found not to be his will. So here if what is meant to be argued is this, that this disposition in favour of the Countess D'Alton may be good, and the rest may be bad, the Jury might have found a special verdict.

If the parties interested are all adult, and waive that part of the order, the question will then be open upon the will alleged, whether the verdict ought to have been special with respect to a part of the will, and negating the rest.

The Lord Chancellor: We are still under the difficulty, whether the record in the Court of Chancery authorizes the issue.

If there are a dozen other wills, this is an issue on the other wills. If the issue had been whether this was his last will and testament or not, there was no occasion for any other issue, if you intended to shew that by a subsequent will made, he revoked that will, because that would enable the Jury to find a verdict negating the validity of that will.

If it is a prior will, the latter part of the order has nothing to do with it, unless

there appears to be some equity arising out of the record in the Court of Chancery, with reference to which a prior will being established, that Court would give some relief.

(Monday, 5th March, 1827.) A question arose respecting the costs of a former [448] day of hearing, which had been paid by the Appellants to the Respondents.

The Lord Chancellor*: There should be no costs of the day; for if this decree as it now stands cannot remain without some steps being taken to get rid of the additions, that would be a ground for allowing at once the present appeal. I think the Appellants should not pay the costs of the day under the circumstances.

The issue is directed, Lady Trimlestown being the Plaintiff and the two D'Altons are to appear on their own behalf and on behalf of their issue. Does it appear from the Judges' notes whether this separate and distinct question was ever agitated before the Jury, namely, whether supposing this will to be bad with respect to Lady Trimlestown, it might not be good as to several parts of it as to the others?

Lord Redesdale: The Judges in their report do not state any thing about the directions which were given to the Jury.

The Lord Chancellor: There do not appear to be decrees in any of the other cases, and the issue is directed in a case which among the three cases would certainly not be the one in which an issue would be directed here.

Lord Redesdale: As I apprehend the verdict, it has found that it was not the intention of Lord Trimlestown to make any provision for his daughter or her family, or to make any provision for the payment of his debts out of the real estate, or to make any limitation in strict settlement of his estates to his son for life, his grandson for life, and so on limiting the estates over to the persons who were to succeed to the [449] title of Trimlestown. That all those provisions formed no part of the intention of Lord Trimlestown, at the time when he executed that instrument. That seems to be the result of what has been done.

The Lord Chancellor: There was a case on the western circuit, I think at Winchester, where a gentleman made his will, and the attorney who drew it, took good care of himself; for after leaving several legacies and some small bequests to other persons, he left all the residue of the real and personal estate to himself. The direction given by the Judge (whether right or wrong is another thing), was this, "you are to consider whether that part of the will is fraudulent, but it does not follow that if it is so, all the rest of the testament may not be confirmed." Does it necessarily follow in this will that all the provisions of 1812 are void, if the provision for Lady Trimlestown is void?

Dr. Lushington: I am prepared to argue that those circumstances which have shewn it not to be Lord Trimlestown's will, *qua* Lady Trimlestown, all bear upon the other devises and bequests in the will, and shew that it was not Lord Trimlestown's will, *qua* the Countess D'Alton and the other legatees.

The Lord Chancellor: It is capable of being so made out: but the question is, whether that way of considering the case was ever put to the jury; because if it has not been so put to the jury, the case has not been tried.

There must be a mistake in this point: if it was right to direct an issue in which Lady Trimlestown was Plaintiff—certainly another should have been directed, in which the Countess D'Alton was Plaintiff.

Lord Redesdale: You begin your evidence [450] against the will, by producing testamentary instruments as the wills of the late Lord Trimlestown, by which he makes provision for these very persons, and by which he limits his estate in strict settlement. Now the effect of this verdict is to say, that it was not the intention of Lord Trimlestown to make these provisions or to dispose of the estate in strict settlement, as averred by that instrument.

The Lord Chancellor: The trial of the issue in that case could not be considered binding on the other parties, there being a great many infants concerned.

Lord Redesdale: Had the evidence produced any thing to do with the question, whether the D'Altons were to have this estate.

The Lord Chancellor: I think it may be argued, that the conduct of Lady Trimlestown vitiates the whole will: but whether it does or does not, it is material to

* The costs were repaid by the Respondents to the Appellants.

know, whether Lord Norbury or Mr. Justice Moore put to the jury upon the trial the question whether, if the whole of the will was not good, any part of it was?

The question is, whether they should not have taken care that this should have gone in some shape to the jury.

Lord Redesdale: If this cause should come on to be heard in the Court of Chancery after the verdict, what is to be done?

The Lord Chancellor: We are sitting as a Court of Equity, and we cannot, as a Court of Equity, try the question relative to this will: and the consequence is, that if the questions embodied in the case, have not all been put to the jury, we have not yet got the opinion of the jury upon the questions or their finding, with respect to which alone we can [451] give any authority. It comes to be a very material question, whether there might not be an issue tried as between the D'Altons and the son!

Lord Redesdale: The issue directs that Lady Trimlestown shall be the Plaintiff; how could the verdict in this issue be a ground for dismissing the Countess D'Alton's bill? The order gives liberty to the Countess D'Alton and the husband to appear by counsel to defend their rights, and those of their children under this will.

(7th March 1827.) The Lord Chancellor: Supposing the evidence against Lord Trimlestown's intention be conclusive, every individual who claims under the former will, has a right to file a bill to set that will aside, they not being parties in this suit.

Suppose a new trial is granted, and Lord Trimlestown has the title as heir at law (whether it would be necessary to claim as such, is another thing): But, supposing he could claim as tenant for life under a former will, which former will is not capable of being effectually attacked, if Lord Trimlestown has filed this bill, making himself the sole party to the agitation of the question, whether the will of 1812 is to stand or not, if it should turn out upon the new trial that Lord Trimlestown is beaten, what is to prevent the persons claiming under the former will, to entertain a suit? Lord Trimlestown in his bill does not rely upon the testamentary papers; but if we are to argue upon some of the testamentary papers as being authentic, and shewing the testator's intention, then we are in truth setting up further papers as evidence of the will of 1812: whereas if it can be effectually done, it ought to be by other evidence, on the papers themselves being first proved.

[452] Lord Redesdale: It is singular that upon a bill where the D'Altons are Plaintiffs, Lady Trimlestown should be made the Plaintiff in the issue; but this extraordinary thing also occurs, that Lord Trimlestown is the defendant in that bill, in the character of heir at law, and in this character gives in evidence that which is to deprive him of that character, and which is not impeached.

The Lord Chancellor: We have no copy of Lord Trimlestown's bill. The issue is directed in the cause of *D'Altons and others v. Lord Trimlestown*; although this is to decide that which is to arise in three causes, we have no bill here except the bill in which the D'Altons are Plaintiffs.

On what principle were depositions taken in the other causes, to which some of the individuals were not parties, ordered to be read?

Mr. Horne: There was an order for it, and that order never appealed from.

The Lord Chancellor: It is not appealed from certainly.

This view of the case is extremely material, that whatever our decision might be, you cannot get through upon this state of the record.

With respect to the depositions taken in the other causes, and ordered to be read upon this trial, how can we sanction that against the infant daughters? How is it possible to proceed? We have no record upon the table, except the bill of Countess D'Alton and the answer of Lord Trimlestown; the consequence is, that it is next to impossible to judge whether evidence was not given at *nisi prius* which could not be given against all the parties. The bill in the D'Alton cause is originally filed by the wife only and the Kemmis's, the infant D'Altons being [453] made Defendants. After Lord Trimlestown's answer is put in, the bill is amended (under what authority I cannot tell, nor is this circumstance taken notice of at all in the printed cases,) by striking out the two infant Defendants, and making them Plaintiffs, claiming interests under this will jointly with their mother. After they are made Plaintiffs, and altering the nature of the demand made by the bill, there is no answer put in

by any body. Now what we are to do, regard being had to these parties, I know not. We cannot take upon ourselves to do that which a Court of Equity cannot do: what are we to do with this cause, looking at it as matter of precedent? I cannot at present, though I struggle to do it, see how the difficulty can be overcome—how, consistently with this record we can come to a decision. I am anxious to take care that the House should not establish a precedent, which it is its positive duty not to establish. The records are extremely material to look at, to see whether we can let this verdict stand, even if we thought it was right. Lord Norbury says the codicil of 1812, is admitted to be a good testamentary paper. If so, how can we conclude the rights of parties under it?

There have been cases in the Courts below, where a person putting in an instrument containing provisions for others, intended it to be only a colour for his deriving a benefit to himself, which he fraudulently seeks by the means of that instrument. Where that has occurred, the Court will not let any part of it stand; but have the courts gone so far as this? Supposing this instrument was improperly obtained on the part of Lady Trimlestown, if there happened to be in it provisions for other individuals, but on account of her conduct the will as it regards her is rejected, does [454] that extend to the testamentary dispositions to other persons?—Was there ever a case in which such provisions were held bad as to others?

Mr. Horne: The question on that point has been a good deal discussed lately in *Porrell v. Muchett* (6, Mad. 216. But the discussion does not appear in the Report.)

The Lord Chancellor: The infants being originally Defendants, and afterwards being made Plaintiffs, by amending the bill, if they had a demand under the will as Plaintiffs, could the original Plaintiffs (as it appears they have done,) waive a further answer, which might have been for the benefit of the infants?

Lord Redesdale: There is no common interest between the parents and the children: the two Mr. Kemmis's were struck out as Plaintiffs, and the children were inserted.

The Lord Chancellor: The date of Lord Trimlestown's answer, and the date of the amendment of the bill, proves decidedly that Lord Trimlestown's answer was put in before the bill was amended. When those infants were made Plaintiffs, their interests were very much neglected. There ought to have been something more than their being put into the bill. Mr. Kemmis is struck out, and there is a term vested in him for raising an annuity to Lady D'Alton; and I should have thought him as material as any one could possibly be to the suit. If it became necessary to make a decree to raise that annuity, how was that to be done without Mr. Kemmis?

Lord Redesdale: Several orders, and particularly [455] an order under which the depositions were used at the trial, was made in the three causes.

The Lord Chancellor: The trial was had, this order of the 6th of June, 1818, in three causes, directing what sort of evidence was to be produced. In those three causes did all the Defendants put in Answers?

Mr. Nolan: It appears that every one of the persons who are made Defendants in these several Bills, put in their Answers.

The Lord Chancellor: Then why have you not their Answers? Where persons are suing for themselves and for the interest of infants, it will not be considered satisfactory if counsel do not take objections which they ought to have taken, because they apprehend the Court is bound to object on the part of the infants.

Lord Redesdale: A Court of Law could only obey the order. Here Lady Trimlestown was the Plaintiff in the issue, and the other persons were no parties to the issue.

Mr. Horne: It is ordered, that the Plaintiffs, Peter Count D'Alton and Rosalie Countess D'Alton his wife, be at liberty to appear in the action.

Lord Redesdale: What right had the Court to make such an order? What is to be done? The case being in the Court of Chancery, if the verdict was not impeached, there could be no motive for a new trial. What is the Court of Chancery to do? There is error on the face of the decree.

The Lord Chancellor: The effect of the order as to depositions, appears to have been utterly mistaken. It was considered as an order, that put upon the parties a duty to produce these depositions, whether the depositions would be evidence or would [456] not be evidence: whereas the order is neither more nor less than the

liberty to offer in evidence depositions without reading the Bill and Answer, and all the proceedings which are usually read in order to introduce them.

Mr. Horne: The depositions read at the trial, were not the depositions of witnesses examined in the Court of Equity when the cause was in hearing, but depositions taken upon a commission issued subsequent to the decree.

Lord Redesdale: If the cause should go back in the state in which it is without any alteration, what is the Court of Chancery to do? It cannot dismiss the Bill.

All the proceedings have been so irregular, that the Court could do nothing upon it. It ought to order the cause to be set down again. Is this order which directs an issue a decree?—is it not interlocutory?

Mr. Horne: There was, as I collect from the papers, a regular decree in the cause of the Countess D'Alton, which directed the issue.

Lord Redesdale: The prayer of the Bill is, that the will may be declared well proved and so on; the order being in the nature of an interlocutory order, if the cause comes on afterwards, the Court must judge whether that order tries the merits of the cause.

The Lord Chancellor: The word decree happens to have got into the order; but looking at that part of the order which directs, that although publication has passed, they shall be at liberty further to examine witnesses, it appears to me impossible to say it is a decree before witnesses examined. That order for examination of witnesses after the issue directed must be by consent, and there was no consent here.

If there is no decree, the infants, or the persons [457] who have the care and custody of the infants, seem totally to have forgotten to inquire whether, if they could not claim a benefit under one will, they might not under another, as they could under any paper of the Testator that might have been brought before the Court, and ought to have been brought before the Court.

Lord Redesdale: This order puts the management of the issue in Lady Trimlestown and her husband. They are to strike the Jury, and so on. All that is said with respect to the Countess D'Alton is, that she might be at liberty to attend at the trial. Now Lady Trimlestown being made the party Plaintiff in the issue, a great deal might be evidence against her on the trial of the issue, which would not be evidence against the D'Altons or any other party.

The Lord Chancellor: A person meaning to commit a fraud for his benefit, might have constructed such an instrument, that the fraud should defeat the whole of the provisions of it, though some of them were made for other persons. But if it happens that the instrument does not make new provisions, but only repeats provisions which had been made in good antecedent testamentary papers, then the fraud may have introduced that, which, if it is objectionable as it regards A., may not affect every thing that is to be found in that paper.

Lord Redesdale: At present the judgment on the trial of the issue is against Lady Trimlestown; but if the D'Altons had been Plaintiffs in the issue, they might have thrown Lady Trimlestown over board. Evidence merely to affect Lady Trimlestown, and not the D'Altons, makes the trial of the issue a totally different thing.

The Lord Chancellor: In that case, which was [458] tried at Winchester, where the real estate, if it passed at all, passed by the residuary devise, Mr. Justice Buller, who tried the cause, was of opinion (right or wrong), that an attorney making himself the residuary devisee, was a fraud; which was going a little too far. In the trial of that case, nobody disputed that the other parts of the will were good, and the Jury found that he did not devise the residue of the estate; that the residuary clause was not part of the will. I do not mean to give any opinion here as to what would be the effect of putting a case of that sort in that way, but it appears to me that the trial was neither properly directed nor properly conducted; unless on the part of some of the persons who were at liberty to attend this trial, the question was either directly or actually put in that way.

Lord Redesdale: The name of Mr. Kemmis was not struck out of the bill until the 6th of December, 1817, and the order directing the issue was the 18th of June, 1817. By the subsequent order of 21st November, 1818, the issue was supposed to be affirmatively upon Lady Trimlestown.

The Lord Chancellor: Can any man take upon himself to say, that the D'Altons could not have claimed an interest under some of the former papers?

Lord Redesdale: The order of the 21st of November, 1817, varies from the order of the 18th of June, 1817.

The Lord Chancellor: The paper of August, 1812, Lord Norbury reports to be a good testamentary instrument. The passage I allude to is this:—"Here at the desire and admission of each side, several letters were proved or admitted to be read at each side, to which letters I must refer your Lordship as the best interpreters of them-[459]-selves, as well as of the competency or incapacity, if any, or the failure of the intellect of the testator, and the object of his intentions: on which letters many ingenious observations were made by counsel at both sides in this peculiar and protracted trial during many days, and embracing every part and transaction of the testator's life, from 1797 to his death in 1813, during which period it was argued by counsel for the Plaintiffs, that he manifested increasing anxiety upon the subject of his testamentary dispositions, as actuated by his various views and impressions of vicissitudes and changes (most of them towards the latter period of his life), arising from new occurrences in his affairs and new properties devolved upon him, all of which were urged with pointed observations on the codicil of the 2d August, 1812, etc., which was not impeached during the trial, but undisputed and admitted as a testamentary disposition of testator." According to Lord Norbury's description, he thought the testator capable of judging what he was about on the 2d of August, 1812.

(Monday, 19th March, 1827.) The Lord Chancellor: There are no parties to this appeal except Lord Trimlestown and Mr. Lloyd. Neither his son nor the D'Altons are named in the appeal. Lord Trimlestown put in his answer in the cause, on his own behalf and in behalf of his son, but *the son is no party to this appeal*. If the son is of age, he should be made a party to the appeal. Lord Trimlestown is only tenant for life under the will; it could not be competent to him to consent as against his own issue. How can we make an addition to the order directing a new trial upon an appeal which brings nobody before [460] us but Lord Trimlestown himself and the Lloyds? How can we possibly do that, having no other Appellant or Respondents than those who are now here?

Lord Redesdale: There are inaccuracies in the whole proceeding. Evidence was admitted upon the trial under the order made in the three causes, the issue being conducted in only one, and the order could not possibly have been made in that one cause.

The Lord Chancellor: Those who are the parties upon this issue were parties in those several cases. But that does not help the imperfection, because, besides the circumstance that the order was made when the persons who were parties in those causes were infants, the Court could not order evidence to be read against parties in whose cause the evidence was not taken.

Mr. Parry: The same evidence was taken in each cause. The Abbé O'Dwyer was examined, for instance, in each cause. Commissioners went from Ireland to France, where they examined him.

The Lord Chancellor: That does not appear in our proceedings. It is clear that if they had been made parties to the issue, considering that one was a married woman and that the others were infants, the Court here would have directed those points to have been made at the trial, about which not one word was said. To bring here the necessary parties, you must present another petition calling them here. Suppose a creditor files a bill against Mr. Kemmis, who has been, for some reason quite unintelligible to me, dismissed as a party to the suit: if any creditor or any legatee, under the last will of Lord Trimlestown, were to file a bill for his debt, or for his legacy, would such creditor or such legatee be bound by that issue?

[461] The Attorney-General: Any creditor might try it again; but in cases of this sort, it is not matter of necessity for the Court to have before them every possible party who might meet the question again.

The Lord Chancellor: It certainly is not; but it is extremely material, if you are trying a question before a jury, with respect to the validity of a will, to take notice that the testator has, as we are apt to say upon these occasions, not gone into his grave without taking care of his creditors. It may turn out upon inquiry, that it is impossible to make this will valid with respect to the Countess D'Alton, if it is not valid with respect to Lady Trimlestown; but whether it be so or not, in my

judgment the Court of Chancery ought to have ordered the counsel of this married woman and these infants, distinctly to take the opinion of the jury upon the issue, and to make objections to the admission of a great deal of evidence, which appears to have been admitted. Suppose Lord Trimlestown had succeeded in the ejectment prayed by this bill, would that ejectment have prevented any other person from trying the validity of this will?

Lord Redesdale: As to all the interest taken by persons entitled to the remainder it is impossible that the Court can do any thing in this suit. If it were to come before the Court upon this verdict, the Court could pronounce no order.

The Lord Chancellor: Lord Trimlestown is only tenant for life, and therefore the first tenant in tail in remainder ought to be a party to this appeal.

Lord Redesdale: The whole proceeding is irregular from beginning to end. I see that Lord Trimlestown insists by his answer to the Countess D'Alton's [462] bill, that the bill is not Countess D'Alton's, but Lady Trimlestown's, and they have proceeded upon that issue to try this question, with Lady Trimlestown as the Plaintiff in the issue.

In order to do justice in this case, all the parties interested in the different instruments, ought to have been before the Court, and the Court ought to have directed an issue to try whether any and which of the instruments, or any and what parts thereof, were the will of Lord Trimlestown.

The Lord Chancellor: The House cannot do that upon these pleadings, because these pleadings take no notice of any antecedent will at all.

We should probably have no objection to the cause standing over, with liberty for you to make any application to the Court of Chancery in Ireland, but whether you will find, regard being had to the state of the record, that the Court of Chancery can do any thing, is another matter.

Lord Redesdale: Lord Trimlestown upon the pleadings in this cause, stands in the case of an heir at law, insisting that his father died intestate, and the evidence he produces upon the trial of this issue, is that very testamentary act, which he says is to be regarded as shewing the intention of his father.

The Lord Chancellor: The bill on his part, contends for an intestacy, and yet his infant son appears by him to claim a life estate under this very will.

Lord Redesdale: The justice of the case never can be attained in the suits as they are framed, and certainly not in the one suit. If it can be effected at all, it must be in the three suits. An order has been made in the three suits on which evidence was [463] admitted at the trial, and this alone is such an irregularity that it is impossible the Court can decide upon the merits of the case.

The Lord Chancellor: The Judge at Nisi Prius informs the Court that divers wills have been given in evidence, whereas Lord Trimlestown is proceeding in this case as if it were an absolute intestacy.

Lord Redesdale: It is impossible in this case to do any thing, for the issue is directed only in the one cause. It is clear from the evidence upon which the Jury have proceeded that that cause cannot try the merits between the parties, and consequently that when the cause comes on upon this verdict, the Court can make no order.

The Attorney General: If there were a remit to the Court of Chancery, in Ireland, would it not be possible to direct an issue in the three causes with the intervention of those parties who claimed separate interests; for instance, Lord Trimlestown's son may be permitted to raise a separate question upon the will.

Lord Redesdale: There are not the proper parties before the Court.

They must not only amend the order directing the issue, but they must amend all the pleadings in the cause. They must make it a new cause.

The Lord Chancellor: If the Lord Chancellor, when he directed an additional issue, had been asked upon what part of the record in those causes he made the addition, in all probability he would have found out that he could not do it upon any part of the record.

Lord Redesdale: Supposing the verdict to be in favour of the will, excepting the dispositions in favour of Lady Trimlestown, the effect will be, that all the [464] prior wills (and the interest of Lady Trimlestown under them) will be revoked by this will; so that it seems to me, that the justice of the case never can be come at but by an issue, directing the jury to try whether any, and, if any, which of the instru-

ments that have been brought forward in this cause, and what parts of them constitute the testamentary disposition of Lord Trimlestown:—then the jury would have the whole case before them; and they must find what was the will of Lord Trimlestown, and what was not the will of Lord Trimlestown.

If you act upon this proceeding only, you must dismiss the bill: which you have no right to do.

The Lord Chancellor: Suppose it turned out that there was another will, could the Court of Chancery make any decree in the present state of the record?

Lord Redesdale: The Court must see that upon the trial of this issue, the merits have not been tried supposing the verdict was right. The justice of the case would be met by an order, referring it back to the Court of Chancery, to review all the proceedings, with liberty for the parties to reform those proceedings in such manner as shall bring the rights of the parties properly in discussion before the Court.

There is nothing so important in the administration of justice as regularity of proceeding. Wherever there is irregularity in the proceedings, it always tends to a bad administration of justice, or to injustice.

The Lord Chancellor: The question is, what the House can do. We are in this situation:—if we say there shall be a new trial, and there is a new trial, in the present state of the record the verdict upon that new trial will be in the same situation as the present is. [465] If this house were to reverse the Lord Chancellor's order, and to say there should be no new trial, and the cause were to proceed, and the Lord Chancellor were to make a decree in consequence of that verdict, that decree would be the subject of an appeal here, and then we should say that upon this state of the record no such decree could be made.

14th June. Lord Redesdale: It appeared in the evidence in this cause that several instruments were executed by Lord Trimlestown for testamentary purposes, and a Bill was filed by the Countess D'Alton, for the purpose of having that which was the last instrument alleged to have been executed by the late Lord Trimlestown, carried into effect in respect to her interests. In the course of the proceedings, before the case had come to that stage in which the Court had to pronounce a decree upon the subject, an order was made for the purpose of directing an issue to try the validity of the instrument thus alleged to have been the will of Lord Trimlestown. That was not a decretal order, but an interlocutory order, made in consequence of some application to the Court. There was also an application for the purpose of having a receiver appointed of the estates during the pendency of the suit.

The order was of rather an extraordinary nature. The plaintiffs in this cause in the Court of Chancery, were the Count and Countess D'Alton. The Defendants were Lord Trimlestown and Mr. Lloyd and Lady Trimlestown his wife, and the children of the Countess D'Alton. The issue directed was—not an issue in which the Count and Countess D'Alton were Plaintiffs, but an issue in which the Dowager Lady Trimlestown was to be Plaintiff, and the Count and Countess [466] D'Alton were to be at liberty to appear and defend their rights. Upon this issue, which ought never to have been directed in such form, it appears to me to be impossible to come at the justice of the case, considering what appeared upon the trial of the issue so directed.

Upon the trial of that issue, several instruments were produced in evidence, which had been executed by Lord Trimlestown, from time to time, as testamentary instruments. The last instrument, that with reference to which the issue was directed, was impeached because it was an instrument executed under the improper influence of Lady Trimlestown, the wife of the late Lord Trimlestown, over her husband, in consequence of which it was said to be her will and not his will. That was the great point in discussion in the case. For the purpose of establishing that fact, a great deal of evidence was entered into, evidence applicable perhaps to an issue in which Lady Trimlestown was the Plaintiff, but if in this issue the D'Alton's had been Plaintiffs, it might have been exceedingly doubtful whether much of that evidence could have been given. Several instruments were given in evidence which had been executed by Lord Trimlestown, all of which made considerable provision for his daughter the Countess D'Alton, and the great objection to the last instrument was the increase of provision for Lady Trimlestown, far beyond the original intention of Lord Trimlestown, expressed in the first will which he had executed.

The result was, that upon the trial of this issue a verdict was given against the

Plaintiffs. An application was then made to the Court of Chancery for a new trial: the Lord Chancellor of Ireland directed a new trial: and the cause came by appeal from that order of the Court to this House, but [467] without the information which was necessary to enable this House to form a judgment upon the subject: because there was not a sufficient report from the Judges of what had passed upon the trial. The cause was remitted therefore to the Court of Chancery in Ireland, for the purpose of obtaining the report of the Judges. The report of the Judges then came before the Court of Chancery: there had been three Judges at the trial at bar in the Court of Common Pleas; one had died in the interim; the other two, Lord Norbury and Mr. Justice Moore, stated what had been tendered in evidence, and it appeared that the opinions of the two learned Judges differed. Lord Norbury was of opinion that the verdict was not warranted by the evidence: Mr. Justice Moore was of opinion that the verdict was warranted by the evidence. Under these circumstances the Lord Chancellor of Ireland, after hearing counsel at considerable length, ordered a new trial to be had in the Court of King's Bench. This order of the Lord Chancellor of Ireland became the subject of appeal to this House, Lord Trimblestown insisting that a new trial ought not to have been granted.

When the case came to be discussed before your Lordships, it appeared that it was impossible, whatever should be done upon the verdict upon that issue, to decide the cause. How could you, or how could the Court of Chancery below, make a proper decree with respect to the late Lord Trimblestown's property, upon an issue directed, in which the whole of the case, as it affected all the persons claiming under that will, was to be operated upon, by evidence which, though it might be admissible against the Dowager Lady Trimblestown, could not possibly affect the other parties. In this view of the case, when it came before [468] the House, and was heard by the learned Lord who then sat upon the Woolsack and those who attended, it appeared absolutely necessary to consider in what manner the cause should be put into such a shape, as that something effectual could be done. In the first place, this being an interlocutory order, if the verdict had been in favor of the Plaintiff, no decree could have been pronounced upon it. Upon the return of the verdict there must have been further proceedings in the cause, and all proper parties must have been brought before the Court, who did not appear to have been brought before the Court in the cause as it stood.

There were at the same time depending two other causes, one in which Lady Trimblestown and her husband were Plaintiffs, and the other in which Lord Trimblestown was the Plaintiff, and some of the orders respecting the trial of the issues, and the evidence which had been offered had been made in one of the causes and some in others of the causes; the consequence of which was, that there was what I do not know how to express by any word so appropriate as the word jumble. There was a jumble of the three causes, which made it extremely difficult to say how, in an appeal in one cause, you could take into consideration the effect of the trial of an issue, where part of the proceedings, and particularly with respect to the admission of some particular evidence, was had in those three causes. Upon the whole, therefore, it appeared to the noble Lord who then presided and myself, that there was no use whatever in proceeding in the cause as it then stood; that all which had been done might be considered almost as expence thrown away, and that it was necessary that the cause should be put in such a state, as that finally the Court of [469] Chancery in Ireland might be able to pronounce an effectual judgment, which judgment should embrace the rights of all the parties claiming under the will of Lord Trimblestown.

It appears that Lord Trimblestown had made great provisions for different purposes. By this instrument, and I believe by every one of them, he had entailed the interest in what I should call the Trimblestown Estate, upon his son and upon his issue male in strict settlement, and he had entailed it upon the D'Alton's in remainder: he had made a different disposition with respect to another estate, the Barnewall Estate, to which he succeeded as the heir of Lord Barnewall. He had limited that estate with a view to its going (failing the descendants from himself) over to the Barnewall family, so that he had in view, unquestionably, in those different instruments a variety of objects besides Lady Trimblestown.

It was endeavoured upon the trial of the issues to connect, in some degree, the Countess D'Alton with Lady Trimblestown, and some of the evidence, which affected

the Dowager Lady Trimlestown, affected also the Countess D'Alton. The evidence, however, on that subject was extremely slight: the Countess D'Alton had been unfortunate in her marriage, and had been therefore in a state of distress, and was living with her father, or dependent upon him, and she, in a letter which she had written to Lady Trimlestown, expresses her obligation to Lady Trimlestown for her kind interference, in respect of the disposition Lord Trimlestown had made in her favor and that of her children. But whatever effect that might have against the Countess D'Alton, it had none against her children.

It appears to me absolutely necessary that the [470] cause should be put into some other course, so as to present the questions which arise upon the several instruments offered in evidence upon the trial of the issue, (which are very different wills and instructions for and drafts of wills and codicils, and so offered in evidence on the trial of this issue, for the purpose principally of shewing the progress of the influence of the Dowager Lady Trimlestown on the mind of her husband,) and to bring all those properly within the view of the Court. For supposing the last will to have been made under the influence of Lady Trimlestown, so as to affect it with reference to the large provisions made for her by that will, that could not possibly affect the dispositions made in favor of the rest of the family, so that the Jury, if they had conceived that that influence had been carried to an improper length, ought not to have found against the whole of the will. If, on the contrary, it appeared to them that the whole of that will had been improperly obtained, it then became another question whether the prior will was not to be considered as the disposition of Lord Trimlestown, that prior will appearing to have been regularly executed with a considerable degree of deliberation with respect to the dispositions contained in it. If that could be affected, still there was a prior instrument, and it was a question important for consideration, whether the whole were affected in the way in which it is conceived that the will last in point of date was affected by the supposed influence of Lady Trimlestown, and the intention of the former instrument would be considered as involved in the same fate: at least it was a matter to be left to the Jury. It was clear therefore to us, that the trial which had been had could not possibly be satisfactory, and that the verdict which [471] had been given was not one, if it was to stand, on which the Court could take any proceeding in the cause, for it was upon an interlocutory order, it did not preclude the parties from amending the Bill, and the whole was thrown into a state of confusion. As it appeared to us, therefore, there could be no end in directing a new trial upon this issue, as had been done by the Lord Chancellor of Ireland, or proceeding in any manner on the order made for that purpose.

Under these circumstances, I should propose an order referring the whole back again to the reconsideration of the Court of Chancery in Ireland, so that the whole case may be properly brought before that Court for its decision. It may be questionable whether the proper way of bringing the whole case before the Court for its decision, would not be by proceeding in the three causes, and bringing all the three causes together to be heard before the Court of Chancery, in one of which Lady Trimlestown is Plaintiff, in another Lord Trimlestown is Plaintiff, and in the one before your Lordships the D'Alton's are Plaintiffs. Those three causes might be brought on perhaps together, and upon those three causes being so united, such directions might be given as might try competently the rights of all the parties. Upon that point, however, it is not in your Lordships' power to give any direction—you can only make an order in the cause which is before you. I propose, therefore, to make an order, stating the opinion of the House with respect to the impossibility of doing complete justice in the appeal which is now before you: that you are of opinion that this cause ought to be referred back to the Court of Chancery for further consideration, in as much as it appears to your Lordships that having regard to all the [472] circumstances to be collected from the several matters appearing in the Judges' report to have been offered in evidence on the trial of the issue directed by the order, the merits of the whole case, as affecting the rights of the parties in this cause, and of other persons interested in the estates of the late Lord Trimlestown, as claiming under or against the several instruments given in evidence in the cause, cannot be properly tried under such issue, and that therefore it is not fit that any farther proceedings should be had under the order directing that issue, and that the

parties interested should be at liberty to proceed as they may be advised, for the purpose of bringing before the Court of Chancery the question whether by all or by any one, and which of the said instruments alleged to have been executed by Lord Trimlestown, as testamentary instruments, or any and what part and parts thereof respectively, Lord Trimlestown did devise and convey all or what part or parts of his real estates, and in what manner and in and by what words, (my view in proposing that direction is that the Jury may find specially, if they shall think that a part of the instrument ought to be rejected and a part retained, and in that case that they may find what words in the will are the words which they ought to substantiate,) and that a proper issue or issues be directed by the Court, in such manner as to the Court may seem right, and in which all proper persons may be made parties.

It appears to me most extraordinary, that in an issue to try whether the Count and Countess D'Alton and their children had any interest in the estates of Lord Trimlestown, the deviser, Lady Trimlestown, whose conduct was the subject of animadversion, should be made the Plaintiff; and therefore, I [473] conceive that if the Court should finally direct issues upon the subject, it might be material to consider whether one or more issues should be directed, and also who should be the parties in those issues, so that a proper decision may be finally had upon which the Court may determine; so that upon the verdict or verdicts that may be found upon the trial of those issues, the Court may be enabled to pronounce a decree respecting the right of the parties in this cause consistently with their rights, and with the rights of all other parties claiming interests in the real estates of the late Lord Trimlestown. When a Court of Equity pronounces a decree carrying into execution the trusts in a testamentary instrument, it is necessary that it should be applied to the rights of every person interested.—Upon this issue you cannot apply it to the rights of every individual, there being several persons not named. For instance, if the rights of the Count and Countess D'Alton are to be supported, they are to be supported against the interest of the remainder man, whose estate will be charged for their benefit. If the instruments are to be considered as sustaining the rights of Lady Trimlestown, her rights will overrun, to a certain degree, the rights of the Count and Countess D'Alton and their issue as well as those of Lord Trimlestown. For such purpose it appears to me that you should declare your opinion that the Plaintiffs in the cause should be at liberty to amend their bill in such manner as they may be advised, so that they make their bill what it ought to have been originally, bringing before the Court all parties interested in the cause; particularly there are certain trustees who are not brought before the Court, whom it may be absolutely necessary to bring before the Court; and that [474] you should order this cause to be referred back to the Court below for further consideration, the Court having regard to the several matters before expressed, and the further progress of this cause, in a manner which may be just and right. Having prepared three or four forms in which I thought the cause might be disposed of, I have at last, with the concurrence of the noble and learned Lord who presided at the hearing of the cause, conceived this shorter form would best answer the purpose of justice and leave the Court below at the greatest liberty, referring the whole back to their reconsideration, and suggesting at the same time why it was so referred back for their consideration, pointing out to them, as far as it is proper to point out to them, the difficulties which prevented your making any decision, except that of referring back to them the question, upon the appeal now brought before your Lordships.

It is lamentable that so much expence should be incurred in this cause— it is unfortunate that so little success should attend the efforts of parties to cut short a cause. But the farthest way about is often the nearest way home, and I think that this cause is a strong proof of the truth of that saying and of the importance of regularity in judicial proceedings, particularly in bringing all parties before the Court, and not attempting to save expence to parties by dispensing with that which is the proper and regular mode of proceeding. I believe it will be found that it would save considerable expence to the parties to follow the ordinary rules. Where the parties are disposed to abide by the event of a trial upon a simple question of fact, and whatever the decision upon that question may be, to abstain from further litigation, they being the only parties interested, their [475] object may in that mode be effected, but when a whole family are to be affected by the decree of the Court, as it must be

in this case if the decree is carried into effect, the consequence is, that the Court must give directions to carry into execution all the trusts of the will, which shall be finally established as the will of Lord Trimlestown. In such a case, I believe no advantage is ever gained by attempting to take the shorter course instead of the longer one. I beg to move your Lordships that that which I have stated from this paper be the judgment of your Lordships.

The Earl of Eldon: I am most decidedly of opinion, that no verdict whatever that can be given upon the issue which was directed in this cause, can enable the Lord Chancellor of Ireland to give any such judgment in these causes as ought to be given. The consequence of that is, that we are placed in this situation, that if we either direct a new trial, or refuse to grant a new trial and leave the old verdict in subsistence, it is equally without avail. If we grant a new trial, we are granting that for a reason which, in my opinion, can operate nothing more than to create a vast additional expence, which can be of no use. The only thing, therefore, that the House can now do that can be useful, is to intimate to the Court why we think that this new trial, if it ought to be granted, should be in a form in which it can avail the parties, and upon that subject I will take the liberty of saying, that supposing the trial to have been properly directed, it appears to me that a great deal of evidence was admitted, the admissibility of which I cannot help considerably doubting, or rather going the length of denying. I am further of opinion, that a point was totally missed upon that trial, which I take to be extremely important, [476] which is, that if there was a part of that will which, on account of undue influence, ought not to be considered as the testamentary instrument of the testator, it does not therefore follow that the whole of that will was to be condemned. We have a case * of that kind which was before Mr. Justice Buller, at the Assizes at Winchester, where the Jury found, that the residuary devise of the estate was good for nothing, on account of the conduct of the party who prepared the will, but the Jury found that all the rest was good; and a great part of this very will, even if one part is affected, on the ground of influence, may be confirmed, and may be as validly testamentary as any will that was ever made. So in the case * of Mr. Barnard of South Cave, the Jury determined that that which was presented to them contained the will of the testator, holding at the same time, however, that a considerable part of that which appeared upon the face of the will, was not any part of the will of the testator: and that points out the utility of the direction contained in this paper, that the Jury shall find in what words the testator devised: but, whatever may be found in an issue directed merely in this one cause, it is impossible that that verdict can regulate the rights of the parties in such a way, as that the Court of Chancery can give a proper direction in all these causes. The consequence of that is, that the Court must take into its reconsideration whether all the causes ought not to be heard together, and whether there ought not to be some amendment before the causes are heard together, so as to introduce all the points, which the Jury [477] ought finally to determine: and I conclude with saying, though it is only a repetition, that if a new trial were granted upon this issue, let the result of that trial be what it may, if the proceedings in the Court of Chancery in Ireland are like our proceedings in the Court of Chancery in England, they may travel through a first trial and through a second trial, and the verdict which may be so obtained will be utterly ineffectual for the purpose for which it is required.

(14th June, 1827.) Ordered and adjudged, that the cause be referred back to the Court of Chancery in Ireland, for further consideration thereof: inasmuch as it appears to this House, that, having regard to all the circumstances to be collected from the several matters appearing from the Judges' report to have been offered in evidence on trial of the issue directed by the said order of the 18th day of June, 1817, the merits of the whole case, as affecting the rights of the Appellant in this cause, and of all other persons interested, in the real estates of Nicholas Lord Trimlestown, deceased, and claiming under or against the several instruments produced in evidence on the said trial, cannot be properly tried on such issue, and that therefore it is not fit that any further proceedings should be had under the said order of the 24th day of May, 1824, complained of in the said appeal: but

* Diligent inquiry has been made as to these cases, but as yet without effect. Information, if obtained, will be inserted in a note at the end of the volume.

that the parties interested should be at liberty to proceed as they should be advised for the purpose of bringing before the said Court of Chancery the question, whether by all or any and which of the several instruments alleged to have been executed by the said Nicholas Lord Trimlestown, deceased, as testamentary instruments, or by any and what parts or part thereof respectively, the said Nicholas Lord Trimlestown, deceased, did devise all or any and what parts or part of his real estates, and in what manner and by what words, and that a proper issue or issues may be directed by the said Court in such manner as may be necessary, and in which all proper persons may be made parties, so that upon the verdict or verdicts which may be given on the trial of such issue or issues, the said Court may be enabled to pronounce a decree respecting the rights of the Appellant in this cause, consistent with his rights and with the rights of all other persons claiming [478] interests in the real estates of the said Nicholas Lord Trimlestown: And this House is of opinion, that the rights of the Plaintiffs in this cause cannot be properly determined, on the pleadings in this cause, as the same now stand: And it is further ordered, that this cause be referred back to the said Court of Chancery for the further consideration of the said Court, to the end that the said Court, having regard to the several matters hereinbefore expressed, may further proceed in the said cause in such manner as shall be just.

[479]

ENGLAND.

(COURT OF CHANCERY.)

RICHARD HEMING,—*Appellant*; THOMAS CLUTTERBUCK and
EDWARD EVANS,—*Respondents*.

[*Mews' Dig.* xv. 394 (*Hemming v. Garrey*), S.C. 1 Dow and Cl. 479. 2 Sim. and S. 311 (*Mews' Dig.* xiv. 1764, xv. 1564). Commented on in *Wilson v. O'Leary*, 1872, L.R. 7 Ch. 448, at pp. 455, 456. Followed in *Turkey v. Henderson*, 1863, 33 Beav. 175.]

G. H., by a testamentary paper in the form of a regular will, naming executors and bequeathing the residue, bequeaths "to his wife £500 sterling per annum for her life, to be placed in and payable out of the long annuities, to stand in her name and etc., (Trustees) and at her decease, to my father T. H. for life, remainder to my cousin R. H., son of my uncle, absolutely," etc. By a second testamentary paper, dated four months after the first, and beginning in the regular form of a will, but not naming executors, nor bequeathing the residue, the testator gives "to his wife so much money as will purchase £500 sterling per annum, in the long annuities granted by government, the income thereof to be received by her during her life for her own use, and at her death, to my child or children for their own use and benefit equally: in default of issue, then to my father T. H. for his life, and at his death to go to my cousin R. H. absolutely," the principal to be in the name of etc. (wife and trustees).

Each of the testamentary papers contained a great number of legacies, and in a large majority of the bequests they were precisely in similar terms. In the case of two of the legacies given by the second will, the testator expresses that they are to be "in lieu of any other annuity he may have granted" to those legatees. This precaution is omitted in the case of the legacy to the wife with remainder, etc. The two papers were proved in the Ecclesiastical Court as one will.

Held in the Court below without doubt, that the second legacy was a substitution for the first. Held on appeal, that it was a case of great doubt and difficulty, but the judgment was affirmed.

The question in this appeal arose upon the construction to be put upon two paper writings, dated respectively the 28th of May, 1780, and the 26th of August,

[480] 1780,—the former marked as an exhibit in the Ecclesiastical Court with the letter F, and the latter marked as an exhibit in the Ecclesiastical Court with the letter G,—of which as constituting the last will and testament of George Heming, Probate was granted by the Prerogative Court to Thomas Ludbey and James Gurry.

These paper writings were in the words and figures, and written with the inter-lineations, and in the manner following:—

“ F ”

“ In the Name of God Amen ”

“ I George Heming of Bond Street in the City of Westminster Goldsmith being of perfect mind and memory make this my last Will and Testament.”

“ Imprimis I bequeath to my dear & faithful Wife Ann Heming Five hundred pounds sterling *l.* annuum for her life to be placed in and payable out of the Long Annuities And to stand in her Name and in the Names of my dear Father Thomas Heming my valued friend Thomas Ludbey & my worthy Kinsman James Gurry In trust for the use of my Wife for her life payable half yearly & at her decease to my Father Thomas Heming for his life remainder to my Cousin Richard Heming Son of my Uncle George Heming & absolutely for his use upon his attaining twenty five years of age if the forenamed Parties are dead, till that time in the same Trusts the parties interested to chuse a new Trustee upon the death of either taking place ”

“ To Eleanor Gurry Wife of the aforesaid James Gurry I bequeath Fifty pounds sterling *l.* annuum for her life out of the Long Annuities and in the same Trusts as above remainder of the term after her death to the Children of Eleanor Gurry by James [481] Gurry share and share alike upon their becoming of age each Child to have their respective share transfer'd to them but the foregoing devise is not to take place except James and Eleanor Gurry do assign their share in an Estate called the Barrow to John Weaver and his Wife as is after directed in the fullest manner in their power ”

“ To Jane Gilley and Benetta Gilley I do bequeath Fifty pounds *l.* Annum to each of them for life in the same Trusts as aforesaid, but in both instances the name of the parties intended to be benefitted to stand in the Bank Books with the Trustees and in case of the death of either Jane or Benetta the deceased Interest for the remainder of the term to go to my Wife absolutely and at her disposal but in case of her death previous then to Thomas or Richard Heming as before.”

“ To Catherine Gilley Two hundred and fifty pounds sterling provided she assign all her Interest in the Barrow to John Weaver & Wife And I recommend her to place it in the Long Annuities for her Life & convey it to her Children if any as she may be married for aught I know & if so I hope happily believing her deserving.”

“ To John & Mary Weaver I bequeath the share of James Gurry & Wife Catherine Gilley & the 2 shares I bought of Jane & Benetta Gilley And I request my wife will assign her Share in the Barrow Estate absolutely to John & Mary Weaver for their joint lives & at their decease to their Children equally But I recommend them to sell the Estate But if so they must place the Money in the trusts aforesaid, for the use of their Children at their death & when of age or forfeit this Bequest.”

“ To my Wives 5 Sisters Fifty pounds each over & [482] above all the foregoing bequests they giving up all papers they may hold respecting payment of Money especially Jane & Benetta.”

“ To my dear Wife my Estate at Edgeware absolutely as she seemed fond of it But request she never Builds there to make a Residence knowing altho' she likes it now it would not be suitable for to reside at—if she does not part with it I recommend it to be left by her to Richard Heming.”

“ I leave to Felix Vaughan Son of Samuel Vaughan Five hundred pounds in the same trust till of age then absolutely hoping he will be advised by my Trustees.”

“ I leave to Thomas Laver as some return for his Fathers faithful services Five hundred pounds in the same manner as I have done above to Felix Vaughan.”

“ To my respected friend Alexr. Baxter Esqre. a piece of Plate of One hundred Guineas value if he be alive at my decease.”

“ To Mary Mapletoft and Beatrix Peirce each one hundred Guineas for their sole use & benefit.”

“ To my dear Wife Three thousand pounds absolutely at her disposal & to her sole use.”

"To my dear Father my share of Ingatestone Estate & to him, Thomas Ludbey and James Gurry my three Executors Five hundred pounds each & likewise to my Wife all my Household Furniture Pictures & whatever I may die possess'd of, the rest and residue of all my effects appointing her to act as Trustee in conjunction with the above named believing firmly she will benefit and shew kindness to all those she knew I esteemed or that were deserving—I likewise bequeath my esteemed Friend John Brewster Esqre. One hundred Guineas if his death takes place previous to mine then equally to his Children."

[483] "as to my Wife if she does marry again which I by no means disapprove of I hope she will gain one deserving her & that will esteem her as she deserves—only advising her to have her fortune settled upon her & her Children previous to Marriage—Witness my hand this twenty-eighth of May Seventeen hundred and eighty."

"Geo. Heming."

"G"

"In the Name of God, Amen—Augt. 26th 1780."

"I George Heming of Bond Street Goldsmith being of sound Mind & Memory do make & ordain this to be my last Will and Testament

"Imprimis I bequeath to my dear Wife Anne Heming formerly Anne Gilley so much Money as will purchase Five hundred pounds sterling *P. Annum* in the Long Annuities granted by Government & the Income thereof to be received by the said Ann

"Heming during her life & at

"her decease to be

"for her own use

Child or Children

"& benefit and at her death to my

"for their own use and benefit equally in default of Issue then to my

"Father Thomas Heming for his life

"and at his death to go to my Nephew Richard Heming for the remainder of the term or absolutely at his disposal when the said Ann and Thomas Heming are both dead the Principal at my death to be placed in the Names of Ann Heming my Wife my dear Father Thomas Heming my valued friend Thomas Ludbey and my worthy kinsman James Gurry In trust for the said Ann or my Children and Thomas [484] Heming—during their lives respectively supposed at about "

900

"I bequeath to my Nephew Richard Heming after the 1. following shares are purchased & assigned over to my Executors all the Estate called the Barrow in the County of Hereford "

1000

"I bequeath to John & Mary Weaver two hundred pounds provided they assign their share and right in the Barrow Estate to my Executors "

200

"I likewise bequeath to the said Mary Weaver Fifty pounds *P. Annum* in the Long Annuities for her life & at her death to the Issue of her Body by John Weaver in default of Issue then at her disposal "

900

"I bequeath to James and Eleanor Gurry in like manner two hundred pounds for their share in the Barrow Estate "

200

"I bequeath to Eleanor Gurry Wife of James Gurry Fifty pounds *P. annum* in the Long Annuities for her life and at her death equally to the Issue she may have by James Gurry in default of such Issue then at her disposal "

900

"To Jane Gilley I bequeath Fifty pounds *P. annum* in the Long Annuities absolutely at her disposal in lieu of any other Annuity I may have granted to her "

900

"To Benetta Gilley I bequeath fifty pounds *P. Annum* in the Long Annuities at her disposal in lieu of any other Annuity I may have granted to her "

900

"To Catherine Gilley Sister of the before named I bequeath three hundred pounds pro-[485]vided she do make a good assignment of her share of the Barrow "

300

"To my dear wife two hundred pounds for the same purpose "

200

"To my dear wife Ann Heming I leave my Estate of Meadow Land at Edgeware in Middlesex for her sole use & benefit But do not recommend her to build at or reside there: if she finds that my nephew Richard Heming is

deserving then she may leave it to him if she approves But if I should leave Issue then after my Wife's decease I will & devise this Estate to the said Issue for ever	1500
" To my dear Wife Ann Heming I leave my House in Tottenham Court Road "	850
" I leave to my dear Wife to be paid her within one Month from my decease two hundred pounds and desire that all the bequests that relate to her may be settled as soon as possible after my decease in order that she may be in the receipt of her income "	200
" To Felix Vaughan my Nephew to be placed in Trust till of Age "	500
" To Richard Heming my Nephew in the same manner "	500
" To Thomas Laver Son of Benjamin Laver as a Token of my esteem In trust till he is of Age "	500
" To my respected Friend Alexander Baxter Esqre a piece of plate if he is alive value—One hundred Guineas "	105
" To Beatrix Peirce & Mary Mapletoft for their sole use One hundred Guineas to each "	210
	<hr/> 18,865

" Geo: Heming."

[486] The testator died in April, 1801, without leaving any children. His father, Thomas Heming, had died in his life-time.

Thomas Ludbey and James Gurry, in February 1809, with the privity of the Appellant, out of the personal estate and effects of the testator, purchased and caused to be transferred into their names and the name of Ann Heming, the testator's widow, in the books of the Governor and Company of the Bank of England, one sum of five hundred pounds per annum, long annuities, in satisfaction of the bequest contained in the testamentary papers, constituting the will of the testator.

Ann Heming died in June, 1818, and the Appellant then set up a claim to have a second sum of five hundred pounds per annum, long annuities, purchased for his benefit: and Thomas Ludbey and James Gurry declining to purchase the same, the Appellant filed his bill in the High Court of Chancery against James Gurry (Thomas Ludbey having died in the mean time) and against Thomas Clutterbuck and Edward Evans, the executors of Ann Heming, which suit upon the death of James Gurry was revived against Thomas Clutterbuck, his executor. Amongst other things, the bill, stating the facts, prayed a declaration, that the Appellant was entitled to two legacies of five hundred pounds per annum long annuities under the testamentary papers, and that the Defendants might be decreed, out of the proceeds of the testator's personal estate and effects, to purchase for the benefit of the Appellant the sum of five hundred pounds per annum, long annuities, in addition to that sum of like annuities, already purchased and invested.

The cause was heard before the Vice Chancellor, [487] on the 5th of May 1825, who dismissed so much of the Appellant's bill as sought that the Appellant might be declared entitled to two legacies of five hundred pounds per annum, long annuities. (See the report in the Court below, 2 Sim. and Stu. 310.)

Against this part of the decree the appeal was presented.

For the Appellants, Mr. Hart and Mr. Perkins.

This is a question whether one or two legacies are given by the testamentary instruments, which must depend upon the construction of the instrument. The doctrine and rule is taken from the civil law, but it has been qualified and distinguished by circumstances shewing intention, etc., and otherwise, until the rule itself is nearly extinguished. The intention is to be looked at through the medium of former decisions on the subject. The doctrine applicable to the question was settled by the case of *Nooley v. Hatton* (1 B. C. C. 390, n.), in which a rule is laid down to be applied to future cases. The judgment below was founded on the supposition that this was not an additional annuity, but a substitution. This was said to appear from the similarity of the two gifts.

If it be a substitution, then nothing could in any event be taken under the former gift. If the testator had a child, the legatee could take nothing under the second instrument, and the second being supposed to be a substitution for the first, he could take nothing in that event under either of the instruments. From the general re-

petition of the bequests in the second instrument, it was inferred by the Vice Chancellor that all the legacies were intended to be repeated. But the legacies to Jane and Benetta Gilley are in the second instrument given expressly in lieu of other annuities. This caution being omitted [488] as to other legacies, affords an inference that they were intended to be double. There are also other alterations: the legacies in the second instrument are offered, not as pure bounties, but on terms of purchase, indicating a great alteration of intention. Some are augmented, some diminished. It appears from the differences in the bequests, that his intention was fluctuating. In the second instrument there is no residuary bequest.

The Lord Chancellor: And no executors.

Mr. Hart: It was probably from these differences that Sir William Wynne thought the two instruments must stand together as one testamentary document. His opinion was—that the first document being a will was not revoked by a paper not naming executors nor bequeathing the residue: that paper he treats as a codicil. Where the same sum is given twice in the same instrument, the proof lies on the legatee to shew the intention to give a double legacy; where similar legacies are given by different instruments, it lies on those who claim against the legatee to prove the want of intention on the part of the testator. So the rule is stated by Swinburne from the civil law. In the case of the *Duke of St. Albans v. Beaucherk* (2 Atk. 636), the reporter has misconceived the intention of Lord Hardwicke, as to the doctrine which is to govern future Judges. The error has been set right in *Hooley v. Hatton*. In all the former cases it was admitted as the general rule, that where the same or different legacies were given in different instruments, they were held to be cumulative. In that case it might have been argued that the legacy of £1000 comprehended the two former legacies.

The supposed *dictum* of Lord Hardwicke, that one only shall be taken, is contradicted by the authorities [489] cited by himself. The rule is, that where less is given by the second than by the first instrument, the legatee shall take both. That rule applies to this case: because the legacy in the second instrument, being qualified and subject to contingency, is less beneficial than the first. The case of *Hooley v. Hatton* was relied on by Lord Kenyon, in *Foy v. Foy* (1 Cox 164, 392). In *Ridges v. Morrison* (in the notes, 1 B. C. C. 390), the judgment of Lord Kenyon is cited. In *Hedges v. Peacock* (3 Ves. 375), Lord Alvanley decided that a legacy was double, because the first was more beneficial, and argued that the testator ought to have explained that he intended to take it away, as he did in the case of another bequest. So it is here: the first legacy is more beneficial, and he does not declare the second to be a substitution, as he does with respect to other legacies. Lord Alvanley lays down the rule, that a contingent legacy by a second instrument cannot be held a substitution for an absolute legacy by a former instrument, unless it is so declared. The judgment, as it stands, must proceed on contingencies: if there should be a child, the first instrument must prevail. If no child, the second. Another principle applied in the judgment is, that from the identity of the other bequests it is to be inferred, that the same rule is intended to be applied to the legacies in question. But Sir W. Grant, M.R., was of opinion, that each legacy must be judged by itself. *Benyon v. Benyon* (17 Ves. 41). In *Ridges v. Morrison*, etc., Lord Thurlow departs from the principle of *Hooley v. Hatton*, which he professes to adopt. All the cases but one adopt the rule, that where legacies are different in amount, or given by different instruments, they are [490] cumulative. Inferences drawn from one class of legacies, are not to be applied to another class.

For the Respondents, Mr. Heald and Mr. Boteler. They relied chiefly on the argument drawn from internal evidence, appearing by the similarity of the great majority of the bequests in the two instruments. The authorities cited were, *Cootte v. Boyd* (2 B. C. C. 521), and the *Duke of St. Albans v. Beaucherk* (2 Atk. 636).

The Lord Chancellor: Before this case is disposed of, it will be necessary to look into the authorities which have been referred to. The question whether it be one of difficulty or otherwise, comes before the House without the assistance of full discussion upon argument in the Court below. The first duty of a Court of Justice, is to satisfy all parties that their case has been most fully heard, and the example of that practice should be set by this, the highest Court of Judicature in the Kingdom. This precept I have received from two of my predecessors: and by one of them, I

was informed that he frequently derived the greatest benefit from the argument of the Counsel, who supported that view of the case, which upon the first impression he had himself taken, because he sometimes found that less was to be said on that side of the question than he supposed, and in consequence of the argument changed his opinion. The House has now been occupied six hours in hearing a case, which was dispatched in one hour in the Court below. That will always be the case where the question is not fully argued in the court of original jurisdiction.

We are bound to consider the two instruments as the will of the testator. I do not think the first impression upon the mind of any man, upon looking [491] at these two papers, would be that they make one will. A question of law is not, however, to be decided by the impression upon the mind of any individual, but by the rules of law: and Sir W. Wynne has decided by his judgment,* that these two papers are not to be considered as two wills, but as one will. The difficulty remains upon the construction of the contents of those instruments. I must look at the cases cited, and some which have not been mentioned, and which it is necessary to consider before judgment is given.

The Earl of Eldon (18th June, 1827): The question in this cause was—whether a party, Ann Heming, was entitled to two legacies of £500, long annuities, or only to one. This question arose on two testamentary papers, or rather I should say, on what was proved as the will of the testator in the Ecclesiastical Court: it consisted of two instruments, which we must consider as constituting together the will, although it is very [492] difficult, at least to my mind, to conceive how it should happen, that both those instruments should have been proved as part of the same will.

The first instrument professes, on the face of it, to be a very regularly formed will. The second instrument does not profess to be a codicil. It begins, "In the name of God Amen. I George Heming of Bond-street Goldsmith being of sound mind do make and ordain this to be my last Will and Testament." These two, however, each being in the form of a will, have been held in the Ecclesiastical Court to be one testament, and of course we are bound to consider them as such. The question in the cause is—whether a bequest of £500 per annum for life, in the first instrument, and a bequest of as much as would purchase £500 per annum in the long annuities, given by the second instrument, are both of them intended to apply to the same sum: in other words, whether these are cumulative, or whether the one is to be considered a substitute for the other.

The general principles upon which cases of this kind are to be decided, are so accurately laid down in the case of *Hooley v. Hatton* (in a note to *Ridges v. Morrison*, 1 B. C. C. 390), that it is unnecessary for me to trouble your Lordships further than by stating it. The rules of the Court of Chancery, and the rules of the civil law upon the subject, are there discussed by the late Mr. Justice Aston, and afterwards applied by the Lord Chancellor. There is this difference, however, that here the second instrument purports upon the face of it to be a will. There has been much reasoning upon the circumstance, that in that case the subsequent instrument appeared to be a codicil. On looking [493] into all the cases, which I have done, I cannot agree with the learned Judge † who decided this case, that [494] it was a

* Extract from the Judgment of Sir W. Wynne: "Now there is nothing here to revoke paper F., which appoints executors and a residuary legatee. I take it to be quite clear that, supposing these two papers to be left in the same manner, this would not have been a revocation of the paper F. It is particularly laid down by Swinburne, in his seventh part, first section, page 527:—The former testament is not revoked, where in the latter will there be no executor named, for then the latter act is a codicil or addition to the former testament." Now in this case I think it would be so. It appears to have been a paper written probably in order to supply some defect in the former, for he was a person very much given to writing and copying papers. I think there is no reason to suppose that when he wrote paper G., he intended to revoke paper F., at least considering the way in which they are both left: and therefore I think these two papers, if they are of any validity, are to be taken together."

† The Vice Chancellor; whose judgment on this point was delivered in the course

very clear case,—on the contrary, it appears to me to be a very difficult one, though I concur in [495] the judgment he has given. Those cases to which the general rule of law is made to apply, are those in which there is no internal evidence in the will itself what is the intent. In all those cases in which there is internal evidence, it has been admitted to be of great weight: and the question, then, is this—[496] whether you can look merely at the different parts of both instruments which give the particular legacy, out of which the question arises, or whether you can look at that which in this case is, in my opinion, of great importance—whether you can look at the two instruments, with a view to the whole contents of each of them, in order to see whether the testator, in the case so put, did or did not mean to give not only to A, B, C, and D, and all the letters in the alphabet, but to be giving to them more than once. My opinion of the case is this, that taking the whole of those instruments together, although there is some difference between the nature of the

of the argument at the bar. The report of the judgment on this point being very short in the reports of Messrs. Simon and Stuart, a full note of the judgment is here subjoined—from the Notes of the Short-hand writer.

The Vice Chancellor: “This case does not in any manner turn upon the principles stated in the case of *Hurst and Beach* (5 Mad. 350). Those are principles which apply to a case in which the particular legacies are not in both instruments, and where there is no question whether the two instruments were intended either wholly or substantially as a substitution for each other. This case turns entirely upon the principle which has been referred to in the case of the *Duke of St. Albans and Beaucherk*, and which was afterwards stated in a case which I have now before me, of the *Attorney General and Harvey* (4 Mad. 263), and which occurred again before me in the case of the will of General Rollo Gillespie. The question here is—whether the second instrument is not substantially a substitution for the first. Now substitution may be either total, or it may be partial. Total substitution is revocation,—partial substitution is to the extent of the exception, which is partially withdrawn from the operation of the second instrument; and in the case of General Gillespie's will, I considered it a partial substitution, as there the residuary estate was withdrawn from the operation of the second instrument, and confined to the first instrument. Now here it is quite plain that the second instrument is not a total substitution for the first. It is not a revocation, for there is no appointment of executors. The appointment of executors depends upon the first instrument, and probate has been also granted of that instrument. To what extent this may be a substitution, it is not necessary for me now to state. I am inclined to think that it might be contended, that this is a substitution in all respects, except as it regards the appointment of executors, and the gift of the residuary estate. I am not quite sure whether, when that came to be discussed, that would ultimately be the opinion of the Court, as the only question before me is—whether it is a substitution in respect to the annuity of £500.

“It is not necessary for me to say more than that I am clearly of opinion that the instrument marked G., is a substitution for the instrument marked F. I believe it to be impossible that any body could read those instruments and come to a different conclusion. I believe it quite impossible that any rational mind that is applied to the subject, can by possibility come to a different conclusion. The original paper F. begins in this way: ‘In the name of God amen;’ and the second, paper G., precisely in the same way, ‘In the name of God amen.’ The original paper F. proceeds thus: ‘I George Heming of Bond Street in the City of Westminster Goldsmith of perfect mind and memory make this my last will and testament.’ The second, paper G., proceeds thus: ‘I George Heming of Bond Street Goldsmith being of sound mind and memory do make and ordain this to be my last will and testament.’ Then the first instrument proceeds thus: ‘Imprimis I bequeath to my dear and faithful wife Ann Heming £500 sterling per annum for her life to be placed in and payable out of the long annuities.’ The second instrument proceeds thus: ‘Imprimis I give and bequeath to my dear wife Ann Heming formerly Ann Calley so much money as will purchase £500 sterling per annum in the long annuities.’ There is no difference whatever therefore thus far, and there is no variation whatever, except in the form of the expression, for there is none at all in substance. The

trusts that are expressed relative to the £500 long annuities, in the first will, and the £500 long annuities in that which really I should have thought was a second will, if there had not been a decision of the Ecclesiastical Court, finding them to be one:—that looking at the whole of what the testator has done with regard to every other legatee named in the first will, and in the second will, this is not a case in which you would be fairly justified in saying there is internal evidence which ought to satisfy you that the testator meant these to be cumulative. I conceive one legacy only was intended, and upon that ground, again professing this to be, in my judgment, a most doubtful and difficult case, I am of opinion that the Vice Chancellor's judgment is right, and that therefore your Lordships ought to affirm it: I would move that it be affirmed without costs.

Judgment affirmed without costs.—18 June, 1827.

second instrument proceeds thus: 'and the income to be received by the said Ann Heming during her life for her own use and benefit and at her death to my child or children for their own use and benefit equally.' Here he introduces what he does not introduce in the first instrument, namely, a gift of the £500 to his child or children, if he should happen to have any children. He had no children either at the time of the making the first instrument, or at the time of making the second instrument. At the time when he made the first instrument, it appears he considered there was not the least probability he should have any children: throughout the whole of that instrument there is no provision for children: but on making the second instrument he does not seem to adhere to the same notion of probability, and he uses this exception, in order that if such an unexpected event should take place, there should be a provision for those children, and with that exception the gifts are precisely the same. He then proceeds in this way in the first will: 'To Eleanor Gurry wife of the aforesaid James Gurry I bequeath £50 sterling per annum for her life out of the long annuities and in the same trusts as above, remainder of the term after her death to the children of Eleanor Gurry by James Gurry share and share alike upon their becoming of age each child to have their respective share transferred to them but the foregoing devise is not to take place except James and Eleanor Gurry do assign their share in an estate called Barrow to John Weaver and his wife as is after directed in the fullest manner in their power.' This, therefore, is the gift of an annuity of £50 per annum to Eleanor Gurry, the wife of James Gurry, and after her death to the children of Eleanor Gurry by her husband James Gurry, provided she and her husband release such interest as they happen to have in a certain estate called the Barrow. Now in the second instrument we do not find that the order of the will is preserved: but there is in the second instrument a gift in the words I am now about to read: 'I bequeath to Eleanor Gurry wife of James Gurry £50 per annum in the long annuities for her life and at her death equally to the issue she may have by James Gurry in default of such issue then at her disposal.' There is not annexed to that gift the condition before stated, that she and her husband should release their interest in the Barrow estate, but that gift of £50 per annum is immediately preceded by a gift to Mr. and Mrs. Gurry, which are in these words: 'I bequeath to James and Eleanor Gurry in like manner £200 for their share in the Barrow estate.' In the first instrument he gives them £50 a-year provided they release their share in the Barrow estate: and in the second instrument he gives them £50 a-year without such a condition, and £200 for their share in the Barrow estate. Now, I need not follow this, as it goes through 14 or 15 bequests in a similar manner. I am of opinion that no one can look at this instrument, and say that, to the extent I have mentioned, this instrument is not to be considered a substitution for the first. Upon this point, therefore, you may give yourself no trouble Mr. Heald, and apply yourself merely to the question of the annuity of £180 a-year."

[497]

ENGLAND.

(COURT OF CHANCERY.)

THOMAS DUFFIELD, Esquire, and EMILY FRANCES his wife.—*Appellants*,
 AMELIA MARIA ELWES, Widow, and ABRAHAM HENRY CHAMBERS,
 Esquire, WILLIAM HICKS, Clerk, and GEORGE THOMAS WARREN
 HASTINGS DUFFIELD, CAROLINE DUFFIELD, MARIA DUFFIELD,
 ANNA DUFFIELD, and SUSAN ELIZA DUFFIELD, Infants, by Original and
 Amended Bill.—*Respondents*.

And between the same Plaintiffs.—*Appellants*; ROBERT GREENHILL RUSSELL,
 Esquire, GEORGE SPENCER SMITH, the said WILLIAM HICKS, Clerk,
 and AMELIA MARIA his Wife, late AMELIA MARIA ELWES, Widow,—
Respondents.

[*Mews' Dig.* xv. 326 (*Duffield v. Hicks*), S. C. 1 Dow and Cl. 1 (*Duffield v. Hicks*), 1 Sim. and St. 239. Applied in *Porter v. Walsh* (1895), 1 L. R. 284; *affd.* (1896), 1 L. R. 148. Adopted in *Cassidy v. Belfast Banking Co.* 1887, 22 L. R., 1r. 68, at p. 76. Considered in *In re Dillon, Duffin v. Duffin*, 1890, 41 Ch. D. 76, at pp. 82, 83.]

E. having by his will made a certain provision for his daughter, an only child—with whom he had been offended on account of a clandestine marriage—(but was reconciled to her and her husband), declares to a common friend his purpose to make a farther provision for his daughter. Being on his death bed, and unable to write, he is urged by that friend to make a gift to his daughter of certain monies secured by mortgage and bond, and expressly assents to that proposal. In the evening of the same day, being then unable to speak, he is reminded by the same friend of the transaction of the morning, and the deeds of mortgage and bond securing the monies, being produced, he is informed that it is necessary to confirm the gift by a delivery of the deeds; and the friend proposed with the father's permission, to hand over the deeds [498] to his daughter. Upon this proposal, the father made an inclination of his head, and the friend then handed the deeds across the bed where the father was lying, to the daughter on the opposite side; whereupon the father placed the hand of the daughter upon the deeds, and pressed it with his own hand for some minutes, and appeared satisfied with what he had done. The deeds in question consisted of, 1. A conveyance in fee of lands to secure £2927, with the usual covenant for payment of the money lent, and bond by way of collateral security. 2. An assignment of a mortgage debt of £30,000, and of a judgment for that sum recovered on a bond with a conveyance of the land, and the usual covenant for payment of the money.

Held that this was a valid *donatio mortis causa*; that the property in the deeds and the right to recover the money secured by them, passed by the delivery followed by the death of the donor, and that the real and personal representatives of the donor, were trustees for the donee, to make the gift effectual.

The original suit in this case was instituted in the Court of Chancery, by the Appellants Thomas Duffield, Esquire, and Emily Frances his wife, as Plaintiffs, with a view of obtaining the judgment of that Court upon several questions arising out of the various dispositions made by George Elwes, deceased, of different parts of his property, by way of settlement, gift and testamentary arrangement; and also for the purpose of placing the infant Defendants, the children of the Plaintiffs, under the protection of the Court.

The Appellant Emily Frances Duffield, was the only child and heir at law, and sole next of kin of George Elwes; she intermarried with the Appellant, Thomas Duffield, Esquire, in the year 1810. The children of that marriage were five; namely, the Respondent George Thomas Warren Hastings Duffield, the only son

of the Appellants, an infant of the age of eleven years; and four daughters, the Respond[499]-ents Caroline Duffield, Maria Duffield, Anna Duffield, and Susan Eliza Duffield, all infants, younger than their brother. George Elwes died in 1821, leaving the Respondent Amelia Maria Hicks, his widow, who, after the decree pronounced in the original cause, married the Respondent the Reverend William Hicks. The Respondent Abraham Henry Chambers was the surviving devisee in trust and executor named in the will of George Elwes; the other trustee named in the will having died in the testator's life. The Respondent William Hicks was named an executor by George Elwes in a codicil. The Respondents Robert Greenhill Russell, and George Spencer Smith were the trustees of the settlement made on the marriage of the Respondent William Hicks, and Amelia Maria his wife.

In the month of February, 1810, the Appellant Emily Frances Duffield, being then about the age of 18 years, intermarried with the Appellant Thomas Duffield, at Greta in Scotland, without the knowledge of her father, and on the 11th day of March, 1810, the Appellants were re-married in England. Shortly after this re-marriage, George Elwes and the Respondent Amelia Maria, then his wife, received the Appellants into their house, to reside with them as part of their family. George Elwes, at the time of making his will, and until his death, was seised in fee simple of divers freehold and copyhold estates, and was also possessed of a very considerable personal estate. By his will, dated the 1st March 1811, and duly executed and attested to pass freehold estates, after directing that all his debts and funeral expenses, and the expenses of proving his will, should be paid, as thereafter mentioned, and confirming a jointure of £100 per annum, and an annuity of £400 to his wife, the Re[500]-spondent Amelia Maria Hicks, he gave and bequeathed unto his dear daughter Amelia Maria Frances Duffield (meaning thereby his daughter the Appellant Emily Frances Duffield), the wife of Thomas Duffield, and her assigns, for her life, all that his leasehold messuage or dwelling-house, with the appurtenances, situate in High-street, Mary-le-bone, and he declared that the same should from and after her decease fall into the residue of his personal estate thereafter devised: And he gave and bequeathed unto his said daughter all his carriages, horses, household furniture and goods, plate, linen, china, stock of wines and other liquors, which should be in and about the said messuage or dwelling-house, or in or about any other house or houses in which he might dwell, or which he might inhabit at the time of his decease: And he gave and bequeathed unto his brother John Elwes, since deceased, and to the Respondent Abraham Henry Chambers, and their heirs, his freehold and copyhold farm and estate, in Suffolk, and also his freehold farm and estate in Essex, upon certain trusts therein expressed, for the benefit of the second or only son of the Appellants, or their daughters in failure of such son, with devises over: And the testator, after giving some legacies of stock and small annuities, and pecuniary legacies, devised and bequeathed the residue of his real and personal estates to the same trustees, upon trust to sell and convert into money all his real estates, mortgages, securities, etc., to hold the monies so produced in trust, among other things, to purchase so much 3 per cent. stock, as would yield £1000 per annum, and to pay the dividends to the Appellant his daughter, during her life, for her separate use: the principal at her death to fall into his personal [501] estate. The residue of the trust fund he disposed of, by special limitations, to the children of his daughter, and their children (if any); remainder to John Elwes.

By a codicil dated the 3d March, 1821, he declared the intent of a cancellation which he had made in that part of his will relating to the sale of his freehold, copyhold and leasehold estates: He devised his real estates to that son of his daughter, who should first attain 21; and appointed the Respondent, William Hicks, a trustee in the place of his brother deceased.

The testator, George Elwes, was entitled to the principal sum of £2927, and interest thereon due to him from Sir Edwin Bayntun Sandys, Baronet, secured by the bond of Sir Edwin Bayntun Sandys, executed by him to the testator, bearing date the 12th day of July, 1820, and further secured by indentures of lease and release and mortgage, bearing date respectively the 11th and 12th of July, 1820, whereby Sir Edwin Bayntun Sandys released and conveyed to the testator in fee simple, by way of mortgage, certain freehold estates. The deed also contained the usual covenant for repayment of the money lent. The testator, George Elwes, was

also entitled to the principal sum of £30,000, and interest thereon due to him from Sir Edwin Bayntun Sandys, and secured by certain indentures of lease and release, and assignment of mortgage, bearing date respectively the 2d and 3d of November, 1820. The release recited a loan of £30,000 made by trustees under a marriage settlement to Sir Edwin Bayntun Sandys, a conveyance of lands therein described to secure the repayment, a bond executed for the same purpose, and a judgment recovered upon that bond. It [502] further recited that the mortgagee having called in the money due on the mortgage, George Elwes had advanced to the mortgagee £30,000, in consideration of which the mortgagee, etc., by direction of Sir Edwin Bayntun Sandys, assigned to George Elwes the £30,000 due on the mortgage and also the judgment, and conveyed the lands, etc. This deed also contained the usual covenant for payment of the money lent, on a day specified, with a power to sell the lands mortgaged on failure of payment.

George Elwes, shortly before his death, in conversations held with the Respondent William Hicks, frequently declared his purpose to make a further provision for his daughter. He was seized with the illness which ended in his death, on the 1st of September, 1821: on the morning of that day the Respondent, William Hicks, proposed to George Elwes to make a gift, *mortis causa*, to his daughter, of the monies secured by the two mortgages before mentioned, to which proposal, the nature of the gift having been explained to him by Hicks, George Elwes expressly assented. Of this proposal and assent a formal note was drawn up, and signed by Hicks and two other witnesses. In the evening of the same day, Mr. Hicks, having been informed that an actual delivery of the thing proposed to be given was necessary to the completion of the gift, caused the deeds of mortgage and the bond to be brought from the office of Mr. Law, the Solicitor of Mr. Elwes. These deeds were then, in the presence of the same witnesses, produced before the testator, and shewn to him, and he was informed by Hicks, that the same were the mortgage deeds and bond to secure the principal sums of £2927 and £30,000, and interest due to him from [503] Sir Edwin Bayntun Sandys, and he was reminded by Hicks of what had passed in the morning, and informed that the gift would be unavailing, unless he confirmed it by passing the deeds; and Hicks then proposed, with his permission, to hand over the deeds to his daughter, whereupon he signified his assent by an inclination of his head. The mortgage deeds and bond were then, in the presence and under the eye and observation of George Elwes, handed by Hicks across the bed in which the testator then lay, to the Appellant Emily Frances Duffield, and were received by the Appellant Emily Frances Duffield, in her hands; and as soon as she had received the mortgage deeds and bond in her hands, George Elwes immediately took hold of her hands, which then contained the deeds and bond, and with both his hands pressed together the hands so holding the deeds and bond, and shewed evident marks of satisfaction. During the whole of this transaction, George Elwes, according to the depositions in the cause and the judgment of the witnesses, although he was unable to write or speak, was in a state of mind competent to dispose of his property, and was aware of what he was doing, and that he was thereby making a gift to the Appellant Emily Frances Duffield, of the benefit of the bond and mortgages.

On the 2d of September, 1821, George Elwes died, leaving the Respondent Amelia Maria Hicks, then Amelia Maria Elwes, his widow, and the Appellant Emily Frances Duffield, his daughter and only child and heir-at-law, and heir according to the custom of the manors whereof his copyhold estates were holden, and also his sole next of kin.

The Appellants had, at the death of George Elwes, [504] five children, namely, the Respondent George Thomas Warren Hastings Duffield, their only son, an infant, and four daughters, infants; namely, the Respondents, Caroline Duffield, Maria Duffield, Anna Duffield, and Susan Eliza Duffield.

After the death of George Elwes, the Respondent, Abraham Henry Chambers, one of the executors named in his will, and the Respondent William Hicks, appointed executor by the codicil, proved his will and codicil in the Prerogative Court of the Archbishop of Canterbury.

On the 1st of October, 1821, the Appellants exhibited their original bill of complaint in the Court of Chancery, (which was afterwards amended,) against the Respondent Amelia Maria Hicks, by her then name and description of Amelia Maria

Elwes, widow, the Respondents Abraham Henry Chambers, William Hicks, George Thomas Warren Hastings Duffield, Caroline Duffield, Maria Duffield, Anna Duffield and Susan Eliza Duffield, and others, as Defendants, which, among other things, stated the substance of the facts before mentioned, and prayed (among other things) that the *donatio mortis causâ* to the Appellant Emily Frances Duffield, of the bond and mortgage securities might be established, and that the Appellant Emily Frances Duffield, or the Appellants in her right, might be declared entitled to the bond and mortgage deeds and to the monies secured thereby, and to all benefit thereof, and that the Respondents Abraham Henry Chambers and William Hicks, as executors and trustees of the testator, might be decreed to execute proper instruments to enable the Appellant Emily Frances Duffield, or the Appellants in her right, to receive the monies due and to become [505] due on the bond and mortgages respectively, and to obtain the full benefit of the securities; and that the Appellants, in her right, might be at liberty to sue in the name of the last named Respondents in any action or suit to be brought against the obligor in the bond, and the mortgagor in the mortgages, the Appellants thereby offering to indemnify the Respondents against all the costs of such action or suit; and that the will and codicil of George Elwes might be established, and the trusts thereof executed, etc.

The adult Defendants to the original and amended bill appeared, and put in their answers supporting the claims of the Plaintiffs as to the *donatio mortis causâ*. The infant Defendants submitted their rights to the care of the Court.

Witnesses were examined in support of the allegations of the bill, and the cause, being at issue, was heard before the Vice Chancellor on the 17th of April, 1823, when a decree was made, by which (among other things) it was declared, that the Court being of opinion that a mortgage security cannot by law be given by way of *donatio mortis causâ*, the Appellant Emily Frances Duffield was not entitled to the mortgage monies secured by the indentures (of mortgage) and the bond.

In 1824, the widow of George Elwes married the Respondent William Hicks, in consequence of which marriage there was a supplemental suit and a decree in August, 1824, to carry on the proceedings.

The declaration of the decree in the original suit, as to the *donatio mortis causâ*, was the subject of the present appeal.

For the Appellants.

Mr. Sugden (Arg. 6th Ap. 1827): The fact of the gifts was not [506] much questioned in the Court below: the argument was upon the question of law, whether money secured upon a mortgage can be the subject of a *donatio mortis causâ*. That the delivery of a bond on death-bed operates as a gift of the money secured by the bond, has been decided in *Gardner v. Parker* (3 Mad. 184), following *Snellgrove v. Bailey* (3 Atk. 214), where Lord Hardwicke puts the case of an equitable interest in a chattel in possession with a legal title outstanding in a trustee, and says that the gift of the chattel would be valid as a *donatio mortis causâ*. At law a bond cannot be assigned. In the hands of a third party, it can only be made effectual by a power of attorney to sue in the name of the obligee. By the mere delivery of the bond nothing passes but the parchment. But it may operate as a gift of the money, and vest in the donee a right to use the name of the donor, or his representative, as if a power of attorney had been given to enforce the payment of the money. This is the principle of decision in *Gardner v. Parker*, and *Snellgrove v. Bailey*. If a sum of money is secured by bond and mortgage, the money secured is personal property. The real estate is simply a security for payment of the money. That the payment is secured by a mortgage as well as a bond, cannot alter the state of the question.

If there is a gift *inter vivos* of money secured by mortgage, the giver (mortgagee) becomes a trustee of the bond by which the debt is secured for the benefit of the donee. If the gift is by will, the heir of the testator becomes a trustee. The statute of frauds is out of the question: for it is a gift of the money secured, and not of the land by which it [507] is secured. The debt is the principal subject, and the real estate being a mere security for the debt, passes as an adjunct to the principal.

The question was agitated in *Hassel v. Tynte* (Ambl. 318), but not decided. Lord Hardwicke thought the money was the principal, but that there was an interest in land. In the *Duchess of Buccleugh v. Hoare* (4 Mad. 467), it was held upon a gift of heritable bonds, that the heir was a trustee of the land for the legatee, and that the money secured passed as part of the personal estate.

The case of *Hurst v. Beach* (5 Mad. 351), is not in principle distinguishable from the present case. A gift by the mortgagee to the mortgagor of the money secured was there held good, although secured by real estate, which could not pass without a reconveyance.

The case as to the mortgage for £2,927, is more clear, the money being secured by bond as well as mortgage. Suppose the bond alone had been delivered: the money would have passed by the delivery, and the heir of the donor would have been a trustee of the land in mortgage for the donee. The deeds of an estate are a subject of property. The estate will not pass by the mere delivery of the deeds: but having been given, they cannot be recovered. In *Snellygrove v. Bailey*, Lord Harwicke considered that the money secured passed by the delivery. There was no bond for the £30,000, but the money was secured by an assignment of the debt, by a conveyance of the land, and by a covenant to pay the money. The assignment of the debt existing, and the delivery of the deed of assignment, operates as a gift of the money assigned. In the case of a bond [508] assigned, the assignee may pass the money by delivery of the assignment.

The effect of these nice distinctions is to increase litigation, because no advice can be given in such a state of the law. There is no solid distinction in this respect between a bond and a covenant. The money passes by the delivery in both cases, because they are securities for money, and capable of assignment. The remedy is the same, and the circumstance that there is an additional security by a mortgage of real estate cannot alter the nature of the gift or the remedy: money secured by mortgage, may be given by a will without witness; so when there is an existing agreement, the mere delivery of deeds operates as a mortgage. These cases must be considered as excepted out of the statute of frauds; otherwise courts of equity have assumed a power of legislation. Where this depends on contract, the relief goes to the extremity of the jurisdiction. The decisions rest not merely on the ground of contract, but because the act of gift is plain and unequivocal. In this case, how in principle can it affect the right under the inferior securities, that there is also a security of a higher nature.

Mr. Longley: A mortgage, though in fee and forfeited, still continues, in equity, a mere security for money, and belongs to the personal estate of the mortgagee: while the estate in the land remains in equity, and to many purposes at law, in the mortgagor. *Pawlett v. Attorney General* (Hardr. 469); *Thornborough v. Baker* (1 Ch. Ca. 283, and from Lord Nottingham's notes in 3 Swanston 628); *Yoy v. Ellis* (Ch. Ca. 220); *Ellis v. Graves* (2 Ch. Ca. 50); *Cope v. Cope* (2 Salk. 419); *Howell v. Price* (1 P. Wms. 294.)

[509] In *Chester v. Chester* (3 P. Wms. 62), Lord Chancellor King observes, "An estate, though mortgaged, continues still to be the estate of the mortgagor, subject to the payment of the pledge which is upon it; and the mortgagee's right is only to the money due upon the land, not to the land itself." *King v. King* (*Ibid.*, 361); *Galton v. Hancock* (2 Atk. 424, 435.)

In *Martin v. Morlin* (2 Burr. 969, 978), Lord Mansfield says, "A mortgage is a charge upon the lands, and whatever would give the money, will carry the estate in the land along with it *every purpose*. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence. Nay it would do it though the debt were forgiven only by parol; for the right to the land would follow, notwithstanding the statute of frauds." *Kord of Tankerville v. Fawcett* (1 Cox's Rep. 237, 239.)

In *Silberschildt v. Schiott* (3 Ves. and B. 49), Sir William Grant, M.R., says, "If the testator's interest had been really a mortgage, there is no doubt a gift of the money would have carried his interest in the land upon which it was secured."

In *Lord Cholmondeley v. Lord Clinton* (2 Jac. and W. 179), Sir Thomas Plumer, M.R., says, "In the hands of the mortgagee, the mortgage is considered in equity, as a mere personal chattel which passes to the executor."

[510] On the other hand, the equity of redemption constitutes the estate in the land. It is not merely a trust—it is a title in equity (Hardr. 467.) It is of such consideration in the eye of the law, that the law takes notice of it and makes it

assignable and devisable (*Ibid*, 469), as Lord Hardwicke held in *Casburne v. Scarfe* (2 Jac. and W. 194.) An equity of redemption is so completely the estate in the land, or rather the land itself, as to be capable of such an adverse possession, as, by length of time, to confer on the adverse possessor an indefeasible title. *The Marquis of Cholmondeley v. Lord Clinton* (Dom Proc. June, 1821, MSS.)

A debt is a *chose* in action; a right to a certain sum of money. This right may be secured in various ways, by record or specialty; or the debt may be allowed to remain due upon simple contract only.

Obligations by specialty comprehend both bonds and covenants for the payment of money. A single bond or bill to pay a sum of money at a day certain, is, in its nature and legal operation, precisely equivalent to a covenant to pay the same sum in the same manner. For, 1st. Each instrument creates a contract or obligation by specialty. It is laid down in Shepherd's Touchstone, chap. 21, "Of an Obligation," that, "any words in a writing, sealed and delivered, whereby a man doth prove and declare himself to have another man's money, or to be indebted to him, will be a good obligation." As, "Mem., that I. A. of B. do owe to C. of D. £20., to be paid at Easter next: or, mem., that I. A. of B. [511] *do promise to pay* C. of D. £20.: or, mem., that I. A. of B. *will pay* to C. of D. £20.: or, mem., that I. A. of B. have had £20. of the money of C. of D.," with many other examples.

2d. Each instrument binds executors and heirs, if they are named in the instrument.

3d. A bond, though usually made in the first person, may be made in the third person (Co. Litt. 230. a.) And a deed of covenant, though usually made in the third person, may be made in the first person (Litt. Sect. 371, 372.)

4th. Actions of debt or of covenant will lie interchangeably on the respective instruments.

"Debt" lies upon every express contract to pay a sum certain, as if a man *covenants* or grants to pay (Com. Dig. Dett. [A. 8] 1 Leo. 208., 2 Leo. 119.) If covenant be to pay rent or other sum at such a day, he may have "debt" or covenant (Com. Dig. Action M: 4 Cro. Eliz. 797.) So conversely, *covenant* will lie on a bond, for it proves an agreement. Per. Lord Nottingham in *Hill v. Caw* (Ch. Ca. 294.) Both bond and covenant to pay a sum of money, constitute an obligation by specialty to do a personal thing.

The money secured is a personal chattel, which came originally from the personal estate of the lender, and accrued to the personal estate of the borrower, and is to return from the personal estate of the debtor to that of the creditor: and the securities, whether of bond or covenant, are of a personal nature, being the foundation of personal actions. Since, therefore, the debt secured by mortgage is a personal chattel, though enjoying the benefit of a real security: it must follow that the addition of the [512] personal securities of a bond or covenant to the mortgage debt, cannot possibly diminish or alter the personal nature of the debt.

The money secured by mortgage, bond, and covenant, or by mortgage and bond, or by mortgage and covenant, still remains a personal chattel, and the debt, or the right to the money, remains a personal *chose* in action.

A creditor, having both bond and mortgage, may put in force which of the securities he will: he may put by the mortgage and sue only on the bond. *Clarke v. Lord Abingdon* (17 Ves. 106.)

In many instances it may be most eligible for the holder of both securities to put in force the personal obligation.

Suppose a mortgage and bond given by way of *donatio mortis causâ*, and the mortgage be a second mortgage in fee, and the real estate an insufficient security, and swallowed up by the first mortgage, it might be best to sue on the bond. The bond would, in that case, be the only valuable part of the gift.

Or, supposing the debt to be secured by a first mortgage in fee, with a covenant for payment of the money, and the mortgaged premises were destroyed by the accident of fire or flood, then the only security available to the creditor, would be the specialty obligation contained in the covenant.

If there be a debt secured by mortgage and bond, or by mortgage and covenant, the assignment of the debt will carry the trust in the mortgaged estate to the assignee.

In *Bosville v. Brander* (1 P. Wms. 458. 460), the question arose, whether the benefit of the [513] wife's mortgage in fee passed by the assignment of the Commissioners under the husband's bankruptcy to the assignees; and Sir J. Jekyll, in delivering his judgment, observes, "There being in the mortgage deed a covenant to pay the mortgage money to the wife, this debt or *chase in action*, was well assigned by the Commissioners to the assignees, and vested in them, like the case of *Miles v. Williams* (1 P. W. 249), where a bond made to a wife, *dum sola*, was adjudged to be liable to the husband's bankruptcy, and assignable by the Commissioners."

"Wherefore, if the right to the debt was vested in the assignees, (as plainly it was,) though the legal estate of the inheritance of the lands in mortgage continued in the wife, yet this was not material; it being no more than a trust for the assignees; like the common case, where there is a mortgage in fee, and the mortgagee dies, here the mortgage money belonging to the executors, though the heir takes the legal estate by descent, yet he is but a trustee for the executor; for the trust of the mortgage must follow the property of the debt."

In *Bates v. Dandy* (2 Atk. 207), Lord Hardwicke held that a husband may dispose of the beneficial interest of his wife's mortgage in fee, as well as of her mortgage for a term.

The definition of a *donatio mortis causâ*, is given in the Institutions (Lib. 2. tit. 7. s. 2), in these words: "*Mortis causâ donatio est, quæ propter mortis fit suspicionem: cum quis ita donat, ut si quid humanitatis ei contigisset, haberet is qui accepit; sin autem supervivisset, is qui donavit, reciperet: vel si eum donationis penituisse; aut prior decesserit cui donatum sit.*" The Emperor then [514] proceeds to observe that, "*Hæ mortis causâ donationes ad exemplum legatorum redactæ sunt per omnia: nam cum prudentibus ambiguum fuerat utrum donationis an legati instar eam obtinere oporteret, et utriusque causâ quædam habebat insignia, et alii ad aliud genus eam retraherant: a nobis constitutum est ut per omnia fere legatis connumeretur, et sic procedat, quemadmodum nostra constitutio eam formavit.*"

A *donatio mortis causâ* has the character of a legacy, by way of contradistinction to a gift *inter vivos* (Cod. lib. 8. t. 57. s. 1).

Every thing, which, by the Roman law, might be bequeathed as a legacy by will, might be the subject of a *donatio mortis causâ*. Thus a landed estate might be so given (Dig. lib. 39. tit. 6. s. 14), or a slave (*Ibid.* 11. 37. 39), or a farm subject to a mortgage (*Ibid.* s. 18. par. 3), or a simple contract debt (*Ibid.* s. 18. par. 1), or a part of a debt (*Ibid.* s. 31. par. 3), or a chirograph or bond for money might be given to a donee *mortis causâ* as a trustee for the obligor, and the beneficial interest in the debt would pass (*Ibid.* s. 18. par. 2).

The parity of a *donatio mortis causâ*, with a legacy, is summed up by Ulpian, in these words: "*Illud generaliter meminisse oportebit donationes mortis causâ factas, legatis comparatas: quodcumque igitur in legatis juris est, id in mortis causâ donationibus erit accipiendum.*" (Dig. lib. 39. tit. 6. s. 7). And by Voet, in his commentary on the Pandects (Lib. 39. tit. 6. s. 1), in the following words—" *Sed et regulariter, quales res, et quibus, et per quos legari possunt etiam mortis causâ rectè donantur.*"

[515] In *Hedges v. Hedges* (Prec. Cha. 269), Lord Chanc. Cowper says "a *donatio mortis causâ* is where a man lies in extremity, or being surprised with sickness, and not having an opportunity of making his will; but lest he should die before he could make it, he gives with his own hands his goods to his friends about him; this, if he dies, shall operate as a legacy; but if he recovers, then does the property thereof revert to him."

In *Ashton v. Dawson and Vincent* (Sel. Cha. Ca. 11) the Lords Commissioners, in their judgment, speaking of a *don. m. c.* say: "It is not a legacy, nor is there any occasion for the executor's assent to it: it is *not a gift at common law*, but in *view of death*: here are express words, but *if he had used no words*, and had been near death, it had been looked upon as a *donatio mortis causâ*; it is a testamentary legacy, of which the common law takes notice, but not proveable in the Ecclesiastical Court: it is only questionable here; and the executor's assent is not necessary, because he might die intestate."

There must be a delivery to perfect a *don. m. c.* according to the law of England.

Ward v. Turner (2 Ves. sen. 441): but then the delivery is according to the nature of the subject; if it be a small chattel in possession, the chattel itself must be delivered, or at least the key of the trunk or receptacle containing it. *Jones v. Selby* (Prec. Cha. 300), *Bunn v. Markham* (7 Taun. 224): if the gift be of bulky goods the delivery of the key of the warehouse or room containing them is sufficient. *Smith v. Smith* (2 Stra. 955. 1734): if it be a *chose in action*, a specialty debt, the instrument creating or securing the debt must be delivered. Thus a bond debt, *i.e.* the equitable interest in the [516] debt, may pass by way of *donatio mortis causâ*, by delivery of the bond. *Snellgrove v. Bailey* (3 Atk. 214), *Gardner v. Parker* (3 Mad. 184), *Blount v. Burrow* (4 Bro. C. C. 72. 1 Ves. jun. 546), the benefit of lottery tickets by delivery of the tickets; *Gold v. Rutland* (1 Eq. Ca. Abr. 346), a specie bill by delivery of the bill; *Drury v. Smith* (1 P. Wms. 404), an Exchequer Tally by delivery, or, what is tantamount to delivery of the Tally; *Jones v. Selby* (Prec. Ch. *suprà*), and, as we contend a mortgage debt by delivery of the mortgage deed, and a specialty debt secured by covenant by delivery of the deed containing the covenant to pay; there being in each of these cases presupposed an intention to give the debt or *chose in action*.

In *Snellgrove v. Bailey* (3 Atk. 214), Lord Hardwicke considers the question to be, *not* whether a bond can generally be given by way of *donatio inter vivos*, but whether the equitable interest in the bond can properly be made the subject of such a gift as he is treating of, namely, a *donatio mortis causâ*. And he decided in the affirmative.

The question now in litigation, is not whether the legal estate in the land may pass by a *donatio inter vivos of the deeds*, as the Vice-Chancellor seems to have considered it to be; but whether the equitable interest in the debt secured by these deeds can pass by a *donatio mortis causâ* of the deeds made with the intention of giving the debt by this legatory disposition.

From Lord Hardwicke's doctrine as to the nature of mortgages, and the mode of assigning a mortgage debt laid down in *Richards v. Symes* (Barnard. Ch. R. 90), and from [517] the case of a *donatio mortis causâ* of a mortgage which he puts hypothetically, in *Ward v. Turner* (2 Ves. sen. 443), we may infer that that learned Judge thought favorably of such a donation, although in *Hussel v. Tynte* (Ambl. 318) he avoided deciding the point.

The benefit of a mortgage security belongs to the personalty of the mortgagee: the mortgage debt is a *chose in action* due from the personal estate of the mortgagor, and any act of assignment or charge of the debt by any person having authority to assign or charge it, will operate as an assignment or charge, *pro tanto*, of the trust of the mortgaged land. *Donationes mortis causâ* have been admitted of money bonds of private persons; of bonds of the East India Company; of Exchequer Tallies; of specie bills; of lottery tickets.—To ask, therefore, of a Court of Equity to establish a *donatio mortis causâ* made of a mortgage deed, with the intention of giving the debt, is only requiring the Court to pursue its own principles, and to acknowledge and allow this necessary corollary from its doctrines and former decisions.

The *factum* of the gift is proved by three unexceptionable witnesses to the donor's declaration of giving his property in the mortgages to his daughter, Mrs. Duffield; and three, equally unexceptionable, to the fact of the delivery over of the deeds to the donee, in the donor's presence and by his desire. The gift was of several securities, and where there are several securities for the same debt, an assignment or gift by the creditor of one security is an assignment or gift of the debt, and neither the creditor nor his representatives can be permitted to set up the other security for the purpose of defeating that assignment or gift; but those who hold the legal estate in the [518] collateral securities become trustees for the assignee or donee of the debt. *Duchess of Buccleugh v. Hoare* (4 Mad. 476).

The donee is entitled to the bond of 12th July, 1820, and to the benefit of the mortgage and covenant for securing the same debt. The decree, however, has not only denied to Mrs. Duffield the benefit of the deed of covenant and mortgage, but has stripped her of her property in the bond, and is therefore erroneous.

As to the objection founded on the statute of frauds, on which of the sections does it rest? Is it the *third* section, which prohibits an assignment of an interest

in land except in writing? That is answered by the consideration that the debt is the principal thing conveyed, and the gift by way of *donatio mortis causâ* of the debt draws after it consequentially the trust of the land, in the same manner as when an assignment for valuable consideration is made by parol, the equitable assignment of the debt draws after it consequentially the trust in the land.

Is it the 5th section which prohibits devises of freehold estate, except by will attested by three witnesses? Our answer is, that a mortgage security is mere personal property in equity: that a bequest of the mortgage money by an unattested will, will pass the mortgage money, and draw after it consequentially the trust of the land pledged for its security.

Is it the 6th section against revocations of wills of land, except by writing attested? Or the 22d section which prohibits revocations of wills of personal estate by word of mouth only? The answer to that is that a will of personality may unquestionably be revoked, *pro tanto*, by a *donatio mortis causâ* made [519] subsequent to the will of the property bequeathed by the will; and this, notwithstanding the section 22 of this statute, and a *donatio mortis causâ* of the mortgage, is a *donatio mortis causâ* of the equitable right to the money, and does not assume to revoke the devise of the legal estate in the land.

Can it be the 7th or 9th sections, which make void all declarations and assignments of trusts of land, unless made in writing? To these we reply, that the *donatio mortis causâ* of the deeds does not assume to convey any interest in the land whatever, by trust or otherwise; but the gift *mortis causâ* of the equitable interest of the debt, made by the delivery of the deeds, will draw after it consequentially the trust or benefit of the security of the landed pledge, as in cases of valid assignment of the debt merely, *inter vivos*.

Is it the 19th section which the Respondents rely on, which prescribes certain rules for the making of nuncupative wills? This difficulty is removed by observing, that the Appellants have never set up this gift as a nuncupative will; but they claim it as a *donatio mortis causâ*, a species of gift sanctioned by a series of authorities in our law, all of them posterior to this statute of frauds, which has been supposed to present such obstacles to this kind of legatory disposition.

The deeds themselves belong to Mrs. Duffield, by the gift of her father, and there exists no equity, to take them from her.

It is clear, from decided authorities, that a gift even *inter vivos* may be made of deeds. "A man may give or grant his deeds, *i.e.* the parchment, paper, and, wax, to another at his pleasure, and the grantee may keep or cancel them. And, therefore, if a man [520] have an obligation, he may give or grant it away, and so sever the debt and it. So tenant in fee simple may give or grant away the deeds of his land, and the executor in the first instance and the heir in the last hath no remedy" (Shepherd's Touch, Ch. 12, p. 241). *Kelsack v. Nicholson* (Cro. Eliz. 196). Again, "A man may give or grant his deed to another, and such gift by parol is good; and if a man hath an obligation though he cannot grant the thing in action, yet he may grant the deed, *viz.*, the parchment and wax, to another, who may cancel and use the same at his pleasure" (Co. Litt. 232, b.).

An heir at law is always a favoured character both in courts of law and equity. An incumbent of a church purchases the inheritance of the advowson and dies, and the dispute being between the heir and the executor who should present to the church, it was adjudged in favour of the heir that all was but as one instant; and where these two titles concur in one instant, the heir should be preferred as claiming under the elder right. *Holt v. Bishop of Winchester* (3 Levinz. 17).

Lord Chancellor Macclesfield says, in *Edwards v. Countess of Warwick* (2 P. Wms. 176), "I take it to be clear, that if I voluntarily, and without any consideration, covenant to lay out money in a purchase of land, to be settled on me and my heirs, this Court will compel the execution of such contract, though merely voluntary; for, in all cases where it is a measuring east between an executor and an heir, the latter shall in equity have the preference."

The want of surrender of a copyhold or a defective execution of a power will not be supplied for younger children against an eldest child being the heir unpro [521] vided for. *Cooper v. Cooper* (2 Vern. 265); nor for grandchildren in any case. *Kettle v. Townsend* (1 Salk. 487), *Perry v. Whitehead* (6 Ves. 544). *A fortiori* there

can be no equity in this present case; for grandchildren, amply provided for by their grandfather's will, to diminish the comparatively small provision he has made for his only child and heir-at-law.

Provision for a child is always favored in equity: *Lord Grey v. Lady Grey* (1 Ch. Ca. 296, 2 Swan. 594).

For the Respondents, the children of Mr. and Mrs. Duffield: Mr. Heald and Mr. M. West.

Mr. Heald: The evidence as to the delivery is peculiar.

The Lord Chancellor: It does not appear that any thing was read, or any question raised as to the fact of donation. It appears by the report to have been decided purely on the question of law, and that without hearing the counsel for the Defendant.

Mr. Sugden: The depositions as to the delivery were read. The case was argued on both sides, and the Vice Chancellor, expressing doubts on the question, recommended an appeal.

The Lord Chancellor: This should have been noticed in the report.

Mr. Heald: Mr. Hicks, in his deposition, used the word "propose;" but it does not appear that Mr. Elwes was informed what was the amount of the property proposed to be given. This case will form a precedent: and it is of great importance it should be ascertained whether he intended to give the £30,000 or the £2927, or both; for it remains in uncertainty what he intended to give. The evidence is very loose, as purporting to shew a full and perfect delivery, with a knowledge of the exact subject-[522]-matter of the gift. In these cases the same evidence should be required, whether the gift is to a child or to a stranger. Would such evidence be held sufficient in the case of a stranger? It goes further than any case in the books. The proposal is made by a third person, and the evidence of assent is by nodding. In the morning Mr. Hicks pressed for an answer, and it was given. But in the evening when they had the deeds, no answer was required, and he was in fact unable to answer. The evidence of Mr. H. Elwes is not very consistent with the other evidence. Probably he has confounded the two meetings. In *Tate v. Hibbert* (2 Ves. jun. 111) it was a *donatio inter vivos*.

It can make no difference that a bond is given with the mortgage. The destruction of the deed does not destroy the estate of the mortgagee. To encourage these donations, renders property insecure. It is against the policy of the law.

The Lord Chancellor: Suppose the bond alone is given without the mortgage,—is the mortgage not to pass, if the debt is given by the bond? The Vice Chancellor spoke to me about this case, and I then thought that there could not be a *donatio mortis causâ* of a mortgage. But now I confess I do not find it easy to maintain the opinion which I then held. Giving the bond must do something or nothing. If it does something, and gives the debt—will not the mortgage debt follow?

Mr. West: The question is, whether there can be a *donatio mortis causâ* of the beneficial interest in a mortgage, by the delivery of mortgage deeds. It is said that the doctrines and principles relating to gifts of this nature are founded upon the civil law; but the Roman [523] law is admitted in our own law, so far only as it has been received and allowed by our law; the civil law and our law differ in many respects. The civil law required many solemnities, having regard to fraud and influence—it required five witnesses: ours does not. By the civil law it partook more of the nature of a legacy than a gift; though by the early Roman law, delivery was necessary to perfect the gift: in the time of Justinian, delivery was not necessary. But our law requires delivery. *Irons v. Smallpiece* (2 B. and A. 553). And it is a general rule that there can be no *donatio mortis causâ* of those things of which the delivery will not perfect the gift: and those cases which have been determined otherwise, are exceptions to the rule, and stand upon very different grounds from the present case.

The delivery of a note not payable to bearer, cannot be the subject of a *donatio mortis causâ*, because it is a mere *chase in action*, and must be sued for in the name of the executor. *Miller v. Miller* (3 P. Wms. 358). Nor can the delivery of receipts for South Sea annuities (2 Ves. 432).

The exceptions to the rule are: the case of *Lawson v. Lawson* (1 P. Wms. 441), where the husband draws a bill upon his goldsmith, payable to his wife, with a direction indorsed upon it, that it should be applied for mourning. This was held to be a

good *donatio mortis causa*; but stress was laid upon its being for mourning, which might operate like a direction given by the testator touching his funeral, which need not be in the will. And on another ground it was held good, as an appointment of the money in the banker's hands; it might likewise have been proved [524] as a testamentary paper. And of this case Lord Thurlow said he did not see the *ratio decidendi*. See *Tate v. Hibbert* (2 Ves. jun. 120).

Snellgrove v. Bailey (3 Atk. 213), is the case of a bond, but the reasons which Lord Hardwicke gives for that determination in *Ward v. Turner* (2 Ves. 112), are technical and unsatisfactory; and they don't apply to the case of a mortgage: first he says, that some property is conveyed by the delivery; for the person to whom this specialty is given, may cancel, burn, and destroy it; the consequence of which is, that it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond, without a *profect in curia*; but this reason does not apply in respect of a mortgage debt; for an action may be maintained in respect of a mortgage debt, though the deeds are destroyed; and there is no necessity for a *profect in curia* of deeds which take effect under the statute of uses, because the deeds belong to the grantee to uses; see *Whitfield v. Faussett* (1 Ves. 394). Another reason Lord Hardwicke gives, that the law allows it a locality; and therefore a bond is *bona notabilia*, so as to require prerogative administration, where a bond is in one diocese, and goods in another; this reason does not apply to the case of a mortgage debt; and Lord Hardwicke, probably upon consideration, thought he had gone too far: for he says in *Ward v. Turner*, "If I went too far in *Snellgrove v. Bailey*, it is not a reason I should go further, and I choose to stop there."

But there is a great difference between a bond and a mortgage debt. If a scrivener be entrusted with [525] the custody of a bond, and he receive the principal, and deliver up the bond, being entrusted with the security itself; it shall be presumed that he is entrusted with a power over it, and with a power to receive the principal and interest; and the rather, because the giving up of the bond upon the payment of the money, is a discharge thereof, otherwise if the obligee take away the bond, for then he had no authority to receive any money; but if the scrivener be entrusted with the *mortgage deed*, not the bond, he hath only authority to receive the interest but not the principal, because the giving up the deed is not sufficient to restore the estate; but there must be a re-conveyance to restore the estate, whereas the giving up a bond in law is an extinguishment of the debt, *Whitlock v. Walham* (1 Salk. 157).

But then it is said there is no difference between the delivery of mortgage deeds by a mortgagee to the mortgagor; and the delivery of mortgage deeds by the mortgagee to a third person. And it has been decided that by a delivery by a mortgagee to a mortgagor of mortgage deeds, there can be a *donatio mortis causa* of the mortgage. *Richards v. Symes* (Barnard. 90). *Hurst v. Beech* (5 Madd. 351). But there is a great difference where deeds are delivered to a person who has an interest and a person who has no interest.—And this difference is established both in the civil law and our own law. By the civil law—*Si debitori meo reddiderim cautionem videtur inter nos convenisse non peterem*. So by our own law, delivery of a bond to a debtor is a discharge of the debt (2 Roll. Abr. 56). But by the delivery of a bond to a third person, no presumption arises of a gift to that person, either by the civil law or our own law. A lessee of tithes cannot grant tithes without deed; yet a parson may grant tithes to [526] him that is to pay them without deed (Shep. Touch. 230). So common of pasture cannot be granted without deed, but it may be without deed to a person who has land to which common is appurtenant, and in *Hassel v. Tynte* (Ambler, 318), Lord Hardwicke recognizes the distinction, for he says, it was a very considerable question whether, by the delivery of mortgage deeds, there be a good *donatio* of the mortgage, and he there says *Richards v. Symes* was a slight precedent.

This case, therefore, is brought within none of the exceptions, and where such an immense mass of property is invested upon mortgage, it would be dangerous to make a precedent, by which large property might be disposed of upon the testimony of one witness; with none of the checks which the law imposes upon nuncupative wills. I admit that it has been decided both in *Cashburne v. Inglis* (2 Eq. Ab. 728, 1 Atk. 603), and in various other cases, that the person having the equity of redemption of the mortgage, is considered as owner of the land, and the mortgagee is only entitled to retain it as a security for his debt; and that a mortgage in a Court of Equity is only

considered as personal assets ; but still it is a debt, and only a *chose in action* ; and being an incorporeal thing does not pass by the delivery ; but then it is said by Mr. Sugden to be like the case of an equitable mortgage where a Court of Equity would compel an actual mortgage to be made, where deeds have been deposited to secure money lent ; but of these cases Lord Eldon said in *ex parte Mountford* (14 Ves. 606), that the first determination establishing a mortgage by a deposit of deeds, surprised the bar considerably. The present case, however, is different. Here the party comes as a volunteer ; the case of an equit-[527]-able mortgage rests upon contract and a valuable consideration. There are two mortgages in this case ; one is a mortgage alone ; the other mortgage is secured by a bond ; but if there can be no *donatio mortis causâ* of a mortgage, the fact of there having been a bond given can make no difference ; the bond is only collateral to the mortgage, and the incident must follow the principal.*

Mr. Sugden in reply : The gift took place in the morning in the absence of the deeds. Gesture is sometimes stronger than words ; which may be extorted. In *Gardner v. Parker*, the Vice Chancellor compelled the executor to lend his name to the donee for the purpose of suing upon the instrument. This was one step. *The Duchess of Buccleugh v. Hoare* provided another step, where the Vice Chancellor held that the heir was a trustee to make the heritable bonds effectual for the donee. The fallacy of the judgment is in supposing the claim to be against the donor, whereas it is against his representatives. In mortgages the estate in the land waits on the money. The debt is the principal thing. The land is the incident inseparable from it. When the debt is assigned, the security must follow.

The Earl of Eldon : In the first of these causes there is an appeal (29th June, 1827) from the Judgment (1 Sim. and Stu. 244) of the then Vice Chancellor, the present Master of the Rolls, in which he makes this declaration, and from that part of the judgment the present appeal is brought. " This [528] Court doth declare, that this Court being of opinion that a mortgage security cannot by law be given by way of *donatio mortis causâ*, the Appellant, Emily Frances Duffield, was not entitled to the mortgage monies secured by the indentures of the 2d and 3d of November, 1820, and the bond of 12th July, 1820, and by the indentures of lease and release and mortgage, dated the 11th and 12th of July, 1820."

This judgment, therefore, proceeds upon the expression of an opinion, that a mortgage security cannot by law be given by way of *donatio mortis causâ* ; and if it be true that a mortgage security cannot by law be given by way of *donatio mortis causâ*, it certainly then would be unnecessary to inquire whether the mortgage of November, 1820, and the bond of July, 1820, and the indentures of mortgage also of the 11th and 12th July, 1820, have been given by way of *donatio mortis causâ* ; because if a mortgage cannot be so given, it is quite unnecessary to consider whether, under the circumstances of this case, it can be held that there was a *donatio mortis causâ*.

Before I proceed to state the opinion which I have formed upon this subject, it is my duty to the learned Judge, from whose judgment this is an appeal, to say, that probably he has been influenced in the opinion which he has expressed by something which had fallen from me in a conversation with him, in which I had certainly expressed very great doubt whether a mortgage could be made the subject of a *donatio mortis causâ*. I consider it just to state that this is so.

The judgment is commenced by the learned judge in the words I am now about to read. " The case of a bond, I consider to be an exception and not a rule : property may pass without [529] writing either as a *donatio mortis causâ*, or by a nuncupative will according to the forms required by the statute. The distinction between a *donatio mortis causâ* and a nuncupative will is, that the first is claimed against the executor and the other from the executor. Where delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causâ*, because it will not prevent the property from vesting in the executors ; and as a Court of Equity will not *inter vivos* compel a party to complete his gift, it will not compel an executor to complete the gift of his testator. The delivery of a mortgage cannot pass the pro-

* Mr. Pepys proposed to argue the case for Mr. Chambers ; but the Lord Chancellor said, that unless he could shew that his client had a distinct interest from the other Respondents, he could not be heard.

perty *inter vivos*:—first, because the action for the money must still be in the name of the donor; and secondly, because the mortgagor is not compellable to pay the money without having back the mortgaged estate, which can only pass by the deed of the mortgagee, and no Court would compel the donor to complete his gift by executing such a deed. As to the case where a bond accompanied the mortgage deed " (I shall have occasion to state presently the distinction between the two mortgages). "I was at first inclined to think that as the bond alone, if it had been the only security for the debt, would under the decisions have passed as a *donatio mortis causa*, so it would draw after it the mortgage as being a collateral security for the same debt,—but upon further consideration I think that the delivery of the bond, where there is also a mortgage, cannot be considered as a gift completed. The mortgagor has a right to resist the payment of the bond without a re-conveyance of the estate, and it cannot be maintained that the donor of the bond would be compelled to complete his gift by such re-conveyance."

The principle which is applied in the decision of [530] this case, is the principle upon which Courts of Equity refuse to complete voluntary conveyances. No Court of Equity will compel a completion of them, and throughout the whole of what I have now read, the donor is considered as a party who may refuse to complete the intent he has expressed; but I think that is a misapprehension, because nothing can be more clear than that this *donatio mortis causa* must be a gift made by a donor in contemplation of the conceived approach of death,—that the title is not complete till he is actually dead, and that the question therefore never can be what the donor can be compelled to do, but what the donee in the case of a *donatio mortis causa* can call upon the representatives, real or personal, of that donor to do; the question is this, whether the act of the donor being, as far as the act of the donor itself is to be viewed, complete, the persons who represent that donor, in respect of personalty—the executor, and in respect of realty—the heir-at-law, are not bound to complete that which, as far as the act of the donor is concerned in the question, was incomplete; in other words, where it is the gift of a personal chattel or the gift of a deed which is the subject of the *donatio mortis causa*, whether after the death of the individual who made that gift, the executor is not to be considered a trustee for the donee, and whether on the other hand, if it be a gift affecting the real interest,—and I distinguish now between a security upon land and the land itself—whether if it be a gift of such an interest in law, the heir-at-law of the testator is not by virtue of the operation of the trust, which is created not by indenture but a bequest arising from operation of law, a trustee for that donee. I apprehend that really the question does not turn at [531] all upon what the donor could do, or what the donor could not do; but if it was a good *donatio mortis causa*, what the donee of that donor could call upon the representatives of the donor to do after the death of that donor.

With respect to the question of fact, whether those mortgages and the bond were or were not given in such a manner as constituted a good *donatio mortis causa*, if there be no objection to the fact, that the subject of the mortgage was an interest in real estate, I do not apprehend that the gentlemen at the bar, though they criticised very much the nature of the evidence which has been given, meant to ask for any issue to try whether there was or was not a good *donatio mortis causa*, if a mortgage can be the subject of a *donatio mortis causa*. In some of the cases which I shall have occasion to mention, it will be seen that where there is any doubt whether in point of fact there was that which would constitute a good *donatio mortis causa*, if in point of law the subject of it can be made the subject of a *donatio mortis causa*, it is a very familiar thing to direct an issue or issues to try that fact. That not having been desired, the case is to be considered on its merits. Supposing the testator to have the power, has he fallen into a mistake with respect to the subject which he did intend so to give, and has he attempted to make a good *donatio mortis causa* of property which he could not so transfer?

It is necessary to state, first, what these two mortgages are, for they differ in their nature. The first is a mortgage for a sum of between £2000 and £3000, and there is the usual bond. The other is the case of an interest conveyed by indentures of lease and release and assignment, the contents of [532] which are such as I am about to state. There being property considerably more than £30,000 vested in trustees under a marriage settlement, they have advanced £30,000 to Sir Edwin Bayntun

Sandys upon a mortgage of his estates and a bond, and judgment recovered upon that bond. The person who is supposed to have made this gift *causa mortis* afterwards advanced to the mortgagee that sum of £30,000, the mortgagor joining in the trust assignment of the mortgage. There was first an assignment of the money, the £30,000; secondly, an assignment of the judgment; and, thirdly, it contained a covenant to pay the money secured by the mortgage, which covenant formed a species of debt affecting the inheritance—the subject of the assignment to Mr. Elwes.

It appears that Mr. Elwes had been extremely angry with his daughter, who had married Mr. Duffield; but towards the close of life, and particularly when he came very near his death, he became very desirous to make a larger provision for his daughter; and, accordingly, in a conversation which he had upon the subject, he mentioned that there were these mortgages, one of two thousand odd hundred pounds, and another of thirty thousand pounds. Nobody, I think, who looks to the evidence, can doubt that it was his intention to make a gift of those mortgages for the benefit of that daughter whom he had restored to his favour, and, accordingly, he stated his purpose. He died the next morning. He was at the time in circumstances in which, it is clear, he apprehended that his death was approaching, and being extremely desirous to make some provision for his daughter, in the course of that morning he stated an intention upon the subject, which could leave no doubt in the mind [533] of any body what that intention was. It occurred afterwards that a declaration of this purpose should be made, and the question is, whether the form of that declaration was sufficient to constitute a gift of the property! There was no time to draw out a regular transfer of the property, but in the course of the morning there were brought to him the instruments,—the mortgages, the bonds, and so on; and it being suggested that it was necessary, in order to make a good *donatio mortis causa*, that there should be delivery of the instruments, subject to the question, whether such delivery constituted a good *donatio mortis causa*; it appears by the evidence of the gentleman who had all these instruments in his hand, that Mr. Elwes took the hand of his daughter and laid it upon these instruments. The evidence presents an accurate account of the clear manifestation of his purpose to give, although that manifestation was accompanied with this circumstance—that he was so near the termination of his life, and so reduced, that he could hardly utter the words, but that it was more by a look than a word that he expressed his approbation of what was done. This was therefore a case where one cannot help feeling a very strong wish that it should take effect; but, it must be remembered, we cannot give that effect unless the law enables us to do it.

Improvements in the law, or some things which have been considered improvements, have been lately proposed; and if, among those things called improvements, this *donatio mortis causa* was struck out of our law altogether, it would be quite as well; but that not being so, we must examine into the subject of it.

I apprehend that the question is not a question between the donor and donee, but that the question is, whether the act is complete to this extent—that the [534] donor gave this in such a manner as to constitute a good *donatio mortis causa* which will bind the interest in the executor as to the personal estate, and bind the interest in the heir at law with respect to the mortgage security as to the real estate? Because, I apprehend, that in a case where a *donatio mortis causa* has been carried into effect by a Court of Equity, that Court of Equity has not considered the interest as vested by the gift, but that the interest is so vested in the donee, that that donee has a right to call on a Court of Equity, and, as to the personal estate, to compel the executor to carry into effect the intention manifested by the person he represents. The only authority it will be necessary to cite for that doctrine is referred to in this decision. The case of *Gardner v. Parker* (3 Madd. 184), is a decision by the same Judge, and was under these circumstances:—It was a gift of a bond by delivering the same and saying, "There, take that and keep it," in the last sickness of the donor—the donor dying two days afterwards. This was held to be a *donatio mortis causa*, and it was directed that the donee should be at liberty to use the executors' names in suing on the bond, he indemnifying them, and the costs of the suit to be paid out of the testator's estate, which is founded on this reason, that the money may be recovered in a proceeding at law, by an action in the name of the executors; but if the executors refuse to permit their names to be used, a Court of Equity will compel

them to permit their names to be used in consequence of the trust which arises from the act of the donor himself.

In another case of *Snellgrove v. Bailey* (3 Atk. 214), "A bond for £100 was given by one Sparkman to Sarah [535] Bailey, which Sarah Bailey delivered to the defendant, saying, 'In case I die, it is yours, and you will have something.' The plaintiff, as administrator to Sarah Bailey, brought a bill to have the bond delivered up." There was a question whether there had been a *donatio causâ mortis*, and the administrator there brought a bill to have the bond delivered up, as being in the hands of the alleged donee. Lord Hardwicke, however, decided, that this was a sufficient *donatio causâ mortis* to pass the equitable interest, not the legal interest in the bond, upon the intestate's death. I find that Lord Hardwicke, in the case where there was a gift in the nature of a *donatio mortis causâ*, directed that the representatives should be at liberty to file a bill to have the deeds delivered up, although he said they might bring *traversi* for the deeds: but if the act of the donor had vested the deeds in the hands of the person in such a manner as to give an interest in the nature of a *donatio mortis causâ*, there could be no equity to obtain the delivery up of those deeds unless the title had been settled at law.

The real question in this case is—not whether this was good as a *donatio causâ mortis*, if the subject of delivery had been a bond alone, but whether the subject of delivery being mortgages, that is, estates in land in one sense of the word, such interests in land as those are can or cannot be made the subject of a *donatio causâ mortis*?—A question which is left in a state of great uncertainty—a question noticed in some cases, but still left in a state of great difficulty: and I cannot but extremely lament that there should have been a decision upon a question of this importance with so little said either in argument or judgment upon the hearings of the cases to be found [536] with reference to this subject. Upon looking into the cases, I observe that in the very first case I can find Lord Hardwicke to have decided, he expressed more doubt upon the subject than, in my humble judgment, speaking with great deference when looking at that great man's authority, former decisions upon the subject would have induced me to expect to find in his Lordship's expressions.

In the case of *Hussel v. Tynte* (Ambl. Rep. 318), in which a lady claimed to have a sum of £1000 secured by mortgage, which she said she had become entitled to by a *donatio causâ mortis* made by the donor (the testator is a wrong term in such a case)—there were two questions, one was a question of fact, namely, whether the circumstances were such as to constitute it a gift, if it was a proper subject of gift? The other—whether it was a proper subject of gift? Lord Hardwicke expressed a doubt whether a mortgage deed could be made the subject of a *donatio causâ mortis*, and he finished the case by saying, "I observe that this lady, when she becomes twenty-one, is to be the residuary legatee of the testator, and as she will very soon attain the age of twenty-one, I will not keep up this controversy between her as claiming this £1000 and the person entitled to the residue if she dies under twenty-one: the probability is she will arrive at the age of twenty-one, and then, as residuary legatee, she will be entitled to all the residue, and then it will become unnecessary to determine whether this £1000 shall be settled upon her or not."

In the case of *Hard v. Turner* (2 Ves. sen. 431), which is a leading case upon this subject, Lord Hardwicke entered into a very long consideration of the case in his judgment. [537] The question there was, whether some receipts for stock having been delivered over, it was a good *donatio causâ mortis*? He was of opinion it was not: that the mere certificate of the stock was not a document of the title, and where no document of the title has been delivered there can be no transfer of the property, and he held that that was not a good *donatio causâ mortis*.

In *Richards v. Symes* (2 Atk. 319, 3 Barnard. 90, and 2 Eq. Ca. Abr. 617) Lord Hardwicke is represented as having decided, that if a mortgagee gave to his mortgagor the deeds of the mortgage, and that fact was proved, that was a gift of the money for which the deeds were a security, and not within the statute of frauds. Now the whole, or the greater part of the difficulty in determining whether the gift of a mortgage can be a good *donatio causâ mortis*, turns upon this, that the question arises how far the statute of frauds will allow of that. Lord Hardwicke was of opinion, according to this case of *Richards v. Symes*, that if a mortgagee gave to a mortgagor the deeds, the statute of frauds would not stand in the way: he held

clearly that the mortgagee cannot get back the deeds from the mortgagor; then he said that the documents, the deeds being in the hands of the mortgagor, though the estate in the land was still in the mortgagee, yet by operation of law a trust would be created in the mortgagee to make good a gift of the debt to the mortgagor, to whom he had delivered the deeds, as the evidence that he forgave the debt and gave it up. We must consider the difference between the actual estate and a mortgage—and recollect that although a mortgage vests an estate in land, (a fee simple mortgage of course vests [538] a fee simple estate in land,) yet it may be represented that there are two estates, one in the mortgagor and another in the mortgagee. A mortgage, for instance, does not revoke the will of the testator. A mortgage does not give dower—it is, in truth, nothing more than a pledge, and if the right to the principal is divested out of the mortgagee by a valid act to divest the right of the principal, the other is considered as what they call an accident, and then the question arises—not whether the land can be got out of the mortgagee without a conveyance, but whether, if the land is to be considered as still remaining vested in the mortgagee, he is not, by operation of law, a trustee for the mortgagor, bound to answer the subpoena of that mortgagor to reconvey the estate to him, and to execute the requisites of the statute of frauds.

In the case of *Hassell v. Tynte*, Lord Hardwicke makes the observation in giving his judgment:—that the case of *Richards v. Symes* was not a precedent of very considerable value; because, he says, that he had directed issues to try whether there was a gift by the mortgagee to the mortgagor, and those issues having ended in deciding that there was not, he considered that a precedent of very little authority. I consider it, however, as a precedent of very considerable authority in such a case as this. It is reported at length in Barnardiston's Chancery Cases, and when I mention that reporter, I am sorry to have to add, that I am old enough to remember Lord Mansfield, who practised under Lord Hardwicke, by whom all these cases were decided, state his opinion of these reports, for he knew the man. I take the liberty of saying, that in that book there are reports of very great authority. The case happens to be reported likewise in [539] another book of no very high character. I mean the second volume of the Equity Cases abridged. It is not so high in character as the first volume of the Equity Cases abridged, but the case as there reported, is reported from a manuscript note, and from a manuscript note which I think is better entitled to credit for this reason; that having called in assistance in this case (which I believe will be the first absolute determination upon the subject, though I think there is a great deal laid down in the cases which ought to lead us to decide what ought to be a good *donatio mortis causa*), I have found authority to consider that report to be a very correct report, in the library and in the mind, which are both equally large storehouses of equity learning—I mean the library and mind of Lord Redesdale. Upon this occasion, he has had the goodness to hunt through all the books he has upon the subject, as well manuscript as printed, and I come to the foundation of my opinion, with all the assistance I can have from that quarter.

According to both the reports, an issue had been directed. If there had been a good delivery, Lord Hardwicke seems to consider that the interest in the land would have passed: "But in all these cases," he says, "there is a difference, both at law and in equity, between absolute estates in fee or for a term of years, and conditional estates for security of money. In the case of absolute estates, it cannot be admitted that parol proof of the gift of deeds shall convey the land itself. But where a mortgage is made of an estate, that is only considered as a security for the money due, the land is the accident attending upon the other (and principal object), "and when the debt is discharged the interest in the land follows of course." A trust [540] of the land then arises by operation of law: when a deed is given a trust also arises by operation of law. "At law, the interest in the land is thereby defeated, and in equity a trust arises for the benefit of the mortgagor;" and his Lordship said, that "if an obligee delivers up a bond with intent to discharge the debt, the debt will certainly be thereby discharged, and the mortgage with it;" and if the bond is discharged in the present case, it is very difficult to say that the mortgage debt, as debt, will not be discharged also.

In reasoning the case of *Ward v. Turner*, and pointing out the distinction there is between the delivery of a mere chattel, and the delivery of any thing which

forms part of the title, Lord Hardwicke says this—and I find by a manuscript note in the possession of the noble Lord I have mentioned, that this is exceedingly correct—“Suppose it had been a mortgage in question, and a separate receipt had been taken for the mortgage money, not on the back of the deed (which was a very common way formerly, and is frequently seen in the evidence of ancient titles), and the mortgagee had delivered over this separate receipt for the consideration money, that would not have been a good delivery of the possession, nor given the mortgage *mortis causâ*, by force of the act.” (2 Ves. 143.) To be sure, that reasoning is quite idle, unless Lord Hardwicke meant to say that delivery of the deed, with a receipt upon the back of it, not by force of the delivery of the receipt on the back of it, but by force of the delivery of the deed, would be a good *donatio causâ mortis*.

The case of *Richards v. Symes* was argued by Lord Mansfield, then Mr. Murray. The case of *Ward v. Turner* was also argued by Lord Mans[541]-field, then Mr. Murray; and he appears to have a strong recollection of it, when he got into the Court of King's Bench, where sometimes equity has been rather more misunderstood than it ought to be, which has perhaps led some men belonging to that Court to abuse equity, when they knew nothing about the matter. There is a case in the second volume of Burrows' Reports (*Martin v. Moulin*, 2 Burr. 979)—a case of very great importance—a case in which a man devised lands: the will, I think, was not attested by three witnesses, but he described the object of his devise of land. There was enough in his will to shew that he meant to pass the personal interest in his property, and it was a question, whether there was a good devise of the mortgage or not. The land itself could not be said to be devised: but the Court of King's Bench held that it was a very good bequest of the personal interest: and Lord Mansfield, in summing up all this sort of doctrine, says—“A mortgage is a charge upon the land, and whatever would pass the money will carry the estate in the land along with it to every purpose.” (That I admit is equity.) “The estate in the land is the same thing as the money due upon it—it will be liable to debts—it will go to executors—it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt or forgiving it, will draw the land after it as a consequence: nay, it would do it, though the debt were forgiven only by parol, for the right to the land would follow notwithstanding the statute of frauds.”

I ought to do it in a spirit of great humility, when I question the doctrine of Lord Mansfield. If he meant by that to say that such acts done with the [542] money will have the effect in a Court of Equity of enabling you to call for a conveyance of land, I am ready to agree with him; but to say that the land is to be considered as passing under such circumstances, is that to which I cannot agree; but still I maintain that the doctrine from first to last is correct, provided you lay the foundation in the intent of the gift, that the debt is well given or well forgiven; and then, as the result of that interest so given, you say that the party who has the land becomes in equity a trustee for the person entitled to the money and to the personal estate.

Lord Hardwicke, with respect to the bond (and it is necessary that I should take some notice of this, because there has been a change in the law which that great judge did not foresee, but which, in later times, and in my own time, has become very familiar in the courts of law,) Lord Hardwicke states, as one ground of his opinion in the case of the bond, that it is a good gift *causâ mortis*, because he says he who has got the bond may do what he pleases with it. He certainly disables the person who has not got the bond from bringing an action upon it: for, says Lord Hardwicke, no man ever heard (and I have seen in the manuscript of the same Lord Hardwicke, that he said no man ever will hear) that a person shall bring an action upon a bond without the *product* of that bond; but we have now got into a practice of sliding from courts of equity into courts of law, the doctrine respecting lost instruments: and I take the liberty most humbly of saying, that when that doctrine was so transplanted, it was transplanted upon the idea, that the thing might be as well conducted in a court of law as in a Court of Equity, a doctrine which cannot be held by any person who knows what [543] the doctrine of Courts of Equity is as to a lost instrument.

Then, if the delivery of a bond would, as it is admitted, (notwithstanding any

change in the doctrine about *property*)—if the delivery of a bond would give the debt in that bond, so as to secure to the donee of that bond the debt so given by the delivery of the bond, the question is, whether the person having got, by the delivery of that bond, a right to call upon the executor to make his title by suing or giving him authority to sue upon the bond, what are we to do with the other securities if they are not given up? But there is another question to which an answer is to be given:—what are we to do with respect to the other securities, if they are delivered? In the one case, the bond and mortgage are delivered: in the other the judgment, which is to be considered on the same ground as a specialty, is delivered—with that, the evidences of the debts are all delivered. The instrument containing the covenant to pay is delivered. They are all delivered in such a way that the donor could never have got the deeds back again. Then the question is, whether, regard being had to what is the nature of a mortgage, contradistinguishing it from an estate in land, those circumstances do not as effectually give the property in the debt as if the debt was secured by a bond only?

The opinion which I have formed is, that this is a good *donatio mortis causâ*, raising by operation of law a trust: a trust which being raised by operation of law, is not within the statute of frauds, but a trust which a Court of Equity will execute; and therefore, in my humble judgment, this declaration must be altered by stating that this lady, the daughter, is entitled to the benefit of these securities, and with a [544] direction to the Court of Equity to proceed in the cause, on the ground of the principle to be found in such a declaration to be made by your Lordships, which, with respect to that part of the case, I take the liberty to advise your Lordships to adopt.

29 June, 1827. Ordered and adjudged by the Lords spiritual and temporal in Parliament assembled, that the said decree of the Court of Chancery of the 17th April, 1823, be, and the same is hereby reversed, in so far as it declares, "That the said Court being of opinion that a mortgage security cannot by law be given by way of *donatio mortis causâ*, the Plaintiff, Emily Frances Duffield, is not entitled to the mortgage monies secured by the indentures of the 2d and 3d days of November, 1820, and the said bond of the 12th day of July, 1820, and by the said indentures of lease and release and mortgage dated the 11th and 12th days of July, 1820." And it is further ordered, that the said cause be referred back to the Court of Chancery, to proceed therein in such manner as shall be consistent with this Judgment.

[545]

ENGLAND.

(KING'S BENCH.)

TIMOTHY POWELL, JOSHUA POWELL, and THOMAS HUNGERFORD POWELL, surviving partners of ROBERT MITCHELL, deceased,—*Plaintiffs*; JOSEPH MARIA SONNET, ANTONIO BERNIS, and JOSEPH MARIA BERNIS, surviving Partners of FRANCISCO BERNIS, deceased,—*Defendants*.

[*News' Dig.* xi. 481. S.C. 1 Dow and Cl. 56, and in Ex. Ch. 3 Bing. 381; 11 Moo. 330. Followed in *R. v. Johnson*, 1836, 6 Nev. and M. 883; and see *Scott v. Bennett*, 1871, L.R. 5 H.L. 248.]

Upon immaterial issues it is not necessary that verdicts should be given. The jury may be discharged from giving such verdicts without consent of the parties.

This was a writ of error, brought on the affirmance by the Exchequer Chamber of a judgment of the Court of King's Bench, in an action of *assumpsit*.

The action was commenced in Michaelmas Term, 1824, issue was joined as of Hilary term, 1825, and the cause was tried in the vacation after Hilary Term, in that year.

The declaration consisted of twenty counts. The twelve first counts were for special damages, alleged to have been sustained by the Plaintiffs below, and their late partner, Francisco Bernis, in his lifetime, and by them after the death of their late partner, in the sale by the Defendants below, and their late partner, Robert Mitchell, of a quantity of wool consigned to them by the Plaintiffs below, and their late partner, Francisco Bernis, for sale. The 13th, 14th, [546] 15th, and 16th counts, were for money paid, laid out, and expended; money had and received; money due for interest, and upon an account stated in the lifetime of Francisco Bernis and Robert Mitchell; and the 17th, 18th, 19th, and 20th counts were similar counts, except that they were laid after the deaths of Francisco Bernis and Robert Mitchell. The Defendants below put in several pleas. To the first sixteen counts of the declaration, they pleaded the general issue, and to the four last counts, they also pleaded the general issue; they then pleaded the statute of limitations to the whole declaration, and to the eight last counts they pleaded a set off.

Upon the two first pleas the Plaintiffs below joined issue: to the third plea they replied, that before and at the time when the several causes of action in the declaration mentioned arose, the Plaintiffs below resided, and from thence had been resident beyond the seas, and that Francisco Bernis at the time when the causes of action in the first sixteen counts mentioned arose, and from thence until the time of his death, was resident beyond the seas; and to the last plea they replied, that they were not indebted to the Plaintiffs below in the manner and form pleaded: on which issue was joined.

To this replication of the Plaintiffs below as to the third plea, so far as the same related to the first sixteen counts of the declaration, the Defendants below rejoined, that the Plaintiffs below and Francisco Bernis were not resident beyond the seas, on which issue was joined: and so far as the same related to the four last counts, the Defendants below rejoined, that the Plaintiffs below were not resident beyond the seas, on which also issue was joined.

[547] On the trial of the cause below, a verdict was found for the Plaintiffs below, on the general issue, as to the twelve first counts of the declaration, with £24,000 damages, and for the Defendants below, on the general issue, as to the 13th, 14th, 15th, and 16th counts; and also on the general issue, as to the four last counts of the declaration. And as to the issue joined on the rejoinder of the Defendants below, to the replication of the Plaintiffs below, to the third plea of the Defendants below, so far as the same related to the twelve first counts of the declaration, a verdict was found for the Plaintiffs below; but as to the same issue, so far as it related to the 13th, 14th, 15th, and 16th counts of the declaration, and also as to the issue joined on the rejoinder of the Defendants below, to the replication of the Plaintiffs below, to the third plea of the Defendants below, so far as it related to the four last counts of the declaration; and also as to the issue joined on the replication of the Plaintiffs below, to the last plea of the Defendants below, as to the eight last counts of the declaration, the Jurors were discharged from giving any verdict.

In Easter Term, 1825, judgment was given in the Court of King's Bench, for the Plaintiffs below, as to the twelve first counts of the declaration, and for the Defendants below, as to the eight last counts. Upon this judgment a writ of error was brought in the Exchequer Chamber, and the Plaintiffs in error assigned for error the common errors, and also that it appeared by the record, that as to the eight last counts of the declaration and the several issues respectively joined thereon, *the Jury were discharged from giving their verdict thereon; nevertheless it did not appear in and by the record, that the* [548] *Plaintiffs in error consented that the Jury should be so discharged.*

In Michaelmas Term, 1825, the Court of Exchequer Chamber affirmed the judgment of the Court of King's Bench.

Upon this judgment of affirmance, the Plaintiffs in error brought their writ of error in Parliament, and assigned for error the common errors, and also that by the record it appeared, that as to the issue joined between the parties on the rejoinder of the Defendants below, to the replication of the Plaintiffs below, to the plea of the Defendants below, by them thirdly pleaded, so far as the same relates to the 13th, 14th, 15th, and 16th counts of the declaration; and also as to the issue joined between the parties upon the said rejoinder of the Defendants below, to the

replication of the Plaintiffs below, to the plea of the Defendants below, by them thirdly pleaded, so far as the same relates to the last four counts of the said declaration; and as to the issue joined between the parties on the replication of the Plaintiffs below, to the plea of the Defendants below, by them lastly pleaded, as to the several promises and undertakings in the eight last counts of the said declaration mentioned, *the Jury were discharged from giving any verdict thereon, nevertheless it did not appear in and by the said record, that the Defendants below consented that the Jury should be so discharged.* And also, that by the said record it appeared that as to the several issues thirdly and lastly joined between the parties, *the Jury were discharged from giving any verdict thereon, nevertheless it did not appear in and by the said record that the Defendants below consented that the Jury should be so discharged.*

[549] The Defendants in error pleaded *in nullo est erratum*.

For the Plaintiffs in error: The Solicitor-General and Mr. Pattison.

After the Jurors appointed to try the cause below, had been sworn to try the several issues joined between the parties in the cause, and a true verdict give according to the evidence, it was not competent for the Court below to discharge the Jurors from giving any verdict, as to any of the issues, without the consent of the parties, and it does not appear that the Plaintiffs in error consented to their being so discharged.

By such discharging the Jury the situation of the Plaintiffs in error, as to their claim for costs, has been altered. For the Jurors having returned a verdict for the Defendants in error, on all the issues joined between the parties, so far as they relate to the twelve first counts of the declaration, the Defendants in error became intitled to the general costs of the cause, deducting the costs of such issues as were found for the Plaintiffs in error; but in consequence of the Jurors being discharged from finding any verdict on the special issues joined between the parties, as to the eight last counts of the declaration, the Plaintiffs in error have been chargeable with the cost of such special issues, instead of the same being deducted as they would have been, had the Jurors found a verdict for the Plaintiffs in error thereon, as they ought to have done.

For the Defendants in error: Mr. Gurney, Mr. Brodrick (and Mr. Tidd).

The jury having found a verdict for the Defendants in error, on the issue joined on the first plea, so far as the same relates to the promises and [550] undertakings in the first twelve counts of the declaration mentioned, with £24,000 damages, and costs of suit, and for the Plaintiffs in error, on the same issue, so far as it relates to the promises and undertakings in the thirteenth, fourteenth, fifteenth, and sixteenth counts, and also on the issue joined on the second plea, as to the promises and undertakings in the last four counts of the declaration; and having also found a verdict for the Defendants in error, on the issue joined on the rejoinder to the replication to the plea of the Statute of Limitations, as to the first twelve counts of the declaration, it became, and was wholly immaterial and unnecessary for the jury to find any verdict on the last-mentioned issue, as to the thirteenth, fourteenth, fifteenth, and sixteenth counts, or on the issue joined on the rejoinder to the Replication to the last-mentioned plea, as to the last four counts of the declaration, or on the issue joined on the replication to the plea of set off, as to the several promises and undertakings in the last eight counts of the declaration mentioned; and the jurors were therefore properly discharged from giving any verdict thereon (see Barnes, 461. 2 H. Blac. 393. 2 Barn and Ald. 546).

The jury having so found a verdict for the Plaintiffs in error, on the issue joined on the first plea, so far as the same relates to the promises and undertakings in the thirteenth, fourteenth, fifteenth, and sixteenth counts; and also on the issue joined on the second plea, as to the promises and undertakings in the last four counts of the declaration mentioned, and thereby negatived the supposed causes of action in the thirteenth, fourteenth, fifteenth, and sixteenth, and also in the last four counts respectively mentioned, could not have found whether the Defendants [551] in error, and Francisco Bernis, were or were not at the respective times, when those several causes of action did respectively accrue to them in parts beyond the seas (2 H. Blac. 246); or that the Defendants in error, before or at the time of the commencement of the action, were indebted to the Plaintiffs in error, in any sum of

money exceeding the damage sustained by the Defendants in error, by reason of the not performing of the several supposed promises and undertaking in the last eight counts of the declaration mentioned.

If the jury had found a verdict for the Plaintiffs in error, on the issue joined on the rejoinders to the replication to the plea of the Statute of Limitations, as to the thirteenth, fourteenth, fifteenth, and sixteenth, and last four counts of the declaration, or on the issue joined on the replication to the plea of set-off, as to the several promises and undertakings in the last eight counts of the said declaration mentioned, the Plaintiffs in error would not have been entitled to any costs thereon. *Postan v. Stanway, Exrtr* (5 East, 261), *House v. Thames Commissioners* (3 Brod. and Bing. 117), *Edwards v. Bethel* (1 Barn. and Ald. 251).

At common law (Com. Dig. Title, Pleader S. 27), it was sufficient if the substance of the issue were found, or so much of it as would have maintained the action or defence. And since the statute, 4 Anne, c. 16, sec. 4, which allows the Defendant to plead several matters, if any one or more of the issues joined on several pleas be found for the Plaintiff or Defendant, which entitle him to judgment on the whole record, the Court will give judgment thereon, notwithstanding there be no verdict, [552] or a bad or imperfect verdict on other issues, the finding upon which, in consequence becomes immaterial. *Bartlett v. Spooner* (Barnes, 461), *Barber v. Dixon* (1 Wils. 11), *Cossey v. Diggon* (2 Barn and Ald. 546), *Rawlins* (2 H. Blac. 391, n.).

As it appears by the *postea*, returned by the Chief Justice, before whom the cause was tried, and is certified by him, as part of the proceedings at the trial, that the jurors were discharged from giving any verdict as to the issues joined on the rejoinder to the replication to the third plea of the Statute of Limitations, so far as the same relates to the thirteenth, fourteenth, fifteenth, and sixteenth, and last four counts of the declaration, and also on the issue joined on the replication to the last plea of set off, as to the several supposed promises and undertakings in the last eight counts of the declaration, it must be presumed, that the jurors were duly and rightly discharged from giving any verdict thereon (3 Bing. 381).

The Plaintiffs in error could not have sustained any damage by the jurors having been so discharged from giving any verdict on the last-mentioned issues; and, it was not the business of the Defendants in error, but of the Plaintiffs in error, to have the last-mentioned issues determined, if they had been so disposed, or imagined that thereby they might be entitled to costs, or any other advantage (Barnes, 462).

The Lord Chancellor (Lyndhurst): The jury having found a verdict for the Plaintiffs on the material issues, the cause was in substance at an end. To what purpose should any thing further have been done.

The consent of parties to the discharge of the jury, is now held unnecessary. The judges of their own authority in many modern cases have dis-[553]-charged the jurors without finding verdicts upon all the issues, and without consent of parties. Applications upon this ground for new trials have frequently been refused, which is, in principle and substance, the same thing.

Judgment affirmed, with £ costs.

[554]

ENGLAND.

(CHANCERY.)

JOHN VERNON, Esquire.—*Appellant*; The Right Honourable JOHN Earl of EGMONT, ARCHIBALD MORTON, and ARCHIBALD RODICK, *Respondents*.

[Mews' Dig. vi. 1303. See *Dobson v. Carpenter* 1850, 12 Beav. 372; and 22 and 23 Viet. c. 35, s. 29.]

E. being tenant for life under a deed of settlement, with a power to lease under certain restrictions, grants leases not in conformity with the power and dies, leaving by will the residue of his personality to J. E. his son, the next remainderman under the settlement.

J. E. having called upon the executors to pay the residue, they require an indemnity against the contingent claims of the tenants in case of eviction, and upon the refusal of J. E. to give such indemnity, he files a bill against them for an account and payment of the residue.

Held, (reversing the judgment of the court below) that as J. E. had the power to disturb the leases, he was bound either to confirm them, or to give the indemnity required, and that the executor had a right to hold the residue, till he obtained the confirmation or indemnity.

On the 2d day of November, 1822, the Respondent, the Earl of Egmont, filed his original bill against the Appellant, stating the will of his father, John James, late Earl of Egmont, dated the 26th July, 1813, whereby, amongst other things, he gave and bequeathed to his wife Isabella Countess of Egmont, during her life, one annual sum of £500, to be chargeable upon and payable out of the manors of Spaxton, Aley, and Plausfield, in the county of Somerset, (except the estates comprised in his marriage settlement) and subject thereto, and also charged with the sum of [555] £12,000 due on mortgage of the said estates, or some part thereof; the testator devised the same to the use of his son the Respondent, then John Lord Viscount Percival, and the heirs male of his body with various remainders over; and after reciting that he was entitled to the reversion in fee simple of and in divers estates in the said county, and also of other estates in the county of Cork, in the Kingdom of Ireland as therein mentioned, he gave and devised the same to the same uses as before expressed concerning his estates in the county of Somerset; and after bequeathing to his wife as therein is mentioned, directed that the monies in the hands of his bankers should be applied in payment of his debts, (except mortgage debts, which were to be raised out of the estates whereon the same were respectively charged) and of the legacies given by his will, and such other legacies as he might give by any codicil thereto. The surplus of such monies and all other his monies and personal estate, he gave to his son the Respondent; and he appointed his wife and the Appellant executrix and executor of his will, and gave the Appellant £100 for his trouble in the execution of his will.

The bill further stated that the testator by a codicil to his will, dated the 5th of May, 1820, gave to Elizabeth White, then in his service, an annuity or yearly sum of £150 during her life, and for securing the same, directed his executors, out of his personal estate, to invest a sufficient sum in their names to produce such annuity; and he gave the interest of the sum so to be invested to the Respondent, John, Earl of Egmont, until the decease of his (the testator's) wife; and he likewise gave to the Respondent the principal and any arrear of interest on the decease of Elizabeth White. The bill further stated, that Isabella, Countess of Egmont, died in the lifetime of the testator, whereby all the [556] bequests given to her by the will lapsed; that the testator died in the month of February, 1822, without having altered or revoked the codicil; and that the Appellant duly proved the will and codicil in the proper Ecclesiastical Court.

The bill prayed that an account might be taken of the personal estate and effects of the testator, and of all such parts thereof as were possessed or received by the Appellant, or by any person by his order or for his use, and the funeral and testamentary expences of the testator and of his debts, as well those due on mortgage as others, and of the legacies and annuities bequeathed by his will and codicil; and that a competent part of the personal estate might be applied in the payment and discharge of such of the testator's debts and legacies as then remained unsatisfied, if any such there were; and that a competent sum of money might be set apart and invested, if the same had not already been done, in the purchase of stock in the public funds to answer the annuity of £150, and that the clear residue of the testator's personal estate and effects might be ascertained and paid to the Respondent, John, Earl of Egmont, as such residuary legatee, and that all proper and necessary accounts might be taken, and directions given for effectuating the said purposes.

The Appellant, John Vernon, on the 10th day of December, 1822, put in his answer to the Respondent's bill, and thereby admitted the will and codicil, the decease of the Countess of Egmont and of testator, that the Appellant had proved the will and codicil, and had possessed himself of the personal estate and effects of the testator,

or as much as he was able, and had, out of the produce thereof, paid the funeral and testamentary expences of the testator, and such of his debts as had come to the Appellant's knowledge, and had set apart and invested a sufficient sum of money to secure the payment of the annuity of £150 and certain other annuities which the testator before his death desired might be paid to certain of his servants; which annuities the Respondent, by deed under his hand and seal, dated the 4th day of March, 1822, authorised the Appellant to pay and provide for out of the testator's personal estate; and that after such payment and appropriation, and after retaining the legacy of £100 bequeathed to the Appellant by the will, there remained in the hands of the Appellant a considerable surplus of the testator's personal estate and effects: but the Appellant submitted whether he ought to have paid over such surplus to the Respondent, in as much as he had received a formal notice from Messrs. Morton and Rodick of an assignment by way of mortgage, bearing date the 19th day of April, 1822, whereby the Respondent assigned to Archibald Morton and Archibald Rodick all the monies and balances of the testator at the time of his decease, in the hands of his bankers, and all other the personal estate bequeathed to the said Respondent by the said will for securing to the said Archibald Morton and Archibald Rodick the sum of £2031 10s. and interest.

The Appellant by his answer further stated, that the testator, being tenant for life of certain real estates in the county of Somerset, and also in the kingdom of Ireland, with remainder to the Respondent, John, Earl of Egmont, in tail, with powers to the testator, under certain restrictions, to grant leases of the estates; he, the testator, had granted various leases of the estates, with covenants for quiet possession; and that such leases, or some of them, were not warranted by the power which the testator possessed; [558] and the Appellant, having been informed that the Respondent intended to avoid the leases, and being apprehensive that he, the Appellant, would be liable to costs and damages as executor of the testator, in actions to be brought by the tenants, under these circumstances submitted, that some indemnity should be provided against such claims, before he paid to the Respondent, the Earl of Egmont, the balance of the testator's personal property.

The bill was afterwards amended, and the Respondents, Archibald Morton and Archibald Rodick, were made defendants, who put in their answer, claiming to be paid a debt due to them from the Respondent, the Earl of Egmont, out of what might be found due to him in respect of the residue of his father's estate.

On the 15th February, 1823, the cause was heard at the Rolls, when a decree was made, directing an account of the personal estate of the testator, not specifically bequeathed, which had come to the hands of the Appellant, the surviving executor, or to the hands of any person or persons by his order or for his use; and it was ordered that the Master should also take an account of the testator's debts, funeral expences, and legacies, and of the annuities given by his will and codicil, and that the personal estate of the testator, not specifically bequeathed, should be applied in payment of his debts and funeral expences, and then in payment of his legacies and of the arrears of the annuities given by his will and codicil; and it was ordered that the Master should enquire and state to the Court whether there were any and what claims affecting the testator's personal estate in the hands of the Appellant, in respect of any leases executed by the testator not in conformity with his power of [559] leasing; and the Master was to be at liberty to state any special circumstances relating thereto as he should think fit; and it was further ordered that the Master should ascertain and certify of what the clear residue of the testator's personal estate would consist, and the Court reserved the consideration of all further directions and of the costs of the suit until after the Master should have made his report.

In pursuance of the decree, the Master made his report on the 20th February, 1824, and thereby stated, among other things, that the sum of £585 11s. 11d. was then remaining in the hands of the Appellant on the balance of his account of the testator's personal estate not specifically bequeathed; that other part of the testator's personal estate consisted of the sum of £2000 received by the Respondent; of sundry arrears of rent due from the testator's estate in the county of Somerset at the time of his decease, which were received by the Respondent by virtue of a power of attorney from the Appellant; of £3000 exchequer bills; also of £10,000 three per cent. consolidated annuities, appropriated to answer the several annuities given by the will

and codicil, and confirmed by the Respondent's deed of the 4th day of March, 1822; of sundry jewels, a carriage and horses, and harness, which were possessed by the Respondent upon the decease of the testator; and of the principal sums of £12,000, £3000, £710, £9000, and £11,000, due on mortgage at the testator's decease, and paid by the Appellant out of the personal estate, together with interest thereon from the day of the decease of the testator.

The Master further reported that the debts due from the testator proved before him, were of the [560] nature of simple contract debts, and amounted in the whole to the sum of £568 11s. 8d. and that no other debts of the testator remained due and unsatisfied; and that he had proceeded to enquire whether there were any and what claims affecting the testator's personal estate in the hands of the Appellant, in respect of any leases granted by the testator not in conformity with his power of leasing; that the Respondent had been examined upon interrogatories, and there were not, as he knew or believed, any claims affecting the personal estate in the hands of the Appellant, in respect of any leases, executed by the testator not in conformity with his power of leasing.

The Master further reported, that a state of facts and charge had also been laid before him on behalf of the Appellant, thereby stating that by indentures of lease and release, dated the 17th and 18th January, 1791, the release made between the testator of the first part, the Respondent, then John Percival, Esquire, commonly called Lord Viscount Percival, of the second part; Samuel Vines, therein described, of the third part, and John Vernon, the elder, therein also described, of the fourth part; the testator and the Respondent duly conveyed all the honors, manors, lands, tenements, and hereditaments therein mentioned and described, in the county of Cork, in Ireland, unto and to the use of the said John Vernon, his heirs and assigns, in order to make him tenant to the precipe, that common recoveries might be suffered thereof, which recoveries were thereby declared to enure to the use of the testator for life, without impeachment of waste, with remainder to and for such uses, trusts, intents, and purposes, as the testator and the Respondent, John, Earl of Egmont, during their joint lives, should ap-[561]-point; and in default thereof, and in case any appointment should be made of only part of the premises, or of only part of the whole estate and interest therein, then as concerning the premises which should remain unappointed and undisposed of, or concerning which no complete appointment should be made, and when the estates thereby appointed should respectively determine to such uses as the Respondent, in case he should survive the testator, should appoint; and in default of such appointment, and in case any such should be made of only part of the premises, or of only part of the whole estate and interest therein, then as concerning the premises which should remain unappointed or undisposed of, or concerning which no complete appointment should be made, and when the estates thereby appointed should determine to the use of the Respondent during his life, without impeachment of waste, with remainder to the use of the said John Vernon and Samuel Vines and their heirs, to preserve contingent remainders with remainder to the use of the first son of the body of the Respondent, lawfully to be begotten in tail male, with divers remainders over; and it was thereby declared that it should be lawful for the testator from time to time during his life, and after his decease for the Respondent during his life, to demise any part of the premises to any person or persons for any term or number of years not exceeding twenty-one years in possession and not in reversion, and so as there should be reserved on every demise the best and most improved yearly rent to be incident to the immediate reversion that could be reasonably had or gotten for the same, without taking any fine premium or foregift, and so as there should be therein contained conditions of re-entry for non-payment of the rents; and so as the [562] same were so framed as there be not therein contained any clause whereby any power should be given to the lessee to commit waste, or whereby any lessee should be exempted from punishment for committing waste, and so as the lessees executed counterparts of their respective leases; and further stating that by indentures of lease and release, dated respectively 21st and 22d January, 1791, the release made between the testator of the 1st part, the Respondent of the 2d, the said Samuel Vines of the 3d part, and the said John Vernon the elder of the 4th part; the testator and the said Respondent conveyed certain estates therein mentioned and described, situated in the county of Somerset, unto and to the

use of the said John Vernon, his heirs and assigns, in order to make him tenant to the precipe, that common recoveries might be suffered thereof, which recoveries were thereby declared to enture to the same uses, intents, and purposes as were declared by the indenture of release of the 18th January, 1791, concerning the estates therein comprised, with the like powers for the testator during his life, and after his decease for the Respondent during his life, to demise any part of the said premises, except the castle or capital messuage of Enmore, and the gardens, demesne lands, and appurtenances therewith held and enjoyed, for any term or number of years not exceeding 21 years in possession and not in reversion, in like manner as was provided in and by the indenture of the 18th January, 1791, as to the estates therein comprised.

And the Master further reported, that by such state of facts it appeared that recoveries were duly suffered pursuant to the covenants contained in the two several indentures of release; and that the testator continued during his life in possession of the hereditaments and premises by virtue of the limitations [563] contained in the said indentures, and the recoveries suffered in pursuance thereof, and that the said estates were of the annual value of £14,000; and that the testator, while he was in possession thereof, alone executed many leases of the same estates, or the greater part thereof, upon the terms mentioned in such leases, and that they contained covenants on the part of the testator for quiet possession; and that the said leases, or most of them, were not in conformity with the testator's powers of leasing, inasmuch as they were for longer terms, and conferred greater powers on the lessees than the testator by the said powers was authorized to grant; and that some of the tenants paid fines for the granting of their leases, and that others had laid out considerable sums of money in improving the estates so demised to them; and that the Respondent was in the possession of the estates by virtue of the limitations aforesaid, and that the Respondent, having a son who might upon the Respondent's decease become entitled to the said estates under the aforesaid limitations, the Appellant charged that so many of the leases granted by the testator as were not in conformity with his powers of leasing, might be avoided, and the lessees might, upon eviction under such leases, have claims against the personal estate of the testator upon his covenants for quiet possession.

The state of facts and charge being admitted by the Respondent, the Master allowed the same, and found that as to such leases as had been granted by the testator not in conformity with his power of leasing, the lessees upon their eviction might have such claims affecting the testator's personal estate in the hands of the Appellant in respect of such leases; and the Master found, that subject to the payment of the testator's debts proved before [564] him, and also subject to any claims which might affect the testator's personal estate in respect of any leases executed by him not in conformity with his power of leasing, the clear residue of the same consisted of the sum of £585 11s. 11d. in the hands of the Appellant; of the sum of £10,000 Bank 3 per cent. annuities, standing in the name of the Appellant, set apart to answer the payment of the several annuities aforesaid; of £3000 exchequer bills; of £1000 cash advanced to the Respondent by the Appellant out of the testator's personal estate; of the sum of £2000 received and possessed by the Respondent as aforesaid; of the arrears of rent due at the testator's decease and possessed by the Respondent; of the jewels and other articles mentioned to have been possessed by the Respondent; and also the several mortgage sums mentioned to have been paid out of the testator's personal estate.

On the 29th July, 1821, the cause came on to be heard before the Right Honorable the Master of the Rolls for further directions upon the Master's report.

It was contended on the part of the Appellant, that before the residue of the testator's personal estate was ordered to be paid to the Respondent the Earl of Egmont, or his assigns, the Earl of Egmont should either confirm the leases granted by the testator, not in conformity with his power, or otherwise that he should give a satisfactory indemnity to the Appellant against any claims which might be made against him as the personal representative of the late Earl, in respect of the said leases, and all costs, charges, damages and expenses which the Appellant might incur or be subjected to in respect thereof.

On the part of the Respondent it was contended, that he was not bound either to confirm the leases or give an indemnity.

[565] The Court ordered that it should be referred to the Master to tax all parties their costs of the suit as between solicitor and client, and that it should be referred back to the Master to carry on the account of the testator's personal estate from the foot of his report come to the hands of the Appellant, or to the hands of any person by his order or for his use; and that the Master should take an account of the amount and value of testator's personal estate possessed and received by the Respondent as in the Master's report mentioned; and it was ordered that the following exchequer bills, (that is to say,) Nos. 2963, 2964, and 2965, dated the 14th day of June, 1824, for £1000 each, part of the testator's personal estate in the hands of the Appellant, should be deposited in the Bank by the Appellant with the privy of the Accountant General of the Court in trust in the cause; and it was ordered that the same when so deposited should be sold with the privy of the Accountant General, and for that purpose the exchequer bills were to be delivered out to one of the cashiers of the bank, who was to receive the money to arise by such sale, and upon receipt thereof was to pay the same into the bank with the privy of the Accountant General, to be there placed to the credit of this cause, and out of the money to arise by sale of the exchequer bills when paid into the bank. It was ordered that such costs when taxed should be paid to the solicitors for the respective parties; and it was ordered that the several sums by the Master's report, dated the 26th day of February, 1824, reported to be due to the several creditors therein named should be paid to such creditors respectively, or to the legal personal representatives of such of them as might be dead; and it was referred to the Master to take an account of what [566] was due from the Respondent the Earl of Egmont, to the Respondents Archibald Morton and Archibald Rodick for principal and interest upon the security for the assignment of the 19th day of April, 1822; and it was ordered, that the residue of the monies to arise by sale of the exchequer bills, after payment of the debts and costs, should be applied as follows, (that is to say) so much thereof as the Master should find to be due to Archibald Morton and Archibald Rodick, upon the security from the Respondent, should be paid to them, and the residue thereof should be paid to the Respondent, John, Earl of Egmont; and it was ordered, that the £10,000 3 per cent, consolidated bank annuities, reported to be standing in the name of the Appellant, should be transferred by the Appellant into the name and with the privy of the Accountant General, in trust in the said cause, to an account to be entitled, "the annuity account;" and out of the dividends to accrue thereon from time to time, it was ordered that the several annuities should be paid in manner therein mentioned; and upon the death of the annuitants respectively, any person or persons were to be at liberty to apply to the Court concerning the bank annuities as they should be advised, and the Master was to be at liberty to make a separate report or separate reports of any of the matters thereby referred to him as he should think proper, and any of the parties were to be at liberty to apply to the Court as they should be advised.

This order was enrolled.

Against so much of this order as directs that the residue of the money to arise by sale of the exchequer bills after payment of the debts and costs should be applied in manner directed by the decree (that is to say), that so much thereof as the Master should find to be due to [567] Archibald Morton and Archibald Rodick, from the Respondent the Earl of Egmont, on their security, should be paid to them, and that the residue thereof should be paid to the Respondent, without making a provision for the protection of the Appellant against the claims of the lessees under leases granted by the testator, the Appellant presented a petition of appeal.

For the Appellant, Mr. Shadwell and Mr. Pemberton.

The judgment in this case rested upon the ground that this was a contingent covenant (Arg. 30 March). But in *Simmonds v. Bolland* (3 Mer. 547) the covenants were various, and the indemnity was given accordingly; so in *Hawkins v. Day* (Amb. 160), it was doubtful whether the executor would ever become liable upon breach of the covenant which depended upon a contingency. *Eeles v. Lambert* (Ayleyn, 38, Styles, 37, 54, 73), and *Nector and Sharp v. Gennet* (Cro. Eliz. 466), were cases at law in which it was decided that a court of law should not interfere on the ground of outstanding covenants unbroken, to prohibit proceedings in the Ecclesiastical Court to recover a legacy. But the jurisdiction of equity was at that time, and even as late as the time of the Commonwealth unsettled.

It was then an unsettled question whether an action might not be maintained for a legacy—*Deeks v. Strutt* (see 5 T. R. 690—the judgment of Lord Kenyon). If such were the law, at present, the ground of the judgment might be more solid. In those early times a legatee was compelled to give bond to the executor, on payment of the legacy to refund, in case [568] any debts should appear to be unsatisfied—*Chamberlain v. Chamberlain* (1 Ch. Ca. 257). That practice has been discontinued, because the law does not order the payment of legacies until the debts are ascertained. Where a debt from its nature cannot be ascertained, not being an existing liquidated demand, but one which may become a charge upon the estate, the principle of the ancient practice gives to the executor a right to indemnity. What defence would the executor have in a court of law upon action for damages in consequence of a breach of covenant? Could a Court of Equity protect the executor in such a case. Executors are protected in equity, and creditors excluded, because they have notice under the decree and the opportunity of receiving their debts, which if they neglect they are restrained by injunction if they proceed at law. But in this case, as there is no existing debt, there can be no notice, and therefore no injunction.

The executor has notice of the covenant, and that in effect it is broken—because his testator covenanted to secure that which it was not in his power to secure. The Respondent who makes the demand against the Appellant, as executor, may himself bring the charge upon the Appellant by ejecting the tenants. Could the tenants have any remedy in equity against the residuary legatee? Or ought the executor to be put to file a bill against the legatee to refund. In the case of the *Queensberry Leases* (*Thomas v. Montgomery*, in Chanc.), a large amount of assets was retained in court to answer the demands of lessees under similar circumstances.

Suppose the residuary legatee had also been ex-[569]-ecutor, could he say that he held the money not as executor, but as residuary legatee. The peculiarity of this case is, that as soon as the order issues to pay the money, the Respondent may bring ejectments against the tenants. If this be law, a tenant for life may grant leases exceeding the power at small rents, and upon large fines—the executor upon his death may hand over the assets to the younger children of the tenant for life, according to his will, and the tenants are left without remedy. It is asked whether an estate is to be kept for ever in chancery to abide a contingency. But here is a covenant ascertained to be incapable of being performed. We ask only for indemnity to be settled by the Master—an equity on behalf of creditors against volunteers.

For the Respondents, Mr. Horne and Mr. Roupell.

It is a startling proposition that estates are to be locked up for an indefinite time. The estates of deceased persons are generally subject to contingencies. Here is no creditor making a claim against the assets. The bill claims a residue, all questions of demand against the estate having been satisfied. The fund, it is stated, is subject to a contingent demand, and they ask for indemnity. The executor is always protected by a Court of Equity. In *Vector and Sharp v. Gennet*, a prohibition was refused, and the Ecclesiastical Court decreed the legacy, notwithstanding the existence of a bond, on the ground that the bond was contingent. It is said that the bond given by legatees to the Ecclesiastical Court, is a protection to the executor. But here the Appellant asks something more than a bond. As to *Eeles v. Lambert*, no judgment is to be found in either of the reports. In former times the Court of [570] Chancery required security from the legatees, but since the modern practice of inquiry as to debts has been introduced, the court has ceased to require such security (*Anon.* 1 Atk. 5).

The legacies may be recalled, if prior claims upon the assets should arise (*Anon.* 1 P. W. 195). In *Noel v. Robinson*, it is said that “common justice requires the legatee to refund.” The court now, never requires security. Suppose a creditor refuses to come in, does the court retain the fund? No; it distributes and gives to the executors equitable indemnity by injunction, as contradistinguished from legal defence. The case of *Simmonds v. Bolland*, is not precisely similar to this. There the executor was also a trustee, and there had been notice of a breach of covenant. The indemnity they seek must be by real, not personal security; and the practice would be attended with general inconvenience.

The Lord Chancellor: Lord Egmont has the power to dispute, or to confirm the

leases: may he not be required before he receives the assets to confirm the leases? If a creditor, having a present debt, omits to claim it under the decree, he may be excluded. But this is the case of creditors who are not qualified to claim—even upon ejectment, not till after judgment. The case is of the utmost importance. A residuary legatee, having the power to disturb leases made by the testator, should confirm, or undertake not to disturb them before he takes the assets. Some security is necessary notwithstanding all the inconvenience attending that course of proceeding.

Mr. Horne: I only argue against indemnity. Lord Egmont is willing to consent that it should be [571] put on record, that he will not disturb the leases. As to the case of the Queensberry leases—the claims had been actually made, and the money was in court.

The Lord Chancellor: There being in that case so many claims by tenants, the court thought it right to retain the fund, while the numerous knotty points of Scotch law were investigated.

The bill, in this case, prays either indemnity or undertaking; and as the Plaintiff is willing to give the latter, does not this make an end of the cause? But this is not done till the parties come to the bar. It is not offered by the answer. There should be no costs on either side.

Upon this offer made by the Respondent's counsel, the case stood over that the Appellant, with the advice of his counsel, might consider whether he should accept the Respondent's undertaking. But it was afterwards ascertained, that the Respondent having assigned his interest and estate in the land, had deprived himself of the power of confirming the leases: whereupon the cause was again brought on for argument:

The Lord Chancellor said (6 April, 1827): that if it were necessary to decide the general principle, although he was inclined to think that the Appellant had a title, he should take much time for consideration: but that the case was special, as the Respondent had the power to confirm, or to disturb the leases, and that he ought not to take the fund out of the hands of the executor, without giving indemnity against any action which might be brought by the tenants, in case of eviction, on which special ground he should advise the House to reverse the decree.

[572] The Earl of Eldon: In this case, which has stood over for judgment, the residue of personal estate is demanded by the Respondent, who has the power to rescind the leases granted by the testator: and if he should do so, the Appellant, as executor of the lessor, will be liable in damages to the extent of assets received by him. Under these circumstances, the judgment, which, in substance, I propose, is, that the Appellant, upon having indemnity from the Respondent against the disturbance of the leases, should pay over the residue of the personality.

The Lords declare (29 June, 1827), that before the residue of the testator's personal estate shall be paid to the Respondent, the Earl of Egmont, or his assigns, the said Earl of Egmont ought either to confirm, or in case he is unable to confirm by his own act, to procure to be confirmed, the said Leases granted by the said testator, not in conformity with his powers, or otherwise give a satisfactory indemnity to the Appellant, against any claims which might be made against him, in respect of the said leases, and all costs, charges, damages, and expenses, which the Appellant might incur, or be subjected to in respect thereof: And it is further ordered, that the cause be remitted back to the Court of Chancery, to proceed therein, as shall be just and in conformity with this declaration.

[573]

IRELAND.

(COURT OF CHANCERY.)

HENRY CROKER, and others,—*Appellants*; RICHARD MARTIN, and others,—*Respondents*.

[*Mews' Dig.* ii. 1073; *S. C.* 1 Dow and Cl. 15. Followed in *Anstey v. Newman*, 1870, 39 L. J. Ch. 770.]

H. R., being possessed of a leasehold estate, by a gratuitous deed in 1731, limited the term to himself for life, with remainder to his son R. R., *quasi* in tail.

In 1739, upon the marriage of R. R., then an infant, a deed, to which he was a party, was executed, whereby the term, the subject of the former settlement, was limited in trust to provide annuities to R. R. and his wife, till 1742; and until that time, and subject thereto, to permit H. R. to receive the rents, and then to raise £1200 for the use of H. R.; and from 1742, to permit R. R. to receive the rents, subject to the charges, and after the deaths of H. R., R. R., and H. R., in trust for the sons of the marriage, as R. R. should appoint, etc. with divers limitations over in trust to raise portions, etc.; and in case there should be no sons of the marriage, or by any future wife, etc. that the term should revert to H. R., his executors, etc.; and H. R. by the deed covenanted to provide for R. R., his wife, and children, board and lodging until 1742, and at that time to pay R. R., his executors, etc., £300 in money or stock, etc.

This deed was executed and acted upon by all the parties.

R. R. came of age in 1741, and died without issue male.

In 1743, H. R. made an appointment under a power in the deed of 1731. By his will also reciting and executing a power in the deed of 1731, and without noticing the limitation of the deed of 1739, he gave to his daughters A. and B., under whom the Appellants claimed the residue of his personal estate.

Held in the Court below, and on appeal that the term did not pass as part of the residue, but vested in R. R. by operation of the deed of 1731, or by operation of the deed of 1739, vested in H. R., subject to the trusts of the deed of 1731, in favour of R. R.

Held also that it was not a case of election, as R. R. had no power to reject the whole of the deed of 1739.

By a deed dated the 19th of May, 1731, and made between Hodder Roberts, of the one part, and John [574] Watkins, Michael Roberts, and the Reverend Randall Roberts, of the other part, after reciting that Hodder Roberts had received as a marriage portion with his wife Jane, lately deceased, £800, and that he had eight children, and was desirous to make a provision for each of them, by conveying the lands thereafter mentioned to the several uses, trusts, and purposes, and subject to the several powers thereafter contained, it was witnessed, that out of his fatherly affection for his said children, and in consideration of the said sum of £800, he gave, granted, etc., unto the said John Watkins, etc., all the lands of Bridgetown, Grange, Clonmore, and various other leasehold estates therein described, to hold, etc., to the several uses, etc.; that is to say, as to Bridgetown and Clonmore upon trust, to permit Hodder Roberts to hold the said lands, and receive the rents and profits thereof during his life; and after the decease of Hodder Roberts, to stand possessed of the said lands to the use of Randall Roberts, eldest son of Hodder Roberts, his executors, administrators, and assigns, subject to the entire yearly rent payable out of the said lands, together with the lands of Grange, unto Francis Hodder, with remainder to Watkins, second son of Hodder Roberts, and several limitations over, if Randall Roberts should die without issue male of his body before he should attain the age of twenty-one years, and also subject to a power for Hodder Roberts, by any deed or writing, or by his will, to be attested by two or more witnesses, to charge the said lands with any sum of money not exceeding in the whole the sum of £2000 sterling, to be raised out of the rents, etc., or by mortgage, etc., and to be paid to his daughters by Jane Roberts, at such times and in such proportions, and with such

interest as he should direct and appoint, etc.; and it was also provided, that it should [575] be lawful for him to make leases of all or any part of the said lands for any term whatsoever, so as two-thirds of the most improved yearly rent should be reserved.

This deed was registered on the 23d of November, 1736.

By an indenture, dated the 29th of December, 1739, and made between Hodder Roberts of the first part; Randall Roberts, the eldest son of Hodder Roberts, of the second part; John Watkins and Matthias Smith, of the third part; Catherine Kift, widow, of the fourth part; and Mary Kift, spinster, daughter of Catherine Kift, of the fifth part; after reciting that Francis Hodder, by indenture of lease, bearing date the 1st of May, 1724, demised unto Hodder Roberts, the town and lands of Bridgetown and Grange, to hold, etc., for the term of 982 years and a half, at the rent of £200: And also, that a marriage was intended to be shortly thereafter solemnized between Randall Roberts and Mary Kift; It was witnessed, that Hodder Roberts, in consideration of the marriage, and for the preferment of his son, and in consideration of the sum of £1000, the marriage portion of Mary Kift, which she was entitled to by the will of her father, which sum was to be paid to Hodder Roberts, and for settling and securing a jointure of £100 per annum unto Mary Kift, during her life, in case she should survive Randall Roberts, and for making some provision of maintenance for Randall and Mary, and the issue of the marriage, Hodder Roberts granted, etc., to John Watkins and Matthias Smith, their executors and administrators, those parts of the lands of Bridgetown, which were thereafter described, amounting to 798 acres, to hold, etc., for all the remainder of the term of 982 years, then unexpired of the lease, at the yearly [576] rent of £200 sterling, payable to the heirs and assigns of Francis Hodder; and it was thereby declared, that the said lands were granted upon trust for Hodder Roberts, etc., until the marriage, and after the solemnization thereof, to the intent that Randall Roberts, and his assigns, should yearly receive out of the said lands an annuity of £100 until the 1st of May, 1742; and upon trust to permit Hodder Roberts, and his assigns, to receive the rents of the said lands, subject to the annuity of £100 to Randall Roberts, and also subject to the like annuity of £100 to Mary Kift, in case Randall Roberts should die before the 1st of May, 1742: And upon further trust, that the trustees should, out of the profits of the said bonds by sale or mortgage, or otherwise, raise £1200 for the use of Hodder Roberts, his executors, etc., and to be paid on the 1st of May, 1744, with interest, etc.; and upon further trust, from the 1st of May, 1742, to permit Randall Roberts and his assigns, to receive the rents of the said lands, charged as aforesaid: And upon further trust, that after the death of Randall Roberts and Hodder Roberts, the trustees should, subject to the said several charges and payments, permit such of the son or sons of Randall Roberts on the body of Mary his intended wife to be begotten, to hold the said lands, in such manner and form as Randall Roberts should direct and appoint; and for want of such direction and appointment, then that the lands should go to such son or sons equally, with divers limitations over in case there should be no sons in trust, to raise portions for daughters of the marriage, and to sons of any future marriage of Randall Roberts, according to his appointment, and in default, etc., for raising portions for the daughters of any such future marriage; and upon further trust, that immediately [577] after the said portions should be raised, or if there should happen to be no such daughter by any such after taken wife, then that the said thereby granted lands and premises should, for and during the residue and remainder of the said term, revert to Hodder Roberts, his executors, administrators, and assigns; and upon farther trust, that in case Randall Roberts should die without any son or sons, or issue male by Mary Kift, or any after taken wife, and should leave one or more daughter or daughters, the trustees should raise £1500 for the portion or portions of such daughter or daughters, with interest at five pounds per cent.; and Hodder Roberts covenanted to provide Randall Roberts, and his wife and their children, board and lodging; and on the 1st day of May, 1742, to pay to Randall Roberts, his executors, administrators, or assigns, £300 sterling, or in lieu thereof to deliver cattle of that value, and also as many cattle as should be sufficient to stock certain lands then in the possession of Hodder Roberts.

This deed was registered on the 28th of January, 1740, and the marriage between Randall Roberts and Mary Kift having been shortly after solemnized, they lived with Hodder Roberts, according to the provisions of the deed, till 1742: Randall

Roberts receiving the annuity of £100 during that period. He attained his age of twenty-one on the 20th of February, 1741. On the 1st of May, 1742, Randall Roberts took possession of the lands, and received from Hodder Roberts £300 in cash, and stock according to the provisions of the deed of 1739, and signed a receipt to that effect, which was indorsed on the deed. By a deed dated the 8th of June, 1743, to which Randall Roberts was a party, Martha and Elizabeth, the sisters of Randall Roberts, having, under the grant of [578] their father, a charge upon the lands comprised in the settlement of 1739, released their claims and confirmed the deed of settlement. Randall Roberts also entered into divers agreements for granting leases of the lands comprised in the settlement of 1739, and upon bills filed to compel the execution of those leases respectively, in his answers recognised the deed of 1739.

Upon a marriage between William Freeman and Elizabeth, daughter of Hodder Roberts, by indenture, dated the 14th of October, 1743, Hodder Roberts demised the lands of Clonmore, and the other lands of Bridgetown not included in the settlement of 1739, to Mr. Freeman, for the term of 960 years, at the yearly rent of £88; being, according to the power reserved to him by the settlement of 1731, more than two thirds of the real value of the premises.

By a deed dated the 15th of October, 1743, after reciting among other things the settlement of the 19th of May, 1731, and the power thereby reserved to Hodder Roberts to charge the lands of Clonmore, and the other lands of Bridgetown, with any sum of money not exceeding in the whole the sum of £2000; and that Hodder Roberts, on the marriage of Randall Roberts, by indenture, bearing date the 29th of December, 1739, conveyed to John Watkins and Matthias Smith, as trustees therein mentioned, 798 acres of the lands of Bridgetown, and excepted out of such conveyance all the residue of the lands of Bridgetown, to the intent that Hodder Roberts might charge the residue of the said lands with such part of the sum of £2000 as he should think proper, as a provision for his daughters; and reciting that on the marriage of his daughter Elizabeth with William Freeman, he agreed to give as a marriage portion with his said [579] daughter the sum of £600 sterling, and that the same should be charged on the said lands; it was witnessed, that in consideration of the marriage, and in execution of the agreement, and by virtue of the power so reserved to him, Hodder Roberts granted, etc. the lands demised, as aforesaid, to William Freeman, to trustees, subject to redemption upon payment of the sum of £600 by Hodder Roberts, etc.

A deed similar in effect was executed on the marriage of Martha, another daughter of Hodder Roberts, with William Verling.

By a deed dated the 6th of June, 1743, Hodder Roberts conveyed to his son Watkins his own life-interest in the premises to which Watkins was entitled in remainder under the settlement of 1731, and procured the concurrence of the surviving trustees in the deed of the 19th of May, 1731.

In the year 1747 Hodder Roberts died.

By his will, dated the 4th of March, 1747, he recited and executed the power reserved to him by the deed of 19th of May, 1731, of charging £800 upon certain lands therein mentioned, and he specifically bequeathed the lands of Clonmore and Paul, otherwise Coolrahaderig, (being the lands of Bridgetown excepted out of or not included in the settlement of 1739,) to his two daughters, Arabella and Harriet, subject to the mortgage for £600, and he bequeathed to his wife Catherine all his household goods, linen, and plate, then in the city of Cork, and the residue of his personal fortune, to his said two daughters, equally to be divided between them.

In December, 1748, Randall Roberts filed a bill to set aside the deed of 1743, claiming the lands of Clonmore and Paul as part of the lands settled on him by the deed of the 19th of May, 1731. Answers to [580] this bill were put in, and witnesses were examined, but what was finally done in the cause did not appear.

In May, 1751, the trustees of the settlement of the 29th of December, 1739, mortgaged the lands comprised therein, to Richard Bradshaw, for £1200, in which mortgage Randall Roberts joined, and the mortgage money was applied in payment of £1200 remaining due upon an old mortgage affecting those lands in common with other lands of Hodder Roberts. The £1200 in the above deed mentioned, was the residue then remaining due of a sum of £2100, for which the lands of Bridgetown, together with other lands, had been mortgaged by deed, bearing date the 21st of

August, 1716, by Randall Roberts, the father of Hodder Roberts, to one Ralph Westrop, whose representatives received the £1200.

Randall Roberts having a daughter, named Catherine, an only child, a marriage took place between her and the Respondent Richard Martin, in the year 1773, previous to which articles were entered into, dated the 2d of January, 1773, by which Randall Roberts granted to trustees an annuity of £300 a year for five years, commencing the 1st of May, 1776, to be issuing out of certain parts of the lands of Bridgetown, and another of £300 a year for five years, commencing the 1st of May, 1784, out of the same lands, as the portion of the said Catherine, with clauses of distress and entry.

In the year 1777 Randall Roberts having neglected to pay the annuity and the head rent of £200, and the landlord having threatened an ejectment, the Respondent Richard Martin, (after paying £300 head rent, to prevent the ejectment,) filed his bill in the Court of Chancery, in Ireland, in which he obtained a decree for an account of what was due to him, and [581] ultimately a final decree for payment of the amount, together with his costs.

By deed dated the 29th of September, 1786, Randall Roberts assigned to the Respondent Richard Martin, a part of the lands of Bridgetown, called the West Inches, for a term of four hundred years, at £129 rent, in satisfaction of £2193, part of the money reported due to the Respondent.

By indenture bearing date the 25th of October, 1788, after reciting that £1651 4s. 8d. would be due to the Respondent Richard Martin, on the 1st of May, then next, in consideration of the same being remitted, and of £360 then paid by Richard Martin, etc. Randall Roberts assigned all the town and lands of Bridgetown, not already sold, to the Respondent Martin, to trustees, to the use of himself for life, with remainder, subject to some small charges, to the Respondent Richard Martin for life, with remainder to Catherine his wife, for life, and after her death, to their only child, Mary Martin, her executors, administrators, and assigns.

In the year 1795 Mary Martin intermarried with John Southcote Mansergh; previous to which articles were executed, dated 6th of January, 1795, whereby the Respondent Richard Martin and Catherine his wife assigned the lands of Bridgetown to trustees, discharged from their life interest, and the Respondent Richard Martin also gave up £100 14s. 3d. a year of the rent of West Inches, to the use of John Southcote Mansergh and Mary his wife, and the issue of the marriage, and in consideration of that settlement lands were at the same time conveyed by John Southcote Mansergh and his father to the same uses.

On the 15th of June, 1795, Randall Roberts died; [582] whereupon John Southcote Mansergh and Mary his wife entered into possession of the lands of Bridgetown.

In Hilary term, 1796, John and Mary Mansergh, then lately before come of age, levied a fine of the lands of Bridgetown, to the use of the articles of the 6th of January, 1795.

In February, 1796, the Appellants, Henry Croker and Harriet Jane his wife, and Watkins William Verling, filed their original bill in this cause, in the Court of Chancery, in Ireland, which was afterwards amended, whereby they claimed all the lands comprised in the settlement of the 29th of December, 1739, as having passed under the residuary clause contained in the will of Hodder Roberts, to his daughters Arabella and Harriet Roberts, under whom the Appellants set up a title.

To this bill the Respondents put in their answers in the month of December, 1796, but no proceedings were taken by the Appellants in the cause (except amending their bill in the year 1797,) until the year 1805.

In 1805 the Appellants moved for a receiver, but their motion was refused, with costs.

The progress of the cause having been delayed by various abatements, in February, 1816, the Appellants brought their cause to a hearing. The Appellants contended that Randall Roberts, under the deed of 1739, took a more beneficial interest than under the settlement of 1731, and that he had accepted the latter provision after he came of age, in lieu of the former; and in support of that allegation, they insisted upon several answers put in by Randall Roberts to bills filed against him, one of them by Wrottesley de la Rue, another by one John Mannsell, and another by [583] Alice Widenham, whereby he set up the strict limitations and leasing powers

comprised in the deed of 29th of December, 1739, in bar of executing certain leases which were claimed from him by the Plaintiffs in those suits.

After a full argument, which lasted for several days, the Lord Chancellor of Ireland dismissed the Appellants' bill without costs.

The appeal was presented against this decree by parties claiming under Arabella and Harriet, the daughters of Hodder Roberts.*

For the Appellants: Mr. Shadwell and Mr. Phillimore.

For the Respondents: Mr. Horne and Mr. Sugden.

For the Appellants it was argued (11th June), that although by the voluntary settlement of 1731, Randall Roberts was entitled on arriving at the age of twenty-one, to the absolute interest in these lands, subject to his father's life estate, yet having by the deed of 1739 entered into a new arrangement, whereby his father gave up his life estate and other considerable benefits to Randall Roberts, and the ultimate reversion had been by that deed expressly limited to Hodder Roberts, the father, his executors, administrators, and assigns, Hodder Roberts thereby became a purchaser [584] for full and valuable consideration of that reversion; and Randall Roberts having, when he came of age, taken all the benefit provided for him by that deed, and so frequently and deliberately recognised and confirmed it, it was not in his power to resort to any title under the deed of 1731, and any attempt to do so was a manifest fraud on Hodder Roberts and those who claimed title under his will to this reversion, as limited to him by the deed of 1739: that it was incumbent on Randall Roberts, on attaining his age of twenty-one years, to elect between the settlement of 1739 and the voluntary deed of 1731, and either to ratify the settlement of 1739, or to abandon it and the benefit he was enjoying under it; and that he so did, or must in equity have been presumed so to have done, because he took possession of his father's life estate, and received the sum of £300, neither of which he would have been entitled to if he had insisted on a title under the deed of 1731, in opposition to that of 1739; and therefore the Appellants insisted that Randall Roberts and all persons deriving title under him with notice, are bound to give full effect to that deed in all its parts, and consequently to the ultimate limitation to Hodder Roberts, his executors, administrators and assigns, under which the Appellants derive their title.

For the Respondent.

The deed of 1739, though competent to supersede that of 1731, so far as the considerations of the portion and marriage extend, is, as to the ultimate limitation to Hodder and his representatives, a voluntary deed, posterior in time and operation to that of 1731; it is as if Hodder had then mortgaged the estate for a sum of money, and that by the terms of the deed the equity of redemption had been limited to him. The ultimate limitation in the deed of 1739, on default of male issue [585] of Randall Roberts, is merely that the premises should go and revert back to Hodder Roberts, his executors, administrators, and assigns: words which import not any new provision or stipulation for his benefit, but simply a declaration that in that event (all that was then contracted for being done and satisfied,) the premises should stand as if the deed of 1739 had never been executed, whereby, according to the strict terms used, they must vest in Randall Roberts, he having been, under the deed of 1731, the assignee of his father. It would be strange to give any other construction to such a clause in the deed of 1739, in which the only party interested under the deed of 1731, was a minor, and could not contract, in which the deed of 1731 is not recited, and in which the family of the wife, the only parties contracting with Hodder Roberts, had no estate in the premises in question, nor power of giving the ultimate right to him, and in which the words used shew that they intended only to leave that right untouched, and as they found it. That this was the understanding of the

* After the decree and before presenting the appeal, John Southcote Mansergh died, having made his will in March, 1817; whereby, in pursuance of the powers vested in him by his marriage settlement, he appointed the lands of Bridgetown as a provision for his second son, the Respondent, Charles Carden Mansergh, an infant, subject to a charge of £1020, with which he encumbered the same for his two daughters, the Respondents, Catherine (since become the wife of George Walker,) and Mary Martin Mansergh, an infant.

parties appears from the several acts above referred to, and particularly from the recitals in the deed of 1743, and the terms of Hodder's will, which, if they are in law sufficient to convey this reversion, are such as to shew that it was not in his contemplation.

If the import of the deed of 1739 was, that the ultimate remainder should vest in Hodder Roberts, that deed could have no such effect, the only party thereto who was competent to convey such remainder being a minor, incapable by law of doing so; nor were there in the deed any words of conveyance from him: and if it be said that at his full age he elected to take under that deed present maintenance, and therefore cannot contest any part of it: the answer is, that as to such maintenance he had no election, it was created by a contract between his father and the family of his wife. They had paid the fortune which purchased it; and though the husband had the power to squander or part with it, yet his father could not call on him to make an election to that effect, and consequently cannot found any right on his having omitted to do so. A wife is interested in the present maintenance of her husband, and shall not by such means be deprived of the benefit of it. It would be a fraud on her and her family if the father had required him to relinquish his present maintenance, under the coercion of facts arising out of the deed of 1731, which was known to the father at the time of the marriage, and not disclosed by him to the wife or her family.

But the answers of Randall to bills filed by tenants have been relied on. These answers alleged no election. They merely stated the deed of 1739 as it was, and submitted the effect to the Court, which decreed against him as entitled to the ultimate remainder, thereby negating the inference now sought to be drawn from those causes. It cannot be conceived that he meant to make such election then, when he had been so many years married, and had no son to take benefit from the deed of 1739, to the injury of his daughter, the first and natural object of his affection: such answers do not afford any evidence of an antecedent election, and the decrees made thereon are strong evidence to the contrary.

The Lord Chancellor (2d July): This case arises out of deeds executed at a very considerable distance of time. Various proceedings have been had in the Court of Chancery in Ireland, and at length the cause was heard before the Lord Chancellor of Ireland, in [587] the year 1816, when the bill was dismissed, but without costs. About two years afterwards, namely, in the year 1818, the Plaintiffs appealed to this House. The circumstance of there being so many parties upon the record has occasioned considerable delay, in consequence of the deaths of some of those parties during the pendency of the proceeding, and the necessity of reviving the suit.

The case arose out of two deeds, one executed in the year 1731, and the other executed in the year 1739. A person of the name of Hodder Roberts was possessed of a very long term in certain lands in Ireland. By the deed of 1731 he settled the term upon himself for life, with remainder to his eldest son, Randall Roberts, his executors, administrators, and assigns, and in the event of Randall Roberts dying without male issue under twenty-one years of age, it was limited to Watkins Roberts, the second son, and so on. But the property being leasehold, vested absolutely in the first tenant, *quasi* in tail. This was a purely voluntary settlement.

There was afterwards, in the year 1739, another deed executed of a great part of the same property. That was executed on the occasion of a marriage being in contemplation between Randall Roberts, who was a party to the former deed, and Mary Kift. The settlement was made in consideration of that marriage and the fortune of the lady. That settlement, therefore, was made for a valuable consideration: by that settlement an estate for life was given to Randall Roberts—certain interests were given to the wife—interests were given to the male issue of Randall Roberts, if he should have any, and there was power given to raise portions for the daughters of that marriage. That marriage took effect. Randall Roberts [588] however, afterwards died without leaving any male issue: portions were raised for the daughters, and there was an end of the limitations under the deed of 1739. But there was a provision in the deed, that after all the limitations should be satisfied, the estate should revert to Hodder Roberts: and the question, and the only question in the cause was, whether the estate should go back to Hodder Roberts, he taking a new estate in the property, or whether it should go back, and be held subject to the trusts of the voluntary settlement of the year 1731.

The Lord Chancellor of Ireland was of opinion that the estate, after all the limitations under the deed of 1739 were satisfied and exhausted, went back, and was held subject to the trusts of the former deed of the year 1731; and I should submit to your Lordships, that the opinion of the Lord Chancellor of Ireland in that respect is correct. The deed of 1731 was a purely voluntary settlement, binding against Hodder Roberts, but not binding against a purchaser for a valuable consideration. The deed of 1739 was granted for a valuable consideration, and to the extent therefore of the limitations under that deed in favour of Randall Roberts, and the issue of the marriage, and the parties who took as purchasers, to that extent, the deed of 1739 would prevail over the deed of 1731; but it would not prevail over the deed of 1731 any further, and therefore, when it was provided by an express stipulation in the deed of 1739, that after all the interests that had been created by the purchase, were satisfied the estate should revert to Hodder Roberts, that estate would be held by Hodder Roberts, subject to the trusts of the voluntary settlement of 1731, which, though not binding as against a purchaser, was binding against him. I apprehend the [589] Lord Chancellor of Ireland, therefore, in deciding that the estate reverted to Hodder Roberts, subject to the trusts of the settlement of 1731, decided correctly and properly.

The question arose out of the will of Hodder Roberts, by which Hodder Roberts had in general terms disposed of all the residue of his personal property to persons under whom the present Plaintiffs claim. If Hodder Roberts therefore took no interest or estate by virtue of the deed of 1739, but it reverted back to him, subject to the trusts of the settlement of 1731, it would be bound by the provisions of that deed, and would not pass to the Plaintiffs under the residuary clause in the will to which I have adverted.

It is perfectly clear, independently of the construction of the deeds to which I have adverted, and the language of the deeds, that Hodder Roberts never meant that the deed of 1731 should be rescinded or altered, except to the extent of the provisions contained in the deed of 1739, with reference to Randall Roberts and the issue of his marriage, because after the deed of 1739, Hodder Roberts, over and over again, recognised the existence of the deed of 1731, and acted according to its provisions.

In the year 1743, which was four years after the execution of the deed of 1739, upon the marriage of his daughter Martha, with a person of the name of Verling, in the settlement made upon that occasion, he recited the deed of 1731, as an existing deed, referred to the powers in that deed, and executed a power conformably to the provisions of the deed of 1731: so that it appears not only that the language of the instrument supports the judgment given by the Lord Chancellor of Ireland, but that it was the obvious and manifest intention of Hodder [590] Roberts, who was the party under whom the present Plaintiffs claim, that the deed of 1731 should be an operative deed, and that it should be broken in upon, only to the extent of the particular interest created by the deed of 1739. It is also a remarkable circumstance, that no mention whatever is made by Hodder Roberts in his will, (although that will is sufficiently particular,) of the supposed interest he had at that time, with respect to that property, so as to enable him to dispose of it. The language of the instrument is confirmed by the obvious intention and meaning of Hodder Roberts, and that tends to shew that the judgment pronounced by the Lord Chancellor of Ireland, was perfectly correct.

It was argued for the Plaintiffs that Randall Roberts, who took under the deed of 1731, and also under the deed of 1739, ought, after he came of age, to have made his election to take under one deed or the other; and it was argued that in fact he had made his election, but it was impossible that Randall Roberts could make his election, he was not the only party to the deed of 1739, there were other parties to that deed; he was not therefore in a condition to get rid of the obligation and renounce the provisions of the deed of 1739 altogether, and take under the deed of 1731, because the parties to the marriage settlement were interested in the preservation of the deed of 1739, and therefore it was impossible he could make such election.

But it is said that he recognised over and over again, by his own acts, the deed of 1739, long after he came of age. It is true he did recognise by his acts the provisions of that deed, because they were all binding and operative provisions: they were provisions made for a valuable consideration under his [591] marriage settlement, he could not get rid of those provisions: they existed in conjunction with the

deed of 1731, qualifying that deed, but not extinguishing and annihilating that deed, prevailing over it only to the extent of the provisions contained in that deed; and therefore this recognition of the deed of 1739, an operative deed which he could not get rid of, is no argument to shew that he or his descendants are not entitled to come in and claim under the deed of 1731. The arguments, instead of shewing that the judgment was incorrect, fail altogether. The judgment therefore should be affirmed.

In disposing of the original bill, in the Court below, the Lord Chancellor dismissed it without costs; but as the parties have thought fit to appeal against that decision, I would propose that the judgment be affirmed, with £100 costs.

Judgment affirmed, with £100 costs.

[592]

ENGLAND.

(COURT OF KING'S BENCH.)

LANCEFIELD.—*Plaintiff in Error*; ALLEN and others.—*Defendants in Error*.

In a declaration by executors, a count stating that the Defendant had accounted with the Plaintiffs "executors as aforesaid," etc., was joined with counts, stating promises to the testator: Held not a misjoinder of action, or if so cured by verdict.

The Defendants in Error brought an action against the Plaintiff in Error, for goods sold and delivered to him by one N. G., deceased, their testator. The declaration in all the counts but one, stated promises made to the testator. In the last count, the Plaintiffs declared that J. L., the Plaintiff in Error, "had accounted with them, A. and C., (the Defendants in Error) executors as aforesaid, of and concerning divers sums of money from the said J. L., to the said A. and C., executors as aforesaid, due and owing, and in arrear; and that he, J. C., upon that account, was found in arrear and indebted to the said A. and C., executors as aforesaid, in the further sum of £150, etc.

This, it was contended, was a misjoinder of action, as the declaration contained counts upon promises, alleged to have been made by the Plaintiff in Error to the testator, and also a count upon a promise alleged to have been made by the Plaintiff in Error, to the Defendants in Error, in their own right, and not as executors; and that it was [593] necessary that it should have been expressly alleged, that the promise was made to them *as* executors.

On the part of the Defendants in Error, it was contended, 1. That the action being brought by them, as executors, it must be presumed, with reference to the other counts of the declaration, that the last count was founded on an account stated by the Plaintiff in Error, with the Defendants in Error, as executors of N. G.; and that the promise declared on, in that count, was made to them accordingly, as such executors. 2. That after verdict, it must be presumed that evidence was given of these facts at the trial, which would be sufficient to support the judgment, and that the objection to the last count being matter of form, is cured by the verdict.

The judgment was affirmed, with £120 costs.

[594]

IRELAND.

(COURT OF CHANCERY.)

DAVID DA SILVA JOCHEBED BERNAL, ESTHER BERNAL, and MIRYAM BERNAL, Executor and Executrixes of ISAAC BERNAL, deceased.—*Appellants*: The Most Honourable GEORGE AUGUSTUS, Marquis of DONEGAL, —*Respondent*.

[Mews' Dig. vii. 270, 271, 285; xi. 579. See notes to *Chesterfield v. Janssen*, 1 Wh. and T. L. C. 7th Ed. pp. 289, 318; Sales of Reversions Act (31 Vict. c. 4), and Moneylenders Act, 1900 (63 and 64 Vict. c. 51).]

D. having filed against M. and B. a bill in Equity to cancel, for want of consideration, certain post obit bonds, and a general bond which D. had executed and delivered to B. to secure the balance of account between M. and B., and future advances by B. to M., and D. having afterwards dismissed the bill as against M., and examined him as a witness, it was decreed on appeal, reversing the judgment below, that D., having deliberately executed a deed acknowledging that the bonds were given to secure certain sums actually advanced by B. to D., and a bond in a penalty defeasible on payment of monies advanced and to be advanced by B. to M., and accounts stated and settled between B. and M., and as no account could be taken in the cause between B. and M., who was no longer a party, D. had debarred himself from impeaching the securities or the consideration stated in them: but on reference to the Master to take an account of what was due from D. to B. on the securities, although it was directed that D. should be bound by the accounts stated and settled between M. and B., he was to be at liberty to falsify the same, or shew any errors or overcharges therein.

In proceeding under this decree upon the account in the Master's office, a book of accounts was produced containing a general statement of accounts between M. and B., and a particular [595] entry as to an alleged purchase by M. from B., of certain bonds executed by W. This entry appeared in the midst of the general account upon two leaves, having an appearance of being inserted in the place of two which had been cut out, but which might have been brought into that state by continued use. Many of the items extending over a considerable period of time, were in the same ink and handwriting. Payments of prior date were entered after payments of subsequent date; and the account, as it appeared, laboured under other suspicious circumstances. There were also produced before the Master, by consent of all parties, plain copies, to save examined copies of the proceedings in a certain cause in which one W. was Plaintiff, and M. and B. with other Defendants; and in which cause it was found upon the decree, (the same books and account having been produced in the cause,) that no money had been advanced, or *bond fide* allowed by B. to M. on the bonds in question. Under these circumstances the Master disallowed the charge of B. against D., in respect of the alleged sale of W.'s bonds by B. to M., and his report to that effect was confirmed by the Court below.

Held on appeal that under the circumstances above stated, and the liberty given by the order to falsify the account, &c. the order confirming the report was right.

Where a Master, by his report, certifies a fact, and exceptions are taken to the report, it lies upon those who are to uphold the report, to produce the evidence of the fact. So if he certifies the result of an account upon the allowance or disallowance of *items* in dispute, and one of the parties excepts to the report, both as to the principle on which the account is taken, and the evidence in support of the allowance or disallowance of the *items*, the parties in whose favour the report is made, must produce the evidence on the hearing of the exceptions.

Whether upon leave "to surcharge and falsify," equities can be administered. *Quære.*

Whether such consent to admit copies of such proceeding as before mentioned, precludes the party who consents from objecting that the originals are not evidence. *Quære.* But if he permits them to be read before the Master and the Court without efficiently raising a distinct objection upon this ground, although by his exception he objects to the report generally, as not supported by evidence; *seem*, that the Master, acting upon the re[596]ference, with leave "to surcharge and falsify," may administer such equity as above mentioned, by disallowing the items which such evidence applies.

In the month of June, 1803, the Respondent filed a bill in the Court of Chancery in Ireland, against Isaac Bernal and Edward May; impeaching certain securities executed by the Respondent when Earl of Belfast, to Bernal, such securities being

four post obit bonds, payable in the event of the Respondent surviving his father, the late Marquis of Donegal; one bearing date the 8th of June, 1795, in the penal sum of £48,000, conditioned for the payment of £24,000; two others bearing date respectively the 20th of June, 1795, in the penal sums of £24,000 and £1000, conditioned for the payment of £12,000 and £500; and the 4th, bearing date the 6th of July, 1795, in the penal sum of £20,000, conditioned for the payment of £10,000; and likewise a general bond (in which May was bound jointly with the Respondent,) and warrant of attorney for the penal sum of £40,000. The bill stated in effect, that he Respondent had received no consideration for the post obit bonds, except certain bonds executed by one Wharton to May,* and which it was alleged virtually

* For the clear understanding of the case it is expedient to state shortly the facts of the suit between Wharton and May.

On the 7th of February, 1795, John Wharton filed a bill in the Court of Chancery in England, against Edward May, Isaac Bernal, Joshua Mendes Da Costa, and other parties, stating in substance, divers pecuniary transactions with Bernal and Da Costa, in the result of which they had obtained from Wharton divers bonds and securities, the considerations for which Wharton thereby impeached. The bill also stated transactions of a pecuniary nature between Wharton and May; and that Wharton having commissioned May, by compromise or otherwise, to get back from Bernal and Da Costa the securities above mentioned, May, upon the pretence that he had paid off, or by payment got rid of such securities, obtained from Wharton post obit bonds executed by Wharton to him, for divers large sums of money, to the aggregate amount therein mentioned. The bill then went on to state, that May had not paid any money, or other valuable consideration to Bernal, for the original securities; and that May was in fact trustee for Bernal and Da Costa, of the securities executed by Wharton to May, and treated them as a substitution for the original ones given to Bernal and Da Costa. The bill prayed in substance, that all the bonds and warrants of attorney, executed by Wharton to May, might stand as securities, only for what was really due from Wharton to the Defendants, or any of them, on the balance of all accounts between them. It then prayed that such accounts might be taken, and for appropriate relief and an injunction.

To this bill May put in several answers, in which he represented himself to have given Bernal bonds and securities of value, as a consideration for Wharton's original securities; which he had, with the concurrence of Wharton, destroyed; and, claimed to be a purchaser, for valuable consideration, of the securities executed by Wharton to himself.

Bernal and Da Costa also put in answers; and Bernal, by allegations, similar to those of May, endeavoured to place May on the footing of a purchaser.

In the course of the cause, it appearing that Wharton's bonds to May had come into the hands of the Respondent, he was, by supplemental bill, made a party; and on the 25th of January, 1797, Respondent put in a short answer, in the nature of a disclaimer, stating that May had some time before, for valuable consideration, assigned, deposited, or delivered, to or for the benefit of the Respondent, certain securities executed by Wharton; but that he, Respondent, did not then hold them, or claim any interest therein.

The Respondent was debited with the amount of these securities, or a large portion of them, in account with May. The bill was dismissed as against Respondent, upon the coming in of his answer, and the suit proceeded without his participation. Evidence was entered into on both sides, and divers proceedings were had in the cause, which was heard on the 25th of November, 1799, and the Court declared, that the bonds given by Wharton to May, and particularly mentioned; as well as a bond and warrant of attorney given by Wharton to Da Costa; appeared to have been the result of a confederacy between Bernal, Da Costa, and May, to defraud and impose on Wharton; and to have been obtained by an abuse of confidence reposed in Da Costa and May, (who pretended to act as his agents,) with the privity and knowledge of Bernal, who shared in the unjust gains of the several transactions in the pleadings mentioned; and it was decreed, that the bonds, and the judgments entered up, should stand as a security, only for the sums which should appear really due from Wharton, on the accounts thereafter directed; and it was referred to

belonged to [597] Bernal. The bill prayed in substance, that the four post obit bonds, and the general bond and warrant of [598] attorney for £40,000, might be given up to the Respondent to be cancelled;—that satisfaction might be [599] entered on the records of the judgments which had been entered up;—and that an account might be taken of all monies received by Bernal, or for his use, by virtue of the post obit bonds—executions in the bill mentioned—or otherwise; and that Bernal might refund; the Respondent offering to give up to him the bonds of Wharton, and to pay to certain third persons, certain monies lent to the Respondent, in a degree, upon the credit of them; and the bill went on to pray all necessary accounts and an injunction to stay proceedings at law.

The injunction was granted upon motion, before answer.

In the month of January, 1801, Bernal put in his answer, wherein he detailed the transactions between himself, May, and Wharton; and stated, that in the month of July, 1794, he had delivered up to May, bonds and notes of Wharton, amounting with interest to £19,212 12s. 10d., and afterwards, upon the persuasion of May, consented to abate £8000 in his demand against Wharton; and that May executed to him, Bernal, his own bond and warrant for the amount of such securities, subject to such reduction as aforesaid; that is to say, for the sum of £11,212 12s. 10d.; and further secured the same by the assignment of a mortgage of property in Dorsetshire; and that a short time subsequently, he deli-[600]vered up to May, for £7500, two post obit bonds for £6000 each, the only remaining securities of Wharton which he then held; and May, to secure the payment of the said sum of £7500, executed to him a bond and warrant of attorney to confess judgment to that amount.

Bernal, by his answer, went on to state the origin of his connexion with May, representing that he had for some years acted as the agent of May, and been in the habit of accepting bills for him; and that on the 8th of June, 1795, May was indebted to him, on the cash and bill account between them, in the sum of £18,032 7s. 6d. for money actually advanced for the use of May, over and above various acceptances which he was under for May, amounting to £3486, and independently of £6781 10s. 3d. which he represented to be the balance remaining due to him from May, in respect of Wharton's securities, after making the aforesaid deduction of £8000; the answer went on to state, that May, being thus indebted to Bernal, and representing that the Respondent was largely indebted to him, at the solicitation

the Master, to take an account of all dealings and transactions between Wharton and Bernal, Wharton and Da Costa, and Wharton and May.

Wharton and May appealed against this decree, which was affirmed, with some variations, one of which seems important with reference to the present appeal. The decree, among other things, having declared, that Edward May was entitled to hold the two bonds dated the 3d November, 1794, which he obtained from Wharton, in lieu of the bonds for £6000 each, payable on the death of Mrs. Anne Hall Stevenson, and Mrs. Frances Farquharson, (and with which he was entrusted by Wharton, to compound and settle with Isaac Bernal,) as a security only for such sum as was really paid or allowed in account between him and the Defendant Isaac Bernal, when the last mentioned bonds were given up. The House of Lords varied this part of the decree, by introducing the words "*bonâ fide*," and directed that May should hold said two bonds of 3d November, 1794, as a security only for such sum as was really paid; or "*bonâ fide*" allowed in account between May and Bernal, when the two last mentioned bonds were given up. Upon inquiry before the Master, consequent upon this variation, several meetings were had; and Bernal's book of accounts hereinafter mentioned, was produced; and the account in page 11, in which credit is given for £7500, on account of the two bonds, payable on the death of Mrs. Stevenson and Mrs. Farquharson, was relied upon by May; but the Master, in his report, dated 19th January, 1809, found that no sum was paid or *bonâ fide* allowed in account between May and Bernal, when the said two bonds were given up. It further appeared by the report, that the sum of £657 19s. 3d. only, was due from Wharton to May in respect of Wharton's securities, and an order on further directions was afterwards made on the basis of this report. See *Wharton v. May*, 5 Ves. 27.

of the Respondent and May, he allowed the latter credit in account for the several sums of £12,000, £6000, £250, and £5000, which allowance to May in account, was in fact the consideration for the Respondent's post obit bonds. The answer then went on to state certain indentures of lease and release, dated respectively the 26th and 27th of February, 1796, between the Respondent and May, the effect of which appeared to be that May, according to the recital, standing indebted to Bernal in the sum of £23,250, and the Respondent to May in the like or a larger sum, the Respondent had, upon the application of May, executed to Bernal the securities above men-[601]-tioned; and the Respondent thereby assigned to May his life interest, expectant on the death of his father, in the estates therein mentioned, on trust, among other things, to apply the rents and profits in payment of what might be due from May to Bernal; the answer then went on to state an indenture or deed of covenant, dated the 18th of October, 1800, and made between the Respondent and Bernal, whereby the Respondent ratified and confirmed to Bernal the several sums secured by the post obit bonds, with interest from the 5th of January, 1799.

In the month of July, 1804, the Respondent filed an amended or supplemental bill, impeaching the consideration of a bond for £60,000, dated the 18th of October, 1800, conditioned for the payment by the Respondent of sums due, and which might thereafter become due from May to Bernal, and the bill praying corresponding relief, prayed a discovery as to other securities obtained from the Respondent.

Bernal put in his answer on the 28th of May, 1806, in which he stated transactions between himself and May, as forming the consideration of the last-mentioned bond, which was conditioned for the payment by the Respondent of the sums due, and which might become due, from May to Bernal, and was in its nature similar to the bond for £40,000 (which had been given up to May) but covering other transactions of a later date, and Bernal relied on circumstances, from which he inferred that the Respondent had executed both the bond and deed of the 18th of October, 1800, with due deliberation.

On the 23d of January, 1804, Bernal filed a cross bill against the Respondent, and Edward May and others, stating, among other things, the execution of certain indentures of lease and release, dated the 26th [602] and 27th of February, 1796, between the Respondent and Isaac Bernal, which deed of release recited, amongst other things, a certain bond executed by the Respondent and Edward May to Isaac Bernal, bearing date the 24th of December, 1795, in the penal sum of £40,000, and conditioned to secure the payment to Isaac Bernal of all monies paid and advanced, and to be advanced by him, and acceptances entered into for Edward May; and by the cross bill he prayed an account of what was due to him on the foot of the several securities, and payment out of the estates vested in trustees as therein mentioned.

In the cross bill it was suggested as a pretence on the part of the Respondent and May, that the bonds of Wharton were the consideration for the Respondent's post obit bonds, which is negatived in the usual form, and the cross bill charges, that the real consideration was credit given by Bernal in account to May.

The Respondent put in his answer, and afterwards two further answers to the cross bill.

On the 18th of July, 1805, an order was made in the cause and cross cause, by consent of the parties; whereby it was referred to the Master, to inquire and report whether Isaac Bernal had entered into any and what other securities for the Respondent, besides those mentioned in his answer in the cross cause; and if so, to state the same specially to the Court, and to take an account on foot of all dealings and transactions between Edward May and Isaac Bernal, etc.

This order was afterwards, on the 1st of March, 1806, discharged by the Court; and the Master's report had thereon set aside; but Bernal obtained permission to use, at the hearing of the cause, the depositions which had been taken before the Master.

[603] On the 22d of July, the Respondent dismissed his bill against May, and afterwards examined him as a witness, *but he continued a Defendant in the cross cause.*

The Respondent and Bernal went into evidence in the original cause, and cross-examined the witnesses of each other. Publication having passed, both causes were set down and came on to be heard together, and on the 9th of June, 1807, the Lord

Chancellor pronounced his decree, whereby it was declared, that the four post obit bonds, amounting together to £46,500, and the bond for £10,000, and also the warrants of attorney to enter judgment on the same, were obtained by fraud and imposition practised on the Respondent, then an expectant heir, and that the bond for £60,000 was obtained by fraud and imposition upon the Respondent, and that the several bonds and judgments should stand and be a security only for the sums which, on the accounts thereafter directed, should appear to be really due from the Respondent to Bernal; and that the deeds of the 27th of August, 1795, and 18th of October, 1800, were fraudulent and void as against the Respondent: And it was referred to the Master to take an account of all dealings and transactions between the Respondent and Bernal, and of all and every the sum and sums of money received by the Respondent of Bernal himself, or by advances made by Bernal to May, or any other person, for the use of the Respondent, and which came to the hands of the Respondent; and the Master was also to take an account of all sums of money levied by Bernal, under executions issued against the Respondent, and also an account of all sums paid to Bernal by or on account of the Respondent, from time to time; and the Mas-[604]-ter was directed to set the amount of what should appear to have been levied and paid, against the sum which should appear due on the dealings, transactions, and advances before mentioned, and strike a balance; and the Respondent was ordered to deliver up to Bernal, the several bonds of Wharton then remaining in his possession or power, and to indemnify Bernal against any demand of Symmons, and Bloxam, and Hartsinck, for or on account of any of their demands in the pleadings mentioned; and the Respondent was to have an injunction as prayed, till further order, and all the parties to proceed with effect before the Master, from day to day, and either party was to be at liberty to make up the decree; and in case of the Respondent not speeding the cause before the Master, Bernal was to be at liberty to apply for a receiver, as he might be advised, and on return of the Master's report, such further order would be made as should be fit; and in the cross cause, Bernal's bill was dismissed with costs as to the Defendants who had never appeared thereto, and against whom the bill had been taken *pro confesso*; being all the Defendants, except the Respondent and May; and against them, without costs.

The accounts thus directed were not taken, but on the 3d of February, 1809, Bernal presented a petition of appeal to the House of Lords, in the original cause, praying a reversal of the order of the 1st of March, 1806, entitled in both the causes; and all subsequent orders in such causes, or either of them, and particularly the decree of the 9th of June, 1807, in the first mentioned cause; and on the 6th of February, 1810, (having in the meantime procured the decree in the cross cause to be drawn up) he presented another petition of appeal in the [605] cross cause, praying a reversal, not only of the order of the 1st of March, 1806, and the orders mentioned in the former petition of appeal, but also the order of the 9th of June, 1807, in the second mentioned cause, and to grant such relief as by the bill in the cross cause was prayed.

The two appeals (MSS. Cases, 1811 and 1815, and Dow. vol. iii. p. 133) were heard together, on the 26th and 28th of March, 1811; and on the 29th of July, 1811, judgment was pronounced therein, whereby the order of the 1st day of March, 1806, was affirmed, but the decree of the 9th of June, 1807, in the first mentioned cause, was reversed; and it was declared, that the Respondent, by the indenture of the 18th of October, 1800, having acknowledged that the post obit bonds of the 8th day of June, 1795, for £21,000, of the 20th of June, 1795, for £12,000, and £500, and of the 6th of July, 1795, for £10,000, had been given in consideration of the sums of £12,000, £6000, £250, and £5000, advanced, lent, and paid by Bernal to the Respondent, or for his use, and at his direction and request; and it also appearing that the Respondent's bond of the same 18th day of October, 1800, was defensible on payment by the Respondent to Bernal, of several sums of money, advanced and to be advanced by Bernal to or for the use of May, in manner therein mentioned; and such costs, charges, damages, and expenses as therein mentioned; and it appearing by the evidence in the cause, that the drafts of the deed and bond of the 18th of October, 1800, were taken by the Respondent, for the purpose of laying the same before Francis Const, Esquire, in the pleadings named, on behalf of the Respondent, and were afterwards returned by the Respondent to the solicitor for Bernal, [606]

with a declaration that the same had been perused and approved of by Francis Const, and that the deed and bond were afterwards deliberately executed by the Respondent; and the Respondent having dismissed his bill against May, and examined him as a witness, so that no account could be taken against May, either of his dealings and transactions with the Respondent or with Bernal, the Respondent had debarred himself from impeaching the considerations of the said several securities, as appearing thereon, and as stated in the said deed and bond of the 18th of October, 1800, and that he could not then impeach the said securities for fraud or imposition, or the considerations of the same; but it was further declared, that under the particular circumstances of the case, the said post obit bonds ought to stand as a security only, for the principal sums stated in the said deed of the 18th of October, 1800, to have been the considerations for the same respectively, with interest thereon, at the rate of £5 per cent. per annum from the date of the said bonds respectively: And it was thereby further ordered, That it should be referred to one of the Masters of the said Court of Chancery in Ireland, to take an account of what was due to Bernal for principal and interest on the said post obit bonds, according to the declaration aforesaid, and to take an account of what was due to Bernal on the said bond of the 18th of October, 1800, according to the declaration aforesaid: And it was thereby further declared, that on taking such accounts the Respondent must, under the circumstances, *be bound by the accounts settled and stated between May and Bernal, except so far as the Respondent should be able to falsify the same, or shew any errors or overcharges therein*: And it was thereby further ordered, That the said Master should compute interest on the several [607] sums of money which should appear on taking the said accounts to be due to Bernal, for advances made by him to or for the use of the Respondent or May, and for the debts due from May to Bernal, according to the terms of the said bond, bearing date the 18th of October, 1800: And it was thereby further ordered, That the said Master in taking such accounts, should make to both parties all just allowances, subject to the declarations and orders aforesaid: And it was thereby further ordered, That the Master should inquire and state, whether the Respondent had discharged the demands of Hartsinck and Co., John Symmons, and Wilkinson, Bloxam, and Co.; and if not, it was thereby ordered, That the Respondent should forthwith discharge the same, and fully indemnify Bernal therefrom; and in case Bernal should have paid, or should pay the same, or any part thereof, then that the said Master should take an account thereof, and charge the Respondent therewith in the accounts before directed, with interest for the same, at the rate of £5 per cent. per annum, from the times of such payment respectively: And it was thereby further ordered, That the Master should inquire into whose hands, possession, or power, the bonds of Wharton, in the pleadings mentioned, had come, and how the same had been disposed of, and where the same then were respectively: And it was thereby further ordered, That all further directions should be reserved to the said Court of Chancery, until after the said Master should have made his report: And it was thereby further ordered, That in the mean time, Bernal should be restrained by the injunction of the court from proceeding at law against the Respondent, as to the Court should seem meet: And it was thereby further ordered, That all parties should be [608] examined upon interrogatories, touching the matters aforesaid, and produce all deeds, instruments, accounts, papers, and writings, as the said Court should direct: And it was thereby further ordered, That the decree of the 9th of June, 1807, made in the cross cause, dismissing Bernal's bill, should be reversed, and that Bernal should be at liberty to proceed in the said cause, as he should be advised; but in case Bernal should be allowed to proceed at law against the Respondent for any part of his demands, it should be without prejudice to any application which the Respondent might think fit to make to the Court of Chancery, to compel Bernal to make his election, whether he would proceed at law or in Equity: And it was finally ordered, That the Court of Chancery (in Ireland,) should proceed to give all the orders necessary for carrying that order and judgment into execution in both the causes."

May, dying intestate, in the year 1814, subsequently to the hearing of the appeal, Bernal filed his bill of revivor and supplement, to which the Respondent and Sir Humphry May put in their answers, the latter admitting himself to be the

brother and heir-at-law of Sir Edward May, deceased; but no further proceedings were had in the cross cause.

The order of the House of Lords having been transmitted to the Court of Chancery in Ireland, was made an order of that court; and it was accordingly referred to Thomas Ball, Esq., one of the Masters of the court, to take the accounts directed by the order; and thereupon Isaac Bernal filed two charges, one on foot of the post obit bonds, and the other on foot of the bond of the 18th of October, 1800; and the Respondent filed discharges thereto; but before any effectual progress was made in the ac-[609]-counts, Isaac Bernal died, whereupon the present Appellants, as his executors, on the 27th of September, 1821, filed their bill of revivor in the Court of Chancery in Ireland, against the Respondent, praying that they might be at liberty to revive the first mentioned cause, which had abated by the death of Isaac Bernal, and that they might have the benefit of the judgment pronounced in the appeal; and the Respondent having appeared to the bill of revivor, it was ordered by the Court, on the 10th of November, 1821, that the first mentioned cause should stand and be revived.

To support the latter charge, the Appellants produced before the Master the bond and deed of the 18th of October, 1800, and also the book in which was contained the accounts alleged to have been stated and settled between Bernal and May, on the foot of the last of which there appeared a balance due from May to Bernal, on the 1st of June, 1801, of £21,372 12s. 4d, which the Master admitted as *prima facie* evidence of the amount of the charge.

The book so produced, commenced with an account current between Bernal and May, of their general bill and cash transactions, beginning in the year 1791, which account is continued to the end of the tenth folio of the book, from whence it is carried to folio fifteen. In two of the intervening folios, namely, eleven and twelve, is contained the statement of the accounts settled between May and Bernal, on foot of the alleged transfæ from the latter to the former, of Wharton's original securities.

The transaction is there stated in this way: the first set of securities, amounting to £19,212 12s. 10d. sterling, is stated to have been delivered to May, for which he gives his bond, dated the 3d of July, 1791, for £11,212 12s. 10d. bearing interest, and [610] gives credit for two sums of £1000 each; one stated to have been paid to a Mr. Williams; the other, Bernal is to deduct from Joshua Mendes Da Costa; making altogether £19,212 12s. 10d.;—another set of Wharton's securities, to wit, two post obit bonds for £6000 each, are stated to be sold to May for the sum of £7500, for which sum he gives his bond to Bernal, dated the same day, bearing interest.

In the twelfth page of the book, the two bonds which May had passed for Wharton's securities, to wit, the one for £11,212 12s. 10d., and the other for £7500 are charged to him with a sum of £637 12s. 6d. stated to be agreed to be charged for interest on the account, making together the sum of £19,350 5s. 1d.; and this sum is written off on the credit side, by cash, and by sundry bills, notes, and other securities received by Bernal, amounting precisely to £19,350 5s. 1d., the greater part of which, namely, £12,804 2s. 9d., appears to have been paid and given by May after Wharton's bill had been filed to impeach the securities, and pending the litigation with him. Amongst these credits, in order to make up the precise sum, are portions of the Respondent's post obit bonds, entered as follows: "1795, June 8th, by money secured on bonds of Lord Belfast, £3000," and (after intervening payments,) "September 17th, by money secured on bond of Lord Belfast, £1000."

In this way, the alleged sale of Wharton's securities to May, appears by the book to be closed, settled, and paid for.

In his answer to the Respondent's original bill, Bernal stated, that he gave credit to May for two sums of £3000 and £1000, part of the said bonds, in liquidation of the balance then due from May to him, on the foot of Wharton's securities, and for the remainder of [611] the post obit bonds, by applying them in part and further liquidation of the cash and bill account between him and May.

Two leaves of the book, containing part of the last mentioned account, namely, the credit side of folio 11, and the debtor and creditor sides of folio 12, appeared to have been either cut out, or worn and detached by use.

From folio 15, the account current which had been brought over from folio 10, is continued with occasional interruption, and occupies the greater part of the book; balances are from time to time struck and signed by May; by the last balance so signed, the sum of £24,372 12s. 4d. appears due from May to Bernal, on the 1st of June, 1801.

The Master having admitted the book as *prima facie* evidence, that the sum of £24,372 12s. 4d. was due from May to Bernal on the 1st of June, 1801, as the balance of the last account stated and settled between them, the Respondent proceeded to falsify these settled accounts, under the liberty given to him by the order made on the appeal.

With this view, the Respondent insisted that the different payments made by May to Bernal, from August, 1794, to September, 1795, and which in the book as it appeared, are placed to the credit of the alleged sale of Wharton's securities, ought to be placed to the credit of the general account of bills and cash transactions between May and Bernal, at the respective dates when such payments took place, without having regard to the pretended sale of Wharton's securities from Bernal to May. Because, as he contended, there was evidence on the face of the book of accounts, and in the nature of the dealings between Bernal and May, and also in the proceedings in the [612] cause of *Wharton v. May, Bernal*, and others (5 Ves. p. 27), to warrant a presumption, that these payments were made by May to Bernal, on account of the bill and cash transactions between them, and that the same were originally placed to the credit of the bill and cash account, and that afterwards, when Mr. Wharton, by his bill in the Court of Chancery in England, (filed in February, 1795) had impeached the securities which had been obtained from him, as obtained by fraud, and without consideration, the accounts between Bernal and May were fraudulently altered, with a view to impose on the Court of Chancery in that cause, by representing May as a purchaser of Wharton's securities, for valuable consideration; that with this view, the account now appearing in the 11th and 12th pages of the book was made out, and credits to the exact amount necessary to balance that account, were withdrawn from the bill and cash account; and this fraud, which was originally resorted to against Wharton, was afterwards turned against the Respondent, thus making a large balance appear to be due from May to Bernal, when, in truth, none was due.

At folio 10 of the book, the left-hand side being insufficient for the debits, they are brought over to the right-hand or credit side of the book, under the credits; and in performing the operation, entries under date of the 20th of June, 1795, have been placed immediately under the credits of the 17th of September, in the same year; so in folio 24, entries of the 5th of September, 1797, occur under entries of the 17th of November. The credits in folio 12, purporting to be payments at different times, from August, 1794, to September, 1795, from the colour of the ink, and the [613] manner of the hand-writing, appeared to have been written at one time. This book was represented by Bernal to be the original book, containing the only account of these transactions, and no other was produced.

Daniel Collyer, a solicitor, proved in the cause, that in the year 1804, May had, in his presence, taxed Bernal to his face, with fraud in the accounts between them, and undertook to point out the places in which Bernal's account book had been mutilated, and that upon Bernal's producing the book as he then did, May opened it, and pointed to the part in which the leaves had been torn out. The Respondent also produced plain copies of the proceedings in the cause of *Wharton v. May*, which, to save the expense of attested copies, were admitted by the Master, by the consent of all parties, the Master certifying such admission and consent.

On the 29th of November, 1822, the Master made his report, whereby he certified that he had proceeded in the accounts and inquiries directed, and found, "that there was then due from the Respondent to the Appellants, (as executor and executrixes of the will of Bernal,) the sum of £23,470 13s. 5½d. British, for four principal sums of £12,000, £6000, £250, and £5000, and a small arrear of interest, after crediting the monies theretofore received and levied, under the several judgments obtained on the authority of the several warrants of attorney, collateral with the bonds, (the particulars of which he had set forth in the Schedule to his Report): And he further certified, That in proceeding to take the accounts directed on the foot

of the before-mentioned bond, bearing date the 18th day of October, 1800, he found that the last settlement of accounts between Bernal and May, was [614] up to the 1st day of June, 1801, and that on that day, it was agreed between them, that there was £24,372 12s. 4d. British money, due from May to Bernal, including four bills of exchange amounting together to £2602 12s. then outstanding, over-due and unpaid, which he found, by an indenture bearing date the 4th of February, 1802, and made between May of the one part, and Bernal of the other part, were severally and respectively to be deducted from the said £24,372 12s. 4d. when the same should severally and respectively be delivered up by May to Bernal, to be cancelled, and exclusive of three several collateral securities which Bernal had entered into for May to Messrs. Wilkinson, Bloxam, and Co., John Symmons, and Messrs. Hartsinck and Co.; but the Respondent having made it appear to him, that such balance of £24,372 12s. 4d. ought not only to be reduced by the amount of three out of the before-mentioned bills, amounting together to £2392 12s. (the fourth having been paid by Bernal), but also by the amount of sundry payments which May made to Bernal in the years 1794 and 1795, to the extent of £19,350 5s. 4d. British, for divers securities of Wharton to the nominal amount of £31,212 12s. 10d. British, but for which it appeared May ultimately recovered only £354 3s. 3d. exclusive of interest: he had in taking the said last-mentioned accounts, made what he conceived to be the proper additions and deductions on foot of the said last settled account of the 1st of June, 1801, between May and Bernal, and in so doing he had, as against the said £19,350 5s. 4d. charged May's account with the amount of one of Wharton's securities for £2900, which, antecedently to the 1st of July, 1794, had been passed by May to Bernal, because Bernal [615] originally received the same from, and gave May credit for the full amount thereof, and he had also charged May's account with the before mentioned sum of £354 3s. 3d., and the amount of sundry costs, which had been proved before him to have been paid by Bernal on May's account, and two sums of £75 2s. 5d., and £81 2s. 5d., the amount of two bills of exchange originally received of, and credited to May, but not paid when due; and he had deducted from the said account all interest charged in the said settled accounts, by which the balance of the last settled account ending the 1st of June, 1801, was ultimately reduced from £24,372 12s. 4d. to £4164 4s. 7d., from which £4161 4s. 7d. he had afterwards deducted the amount of a bill of exchange of £592 12s. 0d., which Bernal originally accepted for the accommodation of May, and which he found May ultimately got up and returned to Bernal in the year 1802, and also two other sums of £800 and £1000 for two other bills of exchange originally accepted by Bernal for May's accommodation, which were yet outstanding unpaid by Bernal, and against the payment of which with interest, the Respondent was to indemnify the Appellants as executors of Bernal, by which the ultimately reduced balance of the last settled account between May and Bernal was brought to the sum of £1771 12s. 7d., from the foot of which he had taken the subsequent account, and calculated interest as directed, and he found that there was a sum of £215 2s. 3d. British money, over-paid and in favour of the Respondent, as appeared by the second Schedule annexed to his Report, which £215 2s. 3d. he had deducted from the before-mentioned sum of £23,470 3s. 5½d. remaining due at the foot of the first Schedule, whereby the whole sum then due from the Respondent to the Appellants, (as [616] executor and executrixes of the will of Bernal,) was reduced to the sum of £23,225 11s. 2½d. British, making £25,161 0s. 5d. sterling Irish money," etc. The Master then went on to state in the Report the result of the other matters referred to him.

To this report the following exceptions were taken by the Appellants:

First Exception: FOR that the Master in taking that part of the account directed to be taken on the foot of the bond of the 18th of October, 1800, had certified, "that on the last settlement of accounts between Isaac Bernal and Edward May, it was agreed between them, that £24,372 12s. 4d. British Money, was due from the said Edward May to the said Isaac Bernal, (including four bills of exchange and some other securities therein particularly mentioned,) yet the Marquis, having made it appear to the Master that the said balance of £24,372 12s. 4d. ought not only to be reduced by the amount of certain bills therein mentioned, but also by the amount of various payments which Edward May made to Isaac Bernal, in the year 1794 and 1795, to the extent of £19,350 5s. 4d. for divers securities of John Hall Wharton, to the

nominal amount of £31,212 12s. 10d. but for which Edward May ultimately recovered only £354 3s. 3d. exclusive of interest, and that the said Master had deducted from the last settled account of the 1st of June, 1801, the monies and securities to the amount of £19,350 5s. 4d. so paid by Edward May to Isaac Bernal for Wharton's securities, and all interest charged on the settled accounts therein referred to, by which the balance of the last settled account, ending the 1st of June, 1801, was reduced from £24,372 12s. 4d. to £4164 4s. 7d. British, and by means of which with some other debits and credits, the report found, that there was a sum of £245 2s. 3d. British, [617] overpaid and in favour of the Marquis," which finding, so far as related to Wharton's securities, the Master was not warranted in adopting, by the decree therein mentioned, (giving to the Marquis a right to falsify or shew error or overcharges in the said settled accounts,) or by the evidence before him.

Second Exception: FOR that the said Master varied the balance of the said settled accounts, by debiting the said Isaac Bernal with £19,354 5s. 4d. as the amount of various payments made by Edward May to Isaac Bernal, in the years 1794 and 1795, for divers securities of the said John Hall Wharton, to the nominal amount of £31,212 12s. 10d. and did not credit the said Isaac Bernal on the foot of the said security, with the sum which Edward May had agreed to credit, and did actually credit the said Isaac Bernal with, whereby the balance appearing by the last settled account, in the said decree mentioned to be due from the said Edward May to Isaac Bernal, on the 1st of June, 1801, namely, £24,372 12s. 4d. was reduced to £4,164 4s. 7d. British: And the report also stated, "That the whole of the said balance was not only discharged, but the balance turned against the said Isaac Bernal, by a sum of £245 2s. 3d.," in which variation the Master was not warranted by any evidence laid before him, even though he was warranted (which the Appellants denied,) in entering into an investigation of the equities between the said Edward May and Isaac Bernal, touching Wharton's securities, or into the considerations given for the same, according to the agreement of the parties.

These exceptions being over-ruled, the cause was heard upon further directions, on the 3d of February, 1823, when it was decreed, "That the receiver in the cause should forthwith account, and pay over to the Appellants the balance in his hands, in liquidation-[618]-tion of the £25,161 0s. 5d., reported due to the Appellants, and that the Respondent should pay to the Appellants the balance (if any should appear due to them, after such payment,) within six months, with interest, at £5 per cent. from the date of the said report, until paid, and that in the mean time, the receiver should be continued, with liberty to the Appellants to apply, from time to time, as they should see fit, and that the receiver should pay over to them such further sums as he might receive, until the said principal sum, reported due to the Appellants for principal and interest, should be fully paid off, and that all parties should be at liberty to apply to the Court, as they should be advised, and that each of the parties should abide their own costs.

Against this order of the 3d of February, 1823, the appeal was presented.

In the course of the argument the Lord Chancellor made the following observations (16 Feb. 1826): *

The Lord Chancellor: I wish the Respondents first to state, whether a sum is not agreed on as the result of a settled account, which is to be surcharged and falsified: And then to point out what are the sums which they mean to withdraw from that account on the ground of what is called falsifying. Neither party, as it appears to me, object on the record to the £24,372 being taken as the result of a settled account: then, the question is, what is the meaning of the words "falsify or surcharge" in this decree? The next question will be, in pointing out what it is that they mean to withdraw from that account, how they are to make it out that that can, according to [619] the true intent and meaning of the words "falsify or surcharge," be withdrawn.

How does it appear that this part of the book laid before the Master makes the balance £24,372? Do not understand me that I cannot find such and such evidence; I want to see the course of the thing. What the Master says is this, "and in proceeding to take the accounts directed under the before mentioned bond, bearing date

* These are given very fully, because the judgment was afterwards affirmed without farther observation.

the 18th of October, 1800, in the penal sum of £60,000 British money. I find that the last settlement of accounts between the said Isaac Bernal and the said Edward May, was up to the 1st of June, 1801." First of all I want to know what it is the Respondent objects to? Not how he makes it out. The ordinary course of falsifying is, to point out some sum. You must begin by shewing that what is in pages 11 and 12 forms part of the charge in this book.

The case stated by the Respondent, as I understand it, is this: May is made debtor for £19,350 on two bonds that are mentioned, one of the 21st of July, and the other of the 12th December, and interest on those; and on the other side he has credit given to him for a great number of bills, amounting to the sum of £19,350. The Respondent contends that he ought to have credit given to him for that £19,350, but that he ought not to have been debited with the other. The Master's report is to this effect:—he says, that on that day it was agreed between them that there was £24,372 12s. 4d. British money, due from May to Bernal, including four bills of exchange, amounting together to £2602 12s., then outstanding, over due, and unpaid, which I find by an indenture bearing date the 11th of February, 1802, made between Edward May of the one part, and Isaac Bernal of the other part, were severally to be deducted from [620] said £24,372 12s. 4d., when the same should severally and respectively be delivered up by May to Bernal to be cancelled.

Then the first thing to be proved here is, that it does appear by that indenture of the 4th of February, 1802, that these bills were to be so delivered up. What is the evidence of that? Where is that indenture? How does that appear? The report goes on to say, "but the Defendant having made it appear to me that such balance of £24,372 12s. 4d. ought not only to be reduced by the amount of three out of the before mentioned four bills, amounting together to £2392 12s., (the fourth having been paid by Isaac Bernal) but also by the amount of various payments which May made to Bernal in the years 1794 and 1795, to the extent of £19,350 5s. 4d. British, for divers securities of said John Hall Wharton, to the nominal amount of £31,212 12s. 10d. British, but for which it appears May ultimately recovered only £354." Now it is upon those who are to support the Master's Report to prove those facts as there stated. The Appellant quarrels with the Master's Report because it has stated such and such deductions to be made, and such and such evidence to be referred to. Then I say you are not at liberty here to prove that those deductions ought to be made, except on the evidence on which the Master has made the deductions.

They take the exceptions in two ways;—they say, first, that the exceptions are such that the report ought to be reviewed; and further, that the whole Judgment should be set aside: And then they put it very fairly again in their exceptions, that you are to shew that these deductions made by the Master, are made properly on the effect of the evidence on which he has proceeded, and not on all the rest of the evidence which you may think proper to bring to this [621] bar; and then that being so properly made, they fall within the meaning of the word "falsifying."

You must shew that the Master is authorized by the evidence to which he there refers to have made that report. You see their exceptions expressly mention the evidence. I allude to that part which goes to the extent of £19,350, and that as a part of £31,212. There you see the exception expressly says, " (that so far as relates to the payments made or securities given to Bernal by May, on account of Wharton's securities, handed to May by Bernal) he ought not to have come to or adopted such report; not being warranted so to do by the true construction of the judgment or decree in the report mentioned (giving to the Defendant a right to falsify or shew error or overcharge in the settled accounts)." That is one principle of opposing it "or by the evidence appearing before him on the taking of the account." Then you must point out what was the evidence before him on taking the account.

If the decree in *Wharton v. May* is to be considered as evidence, (and the Master, in his Report, states that was agreed to be evidence,) you must state the case of *Wharton v. May*. We must see how you apply *Wharton v. May* to the question of *May v. Bernal*.

The Master says, that it was consented between the parties to save the expense of bringing over and proving attested copies thereof, that plain copies of the following orders, reports, exceptions, decrees, and proceedings, in the cause of Wharton against May and others, should be read in evidence before me in those causes as if duly

proved, and which were accordingly read in evidence before me, namely; Decree dated 25th of June, 1799; The Master's report and [622] Schedules pursuant thereto dated 30th of July, 1806; Plaintiffs and Defendants exceptions thereto; Order of the House of Lords on the appeal in the cause, bearing date the 10th of August, 1807; Order on hearing exceptions to the Master's report bearing date 11th of February, 1808; Order bearing date 9th of December, 1808, that Master's report should state result of Schedules on the exceptions sent back; Report of the Master, dated 19th of January, 1809; Decree dated 25th of July, 1809. These were read by consent.

How do you understand that at the bar!—were the proceedings in *Wharton v. May* agreed to be read in evidence? If not, you must state the case of *Wharton v. May*, so as to shew that in taking the account between *May v. Bernal*, those proceedings should have been received. The great difficulty that one has in the case is this, that all that the Master says in his report is, that “the Defendant having made it appear to me that such balance, etc.” The Court is to know in what way the Defendant had made that appear to the Master; what have we in proof as to how the Defendant made it appear. Instead of printing this immense mass of evidence, they should have put in the evidence, which the Master had before him. That would have been in compliance with the rules and orders of the House. The rules of the House require that the evidence should be printed, on which the Master proceeded. It appears by these papers that the Lord Chancellor called on the Master to certify on what evidence he had proceeded, and accordingly he certified that he had proceeded on all these causes and reports and so on, and all this seems to have been without objection; then we have in the Irish cause the notes on the hearing, and I do not find there was any objection made in the argument before the Chancellor to reading all these.

[623] It appears on the notes which I have been reading, that a great many deeds were read before the Chancellor, not one of which have been read to day. The Master, in answer to the application of the Lord Chancellor, says, “I certify that it was admitted by all the parties before me on the enquiry, directed by the order of the House of Lords, that the securities of John Hall Wharton mentioned in these causes, and also in the accounts between the said Isaac Bernal and Edward May deceased, were the same as those mentioned in the cause instituted in England by the said John Hall Wharton against the Defendant, the Marquis of Donegal, and the said Edward May and Isaac Bernal; and it was also consented to save the expense of bringing over and proving attested copies thereof, that plain copies of the following orders, reports, exceptions, decrees, and proceedings in the said cause of *Wharton v. May* and others, should be read in evidence before me in these causes, as if duly proved, and which were accordingly read in evidence before me.” (He does not state that there was any objection to their being read in evidence)—“Namely a decree, etc.”—and he goes through all these particulars. Then upon the hearing of the cause these are all offered in evidence, no objection is made to them on the part of Mr. Bernal's counsel, and a great many deeds are stated as being read. This account also was stated as having been produced in evidence, and then the Court decides on the matter which now appears on the exceptions.

The question therefore is, what was the view of the case taken in the Court below. There is no doubt that in an order giving leave to surcharge and falsify as far as the word “falsify” is concerned, it is neither more nor less than an authority under which due proof and evidence ought to be produced. But, in this case, it [624] comes to be a matter of question, quite different as to the word “falsify,” whether the narrow or strict sense of falsifying is to be adopted by this House. If that is to be so, the fact then is this, that the parties in the Court below proceeded on one ground, and then they come here to undo all that has been done there, as it is represented. The fact may be in dispute. The question is, what was the matter disputed before the Court below? And undoubtedly that again gives rise to another observation, which is this; if the Court below decided in confirmation of the Master's report upon the evidence on which he should have made that report and other evidence, then the Court was wrong: Unless that other evidence was by consent of the parties.

Mr. Hart: The gentleman who attended this cause in Ireland happens to be at the bar of the House. He says he took the objection over and over again that it was evidence which did not apply to this cause before the Master.

The Lord Chancellor: He might take the objection, but did he take any objection to the admission of it as evidence, leaving the Court and Master to decide?

Mr. Hart (23d Feb. 1826): At the instance of May, Bernal had given up these bonds, and as I apprehend on the principles of every court of justice, if Mr. May perfectly conusant of all the circumstances between himself, Mr. Wharton and Mr. Bernal had thought fit to make a purchase of those securities of Mr. Wharton's for a specified sum, giving his bond by way of payment, it was quite immaterial whether the securities that he so purchased, turned out to be worth one farthing or not.

The Lord Chancellor: Was the point you now make, entered into in the Court below?

[625] Mr. Hart: I cannot tell what points were made in the Court below.

The Lord Chancellor: According to the notes, no such thing appears to have been mentioned. There are two points: first, whether the evidence in the cause of Wharton and May, was to be received at all; and secondly, if that evidence was to be received, whether the securities may not be taken at the value represented in this account.

It may be necessary to enquire of the Court below, what were the grounds of decision. If cases come here on points which were not discussed, it is not an appeal, but a new cause. I do not mean to stop you; on the contrary, I think it a very material point.

Mr. Hart: I hope your Lordship will not think the Appellant bound by the omission of his counsel below.

The Lord Chancellor: Perhaps not; but if the client comes here to state points that were not made before the Court in Ireland, he ought to pay the expenses of coming here, if the thing is sent back again. He must do that at least.

What they say is this: here is a bond or security, which was sold by May to Bernal, apparently for so much money; they say, that notwithstanding that appears on the face of the instrument, it is worth only so much less, and that therefore they ought not to be charged with such a sum of money. Then comes the question, was it or was it not before the Court in Ireland, alleged that what appeared on the face of the instrument could not be disputed? You see the allegation on the one side is "you owe me such a sum of money, on such a bond:" the allegation on the other side is, "no, I do not owe you that money on [626] the bond, because whatever appears on the face of the bond is not what is due between you and May." It is on the party who thinks that he can make out this point that the bond shall be the rule of evidence, and that no further enquiry shall be made but what appears on the face of the bond, to insist on that bond.

I am not saying, or presuming to say, what the effect of this "falsifying and surcharging is," as to whether it falls within that rule; I never can suppose the Master went on falsifying and surcharging in the way he has done, unless the parties called on him to do so. His report is to that effect.

Can we understand that unless we have the information on both sides, from gentlemen at the bar, to say that was the case. The first exception goes on the point, that the equities as between Wharton and May, were not to be considered as equities as between May and Bernal, that is a succinct and distinct proposition of law. The second exception is, that the Master would not be warranted in his conclusion, even if he did take those equities into consideration, by agreement of the parties; and therefore the Court refers to him to know what the parties have done before, and he makes a certificate, which seems to me to imply that this was by agreement of the parties, and the Court seems to have proceeded on that. It is very material that we should know what the Court really proceeded on, because, if it was upon an agreement between the parties (and that it might be so is clear from the language of the second exception,) we ought to know whether there was such an agreement as that—that is, whether the Court proceeded on the notion that there was such an agreement.

Take Mr. Wallace's view according to the exceptions. Mr. Wallace is the counsel who signs the ex-[627]-ceptions; and the second exception is, "that the Master was not warranted in what he has done by any evidence laid before him, even though he was warranted (which the Plaintiffs deny,) in entering into any investigation of the securities between May and Bernal touching Wharton's securities, or into the

considerations given for the same according to the agreement that was entered into between the parties." Now what was that agreement?

Mr. Hart: That agreement was to substitute attested copies instead of originals.

The Lord Chancellor: That is not the effect of the certificate. Your first exception is, that there was no ground for the decision from any thing that passed between Wharton and May. The second exception is, that if there was an agreement between the parties to admit that evidence, it did not authorize the report.

If Bernal sold to May *post obit* bonds, stating that he had paid £6000, or any other sum, and it should appear in the proceedings of the other cause that he had not paid one farthing for them; supposing it to be open to Bernal in the other cause to have contended if such thing should appear, that amongst the bonds he had given to May—(sold to May, if you please so to put it): that he stated that, in consideration of a sum of £1000, or any other sum to be mentioned, he had got a *post obit* bond for a sum of money payable on certain conditions, and that it should appear on evidence that should bind him in the cause, that he had paid nothing for that *post obit* bond, would that be conclusive as to May unless he had subsequently acquiesced? That leads me to ask you whether there was any evidence in the Court below [628] of Bernal's state of facts carried in before Master Ball (see the Appendix to the printed cases)? It would be open to a question of a rather singular nature, because that state of facts seems to contend this, that if at any time May had had an equity of the same nature of Wharton's, yet that May's subsequent transactions might deprive him of that equity: whether that would be a consideration that the Master could have gone into, consistently with the order of the House of Lords, may be another question: but whether the House of Lords may not, on that footing, if there was evidence with respect to the state of facts itself, direct some enquiries in order to get at the fact of such subsequent conduct on the part of May, would be another question.

The report takes no notice at all of that state of facts which was carried in by Bernal, nor could the report take any notice of it, because there was no evidence given in support of that state of facts. There do appear to me to be some considerable points mentioned in Bernal's state of facts.

You see Bernal in his state of facts means to establish that May cheated Wharton, and cheated himself beyond all example; and he means also to state that the transactions which May was concerned in, subsequently to the sale of these securities to May, were such as would cut all equity from under his feet, even if there could have been equity at the moment of that sale of the bonds to him. For that reason I ask whether that state of facts was at all supported before the Master.

Mr Hart: I have made no observation on what has been said impugning the book about spoliation, because the intrinsic evidence of that paper itself, is [629] only that time and use have separated those sheets from the mass of the book itself.

The Lord Chancellor: I think that appears to be the case.

After the Argument which took place in 1826, the case stood over for judgment.

On the 25th of June, 1827, the judgment of the Court below was affirmed, on the motion of Lord Eldon, without further observation.

Judgment Affirmed.

[631]

APPENDIX.

(SCOTLAND.) COURT OF SESSION.

HUGH ARBUCKLE,—*Appellant*; CAMPBELL INNES and others,—*Respondents*.

In a proceeding under the stat. 7 Geo. 2. c. 16. sec. 7 and 16. Geo. 2. c. 2. sec. 24.—a party having appeared as proxy for an elector at the annual election of Magistrates and Councillors of a borough,—leaves Scotland in a ship, of which he is Master, upon a voyage to France and back,—having before his departure communicated with his legal agent upon the subject of a petition to the Court of Session, against the proceedings at the election; and during

his absence, and before the expiration of two months from the election, he transmits to the same agent a letter upon the subject. The agent, thereupon, presents the petition in the name of the proxy, and the proceeding is commenced before the expiration of the two months. The proxy does not return to Scotland until after the expiration of the two months, but then recognises the proceeding as instituted by his authority. Held by the Court of Session that there was not, under these circumstances, a sufficient mandatory for the proceeding, and this judgment was affirmed on appeal, but with much hesitation.

On the 25th of November, 1825, a petition and complaint was presented to the Court of Session, at the instance of the Appellant Hugh Arbuckle, and of James McBain, deacon of the incorporation of tailors of the Burgh of Queensferry, both of them constituent members of the meeting for the annual election of the magistrates and councillors of that burgh, held on the [632] 29th day of September preceding, complaining of certain wrongs and abuses committed in the course of the election, and praying that the election of magistrates and councillors, said to have taken place at that meeting should be found to be illegal, and should be reduced and set aside.

The petition is in name of James McBain, and Hugh Arbuckle, proxy, chosen in room of one of the electors of the magistrates of the burgh, constituent members of the meeting for the annual election of the magistrates and councillors of the burgh of Queensferry, held on the 29th day of September last.

It sets forth, "That by act of the 7th Geo. 2. c. 16. s. 7. relating to the election of magistrates of royal burghs, it is declared, 'That it shall and may be lawful to and for any magistrate or councillor of the burgh, who apprehends any wrong was done at any annual election, to bring his action before the Court of Session in Scotland, for rectifying such abuse, or for making void the whole election (if illegal) only within the space of eight weeks after such election is over.'"

"That by another act passed in the 16th Geo. 2. cap. 2. sect. 21." it is further provided and declared, "That it shall and may be lawful to and for any constituent member, at any meeting for election of magistrates and councillors, or of any meetings previous to that for election of magistrates and councillors respectively, who shall apprehend any wrong to have been done by the majority of such meeting, to apply to the said Court of Session, by a summary complaint, for rectifying such abuse, or for making void the whole election made by the said majority, or for declaring and ascertaining the election made, by the majority, so as such complaint be presented [633] to the said Court of Session, within two calendar months after the annual election of the magistrates and councillors."

Then follows a statement of the particular grounds of complaint.

The petition and complaint was boxed on the 25th of November, 1825.

The petition being served upon the persons complained of, they lodged their answer, which, besides a statement of the Respondents' pleas upon the merits, contain an objection to the title of both the complainers. But the title of the complainer McBain was not at issue under the present appeal, which involves merely the title of the complainer Hugh Arbuckle, and the competency of the complaint, so far as at his instance.

"The objection as to Hugh Arbuckle was, that he left Scotland a day or two after the Michaelmas election, on a foreign voyage, and was out of the kingdom at the time when the complaint was presented: that no mandate, or other authority granted by him, has been produced, authorising the complaint to be presented."

On the part of the Appellant it was alleged that he had given verbal instructions for the proceeding before his departure.

And afterwards addressed to his legal agent in Edinburgh, the following letter, which was received and acted upon before the expiration of the two months from the election.

"Dieppe, in France, 7th Nov. 1825.

"Dear Sir,—I have been detained here with contrary winds for this fortnight. I expected when I saw you, to have been on my passage home from Rotterdam before this time. I have to go there for a cargo, and I [634] hope not to be long detained. Prefixed I send you a memorandum about our Michaelmas election. I expect that you have got the minutes of election. Should you want any farther

information on the subject, write me, to the care of Messrs. D. Barger and Son, Rotterdam, and I will attend to it immediately. I think the burgh will be very easily got set aside; and should it be necessary for you, I will rather come home from Rotterdam, by the way of London, as you should be disappointed. I have no doubt that Deacon McBain will allow you to use his name in the petition and complaint. Mr. Melville could speak to him, or I could send word over from Rotterdam to my mother for him to go into Edinburgh to speak to Mr. M. Perhaps in the petition and complaint it might be as well to conclude for the penalties of £100 for each person acting, who may be found disqualified. I remain, dear Sir, yours truly

(Signed) HU. ARBUCKLE.

(Addressed) "James Gibson Craig, North Street,
Andrew's Street, Edinburgh."

The following pleas, in point of law, were submitted on the part of the complainers, in regard to the title of the Appellant.

"1. The complainers, being both natives of this country, no written mandate was required before this complaint could competently proceed at their instance, even though it be true that one of them was out of the country in the course of his business on the particular day on which the complaint was presented."

"2. The complainer, Hugh Arbuckle, having been chosen a proxy for an absent elector, and the [635] other complainer, James McBain, as deacon of the incorporation of Taylors, having been one of the body of electors, they were both constituent members of the meeting of election, and entitled to bring the present complaint, under the statutes there founded on."

There was a third plea on the point of title: but it relates solely to the title of McBain.

The following are the pleas which were stated for the Respondents, with regard to the Appellant's title:

"1. As to the title of Hugh Arbuckle. The Respondents maintain, in point of law, that the present petition and complaint cannot be insisted on, in the name, and at the instance, of Hugh Arbuckle, because,

"1. At the time when the present petition and complaint, at the instance of Hugh Arbuckle, was presented, Hugh Arbuckle, being forth of the kingdom and beyond seas, and having left no mandate to enable any one to appear as his mandatory, no petition and complaint was, in law, presented within the statutory period at the instance of the said Hugh Arbuckle.

"2. As Hugh Arbuckle was forth of the kingdom, and beyond seas, no complaint or the nature of the present one could competently be presented, without an express mandate to that effect, granted by him in favour of the counsel who signed it, or of some individual who, in the complaint, caused himself to be designed as the mandatory of Hugh Arbuckle. 1681, February 3. ——— against Stuart of Archattan, Morr. 353. 1780, July 30. Major Alexander Dundas against Alexander Ferguson, Morr. 8837. 1802, July 6. Davidson against [636] Elphinstone, Morr. 8842. 28th February, 1818, Cameron against McNab, F. C. 436.

"3. The Respondents maintain that the letter which has been produced by the complainers, although it contains memoranda and information as to the election at the burgh of Queensferry, at Michaelmas, 1825, for the use of 'James Gibson Craig, Esq.' to whom it is addressed, and states the writer's willingness to promote the wish of that gentleman, in regard to the politics of the burgh, contains no mandate which could legally have authorized Mr. Gibson Craig to have raised the present complaint as at the instance of Hugh Arbuckle, or in it to have designed himself Arbuckle's mandatory, and still less any counsel to have signed such complaint, or any other party to appear for Arbuckle as mandatory.

"4. This complaint was not originally presented at the instance of Hugh Arbuckle. Nothing done by him, after the statutory period had elapsed, can have the effect of causing this complaint to be considered as having been presented at his instance within the period prescribed by the statute. 1804, February 24th. Gray against Spens. Morr. App. No. 14."

No interlocutor was pronounced declaring the record to be closed; but the case having been taken up by the First Division of the Court on the 11th March, 1826.

the following interlocutor was pronounced:—"The Lords having advised, etc., dismiss the petition and complaint in so far as it is made by Hugh Arbuckle, and decern, etc."

Against this judgment the Appeal was presented.

[637] For the Appellants: Dr. Lushington and Mr. W. Adam.

For the Respondents: Serjeant Spankie and Mr. Alderson.

For the Appellant it was contended that a warrant may be implied. Stair, B. i. t. 12, s. 12. Ersk. B. 3. t. 3. s. 33. L. 18. 53. Mandat. Stair, February 23, 1667, L. Rentoun, Diet. 9395; and that the rule as to warrants, relates only to foreigners, or natives domiciled abroad. *O'Haygen v. Boyd*, Diet. 1611. *Hope v. Mutter*, Id. 4616. 10th June, 1797. Ivory Proc. Vol. 1. p. 163. *Scott v. Gillespie*, Shaw and Dunlop's Rep. Vol. 2. p. 165. *Ewing v. Hare*, Id. Vol. 2. p. 534. *Stewart v. Middleton*. *McInnes v. McColl*, June 13, 1813, F. C. No. 84.

The Respondent's counsel cited the authorities quoted in argument, in the Court below (*antè*, p. 635): and Fitzherbert, Nat. Brev. 25. 55. Geo. 3. c. 181. Huber, 657. Oughton, Ordo tit. 48. p. 81. Balfour Pract. 299. Bankton, B. 1. tit. 3. s. 25. 26. *Melville v. The Earl of Perth*, Diet. 355. *Earl of Marchmont v. Home*, Id. 358. *Re v. Cudlipp*, 6 T. R. 503. *Re v. Trevenen*, 2 B. and A. 339. 479.

The Lord Chancellor (22d Feb.): In the cause in which Hugh Arbuckle was Appellant, and Campbell Innes and several other persons were the Respondents, the question was whether Mr. Arbuckle, who was absent at the time, had given authority for the institution of certain proceedings upon the election, of which he complained and the case having been heard before the first division of the Court of Session, the Court ex-[638]-pressed their opinion in the following interlocutor. "Having advised, etc., dismiss the petition and complaint, in so far as it is made by Hugh Arbuckle; and decern, and find him liable in one half of the expenses incurred in process, in terms of the statute." The Judgment expressed in this interlocutor, proceeds upon the opinion of the Court of Session, that it was necessary Mr. Arbuckle should prove that he had given mandatory for the institution of suit.

This case, in my Judgment affords a question of very great importance, in every way of considering it; but in a case of this nature, in which it appears to me that the Court of Session, in all human probability, must understand a matter of practice of this sort better than we can understand it, and there being great inconvenience, either in holding that they are right, or that they are wrong, I cannot form so clear an opinion that they are wrong, as to take upon myself to advise your Lordships to reverse the Judgment. I should, therefore, propose that the Judgment should be affirmed, and that the cause should be sent back to the Court of Session, to proceed as to the matter of James McBain, the other party according to the reservation in the interlocutor, as they should be advised. Having stated this, as my Judgment upon this extremely difficult question, and as there are great difficulties in adopting the one or the other view of the case, it does not appear to me, that this is a case in which your Lordships ought to give costs.

(1827.) Ordered and adjudged, that the appeal be dismissed, and the interlocutor, so far as complained of, affirmed; and it is further ordered, that the cause be remitted back to the Court of Session to proceed therein, with respect to the complaint made by James McBain, as shall be just.

[639] TOD and others. Appellants; TOD and others. Respondents. *Et c Contra*

[Mews' Dig. iv. 854, as to appeal for costs. See now Judicature Act, 1873, s. 49 and notes thereto in *Annual Practice*, 1901, ii. 139.]

An election of Magistrates in a Royal Burgh, which takes place under a warrant from the crown restoring the Burgh, is an annual election within the meaning and provisions of the 7 Geo. 2. c. 16, s. 7, and 16 Geo. 2. c. 11, s. 22.

An action of reduction and declaratur at common law, to set aside the proceedings, may be competent; but it must be brought within the two months prescribed by the statutes.

An appeal will not lie for costs only, where costs are in the discretion of the Court; But where the Court is directed by an Act of Parliament to give costs,

it is a proper subject of appeal if they are not given according to the requisition of the Act.

The Lord Chancellor : * If this were a question arising upon the law of England, there would be no doubt about it, for I do not apprehend that a statute which gave a summary complaint, is a statute which would take away the common law remedy, but the case of *Young v. Johnson* (Jan. 1766 : Wight, p. 339), in the House of Lords, at a date pretty nearly contemporaneous with the statute, appears according to Mr. Wight's note of it, to have decided, as it has been alleged from the bar, that the action of reduction must be brought within two months. Now, I cannot satisfy my mind on what ground it should be held that the action of reduction should be brought within two months, unless the statute related to actions of reduction as well as [640] summary complaints. Considering the nature of the evidence as we find it in the printed cases in the House of Lords, and that there is not a single word that would support the judgment in that evidence unless it was given upon the point, whereas, on the other hand, that point does not appear to have been mentioned in the printed cases, there appears to be something hanging about that case, which makes it look very much like an authority of the House of Lords upon the point. Whether that case which has been so represented as of authority has been well decided, is a matter which I apprehend this House could not trust itself to examine.

This is an action of reduction and declaratur for setting aside the proceedings at an election, which were had in consequence of His Majesty having been pleased to restore the Burgh of Pittenweem. It has been very much discussed in the papers as well as at your Lordships' bar, whether this was to be considered as within the meaning of the words of the Act of Parliament, an annual election ; whether it was to be considered as a proceeding to be distinguished by majority and minority. Strictly speaking, on looking at the numbers, John Tod, and ten other persons made eleven, and James Tod, and ten others made eleven also, so that you can hardly call it a majority or minority.

But the question is, whether regard being had to the nature of the proceeding this is not within the term, intent, and meaning of the Act of Parliament to which reference has been made ; and on the best consideration I can give to the subject, I think that although this was an election held in consequence of His Majesty's restoring the Burgh ; and although there was this most unseemly diversity of opinion, and very singular conduct in the proceeding when the [641] election was had, yet that still it is to be considered as an annual election, and a complaint within the intent and meaning of the statutes.

Then, the question is reduced to this, namely, whether it is competent to bring this species of action, which is an action of reduction and declaratur, after eight weeks or two months have expired since the election, and before the institution of the proceeding. On the one hand, it has been contended, that this is not to be considered as a proceeding under the statutes which regulate the election of councillors and other persons, at these Burgh meetings, but that it is to be considered as an action brought according to the common law of Scotland, and that being an action brought according to the common law of Scotland, there is no statute which ought to be considered as a bar ; and I have no hesitation in stating that if we were here to judge of the law of Scotland upon English principles, which we ought never to do, and which I believe we have never intentionally done, that it might be a difficult thing to say, where a special proceeding is provided by Act of Parliament, and without words excluding the general operations of the common law, that that general operation of the common law would be to be considered as taken away ; and yet I cannot go the length of saying, that if there are statutes *in pari materia*, you may not infer such a shutting out of the remedy under the common law without any expression in the Act of Parliament which you have to construe.

But I find in this case a difficulty which I apprehend is quite insuperable, because my humble opinion is, that this point has been already determined by your Lordships, and that we cannot now alter it, whatever might have been our opinion

* The facts of the case appear in the opinion delivered by the Lord Chancellor.

upon the question, [642] whether this common law jurisdiction was shut out or not, by these special provisions.

The case of *Johnston v. Young* (January, 1766, in the Court of Session, D. P.), has been alluded to, together with the authority of Mr. Wight and Mr. Bell. With respect to the first named of the gentlemen, I think I am old enough to have had the honour of practising along with him at your Lordships' bar; and that he was a very great authority upon these subjects, nobody can deny; nor did I ever hear any dispute, with respect to the correctness of his representation as to matters of law in which he had been concerned. I need not state to your Lordships who Mr. Bell is, because you are all aware that he is a person whose authority is of considerable weight, though still he is a gentleman practising at the bar.

Upon looking at the case of *Johnston v. Young*, I have not been able to find that there is one word in the printed cases upon the subject; and yet it would be extremely difficult, upon looking at the evidence in that case, to conceive how this House could have made the decision which it has, unless the decision that it made went upon a ground that formed no part of the allegations in the printed case, or the evidence; and accordingly Mr. Wight has recorded in his work that the reversal in this case went upon a ground neither mentioned in the Court of Session in Scotland, nor mentioned in the printed cases laid upon your table; that it went upon this ground, that the action of reduction was competent, but still that it must be brought within two months.

It has been supposed that there is some mistake upon that subject, but when we come to look at a subsequent case that is to be found, which has been decided by your Lordships, it appears to me that it is quite impossible to contend with any hope of [643] persuading the House that Mr. Wight is mistaken as to that fact. It was a case which was heard at your bar in the year 1785, in which Robb Miller and others were Appellants, and Thompson and others, magistrates and councillors of the Burgh of Anstruther Wester, were the Respondents. In the printed case, in that proceeding this reason is stated, "Supposing it were competent to the Appellants, though not constituent members of the council of Anstruther Wester, to insist in the present action, yet as the Acts of 7th and 16th of his late Majesty have expressly limited the time for preferring actions or complaints to two months after the election complained of, and the present action was not brought till near twelve months after the election complained of, it is therefore incompetent, and could only have been brought with an intent to create trouble and confusion at the Michaelmas election, which was to come on a few days after the summons was raised, the prevention of which was the principal object of the statutes." Then this reason, which has the signature of Mr. Wight, goes on, and it may be considered, therefore, that this representation was made to this House with respect to what it had done in the case of *Johnston v. Young*.—"This point has been already determined by your Lordships, who reversed a judgment of the Court of Session upon this single ground, and that, though in a case where a complaint of the same election had been brought within two months, but had been dismissed on account of a mistake in the name of one of the Defendants, after which an action of reduction, similar in form to the present, was brought by several constituent members of the council. No objection was taken to the action in the Court below, nor in the cases upon the appeal. The Court of Session reduced the election, but upon this objection [644] being taken at your Lordships' bar, your Lordships reversed the decision of the Court below without even going into the merits of the case, upon the single ground, that the intention and purpose of the Acts above quoted, was to form a code for the election of magistrates and councillors in Scotland; and while it gave remedies in cases where there was formerly no remedy, it also cured evils which arose from the old laws; and among the other evils the Act intended to remedy, there was no greater than that it was in the power of persons, by bringing actions of declarator and reduction, to reduce elections made many years before and long after the persons whose elections were complained of, were out of office. This question was very fully entered into by your Lordships, and has ever since been understood to be finally settled," and in that case also the appeal was dismissed.

When we are looking at these statutes, which are all made *in pure materia*, it would be a very singular thing to say, that though the magistrates and councillors are

in the form of action required under these statutes to proceed within eight weeks, yet that there is another form of action at common law, in which they need not proceed for eight years, or any given time. I look upon it, therefore, that these cases of *Johnston v. Young*, and *Robb Miller v. Thompson*, decide this point; and I dare not venture to give your Lordships any advice which shall militate against the decision of this House pronounced in those cases.

There is a cross appeal which I feel some difficulty how to deal with. That is about the costs. That those costs should have been given is pretty clear. This House never does entertain an appeal for costs where costs are in the discretion of the Court below; but where the legislature, by statute, has expressly [645] required that the Court of Session, in the case of an action which is brought under the authority of that statute, and in the case of a summary complaint which is brought under that statute, shall make the party who fails pay the full costs of suit, it appears to me, that the party is in fact entitled to full costs of suit, and that being so entitled to full costs of suit, the Court below ought, by their judgment, to have given full costs of suit unless they were prepared to say that this was a case out of the statute. If it is a case out of the statute, it would be a question of discretion, and therefore no appeal would lie; but on the other hand, if this is a case within the intent and meaning of the statutes to which I have referred, it appears to me that the costs ought to be given. The great difficulty is to decide in what form we are to give that judgment. Being desirous that we may be quite right, I would propose that I should have the opportunity of seeing the agents before I move your Lordships to proceed to judgment in the precise terms in which it should be entered. I am, however, of opinion, that this judgment ought to be affirmed, and in some way or other this House must take care to provide that the party who has not failed shall have full costs of suit paid to him by the party who has failed.

(20th March, 1827.) Ordered and adjudged, that the interlocutors complained of in the original appeal be affirmed, except in so far as it omits to give costs; and it is declared, that the Respondent ought to have had the costs of proceeding in the Court of Session, according to the true intent and meaning of the statutes, relative to proceeding in such cases; and it is further ordered, that the cause be remitted back to the Court of Session, to do therein as shall be just and consistent with this declaration; and it is further ordered, that the said interlocutor, so far as complained of in the cross appeal, be reversed.

[646]

(SCOTLAND.)

COURT OF SESSION.

GARDNER and others,—*Appellants*; REEKIE and others,—*Respondents*.

In corporate bodies the form of election is of the substance and essence of their constitution. Upon a petition to the Court of Session, against the election of Magistrates for a Royal Burgh; if it should appear that the proper form of Election has not been observed, it is not competent to the judges to sustain the Election, upon the ground that the result is the same as if the form had been observed.

The constitution of a Burgh in Scotland may be altered by a uniform usage of Forty years. *Semb.*

The Lord Chancellor* (10th March, 1827): This case depends very much upon the question, whether there has been any such usage for any given period of time, as has altered the sett of the Borough, with respect to the mode of carrying on elections. If it depended upon this, that the same persons appeared to be elected in the form in which the election was made, as might have been elected in that form, which if there had not been a usage, would have been the prescribed form, it does not appear to me that the consideration, that the same persons had been elected, would by any means support the election, because I take the form of the election to be of the essence of the election, and more particularly if there are special officers, who are to name individuals, out of which individuals a choice is to be made by the general electors.

* See the facts on which the question arises stated, *post*, p. [649], and *seq.*

I take it to be a principle of our constitution, and I think the Scotch courts follow the principle, that there is first to be the judgment of particular individuals recommending other individuals and then to be a choice by the electors, in general out of those individuals who are so recommended; and I cannot conceive, at least according to any English doctrine, that if nine individuals are proposed, out of whom the whole body of electors are to chuse, that the mere circumstance that they happen to chuse three, who might be the same individuals, if instead of there being one list of nine, there had been three lists of three, out of each of which lists the general body of electors were bound to chuse one: I do not apprehend that the circumstance of the election falling upon the same individuals, if it could be demonstrated that it would have fallen upon the same individuals in either case, would support an English election; because, if the constitution of a Burgh election is, that the individuals who are to name those respective lists of three, have a duty to give a protection to the proceeding which is to place in the situation of Magistrates the individuals who are to be chosen, the mere accident if there is one list of nine, instead of three lists of three, of the same individuals being recommended, by those who had a duty according to the constitution imposed upon them, of pointing out in the first instance who are the individuals that they think ought to be trusted, those out of whom the choice should be made, is not sufficient: I think the departure from that form which would be considered in our courts as of the essence of the proceeding, if it were challenged, would not stand.

It remains, however, to be examined most carefully [648] and most industriously, whether there be any such usage or not, as that which is said to have varied the sett of the Burgh; because, if the usage does not exist, if there has not been a consistent usage for a certain number of years, (I think the law of Scotland requires forty,) if a usage has not existed which varied the sett of the Burgh, no question arises, and I entertain very considerable doubt upon this whether it has, or has not been too hastily taken for granted that no further proof should be entered into before the decision was made in the court of Scotland. Having just broken this subject, I will proceed, on the second day of causes in the next week, to propose the judgment in this case.

The Lord Chancellor (19th March): In this case of *Gardner v. Reekie* the question is, whether nine persons should be named from among the Burgesses at large, out of which there were three to be chosen, or whether there should be three lists of three persons, from each of which three lists one individual should be named. After again thinking on the subject I am satisfied upon two points: first, with respect to a usage which is not exactly conformable to the sett of the Borough but which is a mode of qualifying the proceedings in carrying into effect what the sett of the Borough requires, it is necessary to enquire whether there is a clear usage of forty years of delivering three lists of three each; and if that fact could be established, that there was a clear distinct usage of forty years, then the circumstance that in this case it happened that the same individuals probably would have been chosen if there had been three lists of three, as were chosen out of the one list of nine, does not make it a good election; for it is clear that if the three old Baillies were, [649] according to the usages of the election, each of them to name a list of three, comprehending in each list themselves, and two other persons, and that out of the first of those lists an individual should be chosen, which individual should be one of the Magistrates in the next year, and that out of the second list another individual should be chosen, who should be another Magistrate in the next year; and that out of the third list another individual should be chosen, who should be another Magistrate in the next year, the constitution of the Borough, so looked at, would authorize us, or indeed require us to say that there was a duty devolving upon the old Magistrates, to take care to name distinct individuals who should be the objects of choice by the Burgesses at large; and their not having exercised that duty will not permit of this answer being given, that the same individuals were chosen as if they had exercised that duty; because in that mode the election could not have that sanction which under that rule it was intended to have. I come, therefore, to this conclusion, that it is advisable, before you proceed to judgment in this case, to see whether there was before the Court of Session clear proof, that such a usage was established. On Friday morning I intend to give my final opinion on this case.

The Lord Chancellor (23d March): In the cause of *Gardner v. Reekie* it became necessary, upon reference to the circumstances of the case, to see the agents on both sides, which I have taken an opportunity of doing.

The question in this case arises upon the election of the Magistrates and town council for the Burgh of Kilkenny in the year 1823. In the sett of the Burgh the form of the election is stated thus: "first of all the [650] Baillies," (of whom there are three) "give in their leet of nine persons, whereof they themselves are always three, out of which they are to choose the three Baillies for the year ensuing, and the treasurer gives in a leet of three persons, whereof he himself is always one: out of which they are to elect the treasurer for the said year, which being read over in presence of the council, and approved of by them, is read publicly in an audience of the Haill Burgesses, who are to vote. This being done, the clerk is appointed to sit in the council-house and mark the votes, there being always one of the council appointed to see his right marking, and accordingly first the Baillies, then the Treasurer, Council, and thereafter the Haill qualified Burgesses, one by one, give their several votes for the Baillies and Treasurer for the said ensuing year; and the persons chosen by plurality of votes, together with the new council, immediately convene within the council-house, and accept of their respective offices, and give their oaths *de fidei administratione*, the same being tendered to the three Baillies by the clerk, and by them first to the Treasurer, and then to the Council, which being done, they adjourn."

In this case a complaint was made against the election on two grounds: first, that the leet of nine given in by the Baillies, was not subdivided into three leets. Your Lordships will observe that according to the original sett of the Borough, which I have read, the Baillies are stated to give in one leet of nine persons, out of which three Baillies are to be chosen for the year ensuing; but the Complainants insist that instead of a leet of nine being given in, there should be a subdivision into three leets, "the first containing the name of the first Magistrate of the former year, and two other names, from which alone the new first Ma-[651]-gristrate should be elected; the second containing the name of the second Magistrate of the former year, and two other names, from which alone the new second Magistrate should be elected, the third containing the name of the third Magistrate of the former year, and two other names, from which alone the new third Magistrate should be elected. They alleged that there had been a usage to that effect." This allegation that there had been a usage to that effect, as to the importance of it, depends upon this, whether admitting that the sett of the Burgh in 1710, was of a certain nature, there has been a usage—a uniform usage—such a usage, as would amount to a regulation of the mode of election, from and after the time that that usage took effect by continuance, which would, in the respect I have mentioned, admit of being considered as having become a valid modification of the sett of the Burgh, or a valid alteration of the sett of the Burgh.

There was another ground taken, namely, that the oath against bribery and corruption had not been properly administered. I do not think that it has been successfully contended at the bar, that the case proves any thing like what would be enough, (if any thing could be enough) to set aside the election, and therefore I need not trouble your Lordships any further upon that part of the case.

All that we have heard from the bar with respect to the opinion of the learned Judges, who decided this matter in Scotland, before whom it was brought by petition is, that they were of opinion that an election which produced the same result by one leet of nine persons, as would have been the result if there had been three leets of three given in according to this modified sett of the Burgh, was not subject to ob-[652]-jection. Now attending to what is necessary to be done in this case, I cannot think that it would be right to proceed as stated in the Judgment, upon a representation of that kind. I should certainly feel strongly disposed to say, (and I think I am right in that, unless my mind is influenced by English principles more than it ought to be with respect to a Scotch case,) that according to my notion of the matter the identity of the result, if the form of the election has not been right, would not make the form of the election or the election good: because I take the form of the election in these corporate bodies to be of the substance and essence of their constitution: and if the result upon which the choice is made of three persons, out of one leet, might in some cases be exactly the same as the result when the choice is made of three persons, out of three leets, upon reasoning as applied

to corporate acts it might be clearly shewn that such might very often not be the case, where the proceeding was in truth upon one leet of nine, instead of being a proceeding by three leets of three: in the one case three individuals recommending each a separate leet, and in the other case three individuals recommending one leet, and not three separate leets. I think it might be so clearly shewn that in many cases the result would not be the same, that at least according to our laws of election, and the way in which we should treat the subject here it would be impossible to say, that the casual identity of the result would render such an election good.

But in order to see whether you can get at that question you must look at another question, and you must look at the effect of the evidence in the cause. I cannot collect, either from what is in the printed papers or from what has been stated at the Bar, that we have [653] had the opinion of the Court of Session upon the point I am now alluding to. If I must give an opinion I should say, without having been better assisted upon that point, that if there was a clear uniform usage for forty years together, which forms a kind of prescription in the law of Scotland, according to which uniform usage they have proceeded by three leets, composed by three Baillies, instead of proceeding in the old mode of one leet, according to the sett of the Burgh in 1710, that that uniform usage made out distinctly in point of evidence, and shewn by evidence to have existed, might, according to the law of Scotland, either be considered as such a modification of the sett of the Burgh, or such an alteration of the sett of the Burgh, as that it ought to be proceeded upon as the true construction of the sett of 1710, or such an alteration as might be available according to the law of Scotland; but notwithstanding I have said thus much, in the result it is not my intention to prejudice either of the questions of law, upon which I have taken the liberty to say a word, or two.

If I understand the course which the case took in the Court of Session in Scotland, it does not appear to me that the Court went so far as to enquire whether there had been such a usage, or to give any judicial opinion upon the question of what would, or what would not be according to the law of Scotland, the effect of such a usage, the Court of Session being of opinion that the result being the same, therefore it was unnecessary to enquire any further. I am afraid that, according to our laws, we can not go on in such a state of the cause; and that it is necessary to do that, which, for various reasons, I have a great objection to doing, I mean to remit this cause back again to the Court of Session, with a direction that they should enquire whether [654] there is in this case sufficient proof, or whether, according to their practice, sufficient proof can be given upon a further enquiry by referring it to a Jury, or in whatever other way, that for the period I have mentioned there has been a clear uniform usage to substitute three leets instead of one leet, and that they should enquire what, according to the Scotch law, is the effect of that usage, either in modifying or in altering the sett of the Burgh. If the proof that is given is not sufficient to make out that there has been such a consistent and uniform usage for such a given period (if any given period be sufficient) as would amount to a valid modification of the sett of the Burgh, or an alteration of the sett of the Burgh, then to be sure, if the question is to be decided upon the want of evidence of that usage, that would make it unnecessary to determine the point of law that would arise if there were distinct evidence of such a uniform usage. On the other hand we are not informed here, whether if it should turn upon the question of insufficient evidence, it would be the bounden duty of the Court, according to their practice, to enquire further into the fact of the usage, or the means which they would adopt in order to give themselves the benefit of such further enquiry.

23d March, 1827. Ordered, that the cause be remitted to the Court of Session to inquire, whether any and what usage differing from the sett of the Burgh has taken place as to the form or number of the leets and mode of election of the three Baillies of the said Burgh, and for what length of time such usage has prevailed, and whether, having regard to the nature of such usage, (if any shall be found upon such inquiry to have taken place) and the length of time during which it shall be found to have prevailed, such usage ought, according to law, to be considered as modifying or altering the sett of the said Burgh, as to the form or number of the leets and the election of Baillies; and after such consideration and inquiry, to proceed further upon this petition and inquiry as is just.

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SCOTLAND.

(COURT OF SESSION.)

JOHN DICK.—*Appellant*: JOHN DONALD, (deceased) and, by Revivor,DONALD CUTHBERTSON,—*Respondent*.

[Adopted in *Southby v. Hutt*, 1837, 2 My. and Cr. 219; and see also *Upperton v. Nickolson*, 1871, L.R. 6 Ch. 443; *In re Johnson and Tustin*, 1885, 30 Ch. D. 42; *In re Moody and Yates' Contract*, 1885, ib. 349; *Truitt v. Cannon*, 1877, 5 Rettie, 25.]

A., the wife of a bankrupt, her husband being abroad, without the consent of her husband, or a legal ratification by herself, conveys to Trustees under his sequestration, lands of which she was seized to her and her heirs. Upon a sale of these lands by public roup, the vendor by the articles of roup undertakes to execute to the purchaser a valid irredeemable disposition of the subjects as described in his own or constituent's title thereto. He also thereby undertakes to deliver certain specified deeds, etc., which are described as "all the title-deeds of the property in his custody." Upon a suit by the vendor to enforce the payment of the purchase money, and a proceeding for suspension by the vendee; held, on appeal reversing the judgment below, that it is not such a title as a purchaser is bound to accept, and that the title is not limited by the terms of the articles of roup.

The appeal in this case related to a question of the title to a small property, which was exposed to sale by the Respondent, as trustee on the sequestrated estate of James Corbet, a bankrupt, and was purchased at a public roup by the Appellant.

By the articles of roup, the exposor bound himself to execute and deliver a valid irredeemable disposition of the subjects, as described in his own or constituent's title thereto, upon the usual terms, and [656] to deliver to the purchaser the disposition and instrument of sasine thereon in favour of Mrs. Janet Gillies, and the disposition by her in the exposor's favour, with the instrument of sasine thereon, "which are all the title deeds of the property in his custody."

Mrs. Janet Gillies was wife of James Corbet. The lands in question had been conveyed by a disposition dated the 14th of April, 1813, to the wife of the bankrupt, Janet Gillies, her heirs, and disponees.

Upon this disposition, she was infeft, and her infeftment was recorded on the 16th of April, 1813.

After the sequestration of the husband, by a disposition reciting that her husband had purchased the land when he was insolvent, Janet Gillies conveyed them to the Respondent.

On the 31st of January, 1817, the Appellant purchased the property, at the price of £1300, being the upset price.

The Appellant was bound by the articles of roup, to give bond for the price, but that condition was waved; and it was agreed between the parties that the price should be paid, and the title granted immediately, without entering into the bond. A draft of the disposition was accordingly sent to the Appellant's agent, with the relative title-deeds for the purpose of revisal. Upon perusing these deeds, objections were taken to the title, and the Appellant refused to proceed with the purchase. Upon this the Respondent insisted that the Appellant should find caution, which he refused; and being charged in virtue of letters of Horning at the Respondent's instance to grant bond in terms of the articles of roup, he brought a suspension of that charge.

The reasons of suspension were, *inter alia*, 1st. That the trustee, before he could call for payment of [657] the price, must produce a legal and valid title to the property, which he had taken upon him to sell: 2d. That the disposition by Mrs. Corbet to the trustee, without the consent of her husband, and without a legal ratification by herself, was not a valid and indefeasible title, but was a deed in itself null and void, and which might at any time be recalled or brought under reduction, by the grantor or her heirs or creditors, or even by her singular successors,

to whom she and her husband might afterwards concur, in giving an effectual right to the property.

The Court of Session held that the Respondent was not bound at the expense of the bankrupt estate to make any addition to the title offered by him, but that he was bound at the risk and expense of the Appellant, to concur in any supplementary title which he might wish to have executed.

The appeal was against this decision.*

For the Appellant: Mr. Shadwell and Mr. Campbell.

For the Respondent: Mr. W. Adam and Mr. Abercrombie.

For the Appellant, upon the general question the following authorities were cited (Arg. 26th Nov.):

Rowan v. Cochrane, Dict. 14178: a case where the buyer engaged, by the conditions of roup, to accept a specified title. *Nairne v. Seruingeour*, Dict. 14169: a decision that a buyer is not bound to accept warrandice to supply a defective title. *Lockhart v. [658] Johnson*, Dict. 14176: that a purchaser is not bound to complete his purchase where the power of the vendor of tailzied lands was doubtful. *Tait v. Lord Maxwell*, Dict. 14177: that a purchaser of lands under a tailzie not recorded, might suspend the minute of sale.

As to the disposition, by the wife to the husband, the Appellant made two objections, viz. 1st. That it does not bear to be granted with the advice, or by the consent or concurrence of her husband: and 2dly. That it was not ratified by Mrs. Corbet.

Upon this head the following authorities were cited: The *Regiam Majestatem*, "*de pactis utilibus et inutilibus*," where the law is laid down in these words, "*Sunt etiam pacta inutilia, ut in viro et uxore, ubi uxor nihil potest ducere in pactum, sine auctoritate viri sui*." In the *Quoniam Attachiamenta*, it is said, "*Nulla foemina virum habens potest nec debet, sine viri sui licentia, dare aliquid vel vendere de bonis suis, ultra valorem quatuor denariorum*." Craig, treating of those "*qui feudum dare possunt*," says: "*At qui liberam rei suae administrationem non habent, ut nec alienare, ita nec in dare possunt. Nam ubi alienatio rei suae aliquibus interdicta est, sive à lege, sive à iudice, hi nec feuda possunt concedere. ITAQUE NUPTA SINE VIRI CONSENSU NON POTEST, neque papillus, omnino, neque prodigus, neque furiosus, neque ullus alius qui veri consensum non habet*." "So Stair, by the same custom of Scotland, the wife is in the power of the husband; and, therefore, first, the husband is tutor and curator to his wife; and, during her minority, no other tutor or curator need to be concerned, or concur to authorize her." Lord Bankton, speaking of the rights and duties of a husband, says: "As to the wife's person, he is her [659] curator; the wife, though major, being always *sub cura mariti*, or under coverture; and, if she was minor at the time of her marriage, having other curators, their power ceased, and is by law transferred to the husband. It is on this ground that the wife cannot subscribe deeds *inter vivos*, without the husband's concurrence to authorize her, even though they respect only her own heritage, to take effect after dissolution of the marriage."

Erskine says: "It also proceeds from the curatorial power of the husband, that all deeds done or granted by a wife, without his consent, are in themselves null, though they should relate to her own property, and make no encroachment on any right competent to the husband. The rule that wives are under the curatory of their husbands, is applicable even to brides; for, though a bride be truly *sui juris* while she continues unmarried, yet on her actual marriage, the husband's curatorial powers draw back to the time of proclaiming the banns, after which, the bride is disabled from contracting debts, or granting deeds, not only to the prejudice of her future husband, but her own. She cannot, therefore, after the proclaiming of the banns is begun, contract any debts which will be effectual, either against herself or the bridegroom, nor can she dispose of any part of her estate by donation, or even as a provision to the children of a former marriage without his consent." And,

* Pending the process the Respondent offered to procure an adjudication of the subjects in question, declaring them to belong to the estate of the bankrupt; and he procured a deed executed by the bankrupt confirming the disposition of his wife to Donald, and also a judicial ratification by her upon oath.

speaking of the curatorial powers of the husband, Erskine says: "That if the wife should, without his consent, make a grant of lands, though with the reservation of her husband's *jus mariti*, and the courtesy, the grant would be void, for he is her guardian for the security of her and her heirs, as well as for himself."

[660] It was further argued that the fact (if proved) of the husband being abroad, and his subsequent ratification, did not cure the defect. *Bullions v. Bayne* and *Hepburn*, Fac. Col. 4th Dec. 1793. *Melville v. Dunbar*, Dict., p. 5993: that the conveyance, if, as contended, it was virtually a donation to the husband, was gratuitous, and revoked by the subsequent disposition. Ersk. b. i. t. 6. sec. 29. 31; Stair, b. i. t. 4. sec. 18; Ersk. i. t. 6. sec. 32; Bank, i. t. 5. sec. 102. *Scott against Lady Cranston*, Dict., p. 6108. That the deed could not be considered a donation by the husband to the wife: because it purports to be purchased with her money. Ersk. b. 3. t. 3. sec. 92; and if so, being a provision, was not revocable; Ersk. b. i. t. 6. sec. 30; or reducible as gratuitous under the act 1621; Ersk. b. 4. t. i. sec. 33.

For the Respondent it was contended that the title was limited by the terms of the articles of roup, and was otherwise unexceptionable. The following authorities were cited: *Currie v. Churnside*, Fac. Coll., 11 July, 1789; Erskine's Inst. b. i. t. 6. sec. 27, 29, and 36. *Dr. Clark v. Lady Sharpe*, Dalrymple, 31 Jan. 1717.

The Lord Chancellor (at the end of the Argument): Upon the merits of this case there is no doubt. The Appellant has a right to call for a good and valid title. The question is, whether according to the articles of roup, the purchaser may insist upon a good title. By the mere effect of the contract he is clearly so entitled, unless the right is narrowed by the very terms of the contract. The judges in the court below say, that it is not so good a title as it might be. Some of them admit that it is a doubtful title. One of the judges says, there is no great danger of eviction. The [661] Lord Justice Clerk says, that the purchaser may insist upon a good title. I can see nothing in the article of roup to take away the right. A valid and irredeemable disposition which the articles undertake to give, must be by some person having the right to dispose. As to the condition with respect to the title deeds, I never heard that, because the vendor provides by the conditions of sale that he will give to the purchaser only certain specified deeds, the purchaser must take a bad title, or such title as appears upon the deeds. If there is any thing special in the transaction between the parties, it may be difficult to give judgment on the case, as it appears in the articles of roup. It may be necessary to look carefully into the papers, and see if there is any ground for objection.

(12th Dec. 1826.) Ordered and adjudged that so much of the interlocutor of the 11th of March, 1818, as finds that the Respondent is not bound at the expense of the bankrupt's estate, to make any addition to the title offered by him, but that he is bound at the risk and expense of the representer (Appellant), to concur in any supplementary title he may wish to have executed be reversed: And it is declared that the Respondent is bound to make to the representer a good and valid title, and that the title offered to the representer is not such good and valid title, and with this reversal and declaration.—It is ordered that the cause be remitted back to the Court of Session, to review the several interlocutors complained of, and to do therein as is consistent with this reversal and declaration, and the practice of the Court in proceedings of the nature of that in which these interlocutors have been pronounced.

[662]

SCOTLAND.

(COURT OF SESSION.)

JOHN WILLIAM HENRY, Earl of Stair,—*Appellant*; Sir JOHN DALRYMPLE HAMILTON MACGILL, of Cousland, Baronet, ROBERT DALRYMPLE HORN ELPHINSTONE, of Horn and Logie, Esquire, ANTHONY GOOD-EVE, Esquire, of Gray's Inn, London, and JOHN SMITH, Esquire, Writer to the Signet, Trustees of the late JOHN, Earl of Stair,—*Respondents*.

A., by a trust disposition, directed trustees therein named to lay out the residue of trust funds therein specified, and the interest and proceeds thereof in purchasing lands, which he thereby directed to be settled upon a certain series of heirs named in a deed of tailzie, to which he referred; and afterwards by his will directed that the residue of his personal estate should be invested in government securities, which he gave, together with all the funds, etc., of which he should die possessed, to the same uses as before provided by the trust disposition.

The funds having remained uninvested, held, reversing the decision of the Court below, that after the lapse of one year from the death of the testator, each successive heir of tailzie is entitled to the beneficial enjoyment of the "interest and proceeds" of the funds until invested, and that these words do not import an intention that the interest and proceeds should accumulate for the benefit of the heir who should happen to be intitled at the time when the funds are invested according to the trust.

John, Earl of Stair, by a trust disposition, dated the 18th of December, 1815, disposed to certain [663] trustees, who were the Respondents in this appeal, all and sundry lands and heritages, (other than excepting those contained in any deed of entail executed, or that might be executed by him,) and also all and sundry debts and sums of money, heritable and moveable, owing to him in England or in Scotland, or elsewhere, rents of land, goods, gear, and moveable effects whatever, presently pertaining and belonging to him, or that should pertain and belong to him at his death, with all writs relative to the same, (excepting therefrom the furniture in his house at Culhorn) and that in trust for the uses and purposes after mentioned, and particularly after his debts and legacies were all paid, and a sum set apart for the payment of the annuities, or the same otherwise well secured; he appointed his said trustees and their foresaids to lay out the residue of the trust funds, and interest and proceeds thereof, in purchasing lands in the shires of Wigton, or Ayre, or Stewartry of Kirkcudbright, and at the sight and with the advice and consent of the Lord President of the Court of Session, and of his Majesty's advocate for Scotland for the time being, to annex the same to his entailed estate by taking the rights and securities of the lands so to be purchased, etc., "and under the same conditions, provisions, clauses, irritant and resolute, contained in the disposition and tailzie of his lands of Culquhassen and others, executed by him," and the appointed heirs of tailzie, "and under the conditions aforesaid, and to get the dispositions thereof recorded in the registers of tailzies."

Trustees are then appointed in trust for the uses and purposes contained in the trust deed mentioned, being his sole executors and legates and intromit-[664]-ters, with his whole goods and gear, and other moveables, falling under the testament, (with and under the exceptions aforesaid,) and excluding all others from that office.

Besides this trust deed, which was executed according to the forms of the Scotch law, the late Earl of Stair also left a will drawn up in the English form. By that will, which was dated the 5th of June, 1819, after making certain bequests, he gave the rest, residue, and remainder of his personal estate in England, which should not consist of real or government securities, and directed his executors to convert the same into money, and, after payment of his just debts, to invest such money in government securities; and he thereby gave and bequeathed all such stock, together with all such other stocks, funds, and securities, which he might be possessed of at the time of his death, to such uses and for such purposes as he had, in and by a certain deed and writing, prepared according to the Scotch form, executed by him, and bearing date the 18th of December, 1815, declared of and concerning his personal estate, and as to all estates which, at the time of his death should be vested in him upon any trusts whatsoever, or by way of mortgage, he gave, devised, and bequeathed the same to the Respondents in this cause, according to the nature and quality thereof, upon the trusts and subject to the equity of redemption which, at the time of his death, should be subsisting or capable of taking effect therein. By the effect of these instruments, the whole of the property, except the entailed estates of Lord Stair, under any deed executed by him for that purpose was to be laid out in the purchase of lands to the same uses as the entailed estates of Culquhassen.

[665] John, Earl of Stair, died in 1821, leaving the Appellant the first heir of tailzie and provision.

The question which arose in this cause was, with respect to the proceeds of the personal estate, from the time of the death of Lord Stair, until the whole fund should be laid out in the purchase of lands. The property amounted to £200,000. The trustees invested about £120,000 in the purchase of lands: but as they were by the will directed to invest the whole, the question which was raised was, whether the Appellant was not entitled to the interest from the death of the late Earl of Stair, until the trustees had invested the fund in the purchase of land: or whether, under the words of the trust designation, they were to invest the proceeds as well as the capital, in the purchase of land.

This question came first before the House during the time when Lord Gifford acted as Speaker, in the absence of the Lord Chancellor, upon a suit instituted immediately after the death of the testator. The Appellant in that suit, claimed the interest of the fund, from the death of the testator. Upon this claim, the Court of Session, by interlocutor, dated in February, 1823, decided against the claim. In March, 1825, this judgment was affirmed on appeal, Lord Gifford in moving the judgment (D. P. March, 1825. MSS.), recommending such affirmance, only upon the ground that the claim was made of interest, from the death of the testator; and that, according to the law of Scotland, a year was allowed to the executors to convert the property and provide for the trusts directed by the will.

In April, 1825, the Appellant brought another action, claiming the interest of the fund from the end of twelve months after the testator's death. In Fe-[666]-bruary, 1826, the first division of the Court of Session decided against the claim: because the testator had directed "that the whole produce of the estate, both principal and interest accruing thereon, should be laid out in the purchase of lands; and that it was the first attempt made in Scotland, for having any part of the trust estate allotted to the heir in the mean time, under such circumstances; and also because there had been no undue delay on the part of the trustees, in laying out the trust funds as appointed by the testator."

The Appellant having appealed to the House of Lords against this judgment, upon the hearing of this appeal, Lord Gifford, considering the case as one of very great importance in the law of Scotland, and as it did not appear to him that there were decisions in the law of Scotland ruling the point, moved the House to remit the case to the division of the Court of Session, from which it came for the purpose of their taking the opinion of the Lords of the other division. An order to this effect was accordingly made by the House, in May, 1826 (MSS. D. P. May, 1826).

Upon this remit, with the exception of Lord Eldon and Lord Alloway, the Lords of the two divisions were of opinion, and by interlocutor, dated in March, 1827, decided that the whole interest and proceeds of the fund, were to be laid out in the purchase of lands, and that until the lands were purchased, the Appellant was not entitled under the trust disposition, to any part of the interest or proceeds.

Against this decision the appeal in this case was presented.

[667] For the Appellant: Serjeant Spankie and Mr. Keay.

For the Respondents: Mr. Shadwell and Mr. Miller.

The Earl of Eldon (upon the conclusion of the argument): I propose to proceed on Monday to give judgment in this case. If any of your Lordships have formed opinions already upon the case, yet upon looking back to what was stated by the late Deputy Speaker, Lord Gifford, and looking to the opinions that have been expressed by all the learned Judges, in Scotland, it seems to me that, from a regard to the proper consideration that belongs to such a case, your Lordships should at least take some short time to consider of it before you finally decide. Personally, I am desirous of a short interval: because it is quite impossible I think, in giving judgment in this case, not to refer in some measure to some of those decisions which were pronounced by me when I had the honour of holding the Great Seal in the Court of Chancery:—not for the purpose of doing what I must ever protest I have been most anxious to avoid, namely, determining that any case which belongs to the law of Scotland should be affected, because we have adopted a rule, or have adopted a particular mode of administering the law in England: but for the purpose of considering what were the real principles of those cases, and whether, regard

being had to the law of Scotland, they will or will not authorize us to say, that, according to the law of Scotland, this demand can be sustained. It is for that reason that I should rather wish that the opinion of the noble and learned Lord (Lord Redesdale) who is now in the House attending the hearing of this cause, should be [668] given, before I address your Lordships on the subject; because I may possibly have some impression which his observations may correct. In my opinions, I keep in view the distinction between what is the law of England, and what is the law of Scotland; because I apprehend this case must be decided, not according to the law of England, but according to the law of Scotland. Still, the question will result to this, whether in this particular case, if it were an English will, instead of being a Scotch will, the rule of the law of England will not be the same as the rule of the law of Scotland; and whether the converse of that is not true, that the rule of the law of Scotland is the same as the rule of the law of England, and whether this view may not be taken, not for the purpose of adopting the rule of the law of England, but the rule of the law of Scotland. On these grounds I trust your Lordships will not think it inconvenient that the judgment on this cause should be postponed to the sitting of this House on Monday morning.

Lord Redesdale: I have viewed this case as important in point of principle, for this reason, because, in the argument at the bar, it has been conceived on the part of the Respondents, that there was some inclination to make that which was the rule, adopted by a Court of Equity in England, the rule of the law of Scotland. Now, I apprehend, that this case is to be decided simply upon the intent of Lord Stair, expressed in the instrument which he had executed. That instrument is to be construed so as to carry into effect the principal intent, and the intent is not to be inferred from that which he has not clearly expressed. The doubt which I have upon my mind, particularly upon this subject, is, whether the judges of the Court in Scotland have not added words to [669] this will, which are not in the will; whether they have not to the words "interest and proceeds," added the words "until an investment shall have been made;" it appears to me that in the construction they have given to this will, they have added those words. I have found it difficult, viewing the will, to conceive how that addition can be made to those words. If they are so strongly expressed that it is impossible to give them a different interpretation, to that I must submit, but I cannot find any thing from which I can collect such an intention on the part of the testator. There is another part which I think has been very much overlooked, if I may use the expression, in what has fallen from the learned judges, who decided the case in Scotland. I conceive they have overlooked that which I should have thought the clear rule of the law of Scotland, in construing a disposition of this description, namely, that they are to look to the main intent of the person making the disposition. The main intent appears to be in the view I have taken of it, (subject of course to further consideration,) that his personal estate should be applied for the purpose of creating a property that should go in succession to the several heirs of entail, of a particular estate which he describes, and he means that all his lands, exclusive of entailed estates, should go in the same way. Now it appears to me, therefore, that the will should be construed according to the law of Scotland, as laid down by Lord Stair, the disposer. It is meant for the equal benefit of all the several heirs of entail, and not the preference of one to another.

I have also called to mind circumstances which have occurred in other cases; for instance, that relating to the late Duke of Queensberry's property. The late Duke of Queensberry's property was in litigation for [670] a greater number of years than this; he had made a similar disposition with that which is made in this case. The principal object in that disposition, the creating a settlement of lands to go with his entailed estates, according to the doctrine of this case, would, during all that period of time necessarily have been defeated. Now I think that, in construing a will, you must consider those subjects as operating to defeat the principal intention, which are wholly out of the control of the testator himself, and which he does not mean should control his disposition, and upon that ground therefore it seems to me, that I must look, in judging of this instrument, to what was the main intent of Lord Stair. The main intent of Lord Stair seems to me to have been, to convert his personal estate, and any lands which he should have, and which were

not subject to a particular entail, into lands to be settled upon the same heirs of entail who were included in the disposition which had been made of the particular lands to which he refers: now that intent cannot be carried into execution in the manner in which this instrument appears to me to have been construed in the Court below:—that is a difficulty which strikes my mind; I should certainly wish to give more consideration to that subject, and more especially as the Courts in Scotland appear, with the exception of two of the judges, to have been of a different opinion.

I believe that it is as much the law of Scotland as of every other country, that, in construing a disposition of this description, you are to look to the main intent of the person who makes such a disposition, and that you are not to look at the particular words and expressions, unless they are clear, plain, and explicit, or that you cannot give them another construction. As to the words “interest and proceeds,” it [671] appears to me that unless you add words not in the will, they cannot have the construction attempted to be given by the Courts in Scotland. Under these circumstances I shall certainly consider this case until Monday next, and on Monday I should wish more at large to give my opinion upon the subject.

Although my noble friend may think it necessary to advert to the cases which have been decided, and particularly those decided by himself in the Courts in England, I shall lay those cases wholly out of my consideration, and I shall do so for this reason, that it may be understood, whatever opinion I may form upon the subject, that it is not guided at all by those decisions—I mean any otherwise than as I would guide my decision in this case, by reference to a decision in any foreign Court of justice. In the decision of all cases, we frequently refer to what are the opinions of judges. To the decisions in the Roman law, the Courts of Scotland pay great deference in the rules which they lay down. For what reason is that? It is, because they conceive that what has been the judgment of persons of considerable learning and discretion in other countries, is a very good ground for guiding the decision in a country where there is not a positive rule laid down upon the case. If there had been here a positive rule in the law of Scotland, laid down upon the subject, to that it would be the duty of this House to defer; but where there is no such positive rule, and you are to decide entirely upon the circumstances of the particular case, then I conceive the use that can be made of decisions of that description, is entirely to guide our own discretion, not as decisions, but as the opinions of learned men upon the particular subject. Under this impression I wish to give the subject fur-[672]-ther consideration: my present opinion upon the subject is, that there has been a mistake in construing the intent of Lord Stair, which is to be collected from the disposition he has made.

Lord Redesdale: The question in this case is upon the proper construction of this instrument, and it appears to me that the Lords of Session in Scotland have mistaken the meaning of the disposition of the late Lord Stair. They have supposed that Lord Gifford acted upon an analogy between dispositions of this kind in England and dispositions of this kind in Scotland, and they seem to think that it was a sort of attempt to make what they call the Scotch law conformable to the law of England. It seems to me that they have totally mistaken the subject; the question is not a question of law, the question is a question of intent. What was the intent of the late Earl of Stair? The late Earl of Stair has unquestionably used these words:—that he gave “all his personal property, after his debts and legacies are all paid, and a sum set apart for payment of the annuities, or the same were otherwise well secured, appointing his trustees to lay out the residue of the trust funds, and interest and proceeds thereof in purchasing lands.” But the interest and proceeds are not expressed definitely. They are words which are very properly thrown in as necessary to include whatever interest or proceeds shall be due to him at the time of his death, and whatever interest and proceeds shall accrue (in the same way as in this country we have similar dispositions) during the period allowed to the executors to collect the effects. According to the law of England twelve months are allowed for that purpose. According to [673] the law of Scotland twelve months are allowed for the same purpose. No person has a right to claim against the executors of a testator before the end of a twelvemonth. Six months for the collection of the debts, and six months for the distribution of them, according to the disposition of the testator: that time is allowed by the law of Scotland.

It appears to me that the true construction of this instrument is this, to give all the personal estate to the persons who shall from time to time be entitled to the lands : it is a gift to them—a gift through the medium of a trust, but a gift to them ; and it would be absurd to suppose that he did not mean it equally to them. If the construction which has been contended for by the trustees in Scotland were to take effect, the consequence would be, that there would be an inequality ; for if it should so happen (which might very well happen) that the personal estate, through debts and mortgages, and so on, could not be all collected for the course of twenty or thirty years, the present Lord Stair, and two or three other persons succeeding to the estate, might have no enjoyment of the bequest whatever, but on the contrary, the fund would be augmenting for the benefit of the successors. It appears to me perfectly clear, that the intent of this testator was an equal benefit to all the persons who should succeed each other in the heritages and lands taken under the deed of entail ; and although this is through the medium of a trust, it is in effect a disposition for their benefit, and it strikes me that that is the mistake which has been made by the Court of Scotland. Some of the learned Judges appear to be of opinion, and they have in truth considered the words “ interest and proceeds ” introduced in this disposition, as constituting no interest [674] and proceeds, but, until lands shall be purchased, as part of the substance of the gift. Now I apprehend the meaning of those words is simply this—the interest and proceeds which shall not have been received at the time of the testator's death, and the interest and proceeds which shall accrue until the ordinary time of the disposition of the personal estate. If the words had been added, “ until the money shall be laid out in the purchase of lands,” then undoubtedly that might have been the construction, but there are no such words, and I do not conceive that there is any ground for inferring that it was the intention of the noble Lord to give to his will a construction as if it contained those words, those words not being to be found there.

It strikes me, that even in the argument on the part of the Respondents, and of the learned Judges in Scotland, they really do introduce those words into the will which are not there, and that they have founded their decision upon that opinion.

You will be pleased to recollect some of the circumstances which happen in the disposition of trust property, in order to see to what extent this will go. Suppose this had happened in the case of the Duke of Queensberry, where for twenty years together his whole property was subject to such claims that the executors could not execute his will, would that circumstance alter the intent of the testator ? would it make the disposition different from that which it would have been if that circumstance had not occurred ? So, suppose this trust disposition or will had been disputed, as was the case in the instance of Lord Eife. Suppose the question to be, whether this disposition could or could not take effect, a considerable time might be employed in litigation. You [675] will observe, this extends to all and sundry lands of inheritance, except those contained in the deed of entail, so that it applies to all his lands of inheritance as well as the rest of the property. I take it, that whatever is not within the power and control of the testator is not to be conceived to be within his mind and meaning. It is important to consider within what time he might expect this to be concluded ; there might be debts claimed by persons to whom they were not due—there might be mortgages, and it might be necessary for his executors in England to proceed to foreclose the mortgages ; they might have to sell the mortgages. Under such circumstances, that which they had to perform might have occupied a considerable length of time before the will could be executed, and in the mean time the persons designated as the object of the testator's bounty might not have the benefit of the disposition at all. In this very case part of the property given is lands, but if those lands are not in the particular counties that he mentions, I apprehend those lands must be sold, and the price of them laid out in the purchase of lands in other counties ; that conversion of property it might require a considerable time to execute, and it is impossible to conceive that Lord Stair, when he made this disposition, meant to make the favour which he intended to give to his immediate successor, so very different from that which would be given to future successors which must happen if the construction put upon this disposition by the Court of Session were to prevail.

Under this impression, it has struck me that the proper manner of disposing of

this case would be simply to declare your opinion upon the subject, and to refer it back with that expression of opinion to [676] the Court of Session. I think that will be the best way, because, having declared your opinion upon the subject, the Court of Session will be then able to execute the intention in such manner as to prevent any mistake on the part of your Lordships. I have always thought that, when dealing with the law of Scotland, where you are not so perfectly well acquainted with all the forms and the little difficulties which occur in the execution of a decree, it is best, generally speaking, only to declare your opinion upon the subject, and to leave the execution of that opinion to the Court below; and feeling this to be the proper mode of proceeding, I would propose to your Lordships so to declare.*

This litigation has arisen upon a question not properly respecting the capital of the estate, but respecting the interim profits, and therefore it appears to me referring to the words of the will, in which he appoints factors, and trustees, and persons to collect the effects, etc. that it was his intention that whatever expences occurred with respect to the produce of his property whilst in the hands of trustees, should be paid out of that produce. If a fund is set apart to answer the annuities, that fund cannot be laid out in the purchase of land until the annuities are determined. Now your Lordships will perceive the lands at Bellhaven were to be settled according to the entail: the lands at Bellhaven, therefore, could not be charged with these annuities; they were not within the provisions of the entail, nor could the lands to be purchased be charged with them. It appears to me, therefore, obvious that these words interpret, (if there was any necessity for interpretation,) what was the intention of Lord Stair: [677] that he meant the whole property should go from the time when, according to the law of Scotland, the effects would be considered as collected to the same uses to which he had given the estate of Bellhaven by his will. Under these circumstances, therefore, I would present this † to your Lordships as the proper finding in this cause.

The Earl of Eldon: I agree with the learned Lord in the propositions which he has stated, and particularly in the propriety of remitting this case back to the Court of Session in Scotland, because the execution of the trust must be carried forward in the Court of Session in Scotland. Having, in Scotch causes, been in practice as a counsel at your Lordships' bar, and in judicial proceedings in this House, having been concerned for upwards of forty years, I must take the liberty now of saying (and I shall never have occasion, perhaps, to repeat it) that it has always been an acknowledged maxim in this House, that you are not to make the laws of Scotland in your decisions and by your judicial proceedings similar to the laws of England. That is a purpose which can be accomplished only by legislation. It is not to be attempted in the distribution of justice. You are to decide here as if you were sitting in the Court of Session in Scotland: and I beg your Lordships to attend to what I have now stated, because it is quite obvious that an opinion has been entertained elsewhere that we are proceeding on a different principle. We have never proceeded on a different principle in the long period to which I have been now advert- ing. At the same time it is idle to deny that it is extremely possible that a person whose mind is constantly [678] intent upon what is the law of England, may sometimes feel that mind more influenced by considerations arising out of the law of England than if he were a pure Scotch lawyer, sitting in the Court of Session in Scotland: but I can take upon myself to say for Lord Thurlow, Lord Rosslyn, and myself, that as far as, consistently with human infirmity, we were enabled to guard ourselves against being misled from that influence which our early occupations might introduce into our minds, to the utmost extent we have endeavoured to avoid it; and I therefore preface the few words I have to state, with professing my entire concurrence with that which is expressed by Lord Alloway and Lord Eldin, (both great authorities in Scotch law,) that, "with regard to the English cases so much founded on by the parties, they are not authorities sufficient to warrant the proceedings of that Court, which must be directed by their own laws and by their own

* Here the noble Lord read the minutes which he proposed as the subject of the Order. (See the end of the case.)

† The noble Lord here presented the proposed Order.

rules." This is therefore a case that must be decided according to the law of Scotland.

On the other hand, there can be no manner of doubt that, in considering what the law of Scotland is to be in a case where we have not before us any decision in the law of Scotland which forms a precedent by which we ought to be governed, it is perfectly competent for us to obtain what assistance we can derive in forming a proper judgment by looking at the law of England; not by transfusing the law of England into that of Scotland, but to see how far those principles, which are applicable to every law, and capable of application in the law of every country, can be or not made serviceable for the decision of a case which stands before you for determination. We have not many cases, at least I am not aware of many cases which have been decided in the [679] law of England proceeding from courts of equity and courts of law—not many cases upon this question. I think one of the first is that strong case before Lord Thurlow, of *Hutchin v. Mannington* (1 Ves. J. 366, 4 B. C. C. 491, *note*), which was a case in which a person, if I recollect the circumstances accurately, had died possessed of a very considerable personal property at Bath, and had left considerable sums to different individuals, with a direction that those sums were to go over to others in case those individuals died before they were received. Lord Thurlow was of opinion, and whether the principle is accurately or inaccurately applied in the particular case, is a question that must be submitted to the mind of the man who is considering whether that principle is properly applied or not; but Lord Thurlow was of opinion that there was a rule of law, which rule of law has been applied through all the subsequent cases, namely, that you are not to look at a particular intention of the testator particularly expressed, with a view to carry that into execution, if you find that the primary and principal intention of the testator, declared by the same instrument, must be disappointed by carrying into effect that particular intention, that a different rule would lead to the laying aside all attention whatever to that which was the primary purpose of the testator. Lord Thurlow was therefore of opinion that as it was utterly impossible to inquire how far all the different sums which were to constitute the different legacies given to particular persons, could or could not, with reasonable diligence, have been remitted from a distant country and actually received; it was competent to him, to look into the whole of that instrument, and not laying it down [680] as a rule of equity, but laying it down as a principle on which he could act, to guide himself by what he satisfied himself was the intention of the testator. That was a strong decision, undoubtedly; but he was of opinion that he must sacrifice one intention of the testator or the other, and he thought he was justified in sacrificing that which required the money to be received, to that general intention of the testator, that the persons who were the objects of his bounty should enjoy the benefit of that bounty.

Then came the case of *Sitwell v. Bernard* (6 Ves. 520), as to which I should be extremely sorry to think that I was wrong, because I never certainly in the whole course of my judicial life took more pains to be right than I did in that case. In subsequent cases, in the case (*Angerstein v. Martin*, 1 Turn. 232. See also *Horvitt v. Morris*, *id.* 241) of Mr. Angerstein's will, I had an opportunity of stating that it was not my opinion that there was a general rule, which, let the will be what it might in its terms and its expressions, must be acted upon by a court of justice; but that you are to look to the whole, as Lord Kenyon expressed it, to look to every thing within the four corners of the will, and to see what was the intent of the testator on any point, with respect to which you would be justified in thinking he was not anxious it should be carried into execution. I thought that the will in that case entitled the individual to the interest before the money was laid out, and I cannot in the least agree to the proposition which has been stated in the opinions of high and learned Judges in this case, that the mere object of this testator was to annex this property to the title of Stair; my opinion upon that question being that this testator's primary intent was that all who were to succeed to that title should, as it is to be collected from the text and language of the will, take a benefit under that will; that looking not to a particular intent, but to the leading intent, it appears that he was anxious that each and every of the heirs in succession should have their proportion of the enjoyment of that fund which, as it appears to me, was meant to be a fund to be enjoyed for the benefit of all of them.

Then, the question here is, what was the particular intent of this testator, and what was his general intent. When you see a general intent, I apprehend that will authorize you to say that although there is a particular intent expressed in particular words which may have a more or less extensive meaning, and where the general intent cannot be carried into execution unless you give those particular words a limited meaning, according to all cases in English law and in Scotch law, in all law relating to the construction of wills, you must give that construction which, upon the whole, best and most effectually carries into execution that which was the primary intent of the testator; and I cannot bring myself to think, because the words "interest and proceeds" are in this will, there not being according to what we find very frequently in wills and in deeds—a particular direction that where money is laid out in land, all the interest that shall accrue upon that money shall also be laid out; there not being to be found on the other hand, that which is very common in wills of this description, particular clauses that until the money is laid out the interest shall be enjoyed as the rents and profits would be enjoyed if the money was laid out in land; but that the question here is, whether it being the clear intent of this testator to give a beneficial interest to [682] every one who was to succeed to his real property purchased in those counties in which he directed the purchase to be made: these words, "interest and proceeds" may not be satisfied by a much more limited construction of them than that construction which would make them mean interest and proceeds as they accrue, and may be received until the money shall be so laid out: so that though this should happen to be a title which is to last for ever, if we were to apply such a principle to money to be laid out in lands, the subject of inheritance, as other lands are in Scotland, it might turn out that no one person to whom the benefit of that devise was intended might enjoy any part of that benefit but the ultimate remainder-man.

It is therefore, I apprehend, not upon any purpose of your Lordships of applying this general rule which has been laid down in the Courts of Equity here, that you are now called upon to reverse, in effect by expressing your opinion, this determination of the Court of Session in Scotland; but you are called upon to do so, because, at least, according to my view of the case, you are thereby effectuating what upon the legal and best construction of this will is the authorized construction of this will; authorized I mean by the principles on which you are authorized to construe all wills. Upon the authorized construction of this will you are determining that that benefit shall be given to Lord Stair which you think it consistent with the true intent and meaning of this will should be given to him.

Upon these grounds, therefore, it is that I perfectly agree in the general purpose expressed in the proposition stated by my noble friend. I am also of opinion that as the late Lord Stair has created this question himself by the manner in which he has ex-[683]-pressed himself respecting this purchase and this interest, the expense of deciding this question must fall upon the fund with reference to which the question has arisen.

This House is of opinion that, according to the true construction of the trust disposition in question, the same ought to be considered as containing a gift of all and sundry lands and heritages of John, late Earl of Stair, other than and except those contained in any deed of entail executed by him, and also all and sundry debts and sums of money, heritable and moveable, owing to him in England or in Scotland, and elsewhere, rents of lands, goods, gear, and moveable effects whatever presently pertaining and belonging to him, or that should pertain and belong to him at his death, excepting the furniture in his house at Culhorn, together with the interest and proceeds of such several funds after mentioned to the Appellant, and the several persons who may become entitled in succession to the lands of Culquhasen and others, by virtue of the disposition and tailzie of the said lands of Culquhasen and others, according to the several rights and interests of the Appellant, and of such several persons successively in the said lands of Culquhasen and others, by virtue of such entail, subject nevertheless to the costs and expenses of the execution of the trusts of the trust-disposition in question, except the particular costs and expenses after mentioned, and also subject to the payment of the several legacies and annuities in the

said trust-disposition mentioned: And this House is therefore of opinion that the Appellant was and is entitled, and that the several persons who shall from time to time succeed him in the entail of the said lands of Colquhassen and others, according to the course of such entail, will be from time to time entitled to the interest and proceeds of the whole of the trust funds which have arisen from the end of the twelvemonth usually allowed, according to the course of the law of Scotland, for payment of the debts and legacies, and which shall arise until the whole of the capital of the said trust funds with the interest and proceeds thereof, which have accrued prior to the expiration of the twelvemonth shall have been applied in the purchase of lands according to the directions contained in the trust-disposition, after deducting out of such capital, and out of the interest and proceeds accrued prior to the expiration of such [684] twelve months, all costs and expenses attending the execution of the trusts declared by this trust-disposition, except the costs and expenses attending the collection and application of such interest and proceeds which have accrued, and which shall accrue after the expiration of such twelve months, which last-mentioned costs and expenses this House is of opinion ought to be deducted out of such interest and proceeds only; and this House is therefore of opinion that the costs of all parties to this suit, including the costs of this appeal, in as much as the same particularly concern the question respecting the right to such interest and proceeds, ought to be paid out of such interest and proceeds, as part of the costs of the application thereof; and this House is of opinion that according to the directions contained in the said trust-disposition, the annuities thereby given ought to be secured by the appropriation of a sufficient part of the capital of the said trust funds; that funds should be set apart to answer those annuities, and that the funds which shall be appropriated for such purpose ought from time to time, as such annuities shall respectively cease and be determined, to be applied in the purchase of lands as part of the capital of the said trust funds, and that the interest and proceeds of the funds which shall be so appropriated after payment of such annuities respectively, but subject thereto, ought to be paid from time to time as the same shall accrue to the Appellant, and to such other person and persons as shall from time to time succeed to the Appellant under the entail aforesaid, as part of the interest and proceeds of the capital directed to be applied in the purchase of lands as aforesaid: And it is therefore ordered that the cause be remitted back to the Court of Session to review all the several interlocutors pronounced in this cause, and to make such orders respecting the same, and in execution of the trusts aforesaid, as shall be consistent with the opinions so declared by this House, and as shall be just.

REPORTS OF CASES heard in the House of Lords upon Appeals and Writs of Error, and decided during the Session 1828. By RICHARD BLIGH, Barrister-at-Law. Vol. II.

IRELAND.

(COURT OF CHANCERY.)

Sir GEORGE FITZ-GERALD HILL, Baronet,—*Appellant*: BENJAMIN BALL,—*Respondent*.

[Mews' Dig. i. 727. S.C. 1 Dow and Cl. 164.]

Upon a bill by the assignee of a judgment against the conusor, stating an award in which a certain sum was found due upon the judgment, and praying that accounts might be taken against the conusor upon the foot of the award, and the judgment, the Defendant, the conusor, cannot by his answer impeach the award, and raise questions which had been discussed before and decided by the arbitrators, as to the state of accounts between the Defendant as conusee, and the conusor of the judgment.

In 1793, John Claudius Beresford and James Woodmason were bankers and co-partners in Dublin. The Appellant, who had married the sister of J. C. Beresford, kept an account there. Various money transactions had for many years passed between the Appel-[2]-lant and J. C. Beresford, without any settlement having been made. In a letter dated the 22d of December, 1808, J. C. Beresford called upon the Appellant to settle all the accounts between them, and to pass his bond for the balance; and the Appellant shortly afterwards executed his bond to J. C. Beresford, in the penal sum of £31,000, to secure £15,500, being the balance of the account then stated as due.

In 1807 the partnership with Woodmason was dissolved, and John Claudius Beresford, on the 1st of January, 1808, formed a partnership with the Respondent, Benjamin Ball, Matthew James Plunkett, and Philip Doyne, as bankers. On that occasion an arrangement was made, that the notes and engagements of the old firm should be paid by the new firm, and for that purpose the property of the old firm was assigned to trustees. John Claudius Beresford, having been largely indebted to the old firm, he, in part satisfaction of his debt, delivered over to the Respondent, various securities, and amongst others, the bond of the Appellant. The bond was so given in trust for the Respondent and his partners. Judgment was entered up on this bond in Hilary term, 1810. By an indenture of the 24th of March, 1810 duly registered, John Claudius Beresford assigned the judgment for £31,000, to the Respondent.

A memorial of this assignment was, pursuant to the Act 9 Geo. II., enrolled on the 24th day of March, 1810; and the Respondent became, under the provisions of that Act, the legal owner of the judgment, and entitled as such, to issue execution and levy the amount of it in his own name.

By deed dated 27th of December, 1810, the partnership between John Claudius

Beresford and the Respondent, and Matthew James Plunkett, and [3] Philip Doyne, was dissolved. John Claudius Beresford afterwards became a bankrupt, and a commission of bankruptcy, dated the 22d of March, 1811, was issued against him.

In Trinity term, 1811, the Respondent obtained a judgment in the Court of King's Bench in Ireland, against the Appellant, for £16,585 12s. 6d. debt, besides costs.

The Appellant having questioned the validity of the judgment, and the correctness of the account upon which the bond and judgment were founded, it was agreed between the Appellant and the Respondent, that all matters in dispute relating to the judgment, should be submitted to arbitration.

By indenture bearing date the 18th day of February, 1812, made between the Appellant and Respondent, all matters in dispute between them on foot of the judgment for £31,000, and all matters in difference relating thereto, and the credits claimed by the Appellant against the same, were referred to the determination and judgment of the Right Honourable William Cunningham Plunkett and John Radcliffe, who were thereby appointed arbitrators, to hear evidence and determine what sum or sums of money, if any, was actually due or payable by the Appellant on foot of the judgment; and that such award as they should make, should be conclusive, and be made the judgment, order, and decree of the Court of Chancery, etc.

This deed of submission was, by order dated the 3d day of March, 1812, made a rule or order of the Court of Chancery.

The arbitrators having been attended by the counsel and solicitors on both sides, and having heard and read all the evidence brought before them on behalf [4] of the Appellant and Respondent respectively, touching the matters in difference, published their award, bearing date the 19th of May, 1812, whereby they awarded that the judgment obtained against the Appellant, and assigned to the Respondent, was a good and effectual security for the principal sum of £15,500 with interest thereon from the 1st of December, 1809, on which day the bond was handed over to the Respondent; and the arbitrators further awarded that there was then due to the Respondent by the Appellant, for interest on the foot of the security, from the 1st of December, 1809, to the 19th of May then instant, the sum of £2,295 18s. 3d., and also a sum of £1 10s. 3d. for costs for entering judgment on the bond, and assigning the judgment, making together the sum of £17,810 8s. 6d.; which sum the arbitrators awarded to be justly due and owing to the Respondent by the Appellant, for principal, interest, and costs on the foot of the judgment, and further ordered payment thereof to the Respondent, with the costs of arbitration, and that the principal sum of £15,500 should bear interest from the date of the award, until the same should be paid.

This award was by order of the Court of Chancery, dated the 20th day of June, 1812, absolutely confirmed.

After this award was made, the Respondent called upon the Appellant to pay the amount; but the Appellant refusing to pay, the Respondent sued out a writ of elegit to the sheriff of the city and county of Londonderry, dated the 23d of June, 57th George III. marked for the sum of £21,611 3s. 1½d. whereupon the sheriff duly held an inquisition, whereby it was found, that the Appellant was then possessed of the lands for the several terms of years therein re[5]cited, and was also seised in fee of the several other lands and premises therein also recited. In order to get possession of these lands and premises, it became necessary to bring an ejectment on the title grounded on the inquisition, but the Respondent having discovered, that the Appellant had, previously to the entering up the judgment, charged or incumbered all the lands and premises comprised in the inquisition in July, 1817, filed his bill in the Court of Chancery in Ireland.

The bill stated the several conveyances and leases found upon the inquisition and the judgments, and that an elegit had been sued out, and an inquisition taken; and that by means of the mortgages, the Respondent was prevented from proceeding at law. The bill did not state the award. It was filed against Sir George Fitz-Gerald Hill, John Claudius Beresford, Hall Chambers, who was the assignee of John Claudius Beresford, William Goslin, John Chambers Irwin, Sir Harvey Aston Bruce, John Wilson and William Warren, who claimed two separate judgments against Sir George Fitz-Gerald Hill and John Claudius Beresford, in the penal sum

of £2000 for securing £1000, praying, that the Respondent, Benjamin Ball, might be decreed to be entitled to redeem the mortgages, so far as the same affected the estates and properties of Sir George Fitz-Gerald Hill; and that so much of the mortgage debts as were the proper debts of John Claudius Beresford, might be levied and raised out of the estates of John Claudius Beresford alone, so that the estates of the Appellant might be exonerated therefrom, and for that purpose, that the estates of John Claudius Beresford, or a competent part thereof, might be sold; the Respondent thereby undertaking to pay to William Goslin and John [6] Chambers Irwin, such sums as they should appear entitled to for the redeeming of the Appellant's estates; and that after payment thereof by the Respondent, the Appellant might be ordered to repay the same to the Respondent, and in default thereof, that the Appellant and the Defendants to the Bill entitled to redemption of the mortgaged premises, might be for ever barred from all equity of redemption; and that the mortgaged premises, or a competent part thereof, might be sold; and that all such sums of money as the Respondent should be obliged to pay for the redemption of the mortgaged premises, with interest, and all costs to be incurred by him, might be repaid to him; and that all incumbrances prior to the mortgages might be paid out of the produce of such sale; that all necessary parties might be compelled to execute conveyances; that an account might be taken of what was due on the mortgages as the debt of the Appellant, and also what was due thereon from John Claudius Beresford, and of what was then due to the Respondent on the judgment so assigned to him by John Claudius Beresford, and of the judgment obtained by the Respondent against the Appellant; and that all other just and necessary accounts might be taken; and that in the mean time a receiver might be appointed; and for general relief.

The bill was afterwards amended to make other parties Defendants who claimed an interest in the premises.

The Appellant, by his answer to the amended bill, contended that the bond on which the judgment stood for £31,000 was passed by him, not for a sum mutually agreed upon as due from him to Mr. Beresford, but as a cover or guarantee to secure Mr. Be-[7]-resford in such sum as might appear, on an examination of their accounts, to be due; and he stated money transactions which had subsisted between him and Mr. Beresford, with a view of making it appear that no accounts were ever finally settled between them; that there was not so much due by him to Mr. Beresford as the bond was given to secure, inasmuch as he had after the date and execution of the bond made several payments to Beresford, and that he was entitled to as much equity against the Respondent (the assignee of the judgment) as against Mr. Beresford himself.

In consequence of this answer, the bill was again, on the 2d of January, 1819, amended, for the purpose of setting up the award, thereby stating the deed of submission and the rules thereon; and also stating, that all the matters set up by the Appellant in his answer, as impeaching the judgment, were the same which he had set up before the arbitrators.

To this bill the Appellant put in an answer on the 28th day of June, 1819, recapitulating all the evidences and accounts which he had gone into before the arbitrators, and contending, that though he attended before the arbitrators by counsel and solicitor, his defence was not sufficiently explained and understood. It appeared in evidence that the Appellant's defence, then set up, was by claiming certain payments made by the Appellant to John Claudius Beresford, and certain equities which he also claimed against John Claudius Beresford, and this defence was insisted upon by Appellant's counsel before the arbitrators.

The Defendants Beresford and Bruce not having appeared, a decree of sequestration issued against them. The other defendants by their answers admitted the facts.

[8] The cause was heard on the 3d of August, 1821, on the 16th of August a decree was made by the Lord Chancellor, according to the prayer of the Bill.

The Appellant, being dissatisfied with this decree, obtained an order for a re-hearing, and the cause was re-heard at great length, when a consent was entered into by the counsel of the Appellant and Respondent, that all the correspondence on both sides should be produced to the Court, and read.

On the 22d of November, 1821, the decree was affirmed. The appeal was against the original decree, and the order affirming it.

For the Appellant, Mr. Sugden and Mr. Koe.

For the Respondent, The Attorney General and Mr. Pepys.

It was contended on behalf of the Appellant that judgment should stand only for what should appear to be due from him to Beresford, on taking the account between them and that the objection to the award being introduced by way of equitable defence to a claim in equity ought to be entertained.

The Respondent's counsel relied upon the award as concluding the question between the parties.

The case was argued in part, in June, 1827, and was further heard on the 14th of February, 1828—when the decree was affirmed without observation and with costs.

Decree affirmed with £100 costs.

[9]

ENGLAND.

(KING'S BENCH.)

JOHN DOE, on the several Demises of RICHARD HENRY TOLSON, THOMAS AKENHEAD WARD, and WILLIAM COCKBURN,—*Plaintiff in Error*;
JOHN SANDERSON FISHER,—*Defendant in Error*.

[Under the existing rules of procedure, a plaintiff cannot elect to be non-suited. The only way in which an action can be discontinued is by discontinuance under R. S. C. 1883, Ord. 26, rr. 1-1: *For v. Star Newspaper Co.* (1900), A.C. 19 affirming C.A. (1898) 1 Q. B. 636.]

The opinion of a judge directing the Plaintiff in an action to be nonsuited, if it does not appear on the record, cannot be questioned in a writ of error.

The Plaintiff, if he intends to bring a writ of error on the ground of misdirection, in point of law, should not submit to be nonsuited, but appear, and put the judge to express such opinion, by way of direction to the jury; and thereupon tender a bill of exceptions to the judge, and procure his signature thereto.

This was an action, commenced by the Plaintiff in error, against the Defendant in error, by original writ in the King's Bench; the declaration in four counts, stated in various ways, leases by Tolson, Ward, and Cockburn, to John Doe, with entry and ouster, by the Defendant in error.

The Defendant in error pleaded the general issue, upon which issue was joined. Upon the trial, at York, the Defendant in error, who claimed as issue in tail, proposed to give evidence of the intail, and his right under the gift, as issue in tail; but he was unable to produce any evidence of seizin and possession under the intail, within twenty years before the action commenced, whereupon Halloch, B., the Judge before whom the cause was tried, being of opinion that [10] John Doe had failed to prove his title to recover, directed a nonsuit, and judgment of nonsuit was afterwards signed against the Plaintiff in error, and final judgment was afterwards signed for damages, costs, and charges. Whereupon the Plaintiff in error brought a writ of error, returnable in parliament, and assigned the general errors, and particularly the direction of the judge, that the Plaintiff must be nonsuited, and prayed a certiorari for the purpose of verifying his allegation; to which assignment the Defendant in error rejoined generally.

For the Plaintiff in error: The Attorney General and Mr. Sugden.

For the Defendant in error: The Solicitor General and Mr. Ford.

The argument on the part of the Plaintiff in error, raised the long disputed

question, whether each successive tenant in tail may assert his right within the statutory time of limitation after his title accrues, or whether one period only of limitation is allowed after the time has once begun to run upon an estate under the entail vested in a person not under incapacity.*

The case on the part of the Defendant in error, stood upon the technical ground that the opinion and direction of the Judge, could only appear upon a bill of exceptions which had not been tendered to him at the trial; and that therefore the legality of such supposed opinion, could not be discussed; and upon this ground the judgment was affirmed.

[11]

IRELAND.

(COURT OF EXCHEQUER.)

JOHN TRANT,—*Appellant*; JOHN DWYER,—*Respondent*.

[*Mews' Dig.* viii. 832., S. C. 1 Dow and Cl. 125. As to what is reasonable time under the Irish Tenantry Act (19 and 20 Geo. III. c. 30 Ir.), see *Dyott v. Viscount Massareene and Ferrard*, 1874, 1r. 9 Eq. 149: *ex parte Peyton*, 1888, 21 L. R. 1r. 371; *Hussey v. Donville* (1900) 1 Ir. Ch. 417.]

A lease of lands in Ireland contained a covenant on the part of the lessor for perpetual renewal: and a covenant on the part of the lessee, to pay £1 sterling, for every perch of bog, cut otherwise than thereby covenanted, and to be distrained for as additional rent. Upon a bill filed by the assignee of the lease and his mortgagee against the assignee of the lessor, for a specific performance of the covenant for renewal, it appeared that three years before the filing of the bill, a notice had been given by the landlord to the tenant to name new lives in the place of those which had expired, and to pay the fines with interest, etc.; but in the interval, a correspondence had taken place, from which it was to be collected, that the tenant had always been ready to pay the fine; but that the landlord alleging, by his answer in the suit supported by evidence, that the tenant had cut large quantities of turf in breach of his covenant, and had also made encroachments upon other lands, refused to renew until those two questions were settled; and although no actual tender of the fines had been made, it was clear from the correspondence that they would have been refused, if made.

Held affirming the decree of the Court below, that under these circumstances, the delay of three years was not under the Irish Tenantry Act [19 and 20 Geo. III., c. 30, Ir.] such gross *laches* as ought to deprive the tenant of the right of renewal, and work a forfeiture of the lease; but that the landlord ought to be compelled specifically to perform the covenant for renewal. Held also, that in making this decree for the performance of part of the contract between the parties, it is not necessary for a Court of Equity to provide for the performance of the other part; namely, the covenant against cutting turf, otherwise than by leaving the landlord at liberty, by the decree upon further directions to bring an action at law upon that covenant, especially as that liberty [12] had been given by the original decree; and an action brought against the tenant which abated by his death, and thereupon no application had been made by the landlord to the Court of Equity for its assistance.

Stephen Rice, being, in the year 1748, seized in fee of the lands of Lower Dovea, Killaghara, Ballybrist, and Ballynahow, in the County of Tipperary, including a turf bog, which lay contiguous to the several lands, by lease bearing date the 7th of January, 1748, demised the lands of Ballynahow, with its appurtenances, unto Samuel Hughes, for three lives therein named, at the yearly rent of £150.

* See an argument and decision upon this question, in Moore's Rep., vol. vi. p. 542, *Tolson v. Kaye*, and in 3 B. and B. 207, S. C.

The lease contained a covenant on the part of the lessee, "that he, his heirs, or assigns, should not commit, or wilfully suffer to be committed, any waste on the premises, and should cut his or their turf in straight drains, to be cut sloping one foot narrower for every foot in depth, and agreeable to the natural fall of the land, and of such an equal depth as to preserve a hanging level at the bottom, and to begin at the lowest part of the ground where such drain or drains should from time to time be cut, and that he or they should leave at convenient distances on such drains, parts uncut, of ten feet in breadth each part for bridges, and bore holes underneath on a level with the bottom of such drains, to let the water pass; and that he or they should pay £1 sterling for every perch of bog, which should be cut on the premises during said demise, other than as is thereby covenanted, and that yearly, to be recovered and distrained for as an additional rent."

Stephen Rice, by indenture of lease and release bearing date the 21st of February, 1748, and duly registered, in consideration of £50, assigned the lands [13] of Lower Dovea, Killaghara, and Ballybrist, and also the lands of Ballynahow, to Dominick Trant, and his heirs for ever, reserving thereout a yearly rent of £471 5s.; but Dominick Trant subsequently reconveyed to Stephen Rice the fee of the several lands, and took a lease thereof for lives renewable for ever, subject to the same rent of £471 5s.

Stephen Rice having by articles, agreed to renew the lease of the lands of Ballynahow; Dominick Trant afterwards, by deed dated the 3d of December, 1755, agreed with Samuel Hughes to renew the lease accordingly for ever, on payment of a renewal fine of £10, on the fall of each life.

The Appellant on the death of his father, in the year 1790, having become seized of Dominick Trant's interest in the lands, and Peter Latouche, being seized of Stephen Rice's estate and interest therein, the Appellant, soon after he attained his age, purchased the head rent, and reversion in fee of the three other denominations from Peter Latouche, in June, 1805, and afterwards, in December, 1806, purchased the reversion and head rent of the lands of Ballynahow, and took assignments thereof respectively from Peter Latouche, dated respectively the 15th of June, 1805, and 5th of December, 1806, and thereupon became seized absolutely in fee thereof, subject to the lease to Hughes.

The lessee's interest in the lease of 1748, after the death of Samuel Hughes, in 1785, became vested in Charles O'Neill, who paid to Dominick Trant, the Appellant's father, a sum of money in discharge of renewal fines due upon the fall of the lives of Samuel Hughes, and Edward Dawson, two of the *cestui que vies* named in the original lease of 1748, and thereupon nominated Francis Annesley Hughes [14] and Mary Hughes as two lives to be substituted in the room of the deceased *cestui que vies* under the agreement for renewing the lease.

Charles O'Neill afterwards assigned his interest in the lands to Cooper Crawford, who, by deed of the 30th of October, 1792, reconveyed the same to O'Neill, in mortgage to secure a sum of £2000 with interest.

The mortgage to Charles O'Neill having subsequently been assigned to the Respondent, John Dwyer, the Respondent obtained a further mortgage of the equity of redemption in the lands, from Cooper Crawford, in the year 1801, to secure a further sum of £1000 with interest to the Respondent.

In the year 1808 a dispute arose between the Appellant and the Respondent, respecting the bogs contiguous to the lands occupied under the lease: the Appellant contending that no part of the bog was demised by the lease; that even if a proportional part was demised, the lessee had encroached upon the bog and occupied more than his due proportion; and that he had broken the covenant in the lease, by cutting turf for public sale, and otherwise contrary to the provisions of the covenant, by which large penalties had been incurred. The Respondent contended that he was intitled under the terms of the lease, to the proportion of the bog, occupied by him, and that no breach of the covenant by cutting turf had been committed.

On the 24th of December, 1810, the Appellant served on Cooper Crawford, a notice which, reciting the lease of 1748, and his own and Crawford's title, and that all the lives had expired, and the encroachment upon the bog, and the alleged breach of the covenant by cutting turf, proceeds thus:—"Now take notice, That I require you forthwith to [15] pay me up all rent due out of the said lands, together with the sum of £372 12s. due for renewal fines, septennial fines, and interest due upon the

deaths of the said Samuel Hughes, Mary Hughes, and Edward Dawson. And I also require you to restore me to the possession of such parts of the said bog of Lower Dovea, as you have so possessed yourself of, and likewise to pay to me the sum of £1 sterling, for every perch of turf cut on the said bog, contrary to the covenant in said lease of 7th of January, 1748. And take notice, That unless you forthwith comply with this reasonable request, (which I have heretofore repeatedly called upon you to do without effect,) I will not hereafter consider myself bound to renew your lease of the said premises, and will take such proceeding, as I shall be advised to recover the possession thereof, discharged of any lease or claim you may have for a renewal."

The fines, as stated in the notice, were calculated as upon the three lives named in the lease of 1748, as if no fines had ever been paid since the execution, as the Appellant then conceived to be the fact; but it appeared at the hearing of the cause, that two renewal fines had been paid to Dominick Trant, in the year 1787, and that thereupon he gave a receipt for the same, nominating Mary Hughes a minor, and Francis Annesley Hughes, as *cestui que vies* in the lease of the premises, in place of Edward Dawson and Samuel Hughes deceased; but no deed of renewal was executed.

At the time of the service of the notice there was one fine of £10 and interest thereon from the death of Mary Hughes the elder, the survivor of the original *cestui que vies* in the lease of 1748, who died in the year 1808, [16] due to the Appellant; and it was suggested by the Appellant that Francis Annesley Hughes, one of the substituted lives nominated in the receipt, was also dead at the time, in which event a second fine had become due to Appellant. Mary Hughes the younger, the other life nominated in the receipt, and survivor of all the original *cestui que vies*, died in February, 1812, and from thenceforth there remained no life in being, if Francis Annesley Hughes had previously died.

After service of the notice, several meetings between the parties and a long correspondence ensued on the subject of the encroachments on the bog, and the breach of the covenant in cutting turf. But the parties being unable to effect any amicable adjustment of their mutual claims, the Appellant, by letter dated in October, 1812, altogether declined to renew the lease.

On the 1st of March, 1814, Cooper Crawford, together with the Respondent, John Dwyer, as mortgagee of Crawford's interest in the lands, filed a bill against the Appellant, in the Court of Exchequer, in Ireland, for a renewal of the lease of 1748, having, on the 25th of February, 1814, caused a sum of £50 to be tendered to Appellant in discharge of the fines for renewal and interest due thereon.

The bill insisted that the parts of the bog improved and taken in by the tenants of the lands belonged to the demised premises of Ballynahow, and that neither O'Meara, nor any undertenant of Plaintiff's was in possession, save rightfully under the lease, of any part of the Appellant's estate. The Appellant by his answer, insisted upon the grounds stated in the notice, and also because the Respondent had neglected within a reasonable time after notice, to pay or tender the fines, that he was not bound by law to grant the renewal.

[17] The cause was heard on the 2d of June, 1815, when it was ordered, "that the cause should stand, with liberty for the Appellant to bring an ejectment for such part of the premises as he should be advised; and on the trial of such ejectment the statute of limitations not to be set up, and that the Defendant should be also at liberty to bring any action of covenant he might think fit, and upon any action of covenant to be brought against Plaintiff Cooper Crawford, that service of process upon his attorney should be deemed good service, and that Cooper Crawford should plead issuably, and go to trial in both causes, or which ever of them Defendant might proceed on, at the then next Assizes at, etc.; and that Cooper Crawford should admit that the term in the lease of the 7th of January, 1748, in the pleadings mentioned, was still in being and vested in him, and the lessor's interest vested in the Defendant, and that ejectment or action, or both, should be brought forthwith and be tried by a special jury, and that the Plaintiff should waive all temporary bars, and that the question to be tried on the ejectment should be whether the Plaintiff Cooper Crawford, or his undertenants, were in possession of any, and what quantity of land or bog not demised to Samuel Hughes, deceased, by Stephen Rice, deceased, by the lease of the 7th of January, 1748, in the pleadings mentioned."

The Appellant thereupon brought an ejectment on the title in pursuance of the order, to which a defence was made in the name of Cooper Crawford. The Appellant also commenced an action of covenant to recover damages for the breaches in the lease against Crawford, and issue being joined, and both causes ready for trial, Crawford died, and the Respondent [18] having refused to become a defendant in his place, the causes abated.

The Appellant thereupon served an ejectment in Hilary term, 1816, upon John O'Meara, the occupying tenant of the lands, who consented to be bound by the decretal order of the 2nd of June, 1815: but the action of covenant was abandoned, as the Respondent would not allow his name to be made use of.

Upon the trial of the ejectment, the jury found "that Crawford, or his under-tenants, were in possession of 234a. 2r. 3p. more than were demised by the lease of 1748 of land and bog."

On the 29th of May, 1817, the Appellant took possession under an *habere* of the 234a. 2r. 3p.

The suit in the Exchequer having abated by the death of Cooper Crawford, the Respondent in February, 1818, filed a bill of revivor against the Appellant, and made William Cooper Crawford, a minor, as heir at law of Cooper Crawford, a defendant: the representatives of Cooper Crawford, deceased, having declined interference therein, Cooper Crawford having died in embarrassed circumstances, and his property being insufficient to pay the amount of his debts.

John O'Meara was committed to prison, and afterwards discharged as an insolvent, and died.

The cause in the Exchequer was finally heard in 1820, when the Court pronounced the following decree:

"Upon reading the Judge's report and certificate of the verdict, and it appearing to the Court, that the Defendant, John Trant, has since executed an *habere* and taken possession of the lands so recovered; decree the Plaintiff entitled to a renewal of the lease of the 7th of January, 1748, according to the covenant contained in the deed of [19] the 3d of December, 1755, upon payment of all sums due for rent and renewal fines, to be calculated according to the usual course of the Court, and of all costs at law, and the costs of this cause; and in case the parties differ about the description of the premises, or otherwise respecting the terms of the said renewal, refer it to a Baron, to settle and approve of the draft thereof having regard to the said verdict, so as not to include in the said renewal, a demise of any part of the land or bog so recovered from John O'Meara, under and by virtue of the said ejectment: and let the names of John S. Dwyer and Francis D. Dwyer, being those named in bill by the Plaintiff for that purpose, be inserted in the place of Mary Hughes the elder, and Mary Hughes the younger, and refer it to the Chief Remembrancer or his deputy, to take an account of the rent due and of the renewal fines, and interest thereon, according to the usual course of the Court: and upon payment of such rent, renewal fines, and interest thereon, as shall be found by the said officer to be due as aforesaid to the Defendant, John Trant, let him execute the said lease, and declare such renewal to be made to the Plaintiff as mortgagee, liable to the equity of redemption reserved upon the mortgages of the original lease vested in the Plaintiff, and decree him entitled to tack to his said mortgages what he shall so pay in pursuance of this decree: and let this decree be without prejudice to any action which the Defendant, John Trant, may be advised to bring against the representatives of the said Cooper Crawford or John O'Meara, or either of them, for breaches of any covenant contained in said original lease since the same vested in the said Cooper Crawford."

[20] Against this decree the appeal was presented.

For the Appellant: Mr. Brougham and Mr. Stephenson.

The Respondent must be affected by the gross laches of the tenant in omitting to pay the renewal fines and to take out the required renewal: no tender of any fine for renewal, or of any compensation to the landlord for the tortious acts of the tenant, and those claiming under him, having been made by the Respondent or any other person until after more than three years from the service of Appellant's notice. The Respondent was bound at his peril to act upon the service of the notice to renew, made on Cooper Crawford, his mortgagor, particularly as the Appellant, until the

filing of Respondent's original bill, was unapprised of the Respondent's title or interest in the lease. Although the Appellant may by his notice of the 20th of December, 1810, have demanded a greater sum for renewal fines and interest thereon, than he was then entitled to demand, yet the lessee seeking the benefit of such renewal was bound thereupon to have set his landlord right as to his mistake, and to have ascertained and tendered to him the sum really due for such fines without further unreasonable delay, which he did not do, nor tender any sum whatsoever for the fines for upwards of three years after the service of the notice.* A tenant abusing the trust which subsists between him and his landlord, wilfully violating the covenants in his lease, and converting the possession with which he has been entrusted into the means of encroachment on his landlord's adjoining estate, and of defacing the bounds [21] and landmarks of the farm committed to his possession, and after so doing claiming to retain such encroachment for his own benefit against his landlord, and obliging such landlord to bring an ejectment in order to recover possession, forfeits all claim on such landlord for a renewal of his original lease, as well as all title to assistance from a Court of Equity to compel such renewal.

Even if any renewal of the tenant's interest ought to be decreed in this case, such decree ought at least to have imposed upon him the terms of making full satisfaction or compensation to the Appellant for his damages by reason of such breaches of covenant, as also for the mesne profits due to Appellant in respect of such wrongful encroachments on his estate, the ascertainment and payment of which damages and mesne profits ought to have been made preliminary to any such renewal. The Appellant under the circumstances is left without remedy for the recovery of such damages; the legal estate under the lease of 1748 having expired, and the covenants contained therein determined. It was the more incumbent on the Court to impose such terms on the party seeking the renewal in this case, since it appeared that Cooper Crawford and John O'Meara, the undertenant of the lands, have both died insolvent.

The decree, in professing to leave the Appellant at liberty to prosecute any action he might be advised to bring against the representatives of Cooper Crawford and John O'Meara, or either of them, for breaches of any covenant contained in the original lease since the same had vested in Cooper Crawford, altogether omits to provide any means whereby the Appellant might be enabled to maintain any such action, or to recover any fruits from it, such action not being [22] at all maintainable without the aid of the Court imposing terms similar to those contained in the decretal order of the Court, of the 2d of June, 1815, in pronouncing which order it appears to have been the opinion and intention of the Court, that the immediate tenant of the lands should be held responsible for such breaches of covenant committed by his undertenants.

The Respondent in this case, is to be considered as standing in the situation either of immediate tenant of the Appellant, in which case he must be held responsible for the fraudulent misconduct and waste committed by his undertenants, and by reason thereof to have forfeited his claim to any renewal of his lease, or else in that of a mortgage creditor of such tenant, in which character he cannot be entitled to any relief in the premises beyond the preservation of his mortgage security for his own benefit alone, which relief ought not to be extended incidentally, (as has been done by the decree appealed from,) to give the benefit of a renewal to the representatives of the mortgagor, and to fraudulent and defaulting undertenants, who had forfeited their right to renewal: and the rather in this case when the Appellant by his counsel at the hearing below offered, as he now again does, in case the Respondent is entitled thereto, to pay the Respondent the balance due on the foot of his mortgage, on having the bill in this case dismissed.

For the Respondent: Mr. Pepys and Mr. Tinney.

No such fraud has been proved against the tenants of the leasehold premises, or their assignees, within the meaning and scope of the Irish tenantry Act, as to deprive them of the benefit of the Act. The Appellant, in case of any such fraud, or in case any for-[23]feiture of the lease had been committed, and had not been waived,

* *Jackson v. Saunders*, D. P. 16th July, 1814, MS. and 2 Dow. 453. *Lord Mountnorris v. White*, D. P. 20th Feb. 1816, MS. and 2 Dow. 470. *Barrett v. Bourke*, D. P. 1816, MS. and 5 Dow. 20.

has by his proceedings in ejectment, in which he has recovered only lands found not to be comprised in the original lease, and by not bringing any action of covenant under the liberty given him in that behalf, by the decree of the 2nd of June, 1815, waived such matters, and precluded himself from setting up the same. No demand and refusal of the fines for renewal, so as to deprive the tenant of the benefit of the Act, has been proved, even as against the original complainant, Cooper Crawford, who, on the contrary, was always anxious to pay the same when ascertained. No such demand was ever made against the Respondent, nor was there any such difficulty of finding him as to excuse the want of such demand; nor, if there had been, do the steps prescribed by the Act, in case of such difficulty, appear to have been taken.

The Lord Chancellor (Wednesday, 2nd April, 1828): The question in this cause arises under a lease which was made as far back as the year 1748. It was a lease held for three lives, with a covenant for perpetual renewal. The freehold ultimately vested in the present Appellant, Mr. Trant, and a person of the name of Cooper Crawford, became interested in the leasehold estate. Cooper Crawford mortgaged this property, and Mr. Dwyer stood in the situation of mortgagee. Cooper Crawford, or the person under whom Cooper Crawford held under-let the estate to a person of the name of O'Meara, for three lives renewable for ever. In the year 1787 two of the original lives fell in, and those lives were renewed and the fines were paid in that year. In the year 1808 Mary Hughes, who was one of the three lives then existing, died; the lease was not renewed at that time.

[24] In the year 1810 Mr. Trant, having gone over to Ireland, made some enquiry as to the state of this property, and had reason to believe that encroachments had been made upon his adjoining estate, by the tenant of this property, which had been leased. Mr. Trant at that time was not at all aware of the renewal in the year 1787. On looking at the lease he had reason to believe, from the information he had received, that the covenant had been broken with respect to the manner in which the turf should be cut; and under those circumstances, and with this information, he gave a notice to the tenant of Mr. Cooper Crawford, who was the owner of the leasehold interest, that he should expect forthwith that the three lives should be renewed, and the encroachment on the adjoining estate should be abandoned, and a compensation, according to the terms of the lease, made for the breaches of the covenant; and that unless those terms were complied with, he should not feel himself bound to renew the lease. Upon enquiry, it was found, however, that the two lives I have mentioned had been renewed in the year 1787. This part of the case, therefore, may be left entirely out of consideration. There was at that time, in respect of the life which had fallen in the year 1808, one fine due for the renewal—there was a question with respect to the encroachment on the adjoining estate—and a question also existing as to the turf.

In point of fact, no tender of this fine was made until the year 1814, three years after the notice had been given—and it was contended upon these circumstances, that under the Irish tenantry Act, three years having been suffered to elapse after notice had been given to renew and to pay the fine, that was an unreasonable period, and there was such an omission [25] on the part of the tenant, that he had forfeited his right to renew—and this was the main question in the cause: it was the main question in the Court below, and the main question on the appeal; and if the questions stood on these facts, I think your Lordships would be clearly of opinion that the tenant having suffered three years to elapse after notice had been given, calling on him to pay the fine on the renewal, that was more than a reasonable period; and he would, under the clause of the Irish tenantry Act, have lost his right to claim the renewal. But in point of fact, almost immediately after the notice was given, a correspondence took place between the tenant, Mr. Cooper Crawford, on the one side, and Mr. Trant, the landlord, on the other, and the agent of Mr. Trant, Mr. Dickson, with respect, not to the fine which does not appear to have been a matter of contest between them after the explanation had been given as to what had taken place in the year 1787, but as to the encroachment—and as to the breach of covenant—and particularly as to the encroachment on the adjoining estate of Mr. Trant. It appears in the whole course of that correspondence, that Mr. Crawford, the tenant, was ready at any moment to have paid the fine, and to have obtained the renewal, but that Mr. Trant was unwilling to grant a renewal unless the question as to the encroachment on

the adjoining estate was settled, or unless that part which was in question was altogether abandoned. At last, in the month of October, 1812, Mr. Trant was perfectly satisfied that an encroachment had taken place; and it turned out afterwards, on enquiry before a jury, that very large encroachments had been made by Mr. Crawford, or his undertenants.

Now the question is under these circumstances; [26] Mr. Trant having refused to renew, and Mr. Crawford having been constantly ready to renew and pay the fine, whether the tenant has lost his right from the neglect of not paying the fine, and I think clearly that he has not. The tenant was ready at any moment to renew; it is quite clear from the language of the correspondence, that he was ready to renew, and it would have been altogether an idle ceremony for him to have tendered the money. In point of fact, no tender did take place till the year 1814; nor do I conceive, under these circumstances, and from the nature of the correspondence, that a tender was at all necessary. Both the parties understood that Mr. Dwyer or Mr. Crawford was ready to pay the fine, and it is perfectly clear that if he had offered it, Mr. Trant would not have accepted it: since the question in agitation between them related entirely to the encroachment on the adjoining estate.

But it was argued, that it turned out in the result, that this was really an encroachment on the part of the tenant—that he had committed a wrongful act—that he had been aware himself of this wrongful act, and could not avail himself of his own wrong to suspend the payment of the fine. That does not at all vary the question. If the landlord had been at all anxious about the fine, if that had been the real object of contest between the parties, it was easy for him to offer to renew the lease on the old terms, in the language of the original lease, and without any prejudice to the question of encroachment. As the parties were really in litigation about another matter, and as there was no contest between them on this subject: as it is quite clear that the landlord would not have accepted the fine if it had been tendered, the failure in the condition to tender the fine, could [27] not, under those circumstances, be considered as depriving the party of his right to a renewal of this lease.

It is said that at a subsequent period in the year 1814 a tender was made. A tender might have been considered necessary, with a view to institute this suit, but if the party would not have accepted the money if offered to him, an actual tender on the part of the tenant was not necessary for the purpose of protecting himself against the forfeiture of his right to renew.

It is said that another life afterwards fell in. Mary Hughes died in 1812, but she died in the early part of that year while this correspondence was going on, and therefore that makes no alteration. As it appears to me as far as relates to the main question, the decree of the Court of Exchequer in Ireland was right.

A suggestion was thrown out in the course of the argument that in point of fact none of the lives were in existence: that as to Francis Annesley Hughes there was no proof that he was living; but it appears if it were necessary to go into that question that there is evidence of that fact: for a witness is interrogated as to whether or not Annesley Hughes, not Francis Annesley Hughes, but Annesley Hughes, named in the pleadings of the cause, is living: and he answers, that that Annesley Hughes, that is, the Annesley Hughes named in the pleadings in the cause is living. Now there is no Annesley Hughes named in the pleadings in the cause, but there is a Francis Annesley Hughes. That I apprehend is sufficient to identify that Francis Annesley Hughes, as being the party to whom the witness alludes, and whom he describes as the Annesley Hughes named in the pleadings in the cause, there being no Annesley Hughes, except the Francis Annesley Hughes to whom I have alluded.

[28] Another question arose in the course of this argument with respect to the form of the decree. There is no provision made in the decree against the Defendant with respect to the loss that has been sustained, in consequence of the breach of the covenant of the lease. It is contended that some provision in that respect ought to have been made. Now the facts as far as they relate to this part of the case are shortly these. By the original decree in the year 1815, the landlord was empowered to bring two actions, an action of ejectment, and also an action of covenant—an action for the purpose of trying the case as to the encroachment: and an action of covenant for the purpose of ascertaining whether or not there had been any breach of covenant, and if so, what damage had been thereby sustained. Those two actions

were brought by Mr. Trant against Cooper Crawford, and those two actions were at issue when Cooper Crawford died. By his death there was an end of the actions, but it was very easy for the landlord to go on with the action of ejectment, for as O'Meara was the tenant in possession, all that it was necessary to do was to serve an ejectment, and he being served in ejectment, was willing to adopt the regulations which had been laid down by the court for the purpose of trying the ejectment. The ejectment therefore proceeded, a verdict was obtained, judgment was entered up, and Mr. Trant was put into possession of about 200 acres, which was the amount of the encroachment. So far, therefore, that part of the proceeding was effectual, but nothing was done in respect of the action of covenant, and it is perfectly clear that nothing could be done in respect of the action of covenant, without another step being first taken, but it was competent for Mr. Trant [29] to have applied to the Court, to put Mr. Dwyer under terms after the cause was revived, with respect to that action of covenant. The cause was revived early in 1818, and the final decree was not pronounced until the Summer of 1820. There was a period, therefore, of two years and a half after the revival of the suit in the Exchequer, during which time Mr. Trant might have applied for the purpose of putting Mr. Dwyer under terms, in order to try this question with respect to the breach of covenant, but he made no application for that purpose. I think, therefore, that as Mr. Trant took no proceedings for the purpose of obtaining the opinion of the Court upon those questions, it is now too late to find fault with the decree for making no provision with respect to the supposed loss upon the breaches of covenant. Under these circumstances the decree of the Court of Exchequer should be in all respects affirmed.

Judgment affirmed, with £100 costs.

[30]

ENGLAND.

(EXCHEQUER.)

JAMES HALL and others,—*Appellants*; GEORGE SHEW,—*Respondent*.

This was an action, brought in the Court of Exchequer for an excessive distress levied by the Plaintiffs in error on the goods of the Defendant in error, attended with very aggravated circumstances. Upon the trial of the action, a verdict was given for the Defendant in error, with £550 damages and £40 costs. In Easter term, 1827, upon a notice for a new trial the damages were reduced by consent to £400. Final judgment was thereupon entered up, in Trinity term following. A writ of error being brought in the Exchequer chamber, the judgment was affirmed without argument.

Upon this affirmance a writ of error was brought in the House of Lords. The case was heard on the 5th of March, 1828, the Plaintiffs in error not appearing; whereupon the judgment of the Exchequer chamber was affirmed, with £120 costs.

[31]

ENGLAND.

(IN CHANCERY.)

JOHN HULLETT, and CHARLES WIDDER,—*Appellants*; HIS CATHOLIC MAJESTY FERDINAND THE SEVENTH, King of Spain and the Indies. —
Respondent.

[Mews' Dig. viii. 179, 181; S. C. I Dow and Cl. 169. See also *King of Spain v. Machado*, 1827; 1828, 1 Russ. 225, 560; *King of Spain v. Hullett*, 1833, 7 Bli. N.S. 359; 1 Cl. and F. 333. Among the cases in which *Hullett v. King of Spain* has

been dealt with, it may suffice to refer to *United States of America v. Wagner*, 1867, L. R. 3 Eq. 724; L. R. 2 Ch. 582; *Brunswick (Duke of) v. Hanover (King of)*, 1844, 6 Beav. 13, 21, 37; and see *Farasscur v. Knapp*, 1878, 9 Ch. D. 354; *Mighell v. Sultan of Johore* (1894), 1 Q.B. 144; and *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord* (1897), 2 Ch. 487.]

By a treaty between the governments of France and Spain, it is agreed, that France shall pay to the king of Spain a certain sum of money to be distributed by him among his subjects having claims against the government of France. This sum, by the terms of the treaty, is made payable to an agent to be appointed by the king of Spain. He accordingly appoints an agent, who receives the sum stipulated, and afterwards deposits part of it in the hands of merchants in London, in the name of his secretary. But accounts of the money so deposited are rendered by the merchants to the depositor, and not to his secretary.

Upon a bill filed in equity, in the name of the king of Spain as Plaintiff, against the depositories and the depositor, stating these facts, and praying a discovery, account, and payment of the money into Court, etc. the Defendants demurred upon the grounds of a defect of parties, and that a foreign sovereign cannot sue in a court of equity in England: held affirming the order of the Court below, that the demurrer was properly overruled: that a foreign sovereign may sue as Plaintiff in equity: and that under the circumstances of the case, it was not necessary that the *cestui que trusts* (the Spanish claimants) or the nominee of the agent should be parties to the suit.

Whether after the money has been brought into Court the parties having an interest in the final distribution could sustain a bill to effectuate their claims. *Quære.*

On the 22d day of December, 1827, a Bill in the name of the king of Spain as Plaintiff was filed in the Court of Chancery, against the Appellants, and one Don Justo José de Maclado.

[32] The bill stated, That in the years 1814 and 1815, two public treaties, the one bearing date the 30th day of May, 1814, and the other the 20th day of November, 1815, took place between the governments of France, Russia, Austria, Prussia, and England, to which the government of Spain was an acquiescing party, whereby, (among other things,) the French government undertook to indemnify (in manner therein mentioned) the subjects of Spain in respect of the losses sustained by them in consequence of the invasion of the Spanish territories by the French government in the year 1808.

That a convention, bearing date the 25th day of April, 1818, took place between the governments of France, Russia, Austria, Prussia, and England, to which the government of Spain was also an acquiescing party, whereby, in order to effect the total extinction of the debts contracted by France, in consequence of the treaties, the French government engaged to cause to be inscribed in the great book of the public debt of France, from the date of the 22d of March, 1818, a *rente* of 12,040,000 francs, representing a capital of 240,800,000 francs of the money of the kingdom of France: And it was by the convention declared that the *rente* to be created by virtue thereof, should be divided amongst the therein-named powers, in manner therein mentioned: the portion whereof allotted to the kingdom of Spain, amounted to the sum of 850,000 francs *de rente*.

That although it appeared by the convention that in consideration of 850,000 francs *de rente*, or 17,000,000 capital in French inscriptions, the French government was exonerated from all claims on the part of the Spanish government by virtue of the treaties: and that the settlement of the claims of the subjects of Spain upon that fund, and the division [33] thereof, were to be arranged by Spain, by means of commissioners to be named for that purpose: yet in point of fact, such was not the case, in as much as, prior to, and at the time of, the execution of the treaty of the 30th of May, 1814, the governments of France and Spain had mutual claims one upon the other in respect of many particulars which are not mentioned or provided for in that treaty, which mutual claims formed the subject of an additional article bearing date the 20th of July, 1814, annexed to the last-

mentioned treaty, and to which the respective governments of France and Spain were alone parties.

That with a view to the final adjustment of the mutual claims of the governments of France and Spain, a secret convention took place between the governments of France and Spain, by which it was recited that, in order to remove the difficulties calculated to obstruct, so far as Spain is concerned, the conclusion of the general arrangement which France is at present negotiating with the Courts which signed the treaty of the 20th of November, 1815, for the purpose of definitively settling and extinguishing the sum total of her debts to the subjects of the said Courts, as well as to the Powers, which were parties to the said treaty, and thereupon it was agreed as follows:—ART. I. The sum total to be paid by France to the subjects of His Catholic Majesty, whose claims are founded both on the treaty and the additional article of the 20th of July, 1814, and the stipulations of the convention concluded in conformity with Article IX. of the treaty of the 20th of November, 1815, is determined and fixed at 1,850,000 francs *de rente* in inscriptions upon the great book of the public debt of France, representing a capital of 37,000,000 of francs. ART. II. In case the part which shall or may be assigned to Spain, in the divi-[34]-sion to be made of the total sum which France will bind herself to the Courts which signed the treaty of the 20th of November, 1815, to apply to the payment of the claims of the subjects of the Foreign Powers, should be below the sum stipulated in the preceding Article, the French government engages to supply the means for making up the difference and completing the same. ART. III. The said sum of 1,850,000 francs *de rente* shall be divided into two equal parts, one of which shall be paid into the hands of such person or persons for that purpose to be authorised by the Spanish government, upon the same terms and at the same periods, as those determined with regard to the payments to which France shall bind herself to the other Powers; the other shall remain deposited in the hands of Commissioners appointed for that purpose in equal numbers on both sides, and who shall receive the interest accumulating in a compound ratio in favour of His Catholic Majesty's subjects, creditors of France, until such time when the mixed commission to be intrusted with the investigation and liquidation of the claims of His Most Christian Majesty's subjects against Spain, shall have terminated its labours, and when His Catholic Majesty shall have provided the needful means for the payment of the said claims. ART. IV. In order to remove all the obstacles which might retard the liquidation of the claims of the subjects of His Most Christian Majesty against the Spanish government, a special convention shall be concluded, having for its basis, with regard to the various classes of the claims to be admitted, and the mode in which the same are to be paid, the stipulations of the treaty, and the additional article of the 20th of July, 1814, and those of the convention of the 20th of November, 1815.

[35] The bill then proceeded to state, that in pursuance of the secret convention, the Respondent appointed Don Justo José de Machado, (one of the liege subjects of Respondent, and then residing at Paris, and exercising the functions of Consul General from the Court of Spain to the Court of France,) the agents of the Spanish government, to receive the moiety of the sum of 1,850,000 francs *de rente*, which by the convention was to be paid by the French government into the hands of such person or persons as might be authorised by the Spanish government to receive the same; and that the French government had since paid over to Machado the whole of the moiety of the sum of 1,850,000 francs *de rente*, according to the secret convention; and that Machado had duly accounted for the same with the Spanish government.

That after payment to Machado of the moiety of the sum of 1,850,000 francs, the remaining moiety was left in the hands of the French government as a deposit, in pursuance of the provisions in the secret convention, in order that the same might be applied as directed by the convention; and that with a view of finally settling the mutual claims of the respective subjects of France and Spain, with respect to that fund, on the 30th of April, 1822, a convention was concluded between the governments of France and Spain, which recited that His Catholic Majesty and His Most Christian Majesty being alike animated with the desire of putting an end to the difficulties which have hitherto retarded the liquidation and payment of the

claims of the subjects of His Most Christian Majesty against Spain, and wishing, with a view to the common benefit of their respective subjects, to settle the concern by a definitive adjustment, had for that especial end and purpose agreed, etc. as follows:—[36] ART. I. In order to effect the reimbursement and total extinction of His Most Christian Majesty's claims, the payment of which is demanded from His Catholic Majesty in virtue of the first additional article of the treaty of the 20th of July, 1814, the sum of 425,000 francs *de rente*, representing a principal of eight millions and a half of francs (8,500,000), shall be deducted and taken by the French government from the sum which now lies as a deposit in the hands of the latter, and belongs to Spain in virtue of anterior conventions. ART. II. Upon the preceding stipulation being carried into execution, His Most Christian Majesty engages to discharge and satisfy the above-mentioned claims of his said subjects upon Spain, founded upon the first additional article of the treaty of the 20th of July, 1814, and His Catholic Majesty does thereby remain fully acquitted of and from all and whatsoever His Catholic Majesty owed to them in virtue of the said article. ART. III. Immediately after the exchange of the ratifications of the present convention the French government shall cause payment to be made into the hands of such person or persons as may for that purpose be authorised by His Catholic Majesty, of the overplus of the *rente* which the said French government kept as a deposit, including the whole amount of the compound interest that has hitherto accrued thereon.

That in pursuance of the last mentioned convention, the Respondent appointed one Don Jose Noguira, who had been employed by the Spanish government in negotiating the convention, the agent of the Spanish government to receive the surplus mentioned in Article III. of the convention, which surplus, exclusive of compound interest, amounted to a sum of 703,010 francs *de rente*, or 14,060,200 francs in inscriptions.

[37] That the French government shortly after the ratification of the convention, and in pursuance thereof, paid over to Noguira, by inscribing the same in his name in the great book of the public debt of France, several instalments in respect of the surplus.

That Noguira was afterwards removed from his appointment, and Machado was duly appointed his successor therein, and that thereupon the French government paid over to Machado the whole or the greater part of the residue of the surplus, which had not been previously paid over to Noguira, by inscribing the same in the name of Machado in the great book of the public debt of France.

That Noguira, immediately after his removal from his appointment, transferred into the name of Machado the whole of the instalments which had been so inscribed in Noguira's name in the great book of the public debt of France.

The bill then proceeded to state, that in the early part of the year 1823, a civil war broke out in the kingdom of Spain, and that in consequence thereof, Machado, (who was then residing at Paris,) some time in the course of the year 1823, sold out and converted into money the whole of the funds which then stood inscribed in his name in the great book of the public debt of France, in pursuance of the convention, and quitted France and came to England, having in his possession, either in specie or bills upon this country, the whole or the greater part of the proceeds of the sale, to the value of £500,000 sterling.

That immediately upon the cessation of the civil war, with a view to secure the proper application of the funds, a royal decree was made and promulgated by the Respondent, on the 21st of March, 1824, directing the formation of boards for ascertaining and [38] deciding upon the claims of Spanish subjects against the funds in question.

That in pursuance of the decree, two public boards, the one of them styled "The Board of Examination and Liquidation," and the other of them styled "The Board of Appeal," were appointed, and were both of them still in active operation; that Senor Don Bruno Vallarino was the president of the Board of Examination and Liquidation, and Senor Don Anselmo de Ribas president of the Board of Appeal; that both the boards held their sittings at Madrid; and that all the members comprising the respective boards resided at Madrid, without the jurisdiction of the Court of Chancery in England.

That shortly after the promulgation of the royal decree, a copy was sent to

Machado, by the order of the Respondent; and at the same time an official dispatch was written and sent to Machado, by Count D'Ofalia, then secretary of state for foreign affairs in Spain, requiring him to transmit duplicates of the official letters which he might have transmitted to the constitutional government on the subject of his agency.

That in reply, Machado remitted to the Spanish government the accounts required, by which it appeared, that he had received on account of the Spanish government, by virtue of the convention of the 30th of April, 1822, a sum of 446,403 francs *de rente*; and that he had brought over to England, and then had in his possession, the proceeds thereof either in specie or bills, amounting to the sum of £500,000 sterling.

That on the 15th of June, 1824, the Count D'Ofalia wrote and sent another official letter to Machado, signifying that the boards charged with the adjudication and distribution of the funds for the indemnification of the parties interested therein, being created, the funds must consequently be at the immediate disposal of the boards, subject to the necessary guarantee and security on behalf of the creditors.

That Machado, on the 11th of June, 1824, wrote and sent to Count D'Ofalia, a letter, stating that he acted under an impression of the funds in question being the property of the parties concerned in the claims; and that he should be ready to pay thereout such claims as the boards might recognise as legal, and definitively liquidated, conformably to the treaties.

That on the 19th of July, 1824, a letter was written and sent to Machado by Don Bruno Vallarino and Don Anselmo de Ribas, whereby they directed Machado to deposit the funds then remaining in his hands in a public bank in England, at the disposal of the boards, as the representatives of the creditors, and for the liquidation of their claims, inasmuch as it would be attended with the advantage of producing to the general body of creditors an annual interest, which would increase the original funds for their benefit, and the funds would remain invested with all due security.

That on the 26th of November, 1824, Machado wrote and sent to Senors Don Bruno Vallarino, and Don Anselmo de Ribas, a letter, whereby Machado promised to deposit the balance of the monies then in his hands on account of the Spanish government (after deducting the expenses he had incurred) in the Bank of England, at the disposal of the boards, as the representatives of the creditors, and for the liquidation of their claims; and that the letter of Machado contained the passage following—"I deem it incumbent on me to observe to you, that it appears to me highly expedient, that no time should be lost in proceeding to a definitive settlement of this point, because, should the English subjects, who are or conceive themselves creditors of our government, on any grounds or account whatsoever, (and they are by no means inconsiderable in point of number,) happen to discover the existence of the funds, it is much to be feared that they will resort to all possible judicial measures for the purpose of paralyzing them, and whilst their claims are in a course of discussion and decision before these Courts, which will not only occupy a considerable period of time, but also be attended by a very heavy expense, the Spanish parties and legitimate owners of the funds will be deprived of the enjoyment of their property, if not totally lose it."

That Don Anselmo de Ribas and Don Bruno Vallarino thereupon wrote and sent a letter to Machado, whereby they directed him immediately to deposit in the Bank of England the resulting balance of the monies in his hands, then belonging to the Spanish government, placing it at the disposal of the boards, as the representatives of the creditors, and for the liquidation of their claims.

The bill then proceeded to state, that Machado did not, as required, deposit the balance; and that without the knowledge of the boards, or of the Respondent, and in direct breach of his duty as agent of the Spanish government, some time in the month of December, 1824, he deposited with the Appellants £200,000 sterling, being part of the proceeds of the funds received by him by virtue of the convention of the 30th of April, 1822; and that the Appellants had not, at the time when the monies were so deposited with them, and had not then, and never had, [41] any just claims whatsoever either upon the said monies, or upon the funds received by

Machado by virtue of the convention of the 30th of April, 1822, or upon the Spanish government in respect thereof.

That the Appellants had then, or ought to have, in their custody, possession, or power, the monies so deposited with them: and that the said monies then, according to the laws and constitution of Spain, justly and of right belonged to the Respondent, as the head and sovereign ruler of the Spanish government, to be applied by the Respondent, as such head and sovereign ruler, according to the provisions for that purpose contained in the treaties of the 30th of May, 1814, and the 20th of November, 1815: and that the Respondent had by his agents applied to the Appellants, and requested them to furnish the Respondent with an account of the monies which were so deposited with them, and of their application thereof, and to pay over the amount thereof to the Respondent, or his agents, in order that the same, when so received, might be applied according to the provisions contained in the treaties.

The bill also contained charges that the Appellants admitted that Machado had paid over to them part of the funds: that the whole of the funds delivered by Machado belonged to the Respondent, to be distributed by him pursuant to the treaties: that Machado in November, 1823, inserted a paragraph in a public newspaper called *Le Constitutionnel*, denying assertions of his having placed the funds at the disposal of the constitutional government, and stating that the funds belonged to the claimants under the treaties.

The bill further charged, that the several boards of examination and liquidation, and of appeal, were then still subsisting, and actively engaged in the ex-[42]-amination of the claims of the subjects of Spain, founded on the several treaties, upon the funds which the government of France contracted to pay to the Spanish government by the convention of the 30th of April, 1822, but that none of such claims had been then definitively liquidated and allowed: that the Appellants had not, and no one could have any claims upon the funds, unless the same were grounded upon the treaties: that such claims were altogether of an equitable nature, and could not be properly determined except in a Court of Equity, if any court of justice in England could take cognizance thereof.

That the Appellants alleged, that the monies were deposited with them, by Machado as the agent and in the name and on the behalf of one Achilles de Pereira; whereas Pereira had not then, nor ever had, any claims whatsoever upon the monies, and that Achilles de Pereira was at that time, and had ever since been, and then was, the secretary of Machado, and that the monies were so deposited in the name of Pereira, solely for the purpose of preventing any attachment or other legal process.

That Pereira was then residing in the Netherlands with Machado, beyond the jurisdiction of the Court; that the Appellants had never disposed of any part of the monies deposited with them, except under the express direction of Machado, and had always acknowledged themselves to be the holders of the monies merely as the trustees and agents of Machado: that in the month of January, 1826, they delivered an account to Machado, containing a statement of the payments made by them on account of Machado, out of the monies so deposited with them, and also an account of all the monies so deposited, making a balance of £100,000 in favour of Machado, which balance the Appellants then had in their hands.

[43] That the funds were in great danger of being wholly wasted and lost, unless the same should be immediately ordered to be paid into the Bank of England, in trust in the cause.

That the monies were deposited in pursuance of a fraudulent concert, between Machado and the Appellants, and for the purpose of withdrawing the funds from the claimants, who might ultimately be declared entitled thereto: that when the monies were deposited with them they well knew, or suspected, that the same were not the proper monies of Machado, but that they were actually part of the proceeds of the funds so received by Machado, by virtue of the convention of 30th of April, 1822, and then actually belonged to the Spanish government, to be applied by that government in manner thereinbefore mentioned: that Machado had no right or authority whatsoever to deposit with them any part of the proceeds of the funds: and that in so doing, Machado was committing a direct breach of trust.

The bill also charged that Machado was without the jurisdiction of the Court,

but intended shortly to return to England, and to commence legal proceedings against the Appellants, for the purpose of recovering from them the monies deposited with them, and thereupon to apply the same to his own use: That the Appellants threatened and intended to apply the monies to their own use: That the monies ought forthwith to be paid into the Bank of England for safe custody, for the benefit of all parties who should be declared ultimately to be entitled thereto, or otherwise that the same ought forthwith to be paid over to the Respondent, or his agents; and that the Appellants ought in the meantime to be restrained by injunction from disposing of the monies, otherwise than under the direction of the Court.

[44] The bill finally charged, that Machado and the Appellants then had in their custody, etc., accounts, etc., which they refused to produce.

The prayer was, that the Appellants, and Machado, when he came within the jurisdiction, might answer the matters of the bill; and that an account might be taken of all the money which had been deposited with the Appellants by Machado, etc., and that the amount thereof might be ascertained, and paid over by the Appellants to the Respondent, or his agents, or otherwise that the Appellants might be ordered forthwith to pay the same into the Bank of England, in trust in the cause; and that Machado might in the meantime be restrained, by injunction, from commencing or prosecuting any action, or taking any steps against the Appellants, for the purpose of obtaining repayment of the monies deposited with them; that the Appellants might also be restrained from paying over the monies to Machado, or parting with the same, without the direction of the Court; that the Appellants might set forth the claims (if any) which they had upon the monies deposited with them, or upon the funds received by Machado, by virtue of the convention of the 30th day of April, 1822, and the particulars thereof, and how they make out the same; and that the said claims might be disposed of by the Court.

Process to appear to and answer the bill was prayed against the Appellants, and Machado when he should come within the jurisdiction of the Court.

The Appellants appeared to the bill, and on the 31st day of January, 1828, filed a Demurrer, and for cause of Demurrer shewed, that the Respondent had not by his bill made such a case as entitled him in a Court of Equity to any relief against the Appellants, [45] or either of them; and for further cause of Demurrer they shewed, that the Respondent had not made Achilles de Pereira a party thereto, nor prayed process against him; neither had the Respondent made parties to the bill, nor prayed process against any or all of the persons who, according to the statements in the bill, had or were entitled to claim a beneficial interest in the monies in the bill mentioned, or some part thereof.

The Demurrer came on to be argued on the 22d of March, 1828, before the Lord Chancellor, when it was ordered and adjudged that the Demurrer should be overruled, and that the Appellants should have a month's time to put in their answer.

From this order the appeal was presented.

For the Appellants: Mr. Pepys and Mr. Russell.

For the Respondents: The Attorney General and Mr. Horne.

For the Appellant: It has never been held, that a Foreign Sovereign can sue in Courts of Equity in England; and according to the principles of such Courts, such a plaintiff ought not to be allowed to sue therein, inasmuch as by no possibility can process be issued with effect, or equity done, or a decree enforced against him. The pretended rights, on which the Plaintiff in this bill relies, are rights which he claims merely by virtue of his prerogative as King of Spain; and it is not according to the law or constitution of England, that an English Court of Equity should be made instrumental in enforcing in England the prerogative of a Foreign Sovereign. The pretended right of the King of Spain to the monies sought to be recovered by the bill arises out of [46] a treaty with France, which was inconsistent with the existing relations between each of those countries and his Majesty the King of this country. An English Court of Equity, therefore, will not lend its aid to enforce any such pretended right. This is a bill in Equity, according to the statement of which not one of the parties before the Court has any right to the beneficial enjoyment of the property which is the subject of the suit, and no decree could be made upon it, which would do complete justice. The bill does not bring before the Court all the parties interested in the matters of the suit, and in the questions raised by the statement in

the bill, nor any persons who represent those parties or their interests. Achilles de Pereira is not made a party to the suit, though the bill states, that the monies of which the plaintiff seeks to obtain possession, were paid to or deposited with these appellants in the name of Achilles de Pereira.*

In the course of the argument the Lord Chancellor made the following observations.

The Lord Chancellor: The treaty on the subject of the claims of French subjects, creditors of Spain, says that the sum of one million eight hundred and fifty thousand *francs de rente* to be received, shall be divided into two equal parts, one of which shall be placed in the hands of persons appointed by the Spanish government to receive it, and the other is to remain in France, and is to be deposited there for the purpose of meeting the claims which the subjects of France have on the government of Spain.

Half of the fund was to remain as a species of secu-[47]-rity to the French government, that the Spanish government would pay the claims of the French subjects on the Spanish government. Half of the entire sum stipulated by the convention was to remain in deposit as a security for the purpose of guarding against any default on the part of the Spanish government, with respect to any claims of the French subjects under that commission. It was divided by agreement between the governments.

It has been argued (by Mr. Pepys) that political reasons might have rendered it necessary to recognise the right of some other sovereign; and a case has been supposed, of a bill filed when the French were in possession of Spain, by the individual who exercised the authority over Spain, at that time; the individual who here appears as the Plaintiff, asserting his title as King of Spain, being no doubt deposed from his throne by power, not by right: his father then living, and claiming the throne against the person in possession, and his son against both: as to this and the objection that the title of Ferdinand may be disputable, it is admitted upon the record that he is the King and sovereign ruler of Spain.

That a King is entitled to sue as a King cannot be disputed. As a suitor he submits himself to the jurisdiction of the Court, otherwise it might be an objection that you could not control him. But if he comes here as a suitor, he submits himself to the jurisdiction. Has not the sovereign power of another country the common privilege of mankind? Do you say that by the law of nations he is deprived of that privilege being the King of Spain?

As to the doctrine in *Barclay v. Russell* (3 Ves. 431: see the note in p. 58), are there not some opinions pronounced in some of [48] the cases (see *Dolder v. Lord Huntingfield*, 11 Ves. 283) by Lord Eldon on the *dictum* of Lord Rosslyn in the Judgment given in that case.

As to the objection that the *cestui que trusts* are not parties, it does not appear that any of the claims are ascertained, and all the claimants are abroad; it does not appear that any of the claims are yet substantiated.

Do you mean to say, that the King of Spain is not entitled to take money out of the hands of his own agent, having by his authority received the money from the French government?—It is alleged by the bill, that the person appointed to receive this money, was the agent of the King of Spain, and we must take it as a fact. Whose agent was he, if not the agent of the King of Spain?

The French government expressly stipulated, that they will pay the money into the hands of such person as shall be named by the King of Spain. The King of Spain appoints Machado as his agent, and by virtue of that agency and appointment, the French government allow him to inscribe the *rentes* in his name, and he is allowed to act as the agent of the King of Spain. Only consider it. An arrangement is entered into, not between the subjects of Spain, creditors of France, and the French government, but the King of Spain and the King of France, which ultimately the subjects of the King of Spain were to have the benefit of, but the acting parties were the head of the respective governments.

* The Judgment was given at the close of the argument for the Appellant. Such parts of that argument as are not stated above, are incorporated in the observations made by the Chancellor during the argument.

Why are we to assume on this record that the King of Spain is suing for the purpose of destroying the right: we are rather to assume that he is suing to establish the right. Machado takes possession of this money and gets out of the reach of the King of Spain [49] and the creditors. You will find, taking the whole of the record as it stands, the transaction is this; the government of France contracts with the government of Spain, to pay the government of Spain a sum of money which is to be eventually distributed among certain persons who are the subjects of Spain, who have sustained losses and injuries in consequence of the invasion by France, of Spain. By that treaty between France and Spain, the King of Spain is the party to see the money properly applied; he is the party to see to its application. These very tribunals which are established for the investigation and liquidation of these claims are tribunals established by the will and arbitrary act of the King of Spain. He it is who establishes the tribunal of liquidation. He it is who establishes the court of appeal. They were not existing tribunals; they are tribunals established by him and under his authority. He is to see, as the governing power of that country, to the application of these funds. In the mean time these individuals under his authority get possession of the funds as agents. Then is not the King of Spain (provided a king can sue in our municipal courts) is he not entitled to come here and sue for the money so obtained?

As to the objection that two of the parties to the general treaty had no right to alter that treaty by a private convention, to the prejudice of the parties beneficially intitled under the general treaty, the question is, what construction a court of law would put on the treaties taken together, and not merely on particular passages. The government of France having a counter claim against the government of Spain, by the treaty of 1815 say to the government of Spain, although I agree to pay you this sum, I shall keep it in deposit as a security for the liquidation of the claims of my sub-[50]-jects on you; and the moment you liquidate those claims, the funds shall be handed over to you, and in order to prevent the delay and inconvenience that might be occasioned by the investigation of those claims which France had on Spain, it is at last agreed that France should take upon herself the liquidation of those particular claims, and that the residue of the money should be at once paid over to Spain. There is first a general treaty to indemnify: then comes this private treaty, in which they agree between themselves whatever may be the amount of the claims arising upon the public treaties that this particular arrangement should take place between these two powers. Then comes the treaty of the 21st of April, 1818, by which 850,000 *francs de rente* were allotted to Spain; but Spain had in the mean time provided, in a secret treaty with France, for a different sum.

Supposing the private treaty to be in contravention of the public treaty, do you mean to say that would apply to a question between the King of Spain and his own agent, having received money under that treaty? is that a defence which the agent could set up? I am not quite sure that the transaction was not in all other respects free from all objection. There were counter claims; they agree that the claims which the Spanish government have on France shall amount to so much, on the other hand you have a counter claim on Spain; the question would be whether the 850,000 francs applied only to the claims on the one side, or the balance of account between the parties. If it was to be applied to the balance of account, it was quite unnecessary to ascertain it.

The Lord Chancellor * (June 18th): It is argued that the pri-[51]-vate treaty was a fraud upon the parties to the public treaty, and the parties materially interested in it: but it appears that the fund of 850,000 *francs de rente* was stipulated by the public treaty for particular objects, and for particular claims; and it is with reference to those mutual claims not provided for in that treaty, that the two powers came to an agreement that these mutual claims not included in the sum stipulated by the general treaty, should be regulated and fixed at a certain amount. What is there fraudulent in that? There were other claims not included in the original treaty which led to the alteration of the sum, which is provided for by the secret treaty; that there were mutual claims not included in the other treaty, must be taken as a matter of fact on this record, that is a ground therefore for the treaty regulating the sum at an amount different from that which is contained in the

* The following observations were made during Mr. Russell's argument.

general treaty. What is there fraudulent in that, even supposing that we could enter into the question upon this record, and with reference to this subject? Suppose it had been a transaction between private parties, what is there fraudulent in it? It has reference to particular objects. The record states what must be taken as a fact on the demurrer, that there were other claims. By your demurrer you admit this statement to be correct, that there were mutual claims one on the other, in respect of many particulars not mentioned or provided for in that treaty; how then can you say it is a fraud? A certain sum remains as a deposit in France, and an agreement was come to between the King of Spain and the King of France with respect to the sum so in deposit, and the French government in consideration of being allowed to take to their own use a certain part of that sum, agreed to pay over the rest to such persons as should [52] be nominated by the King of Spain to receive it. The King of Spain nominates Machado, and he receives it: and then he says he is not accountable to the King of Spain.

The whole transaction shows that the boards as they are called, can have no property in the fund. They are merely boards of liquidation, a species of tribunal established for the purpose of ascertaining the amount of the claims; they have no interest in the property; they were merely acting judicially.

The effect of the letters is nothing more than an admission on his part, that he is in possession of the fund. It is an admission on the part of *Machado*, that he got possession, (as appears also by the record,) under the authority of the King of Spain. The only contractors in these treaties are the governments of the two countries. Whatever the subjects take, they take by virtue of the treaties entered into by these governments. The subjects have nothing to do with it; the governments are parties to the treaties, and they are entitled in the first instance to the money; there is no such thing as a treaty between the governments of one state, and the subjects of another state. It is the money of Ferdinand, in the first instance he has the control over it, it is he who is the contracting party. It is his duty as the King of Spain, to distribute it to the subjects. We cannot assume that he will not so distribute it, we have nothing to do with that question. We cannot assume that Ferdinand, when he is in possession of the money, will not distribute it, according to the spirit of the treaty. In fact he has established tribunals for that purpose; but we cannot enter into that question at all. It is money belonging to Ferdinand under that treaty, received by Machado by the authority given to him by Ferdi-[53]-nand, and he is accountable to Ferdinand for it, whether it is, or is not his property.

As to the case of *Mendizabel v. Machado*, it is different from this case. There Machado being in possession of this money, some bills were drawn upon him by Mendizabel, and the money was under those bills to be applied to some objects, foreign to the treaties and the trust. The decision rested upon the misapplication of the funds. In this case it appears that there are tribunals established for the purpose of liquidating the claims, arising under the treaties. That there are tribunals appears on the record, and the claims are in a train of settlement.

It has been asserted that no case has occurred, in which a sovereign was permitted to sue in the municipal courts of England. Can no case be found in which the King of Spain has sued at law? What is that case in Rolle's reports,* where he was directed to bring an action of trover, and he did so? In another case there

* The case is mentioned in Rolle's abridgement. Tit. Court de Admiraltie, E. 3. Ils (the Court of Admiralty) ne poient tener plea d'un suit per le Roy de Spaine, pur succider de Brasill bois en Brasilia pur ceo que est sur le terre. Hill. 12. Ja. B. R. enter le Roy de Espagne et Pountes resolve et prohibition graunt et ceo apres trie al common loy en un trover et conversion. See 2 Bulst. 322.

In Rolle's Reports, p. 133, the case is again mentioned.

Where after reciting the application for and the granting of the prohibition, the report goes on thus:—P. 13. Ja. le Court fut de mesme l'opinion, mes tenus per Coke et Doderidge que l'Embassador puissoit aver action pur ceo en cest court et al auter jour le Counsell del Embassador vient en Court et dit que il voilt surcesser son suite en l'Admirall Court et port action icy, per que fut order per *Curiam* per consent des parties accordant et issint nul prohibition grant et puis le Roy de Spaine port action vers luy en B. R. See Bulst. 322. s. c.

was a bill filed by the Ambassa-[54]-dor of the King of Spain, but the bill was dismissed on the ground that it ought to have been filed by the King of Spain.*

Suppose the King of Spain were to send jewels to be set to Messrs. Rundell and Bridge, and the jewellers were not to deliver them up to the King, do you mean to say that the courts of the country could not interfere? that the King of Spain could not recover the jewels? do you think there would be no redress in a case of that kind?

The action was not by the Ambassador. How can an Ambassador bring an action at law? the party was never in possession of the property. If you look at the reports in Rolfe's, Butstrode, and Rolfe's Abridgment, you will see in some places it is entitled the [55] *King of Spain v. Pountes*. How could an Ambassador bring an action of trover, the property never having been in his hands.

Has the record been examined in the case cited from Rolfe, to see whether the Ambassador was the Plaintiff on the record? It was brought by his direction very likely, but how could an Ambassador bring an action for property belonging to the King? it is quite out of the question. I wish to point your attention to that case in Hobart (Hob. 113, *ante*, p. 51, note), in which the bill was dismissed on the ground that the bill should have been in the name of the King, and not in the name of the Ambassador, as the Ambassador was the agent to the King for political, but not for private purposes. Have you observed what Lord Kenyon says in *Ogden v. Folliot* (3 T. R. 731)? These are his words, "if we were to consider the acts of the province of New York as binding as has been contended, I am at a loss to know why all the property of those persons which was said to be confiscated, did not pass to the executive power of that state, to whom it was said to be forfeited, and why an action might not have been brought in the name of such executive power, to enforce the payment of this bond." † I think you will find in one of those cases (I have not the books here,) that the King of Spain brought an action of trover against a party who had got possession of some property, and he recovered. It is quite clear it must be in his own name. There are several other cases he-[56]-sides that. What reason can you give why the King of Spain should not maintain an action?

It is argued that the Allies, including England, abandoned part of their claims for the purpose of exonerating France, and that the arrangement could not be altered by a private convention which increased the charge.

Supposing any thing to turn on that view of the question, by what documents does it appear that this country abandoned any part of her claim? It does not appear that any party abandoned its rights for the purpose of getting rid of the liabilities on the part of France; but they agreed to fix their claims at certain specified sums. There might be a clear gain by fixing on a precise sum. What is

* See the *Spanish Ambassador v. Bingley*, Hob. 113. The bill was filed in Chancery by the Spanish Ambassador, as Plaintiff suing for all the King of Spain's subjects, for the recovery of goods which were stated to belong to such subjects generally, and not to any individuals named. To this bill a demurrer was filed; and the matter was referred by the Lord Chancellor to the Judges of the Common Pleas, who thought that the Ambassador ought not to be answered. The case was afterwards tried by consent, in a course prescribed by the Judges, and forming no precedent as to jurisdiction.

There had been a previous proceeding in the same matter, which is reported in Hob. 78, under the title of *Don Diego Serviento de Aenna, Ambassador Leiger* for the King of Spain, against *Jolliffe, Tucker, and Sir Richard Bingley*. The Plaintiff sued in the Court of Admiralty, as procurator general for all his master's subjects; stating in his libel a case of piracy, by Jolliffe and Tucker, against ships with cargoes, of subjects of the King of Spain; and that the ships, etc. were taken into a port of Ireland, and came to the hands of Sir Richard Bingley, who converted them to his own use. A prohibition was prayed, and "Montague, the King's serjeant for the Ambassador, said that he could not sue for these goods at common law, because he was not proprietary." See Hob. p. 113.

† He said also, "if the treaty of peace has reference to the first declaration of independence, the bond in question was lawfully transferred to the executive power; and if so, I do not see why an action may not be brought."

the fact? How has it turned out? Is not the sum larger than the claims which have been allowed? I do not think the parties to the general treaty abandoned any claims: there is nothing to shew such abandonment: it is a mere arrangement.

I have directed your attention to what is said by Lord Kenyon, and the case in Rolle (1 Rolle's Rep. 133, *ante*, p. 53); can you state any opposing authority? I think we may assume that a sovereign can bring an action at law. As to the case in Hobart (*Spanish Ambassador v. Bingley*, Hob. 113, *ante*, p. 54), the objection was that he could not maintain a suit in the name of the Ambassador instead of his own name. The matter was disposed of by the Court upon agreement between the parties. It was not a case of regular jurisdiction.

There was a case (*Dolder v. Lord Huntingfield*, 11 Ves. 283) from the canton of Berne, in which certain persons filed a bill on behalf of them-[57]-selves and the canton of Berne: the only objection made, was that it was a bill not filed by an established government recognized by this country.

As to the objection that in the case of a sovereign justice cannot be done: if he appears as Plaintiff, you can do complete justice—you can impose any terms you think proper—you have him in your power—you may file a cross bill, and then you have him completely under your control and jurisdiction.

In the case of the *Colombian Government v. Rothschild*, the objection was that it was not a proper designation of the executive. I was not aware that the present Master of the Rolls had expressed himself so strongly: * but it is quite clear from the observations of the Judge, that if there had been a proper designation of the executive they would have had a right to sue.

In the case of *Dolder v. Lord Huntingfield*, the Lord Chancellor, speaking of Maryland, says, "that state was only a corporation under the great seal dissolved by means which a court of justice was obliged to consider rebellious, and then the transfer of the title from Maryland to any other state was a question a court of justice could look at as a question of law only in one way, and the principle was that the Court could not admit that the title passed to the independent states of America by an act which we are obliged to call rebellion." He goes on to say with respect to [58] that case † before Lord Loughborough, "the question of merits is not decided by the Maryland case, which does not touch such a case as this, a foreign independent state." The inconvenience in many of the cases has arisen out of the shape of the record, but the Lord Chancellor admits most distinctly in that case, that an action can be brought or a bill filed in the name of an independent power, or the executive power of an independent state.

As for the objection that the money might be recovered at law, Machado is the agent, and he received the money as agent of the King of Spain. The jurisdiction is concurrent, and they want discovery and account.

The *cestui que* trusts are not necessary parties, for there is no person who has established any right as appears by the record itself. It is stated that there is no person who has yet established a claim: therefore, there is no person whom you can make a party to the record.

As to the necessity of making Pereira a party, is it stated that the funds are now in the name of Pereira? Is it stated that Pereira acted as the agent of Machado in paying the monies over, or that he has any interest in them at all? They were deposited in the name of Pereira, Pereira being out of the jurisdiction of the Court.

It is stated on the face of the record that Pereira had no interest—he did not claim any interest. All [59] the circumstances which are connected with paying

* The expression alluded to, is in the case of the *Colombian Government v. Rothschild*, 1 Stu. 94. The report of the Vice-Chancellor's judgment contains the following passage: "A foreign state must sue in the names of some public officers who are intitled to represent the interests of the state, and upon whom process can be served by the Defendants."

† *Barclay v. Russell*, 3 Ves. 431: in the report of which the following passage occurs: "I wish it to be considered whether any foreign sovereign under any denomination, can sue in a municipal court of this country. Whether it is not matter of application from state to state. I doubt, whether in a municipal court the right of a sovereign independent state can be recognised"

it over, and every thing relating to it, shew distinctly that he had no interest and no claim whatever. All that is admitted by the demurrer. There is no colour of interest, provided it is stated how, and under what circumstances it is paid. Take it as a naked fact unaccompanied with other circumstances there may be a colour of interest; but you are not to take a part of the averment and reject the rest—you must take the whole—you must take the whole averment together—and the whole averment is admitted by the demurrer to be true. The Master of the Rolls, it is said, has decided * that where it appears on the face of the bill a party has an interest, but it is averred that he is out of the jurisdiction of the Court, it is necessary to pray process against him. But there is no colour of title in Pereira on this record.

It has been argued that the trusts of the original treaties have never been rescinded by competent authority. Upon that point the case stands thus: In the original treaty there was no particular sum stipulated. France was to indemnify the subjects of the different powers for the amount of their claims; then there was to be a mixed commission to adjudicate the amount of the claims. It was afterwards considered most convenient that a precise sum should be appropriated by France: there was an end of the mixed commission; and the surplus under such circumstances belonged to the respective powers. However, that has nothing to do with the present [60] question, there is a subsequent and distinct arrangement made by France with Spain, by which it is agreed that a part of this sum of money on which France had certain claims, should be paid to France, and the rest be paid over and be the property of the King of Spain, that is the distinct language of the treaty. France has certain claims against Spain, and she did not choose to part with the fund till those claims were liquidated. In the mean time the fund was to remain in France accumulating in compound interest for the benefit of the Spanish claimants until the claims which France had were liquidated. Then, Spain and France, by a subsequent treaty, agree to put an end to this arrangement, the French agreeing to take a part of these funds in liquidation of the claims of the French subjects, and the remainder of the sum was to be paid over to the Spanish government. That was the final arrangement—it was under that arrangement that Machado received the money. It is quite clear from this final arrangement that France abandoned all claim on the fund.

Lord Redesdale: This is one of the clearest cases that can possibly be stated. I conceive that there can be no doubt that a sovereign may sue. If he cannot, there is a right, without a remedy: for it is only by suit in Court, that the Respondent can obtain this money: he sues as every sovereign must sue, generally speaking, either on his own behalf, or on behalf of his subjects. If the courts of justice were to refuse to receive his suit, I apprehend that it might be a just cause of war. All transactions on behalf of nations, must be transactions with the sovereign power of those nations: it cannot be transacted otherwise, and what is the subject of the present suit? If any person had a right to object to the authority of Machado in receiving this money, it was the government [61] of France. The French government did not object to it: they paid the money to Machado, and he is put in possession of the fund. Machado receives it as the agent of the King of Spain: it was in that character alone that he received it. The only persons who had a right to dispute the authority of Machado to receive it, were the government of France, and the government of France did not dispute it. Machado, having received the money, deposits it in the hands of Messrs. Hullett and Brothers; and the single pretence, on which there can be the slightest objection in this case, is, that he deposited it in the name of Achilles de Pereira. This man, it is stated, was a person whose name was made use of by Machado, for a particular purpose, and it is so admitted by the Appellants in this case. It is stated that the Defendants have rendered all the accounts to Machado, and never pretended that this man had any interest in the fund in their subsequent transactions with Machado. The bill states, therefore, that this is a mere pretence on their part, and

* — v. *De Tastet et relat.* Mr. Russell (not reported). See *Windsor v. Windsor*, 2 Dickens, 707. But see *contra Haddock v. Pamlinson*, 2 Sim. and Stu. 219, and Red. Ch. Pl. 134. See also upon the general question as to parties out of the jurisdiction, *Fell v. Brown*, 2 B. C. C. 276, and the *Att. Gen. v. Balliol College*, cited in Red. Ch. Pl. 25.

that in truth they have acknowledged Machado to be the person to whom they are to be accountable. Who is Machado on the statement of these proceedings, but the agent of the King of Spain, in his sovereign capacity? It is in his sovereign capacity that he appoints Machado as his agent, and Machado is responsible to the King of Spain. Having received the money in this character, what have the Appellants to do with all these treaties? Nothing: as I apprehend. They have this money in their hands, as the depositaries of Machado, the agent of the King of Spain; that is the truth of the case, as appears on the record.

Under these circumstances, therefore, the Appellants ought to answer this bill, and to say what is the [62] money they have in their hands and to pay that money as the Court shall think fit to direct. If there existed such claimants as are stated, and who might perhaps, some of them, be sufferers if the money was disposed of, without the control of the Court, the bill only prays that the money should be paid into Court; and if there are any persons who have claims, the money being there, they may exhibit any suit they think fit for that purpose: but that is no reason whatever why the Defendants should not answer this bill, admitting what money is in their hands, and paying that money into Court. I conceive, therefore, that this Demurrer ought not to be allowed. Such has been the decision of the Court below, and I am disposed to move your Lordships to affirm that decision: for I cannot find any ground whatever, on which it can be resisted.

As to the proposition that a sovereign Prince cannot sue, it would be against all ideas of justice. In what manner is this money to be got out of the hands of the Defendants, if a sovereign power cannot sue for it. He is bound with a trust for his own subjects when he has obtained the money; but with the execution of that trust you have no more to do, than you would have in many proceedings in this country: as where Commissioners are appointed, for the purpose of adjusting claims between different governments, with respect to which you would not interfere in courts of justice: because the sovereign power of the country must have a power to appoint proper boards for that purpose. It is stated, that such a board is appointed, and that board is in Spain, and not amenable to the jurisdiction of this Court. I cannot, therefore, find any ground on which these parties can refuse to answer this bill; certainly, in honesty, they cannot refuse: they do not pretend, they cannot [63] pretend, that the money is their own. By answering the bill, and submitting to pay the money into Court, they would be free from all further responsibility, and then it would remain to be disposed of, as might be just.

If there were such persons as is suggested having claims on this sum of money, and they had a right to institute a suit on the subject, it would be their business to institute that suit: but at the same time I should doubt extremely whether the Court of Chancery could entertain such a suit under the circumstances, any further than to order the transfer of these funds to the boards which the bill states are constituted by the King of Spain for the purpose of liquidating the claims of his subjects with respect to that fund. What has been done in this country, where boards of a similar description have been instituted? The sovereign power of every state must be entrusted with such an authority, and there cannot be any transaction between nation and nation carried on if this Demurrer should be allowed. It is a transaction of such a description, that the right necessarily accrues to the sovereign power in Spain. That the Spanish sovereign is a trustee for his own subjects, may be true; but the Court of Chancery cannot enforce properly that trust. The hand entitled to receive the fund, according to what may be deemed the law of nations, is the King of Spain, or the person whom he appoints for that purpose. Accordingly, the French government allowed Machado, as the agent of the King of Spain, to receive the money; and the French government were the only persons who had any right to dispute the authority of Machado to receive it. Machado did receive it, under the authority of the King of Spain, and the money is now in the hands of these persons, under the autho-[64]-rity of Machado. On these grounds I submit that this Demurrer ought to be over-ruled.

An objection was made that Pereira was not a party. There is a statement in the bill sufficient to shew that he has no interest in this money, and the circumstances which are stated, must be considered as admitted by the Appellants in their Demurrer. They admit, therefore, that so far from this man having any interest in the fund, the Defendants have constantly rendered their accounts, not to him, but to Machado:

that is the statement in this bill, therefore they have themselves, by admitting that statement in the bill, admitted that this man has no interest. On these grounds it appears to me, that the decision of the Court below is right, and therefore I move that the judgment pronounced by the Court below be affirmed. I do not wish you to consider my opinion as of considerable force on this subject, but it certainly is a subject, on which, in the early part of my professional life, I bestowed a good deal of pains and attention.*

The Lord Chancellor: I see no reason to alter my opinion, the grounds of which I have stated in the course of the argument.

Judgment affirmed, without costs. (The reason given was the dignity of the Plaintiff.)

[65]

ENGLAND.

(COURT OF KING'S BENCH.)

The Reverend EDWARD DRAX FREE, D.D.—*Plaintiff in Error*; MONTAGUE BURGOYNE, Esq.—*Defendant in Error*.

[*Mews' Dig.* v. 1246. S. C. 1 Dow, and Cl. 115; and in K. B. 6 B. and C. 27, 538; 9 Dow, and R. 11.; and in *Eccles. Ct.* 2 Add. 414; 2 Hagg. E. R., 457, 662. Adopted, on point as to prohibition, in *Macnochie v. Penzance (Lord)*, 1881, 6 A. C. 445. See Church Discipline Act, 1840 (3 and 4 Vict. c. 86, s. 21); also Clergy Discipline Act, 1892 (55 and 56 Vict. c. 32).]

The Stat. 27 Geo. 3, c. 44, intitled, an act to prevent frivolous and vexatious suits in Ecclesiastical Courts, and reciting in the preamble, that it is expedient to limit the time for the commencement of certain suits in the Ecclesiastical Courts, enacts, (among other things), that no suit shall be commenced in any Ecclesiastical Court for fornication or incontinence, after the expiration of eight calendar months from the time when such offence shall have been committed.

Upon a libel in the Ecclesiastical Court against a clergyman, containing various articles charging fornication, etc.; and in the concluding article willing that the offender be duly and canonically *punished and corrected* according to the exigency of the law, etc., an objection taken to the jurisdiction on the ground of the Statute 27 Geo. 3, c. 44, was overruled in the Ecclesiastical Court: whereupon a writ of prohibition was obtained in the Court of King's Bench, and upon declaration in prohibition, demurrer, and argument, it was held that the statute applied only to proceedings against fornicators, etc., whether Laymen or Clergymen, *pro salute animarum*; but that a proceeding in the Ecclesiastical Court on the ground of fornication, against a clergyman, for the purpose of deprivation, is not prohibited by the statute, and this judgment was affirmed on appeal.

Held also that the judgment of the Court of King's Bench being for a prohibition, against proceeding on the ground of fornication *pro salute animarum*, but granting a consultation so far as the case related to the proceeding for deprivation, the statute 8 and 9 W. 3, c. 11, which gives costs to the party who obtains the judgment in prohibition, did not apply, inasmuch as it was a qualified judgment, which in substance was for the Defendant in the prohibition, and that if it was to be considered as a *casus omissus*, there was no authority in the Court to give costs.

[66] This was a Writ of Error brought to reverse a judgment † of the Court of King's Bench in an action of Prohibition. The Plaintiff in Error was Rector of the

* See the learned argument of Lord Redesdale, (then Mr. Mitford,) and his colleagues, in the *Nabob of the Carnatic v. the East India Company*. 1 Ves. J. 379.

† See the proceedings, argument, and judgment in the Court below, reported 5 Barn. and Cress. 100.

Rectory of the parish of Sutton, in the county of Bedford. The Defendant in Error was one of the Parishioners.

In October, 1824, the Defendant in Error exhibited articles in the Arches Court of Canterbury against the Plaintiff in Error, charging acts of fornication and incontinence, committed by him, with several of his female servants, in the years 1810, 1812, 1814, 1815, 1817, and 1822, and also that on several occasions during the above, and in the intervening years, he had been guilty of various other acts of gross immorality and neglect of his clerical duties.

The Libel consisted of thirty-one articles, containing the charges above-mentioned, and other Ecclesiastical offences.

The first article stated, that by the Ecclesiastical laws, all ministers in holy orders were required to be decent in their behaviour, to abstain from fornication, etc. under pain of deprivation, suspension, or such other ecclesiastical punishment or censures, as the case may require, and the law authorize, etc. The second article alleged, that Dr. Free was Rector of Sutton. The last article willed, that Dr. Free should be canonically punished according to law, and also be condemned in the costs of the suit, but did not specially point to deprivation.

With respect to the 5th, 7th, 9th, 10th, 11th, and 12th articles, which alleged various acts of fornication, the Plaintiff in Error disputed the jurisdiction of the Ecclesiastical Court.

The Ecclesiastical Court determined (2 Addams's Rep. p. 414) that it had [67] jurisdiction, and gave judgment against the Plaintiff in Error, whereupon he obtained a writ and declared in prohibition. The declaration set forth the libel and the proceedings in the Ecclesiastical Court, and prayed a prohibition. To this declaration a Plea and Demurrer were put in: upon which the Plaintiff joined issue.

The case was argued in Easter term 1826, and on the 6th of May, 1826, judgment was given, which in substance was, that as to so much of the charge as related to the proceeding against the Plaintiff in Error for fornication or incontinence, for the purpose only of his soul's health, and the reformation of his manners, the Defendant in Error should be prohibited from proceeding in the Spiritual Court; but that as to so much of the charge as related to those offences, for the purpose of suspension or deprivation, or other punishment merely clerical, and also as to the other matters charged against him, that the Defendant in Error should not be prohibited from proceeding in the Spiritual Court, but that a consultation should be and it was accordingly awarded in respect thereof: and after argument, the Court of King's Bench was also of opinion that the Plaintiff in Error, was not entitled to costs of suit.

Against this judgment the Plaintiff in Error brought a Writ of Error in Parliament.

For the Plaintiff in Error, Dr. Addams and Mr. Denman.*

[68] The charges against the Plaintiff extend from 1810 to 1822, inclusive. The citation is dated in 1824—eighteen months after any act alleged, contrary to 27 Geo. 3. c. 41.

The suit was instituted for his soul's health, and reformation of manners only—that was the sole motive. Deprivation is only one mode of punishment, and that is, for the soul's health, and reformation of manners. The clergy as well as laity, are within the meaning of the act. The refined distinction between clergy and laymen is not warranted by the words or spirit of the act. The act is general, intended to protect the clergy as well as the laity. Indeed the clergy, from their situation, are deserving of greater protection. The suit, though said to be for deprivation or suspension, is essentially *pro salute animae*, there is no distinction in practice between suits *pro salute animae* and for deprivation; all suits for deprivation are suits *pro salute animae*.—For forty years the act has, in practice, been supposed to apply to the clergy as well as the laity.

The judgment of the King's Bench holds, that it does apply to the clergy as well

* It was proposed with a view to shew the object of the suit to read the citation in the Ecclesiastical Court, to which Campbell objected that the citation formed no part of the record. Dr. Addams answered that the libel must follow the citation. The Lord Chancellor said it did not matter, as the libel described him as Rector of Sutton.

as the laity, to a certain extent. In the Court of Arches it was held not to apply to the clergy at all.—there it was held, that the act passed *alio intuitu* (2 Add. Rep. p. 414). The judgments of the Arches and King's Bench proceed on essentially different grounds.

There is no such thing in the Ecclesiastical Courts as criminal informations. They proceed solely *pro salute animarum*.

The Court of Arches took no distinction between suits for correction, and suits for punishment. The King's Bench did.—This distinction is unwarranted [69] by principle or practice.—In practice, there is no proceeding for punishment, *quâ* punishment: it is merely *pro salute animarum*.—The punishment is a *mean*, not the *end*: the *salus animarum*, and *reformatio morum*, is the end (Gibbs. Cod. Corbet's case, 5 Rep.): deprivation is a mere mean of correction (Raymond, 1510. Cit. *Townsend v. Thorpe*): deprivation, is divesting a man of his freehold: the usual consequence of suits of this nature is *suspension* only. The judgment of the King's Bench leaves the Court no option, it must proceed to deprivation.

The title and preamble of the act, is to stay frivolous and vexatious suits, and limits a time: whether the time is too short or too long, is no matter.—The act is express, and this particularly is a frivolous and vexatious suit. There is no charge within eighteen months after the last offence alleged. Surely there should be some limit to proceedings of this nature. The charges here begin eighteen or twenty years ago: there is no possibility of rebutting such charges, resting upon evidence possibly suborned and got up for purposes of malice or revenge, etc. There is no conviction of the alleged offences, as it rests in mere allegation. For the purpose of the argument it may be assumed that the plaintiff is innocent of every charge, and he is in fact prepared to deny the facts alleged.

There is an obvious impolicy in allowing such charges to be made without limitation of time. This is the very mischief the act intended to remedy. In fair construction the act applies to clergy as well as laity; there is no exception of the clergy, which of course there would have been, if intended. A general act applies without exception: why not in this case?

[70] As to costs,* the Appellant, by the provisions of the act (8 and 9 W. 3. c. 11) is intitled to them, having obtained a prohibition as to the proceeding for fornication.

For the Defendant in Error, Mr. Campbell and Dr. Lushington.

Mr. Campbell: The judgments of the Court of Arches and the King's Bench are the same. For the sake of the church the Plaintiff should be deprived of his living. The citation is not here, but the libel is, which shews the nature of the proceeding. In the first article, there is no notice of reformation of manners: the object in view of the libel is, that he may be deprived of his benefice. The second article states the induction of the Plaintiff: these articles would be immaterial, unless it were a proceeding against him, as Rector of Sutton. There is no penance required or stated for his soul's health. It is a suit for deprivation founded upon these articles. It is stated, that no proceedings for deprivation ever take place in the Ecclesiastical Court; that is not so:—there is a proceeding for punishment by deprivation (2 Burn's Eccl. Law, tit. Deprivation). The direct purpose is to purge the church, which is properly determinable by the Ecclesiastical laws of the realm. Many of the causes of deprivation have nothing to do with *salus animarum* or *reformatio morum*; as for instance: by common law or statute, want of orders, [71] simony, plurality, conviction by temporal courts, omission to subscribe the oaths of supremacy, incontinence,† etc. The causes of deprivation by the Canon law, are wearing arms, non-residence, concubinage,‡ etc.

* It was objected that the appeal could not be heard on the subject of costs: because it did not form part of the record. The Court of King's Bench had given leave to amend the record below, for that purpose: but this had not been done. It was thereupon intimated by the House, upon the suggestion of Mr. Courtenay, that the practice of the House would permit the record still to be amended, and the counsel for the Respondent then waived the objection.

† In the reign of Eliz., Fox and Burton were deprived for adultery: 6 Rep. 13. 6 Hob. 291. Cro. Eliz. 11.

‡ This canonical crime appears to have been punished by *degradation*. By

This libel is framed to give in evidence the matter of the allegations with the view to deprivation. The 16 Car. 1. c. 11. operated * merely to destroy the power of the High Commission Court. The 27 Geo. 3. is the only impediment, does this take away the jurisdiction? if it does not, the common law must have force. Such a result could not have been contemplated by the legislature.

Suppose the case of a bastard child: suppose the fact not discovered till after nine months: this statute of limitation would have run, and the proceeding for deprivation would be barred. It is impossible to contemplate this to have been the intention of the legislature.

The title is part of the act—what is the title, but for restraining frivolous and vexatious suits in the Ecclesiastical Court? the proceedings *pro salute animae* are a mere mockery,—originally they were not so: in modern times they are. In Scotland the practice of penance still prevails to a certain extent. The suit *pro salute animae* now, is to make a person pay costs; it may very well have been the object of the legislature to put a stop to such suits. But could it have been the intention to prevent all suits against the [72] clergy, for deprivation? The words of the act are general: but they have reference to the title and preamble.

In construing acts of parliament, the court looks to the mischief intended to be remedied (Com. Dig. Parliament); if not within the mischief, it cannot be brought within the words. Suits against the clergy for deprivation rarely happen: the cases enumerated in the act frequently: the rare instances are not within the mischief: the offences enumerated, are *defamatory words, brawling in the church, incontinence, etc.* But this is a suit for *deprivation* (*Sherwin v. Cartwright*, Hutton, p. 111). Suits for deprivation are of rare occurrence—suits *pro salute animae* were in the contemplation of the legislature. If a clergyman marry his prostitute, it would be a cause for deprivation: though a suit for the soul's health could not be maintained. So if a clergyman marry a common prostitute, might he not be sued in respect of his incontinence and scandal anterior to the marriage? There is a distinction between a *clergyman* and a *layman*, as to the jurisdiction in prohibition: as to civil punishment, the prohibition would go, but as to the proceeding for deprivation for such an offence, it would not go.

In the Bishop of Clogher's case the party might have been indicted: but he absconded. No proceedings took place in the Temporal Courts; yet there was a suit for deprivation.

The deprivation is the object of the suit in the case of a clergyman:—with respect to a layman it is different, because there can be no deprivation, but merely correction, *pro salute animae*. You cannot proceed *pro salute animae*, even against a clergyman, for an offence cognizable in the Temporal Courts. [73] Therefore, unless a clergyman happen to be *convicted*, in the Courts of Common Law, there could be no suit in the Ecclesiastical Courts: suppose the clerk, after the offence, absconds, and therefore cannot be convicted, the scandal would remain without remedy.

As to costs, the Plaintiff is not entitled to them. The case is clearly not within the Statute of Gloucester. No costs, therefore, can be given, unless the case is within the 7 and 8 W. and M. The question is, whether the Plaintiff has obtained judgment.

The judgment grants a consultation, as to all the matters. The Plaintiff has no judgment. The Defendant may proceed on the whole, but no judgment can be given on that part, which is *pro salute anima*. It does not stay the proceedings, but the judgment.

Dr. Lushington: Over the laity the Ecclesiastical Courts have jurisdiction only in *certain cases*, by virtue of *certain canons which have become part of the law of the land*, but these proceedings are *pro salute animae* only. Over the clergy the jurisdiction is *similar* as to suits *pro salute anima*; but they have a further jurisdiction in respect of the clerical character. The Court itself was primarily established

31 H. 8. c. 14. s. 10. a priest keeping a concubine forfeited his goods, chattels, and promotions, and was liable to imprisonment at the king's will.—See the note in Burn's Eccl. Law, tit. q. s.

* See the 4th sect., but it is repealed by 13 Car. 2. s. 1. c. 12.

for taking care that the clergy performed the clerical duties, a jurisdiction totally distinct from that over the laity. If the conduct of a clergyman be wrong, it is the *duty* of the Court to interfere for the purpose of preserving the Ecclesiastical discipline and morality of the church. The judgment in *Middleton v. Croft* (2 Atk. 607), is an admirable dissertation upon the subject of this jurisdiction.

The canons are held to bind the *clergy*, though not the *laity*; and the courts have exercised such jurisdiction in all instances. If the clergy are to be ex-[74]-empt from such a jurisdiction, it would have the most injurious effect on the discipline of the church. The proceedings have been generally with a double aspect, namely, that ordinary one, *pro salute animæ*, and the extraordinary one of *deprivation* for offences committed against *the discipline of the church*. If you destroy the jurisdiction in the former, you cannot, we contend, do it in the latter. The very commencement of the articles shews that these criminal proceedings were instituted *for the purposes of securing the discipline of the church*. The Ecclesiastical Court has exercised this jurisdiction from time immemorial. The whole tenor of the proceedings shews that they are not for punishment *pro salute animæ*, but merely for another purpose, *essentially within the province of the Ecclesiastical Court*. In the proceedings in the King's Bench, on the prohibition, it was for the first time contended, that the 27 Geo. 3. destroyed the jurisdiction altogether.

The correction of clerks is frequently excepted out of the patents of charters of dioceses. In Exeter such an exception has prevailed for these two centuries. The bishop has the paramount authority, and from him the jurisdiction is derived. The statute of Hen. 7. gives the bishop an additional power—a power of imprisonment. If this act was repealed by 12 Car., it is still in force, for the 13 Car. 2. s. 1. c. 12. repealed the 16 Car. 1. c. 11. This statute is not noticed in the 27 Geo. 3.

As to the construction of the statute 27 Geo. 3., it is a remedial statute to remove a mischief and advance the remedy: was this a mischief entitled to be remedied by the act? The clergy are not within the mischief of the act. However that be, there is a clear distinction between proceeding *for deprivation and pro sal. an.*: [75] comparatively speaking, the offence of fornication in a layman is much more venial. In a clergyman the consequences from the evil example in a parish, are very pernicious. A suit for deprivation necessarily involves the motives and inducements for suspension and deprivation.

The clergy are not mentioned by name in the 27 Geo. 3. This is observable, for it leaves the statute of Hen. 7. in force to punish by imprisonment, and is supposed to take away the power of proceeding *for deprivation and suspension*; this is a *reductio ad absurdum*.

Visitations are held once a year when presentments are or ought to be made by the churchwardens. It may happen then, that the representation on which proceedings are to be instituted, is not known till after the twelve months. Was it meant that the clerk should, in such case, laugh at the discipline of the church? Suppose a man commits adultery, which is not known, but he is afterwards convicted; may not the bishop found any proceedings against the delinquent, on the ground that under the statute the limitation has run out?

The clergy, it is said, require protection. There is no foundation for this argument; for proceedings are scarcely ever instituted against the clergy. There are only fifteen on record in London.

As to costs, if the party succeeds in the *major* part of his demand, he is entitled to costs, not if he succeeds in the *minor* only.

The Lord Chancellor (in the course of the Argument): The suit in the bishop of Clogher's case, was *pro salute animæ*, and also for deprivation. There is no doubt of the jurisdiction to inquire into the offence for the purpose of deprivation. [76] The question raised by Dr. Addams, is whether you can serve the two proceedings. No authority has been cited, and in the absence of authority, are we to assume that they cannot be served?

Is deprivation only an incident?—the original libel was in effect *pro salute animæ*, and also for deprivation, the judgment was to prohibit one of the proceedings—if it had not been for that judgment the Ecclesiastical Court might have proceeded to punish, not only by deprivation, but *pro salute animæ*. The Plaintiff has, therefore, obtained a judgment restraining the Ecclesiastical Court. He had

a just cause to come for a prohibition, and so the Court adjudged. The costs, therefore, should, according to the act, have been awarded.

I am inclined to think, unless better authority than *Baker v. Roger* (Cro. Eliz. 789) can be cited, that proceedings for deprivation may be instituted against a clerk, without any suit *pro salute animæ*.

It is not necessary to proceed for judgment, *pro salute animæ*, and deprivation also, *they may be severed*, and judgment may be given to deprive, though no judgment may be given *pro salute animæ*. What is there to shew that deprivation may not be the substantive object of the suit!

The Lord Chancellor (at the end of the Argument): The Noble Lord and Reverend Prelate, who have attended the whole of this discussion, are of opinion with me that this act of Parliament does *not apply to a suit, the object of which is deprivation*; and also that the proceedings may be severed. The judgment below must be so far affirmed: with respect to the costs some difficulty occurs.

The Lord Chancellor (26th June, 1828): This case arises out of a [77] prosecution in prohibition. The Court of King's Bench gave judgment in prohibition in a particular form, and upon that Doctor Free brought a writ of Error. Certain charges had been preferred against Doctor Free, who was Rector of Sutton, in the county of Bedford: charges of fornication and incontinence of a very precise description, commencing in the year 1810, and continuing down to the year 1822. Those charges were made the foundation of a suit in the Spiritual Court, which suit was instituted in the year 1824, two years, or nearly two years, after the date of the act, which was the subject of the last charge preferred against Doctor Free. Articles were exhibited against him in the Spiritual Court, containing those charges, and it is quite clear in looking at those articles as they are framed, that it would have been competent to the Spiritual Court to have proceeded against Doctor Free to punish him in the ordinary mode for incontinence and fornication, *pro salute animæ et pro reformatione morum*, and also to proceed against him for deprivation either for the one or the other, or both. It is in such a form that the articles are framed, and a corresponding judgment or judgments might have been founded upon those articles.

It was contended in the Spiritual Court by Doctor Free, that the Court could not proceed in that suit, by reason of the 27 Geo. 3. c. 44. By that Act suits for fornication and incontinence must be commenced within eight months from the period when the offence is committed. The Judge in the Court below overruled the objection: in consequence of which a writ of prohibition was issued, and the matter came before the Court of King's Bench. In that Court Doctor Free declared in prohibition, and the main question then raised for consideration, was whether the statute applied to a case of this description. It was admit-[78]-ted that there was no doubt that the statute applied to an ordinary case of incontinence, or fornication, with a view to the ordinary punishment *pro salute animæ et reformatione morum*. The Court of King's Bench were of opinion, (and I am disposed to concur in that opinion,) that a suit of this description instituted against a Clergyman, as well as against a Layman, must be instituted within the period limited by the statute.

But, another and a much more important question arose as to whether or not that Act of Parliament applied to a suit for deprivation, and I think it is impossible to look at the title of that Act of Parliament, at the preamble of it, at the particular provisions and enactments of it, and to suppose for a moment that they could have been intended to apply to a suit instituted for the purpose of deprivation. It is unnecessary to repeat observations upon these particular parts of the Act of Parliament, because it was considered very much in detail in the argument. I will only say generally that I concur in the view taken by the Judge in the Spiritual Court, that the Act does not apply to a suit for deprivation. I concur in the judgment pronounced in the Court of King's Bench with respect to the distinction that the Act of Parliament does not apply to a suit instituted for the purpose of deprivation.

If that be so, let us consider the question of form according to the state of proceedings in the Ecclesiastical Court. I have already stated, that according to my opinion the Court might have proceeded to punish the individual in the ordinary way, *pro salute animæ et pro reformatione morum*, and it might also have proceeded

to deprive him, or it might have proceeded for the one or the other, or both. The Court [79] of King's Bench were of opinion that with reference to the mode of proceeding with a view only to the reformation of the manners, with a view only to punishment *pro salute animæ*, the statute was a bar. They pronounced that judgment distinctly, drawing the attention of those persons who heard the judgment to that distinction; and they, in their judgment, therefore, allowed the party to proceed below, for the purpose of deprivation, and for the purpose of deprivation only. They said there are two objects for which this suit is instituted, or the judgment may be directed to two purposes, those purposes which I stated. As to one, the Court cannot proceed, because it is out of time. With respect to the other, we are of opinion that the statute does not apply, and therefore the Court below may proceed for that particular object.

The Court of King's Bench was warranted in so severing that judgment, not merely upon principle, but on reference to the cases which were quoted. It appears to me that in principle the case of *Slater v. Smallbrooke*,* was directly in point, that was a proceeding against a party who had obtained forged orders, and was instituted to a benefice. A prohibition was obtained, and the case came before the Court of King's Bench, and the Court of King's Bench held that the Spiritual Court had no jurisdiction to enquire into the forgery of orders, with a view of punishing for such forgery, that is to say, as a temporal offence, but that they might enquire into that offence for the purpose of deprivation, and of deprivation only. The Court below, therefore, was allowed to proceed [80] and to enquire into the particular offence of forgery, not with a view to punish for that forgery in the ordinary way, in which the Ecclesiastical Court punishes for that offence, but for the purpose of deprivation; and according to the report of the case for deprivation only. That case applies strictly to the present. By the operation of the statute 27 Geo. 3. the Court below, the Spiritual Court, cannot proceed to enquire into the incontinence and fornication of Doctor Free, with a view to punish him in the ordinary mode, *pro salute animæ et reformatione morum*, but they may, according to the construction which the Court of King's Bench has put upon the Act, proceed to enquire into the incontinence and fornication, for the purpose of deprivation, and deprivation only. I conceive, therefore, that the case of *Slater v. Smallbrooke* is precisely in principle the same as this case.

In the case of *Townsend v. Thorpe* (2 Lord Raym. 507, 2 Stra. 776, *sed vide* 912), the Judgment pronounced after much consideration by the Court of King's Bench, is precisely to the same effect. That was a suit instituted against a parish clerk for the purpose of deprivation. He was charged with various offences of an indecent nature, which it is not necessary to particularize. A writ of prohibition was issued out, and the party declared in prohibition. The Court held that a Spiritual Court has no jurisdiction whatever, to enquire into those offences for the purpose of punishing those offences civilly; but that the Court may enquire into those offences for the purpose of deprivation; and that was the judgment pronounced by the Court, severing the two parts of the charge and allowing an enquiry for the purpose of deprivation; and the judgment of the Court passed accord[81] ingly. Now that also is a case precisely similar to the present, and it is not only similar in principle, but it confirms the judgment of the Court of King's Bench, because the judgment is substantially that, with a view to deprivation only, (whatever forms it may be necessary for the Ecclesiastical Court to adopt,) with that view only the Court below may proceed. If the object of the Court below is to proceed, for the purpose of punishing for incontinence, *pro salute animæ et reformatione morum*, in that case the statute applies: but the Court of King's Bench says we will allow the parties to proceed in the Court below, for the purpose of deprivation only, with all those forms and those ceremonies, and that manner of proceeding, which is necessary for the purpose of carrying on a suit for deprivation. If, therefore, you are satisfied that the construction put upon this Act of Parliament by the Court

* 1 Lev. 138, 1 Sid. 217. The prohibition was refused, because the forgery was touching an Ecclesiastical matter, and the proceeding with a view to deprivation *quia mere laicus*. See S. C. but not S. P. 1 Kel. 731.

of King's Bench, is the correct construction, about which you will probably entertain no doubt, the judgment up to this point should be affirmed.

The only question which remains for consideration is the question of costs, and I confess I at first entertained considerable doubts upon that point. The party who succeeds on Demurrer in prohibition, was not entitled to his costs, previously to the Act of 8th and 9th William 3. Unless therefore it is clear from the Act of 8th and 9th William 3. that he is entitled to his costs, they cannot be given. Now that Act says that if the Plaintiff on Demurrer obtains judgment, he shall be entitled to his costs. What is the case in the present instance? A prohibition is applied for, to restrain the Spiritual Court from proceeding upon certain articles. The judgment of the Court of King's Bench was, that upon those articles the [82] party should proceed, but with this species of exception that they should proceed in a qualified way, and for a particular object. That is a judgment at least as much for the Defendant as for the Plaintiff. How can that be said to be a judgment for the Plaintiff in prohibition, more than it is a judgment for the Defendant? If that be so it cannot be said that the Plaintiff has obtained judgment upon his Demurrer,—it is a judgment for the Defendant in Demurrer, qualified in the manner I have stated. The Court of King's Bench, considering this as a case not within the statute, a *casus omisus*, held that the Defendant was not entitled to his costs in that Court. If it is a *casus omisus*—if that is the right construction of the Act of Parliament—it must follow that it was not the intention of the legislature under such circumstances, that the Plaintiff in Demurrer should be entitled to his costs. I should, therefore, recommend to your Lordships, that the judgment of the Court of King's Bench should be affirmed; and I think, under all the circumstances of this case, that the judgment should be affirmed with costs.

Judgment affirmed, with £100 costs.

[83]

(ENGLAND.)

(COURT OF EXCHEQUER.)

THOMAS LEWIS and ROBERT ANDREW STEVENS,—*Appellants*;
HENRY ALLNUTT,—*Respondent*.

[In view of the fact that tithe has by the Tithe Acts been commuted into a rent charge, cases such as this are not now of much importance.]

A., the owner of the tithes of a district in a parish, and B., his lessee, in July, 1824, file a Bill in Chancery against C., the occupier of lands within the district, praying an account for six years back of the tithes of clover, vetches, meadow and rye grass, and other grasses, cut green, and partly left in the swathe, and partly cocked: C. by his answer, admits the title of A. and B. to the tithes of the district, and his own occupation, and the taking of the tithes; but contends that the clover, etc., are small tithes, and belong to, and are claimed by the vicar, and that he pays to the vicar a composition for all the small tithes, and that the clover, etc. had been used as green meat for his husbandry horses; and upon these grounds he denies the title of the Plaintiffs to the tithes in question.

It appeared in evidence, that in the year 1822, C. had written a letter to B. stating, that on the day of writing the letter, he should cut vetches, and set out the title, and that he had no objection to compound; and in the year 1824 a letter having been written by the Solicitor of A., threatening to file a bill for the tithes in question: C., by his answer to that letter, says, that he has never refused to pay the lessee the tithes of green clover, vetches, and grass.

Upon these admissions, notwithstanding the objections raised by the answer, held (reversing the decree of the Court below,) that the Plaintiffs were intitled to a decree for an account.

Whether the natural or artificial grasses, cut green and lying in the swathe, or set up in cocks, are great or small tithes, and whether if given to husbandry horses, there being other food grown on the farm sufficient for these horses, they are exempt from tithe. *Quære.*

[84] In this Cause a Bill in Chancery was filed by the Appellants as owner and lessee, of the tithes of a district or portion of land within the parish of Cookham, in Berkshire; called by the name of the Lower Division, stating their respective titles, and that the Respondent had, in the years 1819, 1820, 1821, 1822, 1823, and 1824, occupied a certain farm or portion of arable, meadow, and pasture land, lying within the parish of Cookham, or the titheable places thereof; and that the Respondent had, in each of the years 1819, 1820, 1821, 1822, 1823, and 1824, cut and taken from off his said lands, situate within the boundaries aforesaid, large quantities of clover and vetches, meadow and rye grass, and other grasses which he had from time to time carried off whilst green, and without making the same into hay, part thereof in the swathe, the other part thereof in heaps or cocks; and the Appellant submitted that the tithes of all such clover, vetches, grasses, and tares, so cut and taken away by the Respondent, ought to have been set out by the Respondent to the Appellant R. A. Stevens as lessee, or a full compensation for the same ought to have been paid to the Appellant; but that the Respondent had taken the tithes of all the titheable matters and things aforesaid, and converted the same to his own use, without setting out the same to the Appellant R. A. Stevens as lessee, and without making to the Appellant any allowance or satisfaction for the same.

By the amended bill the Appellants charged that if, as the Respondent pretended he had given any part of such clover, vetches, grasses, and tares to husbandry horses, he had at the time upon his farm and lands sufficient provender or food, or in case he had not sold or disposed of the same, he might [85] have had upon his farm sufficient provender or food fit for the sustenance of such husbandry horses, without having recourse to such clover, vetches, tares, and grasses, so carried away green. The Appellants further charged that the tithes of such clover, vetches, grasses, and tares, in fact belonged to and ought to have been set out by the Respondent to the Appellant R. A. Stevens: and, after suggesting that the Respondent at times pretended, though contrary to the fact, that he had accounted for such tithes to the vicar of the parish, the Appellants charged that the Respondent had admitted the Appellant's title to the tithes of green clover, vetches, and grass grown upon the lands in the Respondent's holding during the several years respectively before mentioned: and particularly that the Respondent in the years 1822 and 1824 admitted that the Appellant R. A. Stevens was entitled to the tithes of the green clover, vetches, and grass grown upon the lands in his the Respondent's holding. The amended bill prayed, that the Respondent might be compelled by the decree of the Court to come to a fair and just account with the Appellant R. A. Stevens for the single value of the tithes of all the clover, vetches, tares, and grasses which he in manner aforesaid had and took upon and from off his farm and lands in each and every of the years 1819, 1820, 1821, 1822, 1823, and 1824, and that the Respondent might be decreed to pay the Appellant R. A. Stevens what should appear to be coming to the Appellant on the taking of the account, and for general relief.

The Respondent, by his answer to the original bill, stated, that he believed it to be true that the Appellant Lewis was, in and prior to the time in the bill mentioned, and had ever since continued to be seized [86] of or well entitled to the tithes of corn, grain, hay, and all other of the great tithes, yearly arising, renewing, and increasing, within such district or portion of land as in the bill mentioned; and that such district or portion of land was known by the name of the Lower Division of the parish of Cookham, and that such indenture of demise was made by and between such parties, and to such purport and effect as set forth in the bill: and that, under such indenture of demise, the Appellant R. A. Stevens became entitled to the tithe of corn, grain, and all other the great tithes, yearly arising, growing, renewing, and increasing upon all the lands situate within such part of the parish of Cookham, or the titheable parts thereof, as was or were comprised within the limits, bounds, and precincts described in the bill.

He thereby also admitted the occupation of lands within the district, and the

perception of the clover, etc., from the lands, for the several years and in the manner stated in the bill. But he denied that the tithe of all such clover, vetches, grass, and tares, so cut and taken away by him in a green state, ought to have been set out to the Appellant R. A. Stevens; or that any compensation in respect of the same ought to have been paid to the said Appellant in respect thereof; and he submitted that all such clover, vetches, grass, and tares, whilst in a green state, if titheable at all, was titheable as a vicarial or small tithe, and of right belonging to the vicar for the time being of the parish of Cookham; and that the Appellant R. A. Stevens, as lessee under the Appellant Thomas Lewis, who was the lay impropriator of the rectorial or great tithe, was not entitled to the same.

The Respondent admitted, that he had, by reason of such clover, vetches, tares, and grass, being (if liable [87] to any tithe,) titheable to the vicar for the time being, to whom the Respondent paid the annual sum of £18 as a composition in lieu of his vicarial or small tithe, cut and carried away divers quantities of such clover, vetches, tares, and grass, whilst in a green state, without setting out the same to the Appellant R. A. Stevens, as such lessee, except as thereafter excepted, and had converted the same to his own use, and without making to the Appellant any allowance or satisfaction in respect thereof.

The Respondent denied that the Appellants, or either of them, ever made such applications and requests to him as mentioned in the bill, or that he had refused to comply therewith; but he said that in or about the spring of the year 1823, having been informed that the Appellant R. A. Stevens intended to claim the aforesaid tithe of green meat, he the Respondent, in order to avoid litigation, set out the same, and having apprized the Appellant R. A. Stevens thereof, requested him to take the same away; and that thereupon the Appellant R. A. Stevens replied in the words, or to the effect following, that is to say, "You had better take it up, I don't want any thing more than my right, it will be determined now whether I have any right to it or not, as Sir Samuel Young's Cause* will soon be settled;" and that the Respondent by such answer understood that the Appellant R. A. Stevens agreed that his claim [88] in respect of the tithe of clover, vetches, grass, and tares, should be determined by the decision of the Court of Exchequer in the suit then pending between the Appellants and the said Sir S. Young, Bart. And that the Respondent had, in consequence of such understanding, cut and carried away, and had since continued to cut and carry away divers quantities of the clover, vetches, grass, and tares, whilst in a green state, without setting out any tithe in respect thereof to the Appellant R. A. Stevens.

The Respondent admitted that he had given to his husbandry horses divers quantities of such clover, vetches, grass, and tares, whilst in a green state; and that so much of the residue thereof which was not converted into hay was consumed by his cows. And he said that if the Court should be of opinion that he ought to set forth an account in respect thereof he, for the reasons thereafter-mentioned, was unable so to do, except that in the year 1824 the principal part of the Respondent's hay having, owing to the rains, been spoilt and so badly got up as to be fit only for litter and feed for cows, the clover, vetches, grass, and tares, were in consequence wholly consumed by his husbandry horses; and that in respect of the years 1819, 1820, 1821, 1822, and 1823, in which he had succeeded in getting in his hay in good condition, after allowing the usual proportion of green meat for his husbandry horses, the quantity of clover, vetches, grass, and tares consumed on his farm and lands in a green state had not been more than sufficient for their sustenance; and that the residue thereof had been converted into hay, the tithe whereof had been duly set out to the Appellant R. A. Stevens, or a full compensation paid to him in lieu thereof.

He said, that for the reasons in his answer men-[89]-tioned he was unable to set forth what was the value of the clover, vetches, grass, and tares, or the state thereof

* This was a suit for tithes in the Exchequer, raising the same question—in substance as in this appeal. The decree in the Exchequer was against the tithe-owner, and for the occupier. From which decree an appeal was pending, and would have been heard at the same time with this appeal; but just before the time appointed for hearing, the Respondent died. The cause still remains abated. The report of the case in the Court below, is to be found in 13 Price's Rep. 394. *Lewis v. Young*, Bart.

respectively when the same were so cut and carried away as aforesaid, or how much thereof respectively was taken whilst the same was in heaps or cocks: nor could he set forth a full, true, and particular account of all the said clover, vetches, grass, and tares so cut and carried from off his said farm and lands in each or any of the years 1819, 1820, 1821, 1822, 1823, and 1824, save as aforesaid, or of the value thereof in each or any of the said years, or of the value of the tithe thereof.

By his answer to the amended bill the Respondent denied that he ever admitted the Appellant's title to the tithes of green clover, vetches, and grass upon the lands in the Respondent's holding, during the several years mentioned in the amended bill, or particularly in the years 1822 and 1824; but he said that in the year 1824, for the reasons set forth in his former answer, he set out the tithes of the green clover, vetches, and grass, and invited the Appellant R. A. Stevens to take the same away; but the Respondent, at the time of his so setting out the said tithes, expressly protested against the Appellant's title thereto: and that thereupon the Appellant R. A. Stevens declined to take possession thereof.

The Appellants replied to the answers, and the Respondent rejoined: whereupon the cause being at issue, evidence was entered into by the Appellants, but no evidence was given by the Respondent either to prove the title of the vicar to the tithes in question, or to support any other of the allegations contained in his answers.

The cause was heard before the Vice Chancellor, on the 10th of February, 1827, when, on the [90] part of the Appellant, were read the passages of the Respondent's answer to the original bill, containing the admissions of the title of the Appellants: of his own occupation of lands within the district: of the taking of clover, etc. from those lands during the years and in the manner set forth in the bill: of his denial that the tithes of those articles belonged to the Appellant as lessee of the impropiator, and his submission to the judgment of the Court whether they did not belong to the vicar.

There was also read a deposition by the Appellant's Solicitor, proving a letter written by him to the Respondent, stating that a bill for an account of the tithes in question would forthwith be filed against him; to which letter the following answer, (proved as an exhibit) was returned,—“Sir, Never having refused to pay Mr. Stevens for the tithes of green clover, vetches, and grass grown upon the lands, in my holding within Mr. Lewis's tithing, it is unnecessary for me to do more than acknowledge the receipt of your letter. (Signed) Henry Allnutt, June 23, 1824.” The following letter from the Respondent to the Appellant Stevens, was also proved as an exhibit: “Sir, I shall cut up vetches upon the acre next your clover in Sutton to day. As I have not found you at home when I have called, I shall set out the tithe at present, but have no objection to compound for it, as I think it best for both parties to do so. (Signed) Henry Allnutt, June 8, 1822.”

The Vice Chancellor decreed that the Appellant's bill should be dismissed with costs.

The appeal was against this decree.

For the Appellants: Mr. Fonblanque and Mr. Spence.

The tithes of clover, vetches, meadow, rye, and other grasses, when severed from the ground by [91] the scythe, or in any way but by the mouths of cattle, are great tithe, and the property of the rector, lay impropiator, or other party entitled to the title of hay from the moment of severance, whatever may be the purpose to which the same may be applied, except in the event of their being applied for the sustenance of husbandry cattle, the farmer having no other sufficient provender for such cattle, which in this case was not attempted to be made out. The Appellants are entitled to a decree for an account of the tithes of the titheable matters, as prayed by the bill, more especially as no evidence was entered into by the Respondent to prove the alleged title of the vicar to such tithes; and it was proved by the Appellants that the Respondent had admitted the Appellant R. A. Stevens's title to such tithes.

But in case the Appellants should not be considered as entitled to the tithes of all the titheable matters enumerated, they are at least entitled to the tithes of such parts thereof as were put into cocks, inasmuch as when the grass is put into cocks, it is then in a state in which the farmer is bound by law to set out and distinguish the nine parts from the tenth or tithe: and the carrying away such part of the grass

by the Respondent, without setting out the title, was clearly contrary to law. (No counsel appeared for the Respondent.)

The Lord Chancellor (24th June, 1828): On considering this case and referring to the admissions in the answer, it appears to me that this decree was evidently made in mistake. The letter of the Respondent, dated the 8th of June, 1822, contains a clear admission of his being subject to the payment of tithe.—In my opinion the judgment must be overruled.—I think the Plain-[92]-tiff must then apply to the court from which the case came, for a decree for an account.

We only give judgment, under the special circumstances which appear upon the evidence in the cause, and particularly on the admission of the Defendant himself. As to the particular form, in which the judgment should be drawn up, we will consider further before we pronounce it.—This decides nothing with respect to the general question, as between the Rector and other parties, in this Parish; but on the particular evidence, and the admissions in the cause, the Appellants are entitled to a decree.

We decide this, upon the evidence—I do not find any thing to explain that letter, to which I have adverted.

I see there is another letter written on the 23d of June, 1824, in consequence of an application from Messrs. Freame and Best, in which he says, "Never having refused to pay Mr. Stevens for the title of green clover, vetches, and grass, grown upon the lands, upon my holding within Mr. Lewis's tithing, it is unnecessary for me to do more than acknowledge the receipt of your letter of the 21st instant." He does not any where deny the right of the rector, and he admits the right in that other letter. He never thinks of denying the right till he comes to his answer.

It is said that the tithe belongs to the vicar, but there is no evidence to establish the right of the vicar. It is possible that the right may be in the vicar; but then it must be established by proof. It is to be taken, nothing being shewn to the contrary, to be in the rector, and in this case there is no evidence to disprove the right in him.

[93] 24th June, 1828. Ordered and adjudged, that, upon considering the particular evidence and admissions in this cause, the decree be reversed, and it is hereby declared, that the Appellants are entitled to have and receive, from the Respondent, the single value of the titles of all the clover, vetches, tares, and grasses had and taken by him from off his farm and lands, in each and every or any of the years 1819, 1820, etc. or demanded by the Appellant's bill, in the cause, and that the Respondent ought to pay to the Appellant R. A. Stevens, what should be found due upon such account, together with the costs of the cause; and it is also declared, that the Appellants are entitled to be repaid such costs as they have paid to the Respondent in pursuance of the decree of dismissal.—And it is further ordered, that it be referred to the Court of, etc., to give directions to carry the judgment into execution.

[94]

ENGLAND.

(COURT OF EXCHEQUER.)

The Reverend HENEAGE ELSLEY, Clerk, and HENRY BARTON,—*Appellants*;
the Reverend WATSON STOTE DONNISON, Clerk,—*Respondent*.

[S.C. in Ex. *sub nom.* *Donnison v. Elsley and Barton*, 1824, McCle. and Y. 1
(Mews' Dig. vi. 995).]

Upon a bill for tithes by a vicar against the occupiers of an estate which had belonged to the Knights Hospitallers of St. John of Jerusalem; and, after the dissolution of the monasteries, being vested in King Henry the Eighth, had been granted by him to the Archbishop of York and his successors, under whom the Defendants occupied; the Defendants pleaded that the lands were held by the Hospital exempt from tithes—that they were so held and granted by the king; and they proved that no tithes had within memory been paid for the lands. On the part of the vicar was produced an *insperimus* of an inquisition made under the authority of the Archbishop of York in 1314; by

which it was found, after specifying certain tithes, "that the vicar ought to receive *all other tithes* to the said church belonging. (except corn and hay,) which the master and brethren of the hospital of St. John of Jerusalem received as rectors: but that all the vicars had, ever since the time of the ordination of the vicarage, received all other tithes, and peaceably, and did so at that time, but they were bound to give their tithe of corn and hay."

Held, upon the evidence of this document, that the vicar was entitled to the tithes claimed by his bill.

The Respondent, in Hilary term 1819, exhibited his bill of complaint in the Court of Exchequer, against the Appellants, stating, among other things, that he [95] was, in 1784, presented, instituted, and inducted into the vicarage and parish church of Feliskirk in the county of York: and as such vicar, by some ancient endowment, or by prescription or immemorial usage, had ever since been, and then was entitled to receive all the tithes yearly arising in the parish, or the titheable places thereof, except the tithes of corn, hay, and wood; and further stating that the Appellant Heneage Elsley was the owner of a mansion house and hereditaments situate within the parish thereof, called Mount St. John, which in and since the year 1792, the Appellant Heneage Elsley had demised to the persons therein named, (and amongst others the Appellant Henry Barton,) or the same had been occupied by the Appellant Heneage Elsley himself; and further stating that in and since 1792, such successive occupiers thereof had had divers titheable matters and things (besides corn, hay, and wood,) upon the premises called Mount St. John, the tithes of which ought to have been set out for the Respondent as vicar, but that the same had been subtracted from him; and praying that an account might be taken under the decree of the Court, of the tithes of the several titheable matters and things had and taken by the persons therein named, and by the Appellants, Heneage Elsley and Henry Barton, respectively, in and from the year 1792; and that the Appellants might be decreed to answer and satisfy what should be coming due to him from them respectively, upon the taking of such account.

The Appellants appeared and put in their answer to the bill, and thereby stated, amongst other things, that they did not believe that the Respondent was entitled, by the means in the bill mentioned or other-[96]-wise, to any tithes yearly arising upon the estate or district of land in question; they thereby farther stated that there was a certain estate or district of land situate within the parish of Feliskirk, called or known by the name of Mount St. John, or the Mount Ring, which consisted of a mansion house, and the several parcels of land particularly specified in the Appellants' answer, and of which the mansion house and hereditaments mentioned in the Respondent's bill were parcel; that the said estate or district of land was formerly parcel of the possessions of the late hospital of St. John of Jerusalem, in England, which was dissolved, and the possessions whereof were given to the crown by stat. 32 H. 8. c. 24. intituled "An Act concerning the possessions of St. John of Jerusalem, in England and Ireland."

They contended that the said estate or district of land was by composition, prescription, or some other lawful ways and means, held and enjoyed by the prior and brethren of the hospital at the time of the dissolution thereof, discharged, as well in the hands of themselves as of their lessees or tenants, from the payment of all tithes, as well great as small; that the said estate or district of land came to the crown discharged from the payment of tithes by virtue of the stat. 32 H. 8. c. 24. and of another statute passed in the 31 H. 8. c. 13. intituled "An Act for dissolution of monasteries and abbeys," or one of them; that after the said estate or district of land came to the crown, the same was granted by King Henry the Eighth, in the thirty-fourth year of his reign, to Edward, then Archbishop of York, and his successors; and that the same had ever since belonged to the Archbishops of York for the time being, and had, by virtue of the said statutes, or one of them, [97] been holden and enjoyed by the said Archbishops, their lessees and tenants, discharged from the payment of all tithes, as well great as small; that no tithes arising upon the said estate or district of land, nor any satisfaction in lieu of such tithes, had ever been paid to or received by any person or persons whomsoever, since the dissolution of the

hospital, except the tithes recovered by the Respondent in the late suit * mentioned in the Appellants' answer, and the tithes of parts of the estate or district of land, which since the decree in such suit, which was made in the year 1815, had been rendered to the Respondent, but to which the Appellants believed and insisted the Respondent was not of right entitled.

They further stated by their answer that the Appellant Heneage Elsley had, ever since the year 1792, holden, and then held the estate or district of land as lessee under the Archbishop of York; and contended that the Respondent was not entitled to the tithes claimed by his bill, and they insisted that such tithes ought not to have been set out for him.

The Appellants afterwards put in a further answer relating to certain allotments under an inclosure act, and claiming the same exemption as to the lands allotted.

The Respondent having replied, and the cause being at issue, the Appellants proved the grant by Henry the Eighth, of the lands composing the district of Mount St. John, their identity, and the non-payment of tithe.

[98] On the part of the Respondent as evidence of the endowment of the vicarage of Feliskirk, it was proved by the *inspeximus* of an inquisition registered among the records in the Archbishop of York's registry, and produced by the deputy registrar of the Archbishop of York, that in the year 1314, the then Archbishop of York issued his mandate, directed to Andrew de Grymstone, then sequestrator in the Archdeaconry of Cleveland, commanding him upon the receipt thereof, without loss of time, to go to the church of St. Felix, and there by trusty men of that parish, with scrupulous diligence to inquire in what portions or profits the vicarage of the said church did then consist, and in possession of what profits William de Grymstone the last vicar thereof, was whilst he lived; and in the possession of what profits the other vicars, his predecessors, were since the time of the ordination of the said vicarage, and how much the profits to the said vicarage appertaining, were worth one year with another, according to the true value of the same, with directions to certify thereupon distinctly and openly before the octaves of St. Martin; that the sequestrator, by virtue of his mandate, went personally to the church of St. Felix, and by trusty and wise men of that parish, made due and diligent inquisition upon the premises; by which he found, amongst other things, that the vicar of the church of St. Felix ought to receive the tithe of wool and lambs of the whole parish, and that it was worth, one year with another, 100s.; the lent tithes, and the three oblations in the year were worth, one year with another, five marks; the white tithe was worth, per annum, 16s.; the tithe of hens, ducks, and pigs, was worth, per annum, 20s.; the tithe of hemp, flax, and gardens was worth, per annum, 20s.; the tithe of calves, pullets, and bees, was worth, per an-[99]-num, 6s.; and that it was to be known that the vicar ought to receive *all other tithes* to the said church in any wise belonging, excepting only the tithe of corn, and the tithe of hay, which the master and brethren of the hospital of St. John of Jerusalem received as rectors; but that all the vicars had, ever since the time of the ordination of the vicarage, received all other tithes peaceably, and did so at that time, but they were bound to give their tithe of corn and hay.

It was also proved on the part of the Respondent, by the production of the minister's account, in the 32d year of the reign of Henry 8. that, at that time the master and brethren of the hospital of St. John of Jerusalem were only entitled to the tithes of corn and hay of the parish of Feliskirk; and by the production of the grant of the 36th year of the reign of Henry 8. it was proved, that the tithes of corn and hay of the parish of Feliskirk only were granted to the then Archbishop of York and his successors; and by an indenture of lease, dated the 31st day of October, 1758, being a lease of Mount St. John, and other lands, from the Archbishop of York

* There had been a suit in the Exchequer by the vicar against other occupiers of Mount St. John; the Defendants in that case set up a title to the tithes. In 1816, Thompson, C. B., pronounced a decree for the Plaintiffs, being of opinion that no *title* to the tithes had been made out, but observing that the ground of exemption not having been taken, it was unnecessary to consider the validity of such a ground of defence.

to the ancestors of the Appellants, it was shewn that the small tithes of the district of Mount St. John were not granted to them.

The cause was heard before the Lord Chief Baron, on the 1st and 18th days of May, 1824.

On the 11th of November, 1824, the Chief Baron delivered the judgment of the Court, by which it was referred to one of the masters of the Court to take an account of the tithes of the several matters and things (except corn and hay) had and taken by the Appellants respectively, from and upon the lands and grounds called Mount St. John, or the Mount Ring, in the parish of Feliskirk, in their respective occupations, six years prior to the filing of the Respondent's bill: and it was further ordered and decreed by the Court, that what should be so found due from the Appellants respectively, upon the taking of such account, should be answered and paid by them respectively to the Respondent: and it was further ordered by the Court, that it should be, and it was thereby referred to the master to tax the Respondent his costs of the suit, so far as regarded the said Respondent's demand of the tithes, of which an account was thereinbefore decreed as aforesaid from the said Appellants; and that such costs, when taxed, should be paid by the Appellants to the Respondent, or his solicitor or clerk in Court: and it was also ordered and decreed by the Court, that the Respondent's bill, so far as it sought any account or demand of tithes, other than and beyond the tithes of which an account was thereinbefore decreed, should be, and the same was thereby dismissed out of Court, with costs to be taxed for the Appellants by the master, to whom it was thereby referred to tax the same: and it was further ordered, that such last-mentioned costs, when taxed, should be paid by the Respondent to the Appellant Heneage Elsley, or to his solicitor or clerk in Court.

The Appellants, considering themselves aggrieved, appealed against so much of this decree as ordered, adjudged, and decreed that it should be referred to the master to take an account of the tithes of the several matters and things (except corn and hay) had and taken by the Appellants respectively, from and upon the lands and grounds called Mount St. John, or the Mount Ring, in the parish of Feliskirk, in their respective occupations, six years prior to the filing of the Respondent's bill: and by which it was ordered and decreed that what should be so found due from [101] the Appellants respectively, upon the taking of such account, should be answered and paid by them respectively to the Respondent; and by which it was ordered, that it should be, and it was referred to the master to tax the Respondent his costs of this suit, so far as regarded the Respondent's demand of the tithes, of which an account was thereinbefore decreed as aforesaid from the Appellants; and that such costs, when taxed, should be paid by the Appellants to the Respondent, or to his solicitor or clerk in Court.

For the Appellants: Mr. Boteler and Mr. Bickersteth.

There was no evidence in the cause on the part of the Respondent, that he, as vicar of the parish of Feliskirk, was entitled to take any tithes whatsoever, arising upon the estate or district of land called Mount St. John (Arg. 23d and 26th March, 1827).

The defence is, that the lands of Mount St. John were held by the hospital tithe-free.

The absolute exemption or discharge from the payment of all tithes, as well great as small, arising upon that estate or district of land, insisted upon by the Appellants in their answers to the Respondent's bill, was fully proved by the evidence adduced in the cause.

The inquisition produced by the Respondent at the hearing of the cause, for the purpose of proving his right as vicar of the parish of Feliskirk, to all the tithes, except the tithes of corn, hay, and wood, of the district of Mount St. John, and of disproving the exemption or discharge from the payment of tithes for that district, insisted upon by the Appellants, could have no such effect: first, because the same was taken in the absence of the prior and brethren of the [102] hospital of St. John of Jerusalem, and of their lessees or tenants: and secondly, because the general terms in which this instrument speaks of the right of the vicar of the said parish to tithes, do not prove his right to the tithes of any particular estate or district of land in the parish from which the vicar has never received any tithes; nor are they in any way inconsistent with the fact of any particular estate or district of land in the parish

being exempt or discharged from the payment of tithes (*Carr v. Henton*, 1 Aust. 313. n. 7 B. P. C. 100).

For the Respondents: Mr. Pepys and Mr. Koe.

The defence in the former suit was, a title to the tithes by grant. In this suit they claim by prescriptive exemption. The two defences are inconsistent. It might be a question whether these lands are capable, under the 31st Hen. 8. c. 13. of being discharged from tithes. A hospital was not privileged as a monastery. The exemption was supposed formerly, not to be attached to the lands, but to be personal to the ecclesiastical bodies. The exemption stands on the 21st sect. of 31 Hen. 8. c. 13. But the order of St. John of Jerusalem was dissolved by 32 Hen. 8. c. 24. In this act there is no such provision as in the 21st sect. of 31 Hen. 8. c. 13. It has been held, in similar cases, that such bodies were not exempt. *Cornwallis v. Spurling* (Cro. Jac. p. 57. Archb. of Cant. case, 2 Co. 46. *Urrey v. Bowyer*, 1 Gwill. 250. *Whitton v. Weston*, Latch. 89. Wi. Ent. 342. Godb. 392. W. Jo. 182. N. Bendl. 168, 185). Later cases have taken a different view.

According to the modern rule of prescription, there must be immemorial possession to the time of the dissolution, by a body capable of discharge, and subsequent non-payment. In this case the possession is short of the time of legal memory. Proof of payment [103] of tithes, or acquisition of the lands since the time of Ric. 1. destroys the ground of prescription.

The defence is still in substance, not exemption, but a claim by title, arising from the circumstance of the rectory and the lands being in the same hands. The hearsay of persons lately living is not to be put in competition with the evidence of such a document as the inquisition.

To send the question to an issue would be useless; because it arises upon the construction of an instrument, which it is the province of the Court to construe.

The Earl of Eldon (8th July, 1828): The question which your Lordships have to determine is, whether the owners of a certain part of the parish of Feliskirk, in the county of York, have a right to insist that they are exempted from the payment of small tithes to the vicar.

It appears that there was a former suit in the Court of Exchequer, on a bill filed in the year 1807.—That was a suit relating to these small tithes, in which the owners and occupiers of part of the parish of Feliskirk insisted that they were themselves entitled, as claiming under a sort of Collegiate Institution, called the Hospital of Saint John of Jerusalem, to the small tithes of this district. An instrument was produced from the archives of the Archbishop of York, which, it was insisted, proved that the vicar was entitled to receive many of the small tithes of that parish; and no doubt he was entitled to receive all the small tithes of this parish, unless it could be shewn that they were in somebody else. The suit to which I have first referred, was decided by a learned Judge of very great experience.—I mean the late Lord Chief Baron Thompson, and no man can name him, without stating [104] that few persons who have ever presided in that Court, possessed more ability and research, or were more fitted for the decision of such a question.—Upon the production of the instrument, from the archives of the Archbishop of York, he was decidedly of opinion, and in that the Court agreed with him, that that instrument proved that the vicar was entitled to the small tithes of this district of the parish, as well as those of the rest of the parish; but that at any rate it proved, that the title to enjoy the tithes by the owners of that district, themselves claiming under a grant to the hospital of Saint John of Jerusalem, was negatived by that instrument; and, therefore, that if they had any defence against the vicar, it must be a defence set up on another ground.—That produced the present suit.

In the present suit, the Appellants contend, that they have a right to prescribe *non decimando*, as claiming under a dissolved monastery. Whether that monastery was dissolved by the statute of the 31st Henry 8, or the 32d Henry 8, does not appear from the papers; but your Lordships will recollect, a considerable doubt has been raised, as to one of those statutes, whether it operates beneficially to those who claim the lands belonging to the monastery, or whether the claim is valid on behalf of laymen.

The right of the vicar depends entirely upon the same instrument, and that instrument, it has been contended at the bar, proves that there can be no such thing

as a prescription *non decimando*; because it proves that the vicar himself was entitled to those tithes, though it may appear, that in modern times he has not taken these tithes. The Court of Exchequer has judicially asserted that the instrument proved that there was no positive title to the tithes in those who represented the monastery; that the vicar is entitled to the tithe, [105] and not the person who possessed that instrument; and it is impossible, in my opinion, to decide that that judgment is wrong. It is a mere question upon the construction of that instrument. It is, therefore, a question which necessarily is not sent to a jury; because the construction of an instrument belongs more to the Court than to the jury, who may certainly infer what they think proper from the payment or non-payment of tithe; but if that instrument proves that which Lord Chief Baron Thompson thought it did prove, it is impossible that the case of the Appellants can be supported by it.

When this cause came under the consideration of the Court of Exchequer, in the second instance, they were of opinion that the construction put on that instrument, by Lord Chief Baron Thompson, was the proper construction, and that the vicar was entitled to these tithes.—It is very difficult, perhaps, for any one to say that any instrument of this kind will not bear a good deal of criticism, which may give rise to some degree of doubt: but looking to the opinion of the several learned Judges well versed in the construction of instruments of this nature, who have concurred in their opinion with respect to the legal bearing of this instrument, I certainly cannot advise your Lordships to consider both those judgments as erroneous.—If the first was not wrong, (and from that decree there was no appeal,) the second was not wrong; I am of opinion that they were both right, and that you ought to affirm this decree. I therefore move that this decree be affirmed—I would not propose to give any costs.

Judgment affirmed, without costs.

[106]

IRELAND.

(COURT OF CHANCERY.)

MICHAEL COLLINS,—*Appellant*: The Reverend CHARLES HARE,—*Respondent*.

[Mews' Dig. vii. 218, S. C. 1 Dow and Cl. 139.]

A., an army agent in Dublin, having effected a policy of insurance on his own life for £3000, in 1819, by an informal instrument, attested by two witnesses, assigned the policy to C., who had been for many years his confidential clerk. From the time of the assignment A. paid two-thirds, and C. one-third of the premium. In 1821, by a more formal instrument, drawn up by a professional person, he executed a further assignment of the policy. In the first instrument, the consideration expressed for the assignment is, "*regard and affection*;" in the second, "*friendship and affection*." The last assignment was drawn up by the Attorney of C., and both the instruments were drawn up and executed, without the knowledge of A.'s family.

By a codicil to his will, A. gave to C. a legacy of £100, as a further mark of his regard and affection. Upon the death of A., a letter addressed to his son was found enclosed in his will, stating that the assignment had been extorted from him by C., by threats and undue influence.

Upon a bill filed by H., as executor of A., to set aside the assignment on the ground of fraud, and undue influence, C. by his answer claimed the interest under the assignment, as a compensation given to him by A., in the place of an increase of salary. Upon the depositions it appeared in evidence that C. had given different accounts of the object of the policy, viz. that it was effected as a provision for the wife of A., and that it had been given to him, for making up the accounts of A., in a way to deceive government.

It appeared also in proof of the charge of influence, that C. had declared when the codicil was in contemplation, that none should be executed unless he chose: and when the letter was found in the will, that he said he could

ruin the credit of the house and the character of the testator. Upon this, and other [107] evidence, an issue was directed at the instance of the Defendant, to try whether the assignments as to two thirds of the sum insured, were the free and voluntary acts of the testator, or extorted from him by threats or undue influence, or obtained by fraud: the Defendant, upon the trial of this issue was to produce the deeds of assignment, and the attesting witnesses.

Upon the trial of the issue, the letter found enclosed in the will was tendered in evidence by the Plaintiff: but rejected. The deeds of assignment and the attesting witnesses were produced by the Defendant: but the Plaintiff declined proving them, and the witnesses were not examined, and the deeds not proved by either party, but other evidence was given nearly similar to that which appears upon the depositions in equity on the part of the Plaintiff. The Defendant produced no witnesses: whereupon the jury found that, in the event of *any assignment* having been made, as to two-thirds thereof, it was obtained by undue influence.

A motion to set aside this verdict, and grant a new trial, was refused, and upon a re-hearing, a decree was made in favour of the Plaintiff.

This decree was affirmed on appeal.

The Respondent in 1824 exhibited his original bill in Chancery, in Ireland, against the Appellant, and also against the corporation of the Royal Exchange Assurance of London, stating that John Atkinson, in April, 1819, being desirous, in the event of his death, to secure a competency for his wife, effected a policy of insurance on his life, with the Royal Exchange Assurance of London, for the sum of £3000, and thereupon paid the annual premium for the first year: that John Atkinson had been for many years an army agent, and that the Appellant was his chief and confidential clerk, and in such capacity obtained his implicit confidence, and exercised an almost unbounded influence over him: that John Atkinson continued to the time of his death, to pay the premium on the po-[108]-licy, and that the sum insured formed a principal part of the assets of John Atkinson: that the Appellant had the care of the books of J. Atkinson, and access to all his papers, and had obtained the possession of the policy, and of other papers, books, and vouchers, of the testator, and had taken copies thereof, which he refused to give up to the Respondent: that the Appellant, during the last years of J. A.'s life, had complete dominion over his office, and all the papers and documents therein, J. A. having been, from extreme ill health and infirmity of body, unable to attend to business, or even to take care of his private affairs, and having during such the period of his illness and debility, confided all his affairs, books, and papers to the Appellant: that in such his disability for business, John Atkinson was in the habit of signing and subscribing any such papers as Appellant required him, without reading or being particularly apprized of the contents thereof: and that, feeling himself in his then situation to be much in the power of Appellant, he did not, nor could refuse, to do any act required of him by the Appellant.

The bill further stated that John Atkinson died on the 30th of October, 1823, having made and published his will, bearing date the 29th of August, 1823, and appointed the Respondent sole executor: and that he had since proved the will, in the Court of Prerogative in Ireland, and taken upon himself the execution thereof: that shortly after the death of John Atkinson, a letter from him, dated the 15th of October, 1823, was found enclosed in his will, directed to his son, John Atkinson the younger, in the following words, *videlicet*:—

“My dearest John, as you have told me that you know I have insured my life, through one of the [109] office-keepers, who called for payment for £131, for the policy of insurance, and have asked me in my dying bed, what has become of it, I cannot refuse but tell you the truth, that it was extorted from me by Mr. Michael Collins, by threats and undue influence: the policy for which I pay, is for £2000. (Signed.) John Atkinson.”

The bill then proceeded to state that the policy being in the hands of the Appellant, at the time of the death of the testator, and the testator having kept the state of his affairs secret from the members of his family, the Respondent was entirely

ignorant of the existence of the policy, or its amount; but that in consequence of the letter, the Respondent applied to the agent of the corporation in the city of Dublin, when he discovered that it was effected for the sum of £3000; that on the 3d of November, 1823, the Respondent caused a notice to be served on the Appellant, requiring him to surrender the policy of assurance for £3000, which the testator effected upon his life; and on the 24th of the same month, he served the Royal Exchange Assurance Company with notice not to pay the £3000, or any part thereof to the Appellant: that the Appellant refused to deliver up the policy, alleging that he was entitled to the whole of the proceeds.

The Respondent by his bill charged, that the policy had not been at all assigned to the Appellant, or if an assignment was made, that it was obtained by means of fraud, misrepresentation, and undue influence, and without any consideration; that the Appellant had himself confessed that he was only entitled to one-third part of the policy, the remaining two-thirds being a trust for the testator, and the Respondent, as his executor: as evidence whereof, the Respondent charged, that subsequently to the alleged [110] assignment, and down to the time of his death, the testator continued to pay two-thirds of the premium on the policy, and it was admitted and declared, by the Appellant, that the testator paid the premium on two-thirds, and was the owner of two-third parts thereof, he only claiming to be entitled to one-third.

The bill prayed, that the Royal Exchange Assurance Company might be restrained, by the injunction of the Court, from paying over to the Appellant the amount of the policy, and that they might also bring into Court the sum of £3000, to abide the decree of the Court; and that it might be decreed to be part of the assets of the testator; and that the assignment (if any) might be set aside, and decreed to be null and void, or a trust for Respondent, or might stand as a security only for the sum due thereon (if any) to the Appellant; and that the Appellant might be restrained from proceeding at law on the foot of the policy against the Assurance Company.

The Respondent by his bill also prayed an account on the foot of the transactions between the Appellant and the testator, which account was waived, on the hearing of the cause.

The Appellant, in February, 1821, answered the bill; he admitted that the testator effected the policy on the 20th of April, 1819, and claimed to be entitled to the entire benefit of the policy, under two assignments made to him by the testator: the first bearing date the 23rd of April, 1819, and the second bearing date the 21st of April, 1821. He admitted that he had paid one-third only of the premium on the policy after the first assignment, and that John Atkinson had paid the remaining two-thirds yearly; he alleged that the assignments were respectively made to him, by the testator, in order to make a provision for him, and in consideration of the valuable services [111] rendered by him as clerk to the testator. The Appellant also by his answer admitted that he had taken in the testator's lifetime, and had in his possession abstracts from the books of account of the testator, which did not relate to the Defendant's private account, and that he had at all times access to, and the chief management and control of the testator's books of military accounts.

He relied on these allegations of his answer, and on a codicil made by the testator in his last illness, the day before the date of the letter to his son, whereby a legacy of £100 was left to the Defendant to be paid on the settlement and discharge of the accounts of the house.

On the 1th of March, 1821, an application was made to the Court on behalf of the Respondent for an injunction to restrain the Appellant from receiving, and the then Defendants, the Royal Exchange Assurance Company of London, from paying over to the Appellant the sum of £3000, the amount of the policy, which was ordered accordingly.

By a consent order, dated the 23d of June, 1821, one-third of the amount of the policy was paid over to the Appellant by the Royal Exchange Insurance Company, and the remaining two thirds were vested in stock in the name of the Accountant-General to the credit of the cause; the Defendants, the Royal Exchange Assurance Company, were struck out of the bill, and the bill was amended under the consent order accordingly.

The first assignment, dated the 19th of April, 1819, was by an instrument

signed, sealed, and attested by two witnesses, expressed thus: "I do hereby assign all my right, title, and interest in the policy of assurance, etc. (describing it) to Mr. Michael Collins, [112] of, etc., as a mark of my affection and regard for him; and I do hereby authorize and empower the directors of the Royal Exchange, Insurance Company, etc. to pay to the said Michael Collins, or his assigns, the sum of £3000, payable by them, etc. In witness, etc. (signed) John Atkinson."

The second instrument, dated the 21st of April, 1821, was a regular indenture of further assignment of the same policy:—J. A. granting it to M. C., for divers good causes and considerations, from the friendship and regard which he bore to M. C., and also in consideration of five shillings.

By the depositions in the cause, it was proved that the testator had for some years before his death been in a weak and infirm state of health, and incapable of attending to his affairs as closely as he used to do; that the Appellant had been the confidential clerk and book-keeper of the testator; that he had a considerable influence over him; that he made the entries, wrote the letters, and took and kept abstracts from the accounts of the house; that the testator signed letters and other documents which were presented to him by the Appellant, without reading them; that the Appellant boasted of the power he had over the testator, and the services he had rendered to the testator in the manner in which he made up his accounts with the government, and that by means of these accounts and his knowledge of them, he had Mr. Atkinson in his power, and that he could ruin the house and the private character of the testator; that the Appellant declared that the assignments of the policy were granted to him for making up the general accounts in a way to deceive government; that the Appellant had, up to the year 1818, a salary of £200; that in the year of 1818, the salary was increased to £300 a [113] year, and continued at that sum to the testator's death; that the average profit of the office of the testator was in 1818, about £748, in 1819, about £567, in 1822, did not exceed £100, and that in the year 1823 it was not sufficient to pay the Appellant's salary.

It was also proved that the testator left his family in very narrow circumstances, at the time of his death; that the Appellant had offered, after the testator's death, to give up the policy, and said that he had a deed prepared for that purpose; that the Appellant boasted that the testator could not make a codicil to his will, without his consenting to it. Proof was also admitted, that the letter dated the 15th of October, 1823, was of testator's hand-writing, and found with his will and codicil, and that after the testator's death, it was read in the presence and hearing of the Appellant; it also appeared in proof, that the assignments of the policy were executed by the testator, without the knowledge of his professional adviser, who was usually employed and consulted by him in all law affairs, and without the knowledge of any of the members of his family; and that the Appellant had said, when asked about the insurance in the lifetime of the testator, that it was an insurance for the benefit of the testator's wife.*

The cause was heard before the Lord Chancellor of Ireland; and on the 28th of April, 1825, his Lordship pronounced an order, that the Respondent should forthwith commence a feigned action in the Court of King's Bench, in Ireland, against the Appellant, to [114] which the Appellant was forthwith to appear and plead the general issue, and admit all matters of form, and that the question to be tried, should be the issue following, to wit, "whether the assignments of the 23d of April, 1819, and the 21st of April, 1821, were, as to two-thirds of the sum insured, the free and voluntary acts of the testator, or whether the same were extorted from him by threats and undue influence, or obtained from him under any circumstances of fraud; and it was further ordered, that the Defendant Michael Collins, should be under the terms of producing on such trial the assignments, and the witnesses thereto, and also the person who drew the assignment of the 21st of April, 1821; and the Judge before whom such trial should be so had, was thereby desired to certify to the Court the verdict that should be given; and further directions were reserved until the return of the Judge's certificate.

The feigned action was tried before the Lord Chief Justice of the Court of King's

* The substance only of the evidence is shortly stated. It appears more fully in the argument, and the Lord Chancellor's speech on moving Judgment.

Bench, in Ireland, when the jury found a verdict for the Respondent, and the Chief Justice certified that the issue was tried before him and a special jury of the county of the City of Dublin, on the 1th day of July, 1825, when the jury by their verdict found, "that in the event of any assignments having been made by the deceased, they were (as to two-thirds of the sum insured by the policy of insurance, therein mentioned,) obtained by undue influence."

Upon the trial the Appellant produced the deeds of assignment, the attesting witnesses, and the attorney who prepared the second deed. But the counsel for the Respondent declined proving the deeds, or examining the witnesses. The assignments were not proved by either party: and the Appellant [115] conceiving, that for want of such proof, the Respondent had failed to establish his case, did not call witnesses, which, as he alleged, he had in attendance.

Under these circumstances a motion was made before the Lord Chancellor, on behalf of the Appellant, that the verdict should be set aside, and a new trial directed, on the grounds that the verdict was against evidence, and against the charge of the Judge, and without a sufficient investigation of the facts bearing upon the issues directed to be tried, and because the verdict under the circumstances in which it was delivered could not give satisfaction to the Court.

By an order of the 3d of December, the motion was refused, with costs.

The cause was heard on the Judge's certificate, on the 16th of February, 1826, when, on the application of counsel on behalf of the Appellant, it was ordered that the Defendant should be at liberty to petition forthwith for a re-hearing, and the cause having been accordingly reheard on the 2d of March, 1826, it was decreed, that the assignments of the policy of insurance, dated respectively the 23d of April, 1819, and 21st of April, 1821, so far as they related to two-thirds of the policy, were fraudulent and void, and that the sum of £1818 6s. 10d., 3½ per cent. stock, and the sum of £95 9s. 3d. cash then remaining in the Bank, to the credit of the cause, being the produce of two-thirds of the said policy of insurance, were part of the assets of the testator, John Atkinson, deceased, and that the Respondent was entitled to his costs of the suit, both at law and in equity, and the Respondent, waiving the accounts, prayed by his bill, that the Accountant General should transfer to the Respondent, or his attorney thereto lawfully authorized, the sum of £1818 6s. 10d., 3½ [116] per cent. stock, and should also draw in favour of Respondent, or his attorney thereto lawfully authorized, for the sum of £95 9s. 3d. so remaining in the Bank to the credit of the cause.

From the decretal order of the 28th of April, 1825, the order of the 3d of December, 1825, and the decree of the 2d of March, 1826, the Defendant in the Court below appealed to the Lords in Parliament.

For the Appellant: Mr. Horne and Mr. Bethell.

Ascendancy of a servant over his master ought not to be presumed to result from the relation between them; the nature of the transaction, and its circumstances in the manner and order of their occurrence are such as not only do not afford any internal evidence or ground for suspicion of fraud, but give the strongest confirmation to the sworn statements of the Appellant in his answer, and lead to a contrary conclusion: and therefore the Court ought not to have acted except on direct testimony of actual fraud. No evidence was adduced by the Respondent on the hearing of the cause in equity, which proved a case of fraud against the Appellant, in obtaining the assignments in question from the testator.

The Respondent's case, as made by the bill, rests upon the allegations of an undue advantage taken of the mental weakness of the deceased, which had been occasioned by bodily infirmity. But his witnesses, on the contrary, agreed, that the deceased was in the enjoyment of good health at the time of this transaction; and laboured under no weakness of mind from that or any other cause:—it appears, that his soundness of understanding and attention to and control over his business continued unimpaired till within a [117] few months previous to his decease. If, however, a solemn instrument be impeached on the ground of the grantor's incapacity, or of fraud, the fact should be proved by evidence directly relating to the transaction. The rest of the Respondent's evidence consists of the letter of the testator, of the 15th of October, 1823, and the testimony of his witnesses, as to the language of the Appellant, at the meeting of Mr. Atkinson's relations on the day of his decease.

The letter was not admissible in evidence; and, if admissible, ought not, under the circumstances of this case to have been received in a Court of Equity. The false and contradictory account it gives of the transaction, and its inconsistency with the feelings of kindness and bounty towards the Appellant, which are manifested by the testator, in his codicil of the same date, render it impossible to believe that it was the deliberate and voluntary act of the deceased. With respect to the language imputed to the Appellant by the Respondent's witnesses, a Court of Equity ought not to have used it as a ground of judicial inference: because a decision ought not to be founded upon facts which are not put in issue in the cause, especially in a Court of Equity, where the injustice of so doing will become more evident from advertg to the nature of the proceedings, and the mode of examination of witnesses established in such courts. But, independently of this general principle of justice, any inconsiderate expressions, such as are imputed to him by the evidence in this cause, regard being had to the occasion when they are stated to have been used, and there being in answer to the threats and imputations cast upon him, cannot be judicially taken against him as an admission of a fact, which, on all other grounds, it is impossible to believe. [118] Such evidence, therefore, ought not to have influenced the Court in directing the issue; nor ought a verdict, which was founded on such evidence alone, to have been satisfactory to it.

Admitting this to be a case where the Court ought not to have refused an issue, it was incumbent on the Court to have provided with certainty, that both the form and language of the issue, and the manner and circumstances of the trial, should be such as to bring the true points in the cause before the jury, which cannot be gathered either from this issue or the trial. But, in fact, regard being had to the nature of the case, and the evidence properly admissible in the cause, no issue ought to have been directed, but the bill ought to have been dismissed with costs, against the Appellant.

The letter of the testator was not admissible to destroy the effect of his own deed. It was rejected at law, and ought not to have been admitted in equity. The letter is contradicted by the codicil, dated almost at the same moment, and giving a legacy to the Defendant, as a farther mark of regard and esteem. The deed of assignment contained no covenant binding the testator to continue the payment of the premiums, yet he continued them to his death. The son knew of the assignment before the death of the father, and might have interposed; at all events there should have been a new trial. As the matter stands, there is no proof of any assignment, and the principal witnesses to the transaction have not been examined.

For the Respondent: Mr. Sugden and Mr. Spence.

The decree of the 28th of April, 1825, is well warranted by the principles and practice of Courts [119] of Equity, and the particular nature of the case itself. There was proof sufficient made by the Plaintiff in the equity cause, to sustain a decree for setting aside the assignments relied upon by the Appellant as to two-third parts of the policy of insurance, and the issue directed was for the purpose of satisfying the conscience of the Lord Chancellor as to the proofs so made. The direction of issues in such a case is conformable to the principles and practice of Courts of Equity. The Appellant did not object to the issue as directed, but asked for it in preference to a decree against him which would have been pronounced had he declined the issue. The order of the 3d of December, 1825, was right, inasmuch as the verdict was conformable to law and to justice, was founded upon cogent evidence, and not contradicted by any evidence on the Appellant's part. The decree of the 2d of March, 1826, is warranted by the verdict, as well as by the proofs and pleadings in the cause.

It would be against public policy, and the principles of equity to affirm instruments obtained clandestinely by a clerk from his employer without consideration, and in both instances kept concealed from the confidential attorney and friend, and also the relatives of the grantor.

The expression in the codicil of regard and affection follows the name of another legatee, which is coupled with that of the Defendant, and the codicil itself is impeached. It was the business of the Defendant on the trial to prove the assignment. He refrained, from fear of cross-examination. The attesting witnesses probably knew of nothing but the execution.

The Lord Chancellor: This appeal is principally, if not entirely, on a question of

fact. The counsel for [120] the Defendant not being satisfied with the opinion of the Lord Chancellor of Ireland, an issue was directed.

The case came on for trial before the Lord Chief Justice of the Court of King's Bench. The jury gave a verdict corresponding with the opinion of the Lord Chancellor. An application was then made for a new trial, and after hearing counsel for several days, the new trial was refused. Under these circumstances it would require a satisfactory case to rescind the decision.

The question arises upon the assignment of a policy of assurance. (Here the Lord Chancellor stated briefly some of the facts of the case.) The assignment was executed in private, and attested by two witnesses; but they probably knew nothing of the transaction. (Here the Lord Chancellor read the assignment of 1819.) This was done in 1819. In 1821 another assignment was executed in a more formal manner, by deed regularly drawn and prepared obviously by a professional person. Why a second assignment was executed does not appear.

In 1823 Collins was taken into the partnership. On that occasion letters commendatory of Collins were sent to their correspondents. But it appears that Collins, who had great control and influence over Atkinson, was in the habit of writing letters and accounts which were signed by Atkinson without investigation. It appears also that a few days before Atkinson's death a codicil was drawn up under the influence of Collins, by which £100 was given to him, as in the codicil it was expressed, as a further mark of esteem. On the death of Atkinson, a letter addressed to his son, alleging that the assignment was extorted, was found inclosed in his will. (Here the Lord Chancellor read the letter.) The policy was [121] for £3000; the premium for £2000, was paid by Atkinson, for £1000 by Collins.

These are the facts of the case up to the death of Atkinson, and they furnish many circumstances of strong suspicion: in the first place the motive for the assignment of the policy was put by Collins, on the ground of inadequacy of salary, and further remuneration; but it turned out that in 1818 the salary was £200: from that time it was £300 per annum: and during the same period the profits of the business varied from £800 per annum downwards, and in one year it was a losing concern. Under these circumstances it is extraordinary to say that the concern was sufficient to afford a larger salary than £300, or that the policy could have been assigned for that reason. In the next place it is singular that a second assignment of the policy, prepared by a professional man, should have been executed, nobody being called in on the part of Atkinson. The gentleman who had always been consulted by the testator, proved that he was not consulted on this occasion: the whole transaction was kept secret. But a fellow clerk had heard that this insurance had been effected, and questioned Collins on the subject, who said that it was a little provision for the testator's wife: and while the codicil was under preparation, a few days before the death of the testator, Captain Atkinson, his son, having complained of delay, the Defendant turned round to the clerk and said, no codicil should be executed unless he chose. This is a material fact, and there is other evidence that the testator acted under the control of Collins, the clerk. When the letter was discovered, after the death of Atkinson, a conversation took place in which Collins said that he could destroy the credit of the house by producing the public ac-[122]counts. It appears that the Appellant had Atkinson under his influence, by the manner of keeping these public accounts; which was the cause of executing the assignment, and also the codicil giving £100 to Collins as a further mark of approbation.

Upon the urgency of counsel an issue was directed. The case was heard before the Lord Chief Justice: witnesses for the Plaintiff were examined: Collins's counsel called no witnesses. The jury, under the direction of the Lord Chief Justice, found for the Plaintiff. The Lord Chief Justice directed the jury, "that as neither party had proved the instruments, or examined the attesting witnesses, or the person who drew the last assignment, they could know nothing of the contents or the facts attending the executions or the consideration, except what might be collected from the conversations in the presence of both parties, which had been given in evidence: and that the question which arose upon that evidence was, whether Atkinson executed the assignment under an apprehension communicated or suggested to him by the Defendant: that the Defendant had it in his power to destroy his character, and ruin the credit of his house, by exposing frauds in the public accounts of the house with government, kept by the Defendant for the deceased: and that he would do so unless

those policies were assigned to him, etc. Upon this direction the jury found that in the event of any assignment having been made by Atkinson, etc., it was obtained by undue influence." The evidence before the jury consisted of admissions by Collins, which might have been the foundation of the verdict. It was suggested that the Lord Chief Justice was not satisfied with the verdict. [123] But from the conversation which he had with Lord Manners, it appears that he was satisfied.

In point of form there is some objection. The assignment was not produced in evidence; but it was competent to the Defendant to prove it. The real question was in substance tried on that occasion, and it is not sufficient to reverse such a decision that there is some defect in point of form. An issue is to inform the conscience of the Judge who directs it, and if he has all the evidence before him, an omission to prove an instrument upon the trial of the issue, is not a ground to direct a new trial, especially as the Lord Chief Justice was satisfied.

Taking all the evidence together, I should have concurred with the jury. The matter was originally heard at great length in equity, upon a question of fact, which has been duly investigated, and the verdict of a jury corresponded with the opinion of the Judge in equity. The case coming back again, was thoroughly sifted and examined upon a re-hearing.

Under these circumstances it would require a very strong case to reverse such a decision. My opinion is, upon the facts in evidence, that the judgment is right, and, unless some doubt were expressed on the question, I should move that the judgment be affirmed.

Judgment affirmed, with £100 costs.

[124]

ENGLAND.

(COURT OF CHANCERY.)

W. R. P. TYLNEY LONG WELLESLEY and others, infants, by their next friend,—

Appellants; The Hon W. POLE TYLNEY LONG WELLESLEY.—*Respondent*.

[Mews' Dig. vii. 1487; S. C. 1 Dow and Cl. 152; in Court of Chancery, *sub nom. Wellesley v. Duke of Beaufort*, 1827, 2 Russ. 1. Commented in *In re Goldsworthy*, 1876, 2 Q. B. D. 82; and see *In re Agar-Ellis*, 1883, 24 Ch. D. 323; Guardianship of Infancy Act, 1886 (49 and 50 Vict. c. 27); Custody of Children Act, 1891 (54 and 55 Vict. c. 3); *In re Newton (Infants)*, (1896), 1 Ch. 740; *In re A. and B. (Infants)*, (1897), 1 Ch. 786; *In re X.*, (1899), 1 Ch. 526.]

The Court of Chancery has jurisdiction to appoint a guardian for infants, being Wards of the Court, excluding the father; and upon evidence that the father was living in a state of adultery, and had encouraged his children in swearing, keeping low company, etc.; it was held a fit case to exercise the power to exclude him from the guardianship.

The question upon this appeal was, whether the Appellant, *jure paterno*, was intitled to the custody of his children, or whether the Court of Chancery had jurisdiction to deprive him of that custody, and to appoint another guardian for the children; and whether that jurisdiction, if it existed, was properly exercised under the following state of circumstances.

The Appellant, in 1812, married Catherine Pole Tylney Long. By the settlement made upon the marriage, £13,000 a year was settled upon her as pin-money, and, subject to that annuity, her lands in fee-simple were settled upon the Appellant for life. The lands to which she was intitled in fee-tail, under the will of Sir James Long, were settled upon the Appellant during the joint lives of himself and his wife. Out of these lands, portions for the younger children were to be raised, under an appointment made [125] by Mrs Wellesley, according to a power vested in her by the will. Subject to these portions the lands vested in the eldest son, as tenant in tail upon the death of Mrs. Wellesley.

In 1821 the Appellant, accompanied by his wife and family, went abroad, to avoid his creditors, and there he formed an adulterous connexion with Mrs. Helena Bligh, which caused a separation between him and his wife. He continued to reside and cohabit with Mrs. Bligh at Paris. Mrs. Wellesley, in 1824, proceeded to England, taking with her, by his permission, a daughter and two sons, the issue of the marriage. In 1825 proceedings for a divorce were commenced by Mrs. Wellesley in the Ecclesiastical Court; and a bill in Chancery was also filed by her direction, to make her infant children wards of the Court, with a view to prevent their abduction by force or stratagem, on the part of the Appellant.

In September, 1825, Mrs. Wellesley died, having committed her children to the care of her sisters, the Misses Long, with a death-bed request that they would not permit the Appellant to get possession of them. On the 30th of September a bill was filed in the name of the infants by their next friend, against the persons having the legal estate in property which they held in trust for the infants, praying the usual accounts; that the portions of the younger children might be raised; and that a proper person might be appointed to have the care of the persons of the three infants, during their minorities, with an allowance for their maintenance.

After the death of Mrs. Wellesley, the Appellant applied to the Misses Long, and requested them to deliver the children to his custody, which they refused. In October, 1825, he procured a writ of *habeas corpora* from the Court of King's Bench, [126] which was served on the solicitor of the Misses Long. On the 3d of November, and before the return of the writ, a petition was presented to the Lord Chancellor in the names of the infants, to restrain him from prosecuting the writ; and in consequence of an opinion expressed by the Lord Chancellor, that he could not have the custody of the infants while he was abroad, he desisted from prosecuting the writ.

In November, 1825, the Appellant, being still abroad, presented a petition praying a reference to one of the Masters of the Court, to approve of a plan for the education of the infants, and a suitable establishment for their residence.

On the 9th of November, the Lord Chancellor made an order of reference as to a plan of education, and an establishment for residence; and that the Master should approve of a proper person to act as guardian to the infants, and "state to the Court what relations, *other than their father*, the infants had, etc. etc.; and that the Appellant should be restrained from interfering with the infants, etc."

On the 14th of December, the Appellant presented a petition, stating his intention to reside in England where he then was, and claiming, as the father and natural guardian, the custody of the infants, and the management of their education. The petition prayed, "that the order of the 9th of November, 1825, might be rescinded, and that the Misses Long might on a day to be named deliver over the infants to their father."

In support of this petition, and in opposition to it, various affidavits were filed, which, as to many of the allegations, were directly contradictory. After argument, additional affidavits on both sides were filed upon the suggestion of the Lord Chancellor.

In the meantime the adulterous intercourse between [127] the Appellant and Mrs. Bligh continued, and damages had been recovered in an action for *crim. con.* by the husband against the Appellant.

In January, 1827, one petition again came on for hearing. The evidence consisted of affidavits to the number of forty; letters from the Appellant to his children and his wife; and from her to him, and others.

The case made against the Appellant upon this evidence was general ill treatment of his wife, an adulterous connexion continuing to the time of making the order and the encouragement of the children in habits of swearing, and keeping low company. Letters were produced, written by the Appellant to his sons, in one of which, in the midst of much good moral advice, he says, "If the fellow be a sportsman who told you, etc., *damn his infernal soul to hell*;" In another, "study hard, but as soon as you have completed your tasks, go out, in all weathers, and *play hell and Tommy*, etc., chase cats, dogs, and women, old and young, but spare my game." In another letter, written to the tutor of his sons, complaining of the interference of Mrs. Wellesley and her sisters, whom he suspected of being fanatical, or over-

religious, he says, "there are certain things which ought to be let alone, a man and his children ought to be allowed to go to the devil their own way, if he pleases."

On the 1st of February, the Lord Chancellor made an order, by which, reciting that the affidavits, filed in the matter of the petition, to the number of forty, had been read, he ordered that it should be referred to the Master, to enquire and report to what person or persons (other than the Appellant,) the custody of the infants, and the care of their maintenance and education should be committed, etc., and that the Appellant, and all other persons should be restrained from removing, or attempting to remove the infants, [128] or any of them, from the care and custody of the Misses Long, etc.

Against this order the appeal was presented.

For the Appellant: Mr. Horne, Mr. Brougham, (and Mr. Beames).

For the Respondents: The Attorney General and Mr. Pepys.*

Lord Redesdale (4th July, 1828): I have given to this case all the attention which it is possible for me to give; and I have not the slightest hesitation in saying, that I think the order which has been pronounced in the Court below, ought to be affirmed, supposing that Court had authority to make the order. I am also of opinion that the Court is authorized to make such an order, according to all the principles that have been acted upon, from the earliest period down to the present time.

What is the ground on which the opposition is made to this order? The opposition is founded on the right of the father to have the care and custody of his children. That right is not disputed by the order; but the question is, whether the father having that right, is to be at liberty to abuse that right. That is the real question. Why is the parent entrusted with the care of his children? Because it is generally supposed he will best execute the trust reposed in him: for that it is a trust, of all trusts the most sacred, none of your Lordships can doubt.

If a guardian is appointed under the statute, which enables the father to appoint a guardian, the counsel at the bar have not disputed that that is a trust: it is a [129] delegated trust: a trust, which the law has enabled the father, when he ceases to live, to give to others for the benefit of his children: but if the father abuses that trust, if he appoints improper persons to be the guardians of his children, is it doubted, that a court of justice can interfere, and can prevent that misapplication of the power, which is given to the father? If, on the contrary, the father meant well to execute the trust, but has been deceived, and has appointed for the purpose a person improper to be entrusted with the care of the children, is it questioned, or has it been questioned at the bar, that some Court, or that the Court which has made this order, has a right to interfere, to control the conduct of the person so delegated by the will of the father?

I apprehend, it is impossible to say that the father has that absolute right, which is contended for at the bar. What are the grounds on which the custody of the children is given to the father? First, protection, then care and education. Is it not clear, that if the father does not give that protection, does not maintain the child, that the law interferes, for the purpose of compelling the maintenance of that child? Is it not clear, that if the father cruelly treats the child in any manner, that a court of criminal jurisdiction will interfere, for the purpose of preventing that treatment? Is it to be said then, there is no jurisdiction whatsoever in this country, that can control the conduct of the father in the education of his children? If a stranger was to enter into this house, and hear what was argued on that subject, would it not strike him with astonishment that the law of this country should not have provided for such a case?

We find that now, for a hundred and fifty years, the Court of Chancery has assumed an authority with [130] respect to the care of infants: and it has assumed that authority, to the extent in which it was assumed, for this reason: as long as the feudal tenures remained, generally speaking, infants who had lost their parents, were under the protection of the law which then existed, with respect to the treatment and the care of the children. When that was at an end, it was thought fit, by a particular statute, to enable the father to make an appointment of a guardian

* The arguments and authorities did not materially differ from those which appear reported as upon the hearing in the Court below. See 2 Russell's Rep. p. 1.

for his children, giving to him the power which that statute gave, to select proper persons for that purpose. As I observed before, if he makes an improper selection, if the person whom he has so selected, misconduct himself, it is perfectly clear, that a power has been assumed to control that conduct.

Now, upon what does Lord Somers, upon what does Lord Nottingham, upon what does Lord Hardwicke, upon what ground does every Chancellor who has been sitting on the bench, in the Court of Chancery since that time, place the jurisdiction? They all say, that it is a right which devolves to the Crown, as *pater patriæ*, and that it is the duty of the Crown to see that the child is properly taken care of.

We all know that many jurisdictions are given to the Crown, many powers are given to the Crown; but those powers are all to be exercised by responsible ministers. It is not the king who takes on himself to determine who is to be a proper guardian of the children; but he is to delegate to different ministers, the different kinds of powers which belong to him, that there may be, according to the language of our law, persons responsible to the king and the people, for their good conduct, in the administration of their trust. I, therefore, have no doubt in the world, that it must be taken, to be a jurisdiction rightly assumed; for a hundred and fifty years past, [131] unquestionably assumed by the Chancellors sitting in the Court of Chancery.

Lord Somers resembled the jurisdiction over infants, to the care which the Court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown, in the same way. There is no particular law upon the subject: the law merely declares that the king has the care of the persons who are of insane mind, and that he is to take care of their property. If they are absolute idiots, the property devolves to him during their lives, and he is to provide only for their maintenance. If they are not idiots, but persons who have lucid intervals, then the king is to take care of their property, to take care of their persons, to take care of their maintenance; and whatever property may be accumulated in the mean time, he is a trustee of it for the benefit of those who may be entitled at their death, or to them, if they should ever recover. With respect to the case of infants, can there be a stronger proof that it was conceived to be reserved to the Crown than this: that the City of London claim, as an immemorial right, and a right which must have been derived to them from the Crown, the care of orphans, and that they have most extraordinary powers for that purpose, extending to enable the Court of Orphans to commit to Newgate a person who disobeys their order! That has been allowed in a Court of Common Law, and it is founded upon usage, which must have been founded originally upon a grant from the Crown, of such powers to the Corporation of London.

I think there can be no doubt, therefore, that the law of this country has reserved to the king the prerogative for the protection of infants, to be executed [132] in such a manner as the constitution requires him to execute all his prerogatives. If we look to this case with respect to the father, why is the conduct of the father not to be considered as a trust, as well as the conduct of a person appointed as guardian? It is true that the law has not authorised the compelling a father to furnish means of maintenance beyond actual maintenance. You cannot say that the father, whatever his property may be, shall allow to the child so much or so much for the maintenance and education of the child, the law compels him to maintain that child. If he refuses, he may be compelled to maintain him; but the law can do no more than compel bare maintenance. But, if the child has property of his own, then there is a right to apply that property, which belongs to the child, most beneficially for the purposes of the child's support and education.

In this case, the children who are the objects of your Lordships' attention, have property, and, through the medium of that property, a maintenance may be applied for them. The children were, at the time of the death of their mother, under her care. If they had had no property whatsoever, it would have been extremely difficult, unquestionably, for the Court of Chancery to have found the means of maintaining them according to their rank and situation; because, they have no power to compel Mr. Wellesley to do more than to afford them bare maintenance, and that in another mode of proceeding. But, as they have property, it was thought fit, on the death of their mother, and upon Mr. Wellesley proposing to take the children under his immediate care, to file a bill in the Court of Chancery against the persons who

were in possession of that property, to compel [133] those persons to apply the income of that property for the benefit of those children. Those persons had no right to make that application of the property, no unquestionable right, without the intervention of the Court, because, having a father, and he being bound to maintain them, it would not have been allowed to those trustees to expend money in their maintenance without the authority of the Court for that purpose.

Upon what ground is the Court required to maintain these children out of their own property, and not at the expense of the father? It is because that father is an improper person to have the care of these children; and, as it is proposed that their maintenance and education should be put out of his control, it is, therefore, as he may refuse to afford them more than will supply them with their bare maintenance, which the law of the country would require from every person who had the means to maintain his children: it is for that reason that the Court is to take upon itself, out of the property that those children have, instead of accumulating the income of their property for their benefit, till they should be capable of taking possession of it themselves, to apply a part of it for their maintenance and education. This bill being filed, an application is made to the Court to appoint a proper person to act, for the purpose of taking care of those children, and applying this fund for their maintenance. That the Court has jurisdiction with respect to the maintenance is unquestionable; it is a jurisdiction with respect to the income of the property, to take care of it for the benefit of the children, to apply it for the benefit of the children, as far as it may be beneficial for them that it should be so applied, and to accumulate any sur-[134]-plus, if any surplus there should be. The right, therefore, to act, upon this subject, is unquestionably independent of any other part of the case.

If Mr. Wellesley had not been of the description which is attributed to him by these proceedings: had he been a person not objectionable in himself, but in extreme poverty, and unable, therefore, to maintain his children, which has been the case in some instances which have come under the consideration of the Court, the Court, as in those instances, might have thought fit to allow, out of the income belonging to the infants, a sum of money for the purpose of the maintenance and education of those children; but, in all those cases, the Court has always thought fit to take on itself, and it was bound to take on itself the mode in which that allowance should be applied for their benefit, and therefore has put it under some control. Whether it has entrusted the father with the application, or whether it has thought fit to appoint other persons to see to the application, it has always been put under some sort of control.

It is said, that there is nothing from which this jurisdiction can be inferred as belonging to the Court, except the *dicta* that may be found in books, and the actual exercise of it for one hundred and fifty years by persons who have sat in the Court of Chancery. If we look back to the constitution of the government of this country, there are many things which we cannot ascertain. Will any of your Lordships tell me how there comes to be a House of Commons and a House of Lords? I cannot tell. I have taken much pains to investigate that subject, and I believe it is impossible to say whence it originated—whence it came, that that which, to all appearance, from early records and early history was a General [135] Council of Barons, came to be divided into two Houses of Parliament, a House of Lords and a House of Commons, the House of Commons elected and not summoned on any other ground. We know that it arose at a certain period, but how it then took place we do not know.

It is so with respect to many other jurisdictions. As to much of the jurisdiction of the Court of King's Bench, of the jurisdiction of the Court of Exchequer, your Lordships would be extremely puzzled to say how it originated. With respect to this jurisdiction of the Court of Chancery, I have had some experience on the subject in the character of one of the Justices of Wales, and at one time Chancellor of the bishopric of Durham. With respect to Wales, all the jurisdiction originated by an act of Henry VIII. That act gives jurisdiction to the Chancellor, and, as incident to their Courts of Chancery, all the Justices of Wales have constantly exercised this jurisdiction, with respect to wards in their court. I really cannot tell whence the Chancery of Durham originated; but, as Chancellor of Durham, I have exercised this jurisdiction, and nobody doubted the right to the jurisdiction.

These instances prove distinctly, that it is considered in the constitution of the government of this country, that all powers in the administration of justice, which are necessary in themselves, are vested in the Crown, vested in the Crown to be exercised by those ministers of the Crown to whom the jurisdiction has usually been delegated; and this jurisdiction must be taken to be delegated to the Court of Chancery, whenever there is a suit respecting property in that Court; and if there was a suit respecting property in the Court of Exchequer, as a Court of [136] Equity, to take care of the property belonging to an infant, the Court of Exchequer would exercise that jurisdiction, as incident; that is, it would take care that the property which was to be administered under its direction, should be properly so administered.

It would be a very extraordinary decision to hold, as it has been argued, that, until this House, as a Court of superior jurisdiction, had positively decided on the jurisdiction, that that jurisdiction should be considered as not existing. It must previously exist from the supposition of the general administration of justice before this Court could entertain any judgment on the subject. It may be said, if the Court of Chancery exercised the jurisdiction where it has none, this Court may pronounce that it has no jurisdiction, but this Court cannot pronounce that it has jurisdiction, but because it has previously the jurisdiction. If it were necessary to go back into times long past, to examine the grounds on which every law is administered in this country, before it could be considered as legally administered, we should be involved in very great difficulties. But what has been the practice for a great number of years, has been held, not in this country alone, but in all countries, to be a ground for supposing that it was rightly done, on this supposition, that if it had been wrongfully done, it would not have been permitted to be continued.

Having said thus much on the question of jurisdiction, I will say very little on the rest of the case. The jurisdiction, I conceive, extends to the case of the person as far as is necessary for protection and education. The care of the person to protect from violence belongs to the Court of King's Bench, but [137] the care of the person with respect to education does not belong to the Court of King's Bench, and the Court of King's Bench disclaim any such right: therefore, as to the care and protection for the purpose of education, it belongs to this Court, which has exercised the jurisdiction. The Chancellor perhaps might have exercised it independent of the cause which has been instituted; but as incident to the cause that has been instituted, I apprehend there can be no doubt of the right to exercise the jurisdiction. If the jurisdiction exists upon the grounds on which the Court has thought fit to interfere with the care of the father in the management of his children, I would only refer to one passage in a letter, which Mr. Wellesley himself wrote to Mr. Pitman, the tutor of these children; and I would ask then whether any one of your Lordships can doubt as to the necessity of some control over the management of Mr. Wellesley with respect to his children. It is in a letter to Mr. Pitman, dated the 16th of November, 1824, in which he says, "there are certain things which ought to be let alone, a man and his children ought to be allowed to go to the devil their own way, if he pleases." Now, my Lords, a man who can so write to a person of the description of Mr. Pitman (for it is not a loosely written letter, to a loose person, to whom he might have expressed himself carelessly, but it is a letter written to Mr. Pitman, the tutor of his children) has, independent of any other consideration, declared himself to be an improper person to have the sole control and education of his children.

The order that has been made does not absolutely exclude him, because if Mr. Wellesley found that improper persons were proposed to have the care of his [138] children he might, with great propriety, interpose, and the Court would attend to any objection he might make on that subject.

The Lord Chancellor: He has proposed his own tutor, and that tutor has been appointed.

Lord Redesdale: I was not aware of that. With respect to the immediate care he has proposed a proper person, and that person has been appointed, and he may control the conduct of any person who may be appointed to have the care of the children, and he has a right to apply to the Court if there should be any misconduct on their part, and I can have no doubt the Court would pay every attention, and ought to pay every attention, to any such representation.

Mr. Wellesley complains that there stands on the records of this Court, in the

affidavits, much which he asserts is a libel upon his character. It is unfortunate that, when any question of this kind comes to be contested in family transactions, many things disagreeable to the feelings of the parties will be brought forward, and it would have been infinitely more prudent, in my humble opinion, if Mr. Wellesley had not carried the matter to this length, but contented himself with that which he would have been permitted to use, the interference with respect to the persons who might be appointed to the care of the children, and the interference with respect to the mode in which that care should be exercised. Mr. Wellesley has brought upon himself all that has passed on this occasion; it is very much, in my humble opinion, owing to himself.

Much has been said with respect to that part of the evidence which relates to the transactions in Italy. The learned Judge who pronounced this order appears, by the report of what he said, not to have [139] relied upon that evidence: but to have relied upon the evidence of that which subsequently happened as the foundation of his order. It seems to me that, in the argument of the counsel at the bar, they have thought that this case was to be used more for the purpose of throwing obloquy on the conduct of a Dr. Bulkeley, and of a Mr. Meara, and of another person, (I forget his name,) than for any other purpose. With respect to Dr. Bulkeley, it is not for me to say anything. Judging from the whole that appears in these affidavits, the question of truth or falsehood lies certainly between him and Mr. Wellesley; but I must take leave to observe that the subsequent unquestionable facts strongly confirm Dr. Bulkeley, and as strongly tend to invalidate what has fallen from Mr. Wellesley.

With respect to Mrs. Bligh being a person in the situation in which she stands, I cannot think that great reliance can be placed on what she has asserted in her affidavit; and, taking the whole evidence together, I think there can be no doubt that the order which has been made, if there was authority to make it, is justified by that evidence. Can any of your Lordships who has read the evidence, and read it with the utmost candour towards Mr. Wellesley and Mrs. Bligh, doubt that there ought to be some restraint? It has been asserted at the bar, that Mrs. Bligh has been carefully kept separate from these children? Can you doubt whether the separation has not been owing to the very circumstance of his apprehensions from these proceedings? Can you doubt, from the influence which it appears from these affidavits, Mrs. Bligh has over Mr. Wellesley, that if there was no control exercised by the Court upon this subject, Mrs. Bligh would be the person to have the [140] care of these children, or at least to influence the manner in which they would be disposed of.

I feel for Mr. Wellesley, because I see that he is in chains—I see that Mr. Wellesley has unfortunately made a connexion which he is unable to dissolve, and which I believe, from many passages in the affidavits, at one time he would have been very happy to have been enabled to dissolve; but as it is, he has put himself in a situation in which, in my humble opinion, he cannot be considered as a freeman.

Under these impressions, I approve of the order which has been made, having no doubt whatever of the authority to make that order, and conceiving that if your Lordships were to hold that there was not authority, you would do the greatest possible mischief to the country—a mischief which must instantly be remedied by the legislature, for it never could be endured that the country should be in such a situation, that children, such as these are, particularly, should be in the power of the father to treat as he might think proper with respect to their education, the eldest child in this case being likely to be a peer of the realm.

Only consider to what extent this might go. It might happen that a person might form an improvident marriage. A lady who had high expectations, might marry a person of the lowest, and most profligate description, and her son might, after her death, be entitled to great property, and might also be a peer, the father being a person of the most abandoned description, of the worst education, the most improper person to have any care or direction of the management of that son; and is the doctrine to be endured that there does not exist in this country a jurisdiction to control the power of the father in such circumstances. I deny that the law ever considered that [141] he has such a power, it has always considered it as a trust. Look at all the elementary writings on the subject; they say that a father is entrusted with the care of the children; that he is entrusted with it for this reason, because, it is to be supposed, his natural affection would make him the most proper person to

discharge that trust. Under this impression I humbly move your Lordships to affirm the Judgment of the Court below.

Lord Manners: The argument of the noble and learned Lord who has discussed this case (concurring entirely, as I do, with all which he has stated) has rendered it unnecessary for me to enter into much discussion on any of the points that occur in this case.

This is an appeal against an order of the late Lord Chancellor, Lord Eldon, by which he declined to comply with the petition of the Appellant, Mr. Wellesley, which required, among other things, to have the children in his custody, instead of which, the noble and learned Lord directed a reference to the Master to report as to a proper person, with the exception of the Appellant, to have the care and the superintendence of the education of his children. This order of the noble and learned Lord is objected to by Mr. Wellesley, the Appellant, upon two grounds: first, that the Chancellor has not a jurisdiction in the Court of Chancery to separate the children, the wards of the Court, from their parent, while he is residing in this country: secondly, if there be such a jurisdiction, that, in the present instance, it has been improperly exercised.

With respect to the first question, I acknowledge I have not attempted to explore the origin, or to ascertain the commencement of the jurisdiction. If I had so done, I should have been anticipated in every [142] thing which might have been said usefully upon the subject, by my noble and learned friend; for it seems to me, indeed, abundantly sufficient for the purpose of this case, that this jurisdiction has been uniformly asserted and repeatedly exercised by successive chancellors for a period of more than a century. I have looked into the cases referred to on the subject, to discover if any chancellor hesitated, or has entertained a doubt as to this jurisdiction. I do not find, from the time of Lord Nottingham to the present day, that any doubt has been stated by the Court with respect to the existence of such a jurisdiction. It has, then, become the established jurisdiction of the Court; it has become the practice of the Court, and as such, a part of the law of the land. Indeed, it is a strong confirmation of this jurisdiction, that, on a writ of *habeas corpus* being applied for by the father, to have the children restored to him, in the Court of King's Bench, that Court enquires whether they are wards of the Court of Chancery, and whether there are any proceedings in that Court respecting them. If the Court of King's Bench finds there are such proceedings, it declines to grant the writ. This would be a dereliction of their duty if no such jurisdiction exists; this seems to be a strong judicial recognition of the existence of this jurisdiction, to be exercised by the Chancellor in the Court of Chancery. Upon that ground, therefore, I can entertain no doubt. There was an observation of Mr. Brougham on the subject, that the jurisdiction could not exist, because you could not ascertain the limits of it. That objection applies to every case where there is a discretion in the judge; where the result of the facts is not a question of law, but a question of discretion. It is therefore impossible to say what are the limits of that jurisdiction; every [143] case must depend upon its own circumstances. With respect to the jurisdiction, I should agree with Lord Thurlow, that it is too well established, to be open to question.

Then it is contended that in the present instance, this jurisdiction has been improperly exercised. Now I admit, (for I have taken pains to read through all the affidavits, voluminous as they are,) that upon some facts it is utterly impossible to reconcile the affidavits. I do not, however, think on those facts, on which there are these contradictory statements in the affidavits, that those facts are material to the decision of this case. There is abundantly sufficient, in my opinion, independent of the disputed facts, to warrant the order that was pronounced by the noble Lord below. It is perfectly clear, for instance, that Mr. Wellesley was, at the time of the death of his wife, living in a state of adultery with Mrs. Bligh—that is perfectly clear; and from all that appears in the cause, that intercourse still continues. If so, to restore this little girl and her brothers to the care and custody of the parent, would be, in fact, to deliver them over to this abandoned woman. It is also perfectly clear, to my mind, that Mrs. Wellesley had intended to institute proceedings in the Ecclesiastical Court, to dissolve the marriage. That she intended to prosecute that, or some other suit, is manifest from her own letters, which I think have been properly read in the course of the discussion of this subject.

Now I state this, not for the purpose of insisting (for the case does not require such an opinion,) that the mere act of adultery, or the living in a state of adultery, on the part of the father, is sufficient to warrant the separation of the children from their [144] parent: I do not state such to be the case. If that case should arise, then it will be time enough to give an opinion upon it. This is only one circumstance in the case, and I rely upon it principally for this purpose, to shew the reprobate character, and vicious habits of the Appellant. His unfeeling and cruel behaviour towards his wife, are also circumstances which tend strongly to disqualify him from being the guardian of his children. But I principally rely upon those facts which corroborate the other charges in the case, and which are much more pointed, and much more particularly applicable to the question now in dispute; namely, whether these children ought, or ought not to be restored to the father. The charge is, that he instructed, or encouraged them in the habit of profane swearing, perhaps the only vicious habit, which at the time when the order was pronounced, these children were capable of contracting; a most vicious habit, which he chooses at all times to represent as venial, and if the boy is in a passion, such as is perfectly allowable. Now this charge does not depend on the testimony of Dr. Bulkeley. With respect to Dr. Bulkeley, I will say a few words presently, but it does not depend on his testimony; it is distinctly proved by Mr. Pitman, whose veracity is not called in question; and that testimony of Mr. Pitman is corroborated in the strongest manner by the letters of Mr. Wellesley to his son, and to Mr. Pitman himself. Those facts stand perfectly clear in themselves, and are so established in point of proof, that it is impossible to entertain a doubt about them.

Then with respect to Dr. Bulkeley's evidence, I certainly do disapprove of some part of the evidence of Dr. Bulkeley; I think he has unnecessarily [145] come forward to disclose confidential and professional communications that have been made to him; but with respect to his veracity, with respect to the truth of what he has sworn to; I profess, in looking over the affidavits, I think those in support of his credit, far preponderate over those which impeach that testimony, and I think he stands entitled to credit in a court of justice. He corroborates the charge of its being the habit of the Appellant, in this case, Mr. Wellesley, to instruct or encourage his children in profane swearing. That is an extremely vicious, and most dangerous habit to impress on children, especially with the authority of a father.

Now, supposing Mr. Wellesley not to have the parental right, and that we are to look to the Court of Chancery for the appointment of the guardian, I do not believe there is to be found in the community, a person less qualified for the office and the duties of it, than the Appellant; it would be utterly impossible he could be appointed as a guardian by the Court. Suppose Mr. Wellesley had been a testamentary guardian, and led this vicious life, set this bad example, inculcated this bad habit of profane swearing upon the boys entrusted to his care, as testamentary guardian; undoubtedly the Court would consider him as abusing his trust, as unfit to have the care and protection of the children, and would rescue them from the mischief and danger of so bad an example, and such vicious propensities.

I do not understand, in looking at the office of guardian, how to distinguish between the testamentary guardian, and the parent. The testamentary guardian deriving his title from the right of the parent, under the act of parliament, it is a continuation of the same trust, and whether it is exercised by the parent, or by the person delegated by him, is under the same [146] control, and liable to the same jurisdiction. The Court certainly would regard the feelings of the parent; the Court would be anxious that the affection of the children should not be estranged from their parent; it is a most important duty imposed on the person who may have the care of the children, to impress that on their minds; but inasmuch as the Court cannot correct the vices of the parent, the Court is bound to protect the children against them. On that ground the noble Lord acted, and, I think, properly acted. If there be a jurisdiction, of which I entertain no doubt, I cannot suggest to myself a case which more imperiously calls on the Chancellor to interfere, and exercise that jurisdiction, than the present; to take the children away from the person who has a total disregard to their moral and religious principles, and who is setting such a dangerous and mischievous example to these young children.

The Lord Chancellor: It is not necessary for me to say more, after what has been

said by the two noble and learned Lords, than that I perfectly concur in their opinion on both the points, and in the conclusions which they have drawn.

We are of opinion it is not a case for costs.

Judgment affirmed, without costs.

[147]

(ENGLAND.)

The KING,—*Plaintiff in error*; The Right Honourable CHARLES ANDERSON PELHAM, Lord Yarborough,—*Defendant in Error*.*

[Mews' Dig. xii. 666, S. C. 1 Dow and Cl. 178; 5 Bing. 163; in K. B. 3 B. and C. 91; 4 Dowl. and R. 790. Adopted in *In re Hall and Selby Ry.* 1839, 5 M. and W. 332; and see *Foster v. Wright*, 1878, 4 C. P. D. 446; *Hindson v. Ashby* (1896), 2 Ch. 1, 27, 28.]

Upon a commission under the Great Seal, and an inquisition returned into and filed in the Petty Bag Office of the Court of Chancery, lands were seized into the king's hands as derelict by the sea. The lord of the adjoining manor, upon petition to the Lord Chancellor, having obtained leave to traverse the inquisition, filed his traverse in the Petty Bag, denying that the lands were *derelict*, and pleading that they were formed by alluvion, or gradual deposit of soil. The Attorney General, in his replication to this traverse, took issue upon the alleged fact of alluvion, and the Defendant joined issue. Upon the trial, a verdict was found for the Defendant, and afterwards, upon application of the Attorney General for a new trial, the Court ordered the facts proved to be stated in a special case; which being argued, a verdict for the Defendant was entered by the direction of the Court.

A writ of error from this judgment, directly to the House of Lords, being brought by the Attorney General, on behalf of the crown; Held, that the House of Lords has jurisdiction to hear such writ of error; that it is not necessary to carry a writ of error first to the Exchequer Chamber, and that lands formed by alluvion, that is by gradual and imperceptible deposit, on the shore of the sea, belonged to the lord of the adjoining manor, and not to the king, *Jure coronae*.

A custom regulating the rights of the owners of all lands bordering on the sea, is so general, that it need not be pleaded.

In the 59 Geo. 3. a commission was issued under the great seal, appointing certain commissioners [148] therein named, and directing them to inquire whether there were any and what lands, and how many acres of land, in or adjoining or near to the several towns, parishes, or lordships therein mentioned, or any or either of them in the county of Lincoln, being land in time past covered with the water of the sea, and then by the sea left, and not covered with water, which to His Majesty in right of his crown, or in any other right, did belong and appertain, and which were concealed, subtracted, and unjustly withheld from him, and if so, by whom and how long, and who hath received and taken the issues and profits thereof from the time of such dereliction, or not covering, and to what amount, and in whose possession or tenure the said lands then were or remained, and how much they were worth by the year, according to the true value thereof; and all and singular the lands, which by the inquisition to be taken in that behalf, should be found to be concealed, subtracted, and unjustly withheld and detained from His Majesty, to enter upon and take and seize into the hands of his said Majesty.

In pursuance of this commission, an inquisition was taken, bearing date the 12th of November, in the same year, under the seals of three of the commissioners, named in the commission, and of twelve jurors, whereby they found (amongst other things) that there was a certain piece of land, being salt marsh, lying near or adjoining to

* See the report of this case, in the Court below, 3 B. and A. 91.

the parish or lordship of North Cotes, in the county of Lincoln; and which piece of land was bounded towards the south and south-west by the sea-wall or sea-bank, of the lordship of North Cotes, and towards the north-west, by a part of the sea-wall or sea-bank, of certain lands, in the lordship [149] of Tetney, and on all other parts by the sea, and containing by estimation, four hundred and fifty-three acres, or thereabouts, and was of the value of four shillings for each acre, by the year, of lawful money of the United Kingdom, according to the true value thereof; and was in times past, covered with the water of the sea, but was then, and had been for several years past, *by the sea left*, and was not covered with water except at high tides, when the sea flowed to the sea-walls, or sea-banks: which said last mentioned piece of land, from the time of *such dereliction*, thitherto had been, and still was unoccupied; but the herbage thereof had been, from time to time, eaten and consumed by the cattle and sheep, belonging to divers tenants or occupiers of lands, situate within the parish or lordship of North Cotes: which said piece of land, (together with other pieces of land similarly described,) the commissioners had therefore taken, and caused to be seized into the hands of his Majesty.

On the 12th of December, in the same year, the commission and inquisition were returned into the Petty Bag Office of the Court of Chancery, and filed there.

In consequence of this inquisition, the Defendant in error presented a petition to the Lord Chancellor, stating the commission and inquisition, and his title to the manor of North Cotes, and praying for leave to traverse so much of the inquisition, and return thereof, as related to that part of the unembanked salt marsh land, which was situate within, or near adjoining to the parish, lordship, or manor, of North Cotes.

This petition was heard before the Vice Chancellor, and after argument an order was made, by which [150] permission was granted to the Defendant to traverse so much of the inquisition, as related to the land in or adjoining to the manor of North Cotes; and similar permission was granted to the several lords of the manors, and owners of lands, in or adjoining to which the other pieces of land, mentioned in the inquisition, were situated.

In pursuance of this order, the Defendant in error in Easter Term, in the first year of His present Majesty's reign, filed his traverse in the Petty Bag Office, in the Court of Chancery, which, setting forth the commission and inquisition, and admitting that there was a piece of land, being salt marsh, bounded as in the inquisition is mentioned, and admitting the quantities and value thereof, as therein also mentioned, and that the said piece of land was then and there, and had been for several years, not covered with water, except at high tides, when the sea flowed to the sea-walls or sea-banks, and admitting that the herbage thereof had been, from time to time, eaten and consumed by the cattle and sheep, belonging to divers tenants or occupiers of land, situate within the parish or lordship of North Cotes, states, that from time, whereof the memory of man runneth not to the contrary, there hath been, and still is, a certain ancient manor, called or known by the name of the manor of North Thoresby cum North Cotes, situate within the parish of North Cotes aforesaid, in the county of Lincoln; and that the Defendant, long before the respective days of issuing the commission, and finding the inquisition, to wit, on the first day of July, 1758, was seized in his demesne as of fee, of and in the manor of North Thoresby cum North Cotes, and the demesne lands thereof; and that the same piece of land heretofore, to wit, on the first day [151] of January, 1300, and on divers other days and times between that day and the day of the finding of the inquisition, by the *slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand, and matter, being slowly, gradually, and by imperceptible increase, in long time cast up, deposited, and settled, by and from the flux and reflux of the tide* and waves of the sea, in, upon, and against the outside and extremity of the demesne lands of the same manor, hath been formed, and hath settled, grown, and accrued upon and against, and unto the said demesne lands, of the same manor, and the same part and every portion thereof, when and as the same hath so there been formed, settled, grown, and accrued, hath thereupon and thereby, at those times respectively, in that behalf above mentioned, forthwith become and been, and from the same several times respectively, have and hath continued to be, and still are, and is part and parcel of the demesne lands of the manor; and the several owners and

occupiers of the same manor, for the time being, during all the time aforesaid, until the time of the seizin of the Defendant as aforesaid, and the Defendant, during the time he hath been so as aforesaid seized of and in the said manor, from the time of the formation and accretion of the same piece of land, and every part thereof respectively, continually, until the time of the finding of the inquisition, respectively were and was seized in their and his demesne, as of fee, of and in the same piece of land, and every part thereof, when and as the same hath so been formed and accrued as aforesaid, as and for part and parcel of the demesne lands of the same manor. The Defendant's traverse concluded thus:—"Without this, that the said piece of land, or any part or parcel [152] thereof, was by the sea left in manner and form as in the inquisition is above supposed and found."

The Attorney-General, in his replication, traversed part of the inducement to the Defendant's traverse as follows:—"Without this that the said piece of land at the times in the said plea mentioned, by the slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand, and other matter, being slowly, gradually, and by imperceptible increase, in long time east up, deposited, and settled by and from the flux and reflux of the tide and waves of the sea, in, upon, and against the outside and extremity of the demesne lands of the same manor, hath been formed and hath settled, grown, and accrued upon and against and unto the said demesne lands of the same manor, in manner and form as the said Defendant hath above in his said plea alleged.

The Defendant in his rejoinder took issue upon that fact.

The replication of the Attorney-General then took issue on the Defendant's traverse, that the said piece of land was and still is by the sea left in manner and form as in the inquisition is above supposed and found; and thereupon, also, the Defendant joined issue.

The case came on to be tried at the Spring Assizes, 1823, for the County of Derby, (the venue having been changed from Lincolnshire to Derbyshire, by order of the Vice-Chancellor on the application of the crown,) by a special jury of the county, some of the special jurymen having previously had a view of the land in question, when a verdict was found for the Defendant.

The Attorney-General, on behalf of the Crown, having applied to the Court of King's Bench for a new trial, the Court directed the facts proved to be [153] stated in a special case for the opinion of the Court, which was accordingly done, and the case came on to be argued in Trinity Term, 1824: when, after argument, the Court were unanimously of opinion that the verdict was right, and that judgment should be, and it was accordingly entered for the Defendant thereon.

A writ of error in Parliament was thereupon brought by the Attorney-General on behalf of the Crown, and the following was the error assigned:—"That it appears by the said record, that the land therein described was and is land gained from the sea by alluvion, and that in no part of the traverse filed by the said Defendant to the inquisition in the said record stated, nor in any other part of the said record doth the said Defendant state or allege any custom or prescription, or other sufficient matter, whereby the right and title of our said Lord the King to land so gained, can by the law of the land be barred or defeated; and that the said traverse so filed by the said Defendant, and the matters therein contained, are not sufficient in law to bar or defeat the said right and title of our said Lord the King to the land so gained by alluvion as aforesaid."

The common error was also added.

For the Plaintiff in Error: The Attorney General and The Solicitor General.

For the Defendant in Error: Mr. Denman and Mr. Coleridge.*

* The argument was, in substance, the same as in the Court below. There was a preliminary objection taken in the printed papers, and touched, but not prosecuted in the argument, on the behalf of the Defendant in Error, viz.: that the proceeding having been originally *ex parte*, and the judgment on the case stated not having been given *in a cause*, could not, according to the practice of the House, be the subject of a writ of error. Upon this question see, as to proceedings in lunacy, *Rochford v. the Earl of Ely*, 6 B. P. C. 329, in *mandamus*, *Pinder v. Hearle*, 3 B. P. C. 505: in the case of an order made under the authority of an Act of Parliament, in a matter

[154] In the course of the argument the Lord Chancellor made the following observations:—

The Lord Chancellor: Lord Hale most obviously interprets the expression "*secundum patriae consuetudinem*," to mean the custom of the district. With respect to actions against carriers, and so on, the common form of the declaration is, "according to the custom of the realm:" that is very analogous to the expression "*secundum consuetudinem patriae*."

Patria comprehends the whole country.

In the case of the Abbot of Ramsey (Dyer, 326), the following passage occurs in the judgment.

"*Quod secundum consuetudinem patriae domini maneriorum prope mare adjacentium habebunt marettum et sabulonem per fluxus et refluxus maris.*"

Nothing can be more general than that.

The case of the Abbot of Ramsey is not the case of a gradual increase, nothing is said about gradual increase; it is alternate, up and down. That is a case which could not, according to the doctrine laid down [155] by Lord Hale, have been supported by prescription or custom, because it is not a case of gradual increase. It appears to be a case of occasional loss. It depends on a different principle.

In the judgment of the Court, in the case of *The King v. The Bishop of Winchester* (Staun. Prer. tit. Traverse, c. 20. 63), the authority of Staunford is cited.

No man shall traverse the office, unless he makes himself a title; and if he cannot prove his title to be true after he has set it out upon the record, although he may be able to prove his traverse to be true, yet his traverse will not serve him.—He cannot traverse without a title, and if he has no title, his traverse falls to the ground.

In the case of *the King v. the Bishop of Winchester*, the king's title had not been found by matter of record. That is a distinction: here the king's title is found by matter of record.—The subject on suggestion, of his having a title, is allowed to come in and traverse the inquisition. If he has no title at all, the king's original title stands. There are cases of that description. A party may be entitled to appear and contend against the king's title, by having a title of his own arising from some cause: that is a matter of investigation. If it turns out that he has no title, he is reduced to his original state.

The right of the Plaintiff in error is pleaded to be in consequence of slow and gradual accretion of the land: and they have traversed that plea.

It is traversed in substance, and in effect.

The king has, by his prerogative, the soil between high and low water-mark; it is an incident to his prerogative.

Lord Hale, in the case of the Abbot of Peter-[156]-borough, observes, that there a custom was laid, and he relies not barely upon the case without it.

There is an allegation in the case of Sutton Marsh,* precisely in the same terms as this. There is no declaration of the district, to which the custom applies. It appears to be laid down generally, as the custom of all manors bordering on the sea. Reasoning from what appears on the Sutton case, the conclusion is, that it was meant to be laid as the custom of all manors bordering on the sea, without defining to what manor it particularly applied. There appears to be no room for a misapprehension as to that record, to which I am now referring.

I propose to put this question to the learned judges. "A. is seized in his demesne as of fee of the manor of N., and of the demesne lands thereof, which said demesne lands were formerly bounded on one side by the sea. A certain piece of land consisting of

arising out of proceedings upon a writ of extent, *Wall v. the Attorney-General*, MSS. D. P. 1822; *Howe v. Attorney-General*, MSS. D. P. 1824: in the case of an order made by the Court of Exchequer, in Ireland, upon one of its officers, *O'Neill v. Fitzgerald*, MSS. D. P. 1826. See also the stat. 14 Ed. 3. stat. 1. c. 5: 27 Eliz. c. 8: 31 Eliz. c. 1.

The House has no jurisdiction by way of error, or appeal against any order in bankruptcy, or generally upon any proceeding, unless it *arises in a cause*, the only exception is, in the case of a proceeding under a commission of charitable uses, which is warranted by ancient precedent.

* *The King v. Oldsworth*; Hale de Jure Maris, pp. 30, 31. 12th Car. 1. p. 14.

about four hundred and fifty acres, by the slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand, and matter slowly, gradually, and by imperceptible increase, in long time cast up, deposited, and settled by and from the flux and reflux of the tide, and waves of the sea, in, upon, and against the outside and extremity of the said demesne lands, hath been formed, and hath settled, grown, and accrued upon, and against, and unto the said demesne lands. Does such piece of land so formed, settled, and accrued as aforesaid, belong to the crown, or to A., the owner of the said demesne lands. There is no local custom on the subject."

[157] The question was handed to Lord Chief Justice Best, and the further consideration was postponed.

Lord Chief Justice Best (After stating the question proposed for the opinion of the Judges, proceeded as follows): The judges have desired me to state their opinion, that land gradually and imperceptibly added to the demesne lands of a manor, as stated in the introduction to your question does not belong to the Crown, but to the owner of the demesne land. All the writers on the law of England agree in this, that as the king is lord of the sea, that flows around our coasts, and also owner of all the land to which no individual has acquired a right by occupation and improvement, the soil that was once covered by the sea belongs to him.

But this right of the sovereign might, in particular places, or under circumstances in all places near the sea, be transferred to certain of his subjects by law. A law giving such rights, may be presumed from either a local or general custom, such custom being reasonable, and proved to have existed from time immemorial. Such as claim under the former, must plead it, and establish their pleas by proof of the existence of such a custom from time immemorial. General customs were, in ancient times, stated in the pleadings of those who claimed under them; as the custom of merchants, the customs of the realm, with reference to inn-keepers and carriers, and others of the same description. But it has not been usual for a long time to allude to such customs in the pleadings, because no proof is required of their existence they are considered as adopted into the common law, and as such are recognised by the Judges without any evidence. These are called customs because they only apply to particular descriptions of persons, and do not affect all the [158] subjects of the realm; but if they govern all persons belonging to the classes to which they relate, they are to be considered as public laws: as an act of parliament, applicable to all merchants, or to the whole body of the clergy, is to be regarded by the Judges as a public act.

If there is a custom regulating the rights of the owners of all lands bordering on the sea, it is so general a custom as need not be set out in the pleadings, or proved by evidence, but will be taken notice of by the Judges, as part of the common law. We think there is a custom by which lands from which the sea is gradually and imperceptibly removed by the alluvion of soil becomes the property of the person to whose land it is attached, although it has been the *fundus maris*, and as such the property of the king. Such a custom is reasonable as regards the rights of the king, and the subjects claiming under it, beneficial to the public, and its existence is established by satisfactory legal evidence.

There is a great difference between land formed by alluvion and derelict land. Land formed by alluvion must become useful soil by degrees, too slow to be perceived. What is deposited by one tide will not be so transient as to be removed by the next. An embankment of a sufficient consistency and height to keep out the sea must be formed imperceptibly. The sea frequently retires suddenly, and leaves a large space of land uncovered. When the authorities relative to these subjects are considered, this difference will be found to make a material difference in the law which applies to derelict lands, and to such as are formed by alluvion. Unless trodden by cattle, many years must pass away before lands formed by alluvion would be hard enough or sufficiently wide to be used beneficially by any one but the owner of the lands adjoining. As soon as alluvial lands rise above the [159] water, the cattle from the adjoining lands will give them consistency by treading on them, and prepare them for grass or agriculture by the manure which they will drop on them. When they are but a yard wide, the owner of the adjoining lands may render them productive. Thus lands, which are of no use to the king, will be useful to the owner of the ad-

joining lands; and he will acquire a title to them on the same principle that all titles to lands have been acquired by individuals, viz., by occupation and improvement.

Locke, in a passage in his *Treatise on Government*, in which he describes the grounds of the exclusive right of property, says, "God and man's reason commanded him to subdue the earth, that is, to improve it for the benefit of life, and thereon lay out something upon it that was his own, his labour. He that, in obedience to that command, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him." This passage proves the reasonableness of the custom that assigns lands gained by alluvion to the owner of the lands adjoining. The reasonableness is further proved by this; that the land so gained is a compensation for the expense of an embankment, and for losses which frequently happen from inundation to the owners of lands near the sea.

This custom is beneficial to the public. Much land, which would remain for years, perhaps for ever, barren, is, in consequence of this custom rendered productive as soon as it is formed. The sea being gradually and imperceptibly forced back, the land formed by alluvion, will become of a size proper for cultivation and use, and in the mean time the owner of the [160] adjoining lands will have acquired a title to it by improving it. The original deposit constitutes not a tenth part of its value, the other nine-tenths are created by the labour of the person who has occupied it, and, in the words of Locke, the fruits of his labour cannot, without injury, be taken from him. The existence of this custom is established by legal evidence. In Bracton (Book 2, cap. 2) there is this passage: "*Item quod per alluvionem agro tuo flumen adjecit jure gentium tibi acquiritur: est autem alluvio latens incrementum et per alluvionem adjici dicitur quod ita paulatim adjicitur quod intelligere non possis quo momento temporis adjiciatur. Si autem non sit latens incrementum, ino apparens contrarium erit.*"

In a treatise, which is published as the work of Lord Hale, treating of this passage, it is said that "Bracton follows in this the civil law writers, and yet, even according to this, the common law doth regularly hold between parties; but it is doubtful in case of an arm of the sea." It is true that Bracton follows the civil law, for the passage above quoted is to be found in the same words in the *Institute* (Lib. 2, tit. 1, s. 18); but Bracton, by inserting this passage in his book on the laws and customs of England, presents it to us as part of those laws and customs. Lord Hale admits, that it is the law of England in cases between subject and subject; and it would be difficult to find a reason why the same question between the crown and a subject, should not be decided by the same rule. Bracton wrote on the law of England, and the situation that he filled, namely, that of Chief Justice, in the reign of Henry 3, gives great authority to his writings. Lord Hale, in his history of the common law (Cap. 7), says that it was much [161] improved in the time of Bracton. This improvement was made, by incorporating much of the civil law into the common law.

We know that many of the maxims of the common law, borrowed from the civil law, are still quoted in the language of the civil law. Notwithstanding the clamour raised by our ancestors for the restoration of the laws of Edward the Confessor, I believe that these, and all the other Saxon and Norman customs, would not have been adequate to form a system of law sufficient for the state of society in the times of Henry III. Both courts of justice and law writers were obliged to adopt such of the rules of the digest, as were not inconsistent with our principles of jurisprudence. Wherever Bracton got his law from, Lord Chief Baron Parker (*Fortescue*, 408), says, "as to the authority of Bracton, to be sure many things are now altered, but there is no colour to say that it was not law at that time. There are many things that have never been altered, and are now law. The laws must change with the state of things to which they relate; but according to Chief Baron Parker, the rules to be found in Bracton, are good now in all cases to which those rules are applicable." But the authority of Bracton has been confirmed by modern writers, and by all the decided cases that are to be found in the books. The same doctrine that Bracton lays down, is to be found in *Rolle's Abridgement* (Tit. Prerogative, *En le Mere*, p. 168 and seq. pl. 3, 9, 12), in *Comyn's Digest* (Title Prerogative, D. 62),

in Calles (Broderip's edition, p. 62), and in Blackstone's Commentaries (Vol. ii. p. 262).

In the case of the Abbot of Peterborough (*Hale de Jure Maris*, in Harg. Law Tracts, p. 29), it was [162] holden, "*quod secundum consuetudinem patria domini interiorum prope mare adjacentium habebant marettum, et sabulonem per fluxus et refluxus maris per temporis incrementum ad terras suas costera maris adjacentes projecta.*" In the treatise of Lord Hale, it is said, "here is custom laid, and he relies not barely on the case without it." But it is a general, and not a local, custom, applicable to all lands near the sea, and not to lands within any particular district. The pleadings do not state the lands to be within any district; and such statements would have been necessary if the custom pleaded were local. The *consuetudo patria* means the custom of all parts of the country to which it can be applied; that is, in the present case, all such parts as adjoin the sea.

The case of the *King v. Oldsworth* (the case of Sutton Marsh, cited in *Hale de Jure Maris*, pp. 30, 31, in Harg. Law Tracts) confirms that of the Abbot of Peterborough, as to the right of the owner of the adjoining lands to such lands as were "*secundum majus et minus prope terras et tementa sua projecta.*" That case was decided against the owner, because he claimed derelict lands against the Crown. Here it will be observed that there is a distinction made between lands derelict and lands formed by alluvion, which distinction, I think, is founded on the principle which I have ventured to lay down; namely, that alluvion must be gradual and imperceptible, but the dereliction of land by the sea is frequently sudden, leaving at once large tracts of its bottom uncovered, dry, and fit for the ordinary purposes for which land is used. But still, what was decided in this case is directly applicable to the question proposed to us. The Judges are, therefore, war-[163]-ranted by justice, by public policy, by the opinion of learned writers, and the authority of decided cases, in giving to your question the answer which they have directed me to give.

The answer to your Lordship's question is the unanimous opinion of all the Judges who heard the arguments at your Lordships' bar. For the reasons given in support of that opinion I am alone responsible: most of my learned brothers were obliged to leave town for their respective circuits before I could write what I have now read to your Lordships. I should have spared your Lordships some trouble if I had had time to compress my thoughts; but I am now in the midst of a very heavy *nisi prius* sittings, and am obliged to take, from the hours necessary for repose, the time which I have employed in preparing this opinion. If it wants that clearness of expression which is proper for an opinion to be delivered by a Judge to this House, I hope that your Lordships will consider what I have stated as a sufficient apology for this defect.

The Lord Chancellor: I beg to express my thanks to the learned Chief Justice, and to the Judges, for the attention they have paid to this subject; and I have only to add, that I entirely concur in the conclusion at which they have arrived: I would recommend to your Lordships, as a necessary consequence of the opinion which has been expressed, that the judgment of the Court of King's Bench upon this matter should be affirmed.

The Earl of Eldon: I heard only part of the argument, and, therefore, I have some difficulty in stating my opinion in this case; but, having had my attention called to subjects of the same nature, on [164] former occasions, it appears to me, after reading the finding of the Jury, that the opinion of the Judges is correct. I, therefore, concur in the opinion which the Lord Chief Justice has expressed.

Judgment affirmed.

[165]

ENGLAND.

(COURT OF EXCHEQUER.)

The Wardens and Commonalty of the Mystery of MERCERS of the City of London.

—*Appellants*: HIS MAJESTY'S ATTORNEY GENERAL,—*Respondent*.[*Mews' Dig.* iii. 286. . Commented on in *A.-G. v. War Chandlers Co.*, 1870, L.R. 5 Ch. 509.]

A., by a deed executed in 1616, for a nominal consideration, conveyed to certain persons therein named, certain premises which were then let upon lease for forty-one years, at a rent of £150. By another deed of the same date, reciting, among other purposes, a desire to relieve the poor of the Mystery of Mercers, of which the grantor was free, and the better to manifest his love and affection towards his brethren, the freemen of the said company, it was declared that the grant of the premises comprised in the former deed, and of the rent of £150 reserved upon the lease, was made upon trust as to the premises, and the rent reserved, and all future rents and profits; that the grantees should receive and pay the monies arising therefrom to the Wardens of the Mystery of Mercers of the city of London, and their successors, and that the said Wardens and Commonalty should dispose of the monies to the uses therein mentioned. The schedule annexed to the deed then [166] enumerated various charitable objects to which the money was to be applied, among which was a donation to poor brethren of the Mercers' Company. These donations amounted altogether to £149 11s., leaving a sum of 9s. of the reserved rent of £150 unapplied in the hands of the Mercers' Company. By improvements of and additions to the estate in consequence of an act of inclosure, the rent increased to a sum of £1000 a year, at which rent the premises were let in 1817: of this increased rent the Mercers applied £521 2s. in various payments according to the trusts: the residue of the rents of the estate they had for many years carried to the general account of the company, and applied them to their own use.

Upon an information filed to regulate the charity, held in the Court below, and on appeal, that the Mercers' Company were trustees of the rents and augmented rents, and that the surplus, after answering the payments directed by the deed, were applicable to such and the same purposes as directed by the deed, without prejudice to the question how far the Mercers' Company were intitled to share in the increased rents, with reference to their share of the original rent of £150.

By indenture of bargain and sale, dated the 17th January, 1616, and made between Sir Thomas Bennett, knight, citizen and alderman of the city of London, of the one part; and Thomas Bennett, the younger, citizen, and alderman Rowland Backhouse, and eighteen others, citizens and mercers, of the other part; the said Sir Thomas Bennett, in consideration of twelve pence, and other good considerations, granted, bargained, and sold to the said parties of the second part, the rectory and church of Kirton, in the county of Lincoln, and the advowson and right of patronage of the vicarage of Kirton, late being parcel of the possessions of the monastery of Buckland, in the county of Somerset; and all the messuages, lands, tithes, and ecclesiastical dues and payments thereto belonging, which premises were by letters patent dated the 8th April, 6 James I., granted to Francis [167] Phillips and Richard Moore, and the yearly rent of £150 reserved upon a lease of the said premises, dated on or about the 12th July, 14 James I., made by the said Sir Thomas Bennett to George Skelton, for the term of forty-one years, to hold to the said parties of the second part, and their heirs, yielding and paying to the King and his successors the rent of £29 yearly reserved by the said letters patent.

By another indenture of the same date, and made between the said Sir Thomas Bennett, described as being the third son of Thomas Bennett, late of Clapcott, near Wallingford, in the county of Berks, deceased, of the first part; the said Thomas Bennett, the younger, Rowland Backhouse, and eighteen others, of the second part:

the wardens and commonalty of the Mystery of Mercers, of the third part: and the mayor, burgesses and commonalty of the borough of Wallingford, of the fourth part; after reciting the before-mentioned deed, and also reciting that the said Sir Thomas Bennett, being incited to works of charity, was desirous to leave some memorial of his thankfulness to God, to be continued for ever, towards the relieving and maintenance of the poor of the said borough of Wallingford, being near the place where he was born, and of the poor within the city of London, where he then dwelt: and of the poor of the Mystery of Mercers, of which he was free; and the better to manifest his love and affection towards his brethren, the free-men of the said company, it was testified and declared, by the parties thereto, that the grant of the said rectory and advowson, and of the messuages, lands, tithes, and ecclesiastical dues thereto belonging, and of the said rent of £150, was made by the said Sir Thomas Bennett to the parties of the second part, upon the trusts and limitations, [168] and for the intents and purposes expressed and declared by a schedule thereto annexed: and the several parties covenanted with each other well and truly to perform the said trusts on their parts to be performed. The schedule annexed to the deed, after stating that it contained the several trusts and limitations which were from time to time thereafter to be performed, touching the rectory and church of Kirton, and the advowson and other the premises and things specified in the last stated indenture, and touching the yearly rent of £150 reserved upon a lease theretofore made of the same, by Sir Thomas Bennett, unto George Skelton, for the term of forty-one years, from Lady-day then next coming, and touching all other rents, issues, and profits of the same premises, directs (amongst other things) that the parties of the second part should permit the said Sir Thomas Bennett to receive the rents until Lady-day then next, and should from thenceforth receive the said yearly rent of £150, and all other rents and issues thereof, and yearly pay and deliver the monies arising thereupon to the wardens of the Mystery of Mercers of the city of London, and their successors, or such one of them as the said company should appoint and be answerable for; and that the said wardens and commonalty should, from the said Lady-day, dispose of all the said monies so from time to time to be paid and delivered as aforesaid, to the uses following:—viz. to the king for the fee-farm rent reserved, by the letters patent before-mentioned, the sum of £29 yearly; and to the receiver for two half-yearly acquittances, 1s.; to the mayor and burgesses and commonalty of Wallingford, to be paid half-yearly, and to be distributed by them among fifteen of the most poor and aged sort of men and women of the said borough town, in the manner [169] therein mentioned, the sum of £20; to four poor brethren of the company of Mercers, such as should have their freedom by service or patrimony, being then decayed in their estate, £5 a-piece yearly, as long as they should live and be of good behaviour; the vacancies to be supplied by the said company upon their quarter days, amounting together to the sum of £20; for redeeming twelve or more prisoners, yearly, lying for debt in the two Compters and Ludgate, such as might be redeemed for 10s. or under, and for half or less if they could of the debt due, so far as the sum of £24 in every year would extend; for clothing with hose, shoes, shirts, and such like, poor and naked men, women, and children, wandering in the streets of London, and that have no dwelling, to be bestowed at the discretion of the said wardens, or such one of them as the said company should appoint, the sum of £44; for the relief of poor children in Christ's Hospital, in London, to be paid to the masters and governors, the sum of £20; for the charge of a dinner for the wardens, assistants, and livery of the said company, at their hall on St Andrew's day, the sum of £20; to the wardens appointed, for their pains in disposing of the said monies, the sum of £1; to the clerk of the company for his attendance, and for providing and keeping a book, yearly, of the said distributions, and making of acquittances, the sum of £1; and to the headle of the company for his attendance in the distributions, the sum of 10s. The schedule then contained directions, that when the said trustees should be reduced to eight, the survivors should convey the premises to twenty others, being freemen of the Mystery of Mercers, and their heirs, upon the trusts aforesaid. The schedule also contained a further provision, that if it should happen [170] that the rectory of Kirton, and other the premises, should at any time be lawfully exicted, or that by the alteration of times, the rents and profits thereof should so much decay and

fall, that the good uses above mentioned should not be maintained therewith, in such case the wardens and commonalty should not be charged with any further payments than the said rectory and other the premises should in true and just value amount to; and it should be lawful for the company to make a proportionable abatement of the monies before limited to the said several uses, answerable to such decay or fall of the rents thereof, as should so happen.

The payments by the schedule provided, to be made out of the rent of £150, being the income of the premises at the time of the grant, amounted to the sum of £149 11s.

New trustees were from time to time chosen of the said rectory, and other property and conveyances thereof from time to time made to such new trustees, who from time to time paid over the rents and profits of the rectory to the wardens and commonalty of the Mystery of Mercers, in order that they might distribute the same according to the trusts of the deed before-mentioned and the schedule thereto.

In the year 1772 an act of parliament was passed, intituled "an act for dividing and inclosing the Common Fen and certain other commonable places and open fields within the parish of Kirton, in the parts of Holland, in the county of Lincoln." The commissioners under that act by their award, dated on or about the 10th of May, 1773, allotted to the company of Mercers in lieu of all the tithes, both great and small, and all ecclesiastical dues and payments arising and belonging to the company upon and out of all or any [171] of the lands in the parish of Kirton, and upon the Common Fen and other places directed to be inclosed, three parcels of land lying in the High or Great Fen, in the inclosure called Kirton Inclosure, in the said parish of Kirton, containing respectively 317a. 1r. 29p., 226a. 3r. 23p., and 48a. 1r. 12p., and one parcel of land lying in the inclosure called Sutterton Inclosure, in the parish of Sutterton, containing 3r. 3p., making the whole quantity of land allotted 593a. 1r. 27p.

By a lease dated on the 22d of June, 1773, after reciting the particular allotments from the commissioners' award as before stated, and also reciting that the company were also possessed of a messuage or cottage and 2a. and 1r. by estimation, of pasture land thereto belonging, and also of 3r. and 13p. by measurement, then inclosed, in the parish of Kirton, and of 2a. by estimation of pasture formerly inclosed in the parish of Sutterton, and that all such lands and allotments contained together by measure and estimation 598a. 2r.; and also reciting that an estimate had been made of the expense of building a substantial messuage, barns, stables, and brew-house, and other proper houses and buildings in some part of the premises, amounting to the sum of £1215 17s. 1d., and a like estimate of the expense of fencing and dividing the allotments, amounting to the sum of £1149 6s. 5d., and that one William Watson had agreed with the company for a lease of the premises, and to expend the said sums of money for the purposes aforesaid; the company demised all the said premises to William Watson for sixty-one years, from Lady-day then last, at the yearly rent of £315, and the lessee covenanted to expend the before mentioned sums respectively in [172] erecting the buildings, and in fencing the allotments within the three first years of the term.

The covenant had been duly performed by William Watson, at an expense exceeding the stipulated sums by £700, and continued in the possession of the premises till the time of his death, upon which event his son, William Watson the younger, became intitled to the lease, and finding himself unable to carry on the farm, agreed with the company to surrender the lease to them upon having an annuity of £400 secured to him for the remainder of the term of sixty-one years, and the agreement was carried into effect by a deed of surrender, dated on the 1st of March, 1816.

A new lease, dated the 7th of October, 1817, was afterwards granted to Samuel Everard, the present tenant, for twenty-one years and a half, from Lady-day 1816, at the rent of a pepper-corn for the first half-year, and of £1000 per annum for the remaining twenty-one years, and these terms were fixed in consideration of the tenant agreeing to lay out £700 in repairing and improving the premises.

The payments specified in the schedule annexed to the indenture before stated, were not increased by the company, but such payments were from time to time regularly made, except as to the sum allotted to Christ's Hospital, which was pur-

chased by the Appellants, and also to the sum allotted to the Appellants for a dinner on St. Andrew's day, which had for some years been discontinued, by reason of the surplus produce of the charity estate having been carried to the company's general funds. The sum allotted for the discharge of poor debtors had been frequently unapplied, in consequence of the restriction as to the amount, but the unapplied arrears had been duly [173] brought to account, and from time to time invested in the funds; and in the month of August, 1808, a sum of £102 17s. 2d. three per cent. consolidated Bank Annuities was purchased with £273 8s. 10d. arising from such arrears; and in the month of February, 1818, a further sum of £397 2s. 10d. three per cent. consolidated Bank Annuities was purchased with £320 3s. 11d. out of such arrears, making in the whole the sum of £800 three per cent. consolidated Bank Annuities, and the dividends thereof, amounting to £24 per annum, were carried to the account of the prisoners; and at an audit of the accounts of the charity on the 11th of October, 1820, there was a balance in the hands of the company of £149 11s. 11d.

In the year 1818, upon a report made by a committee to the court of assistants, that the small sums directed to be appropriated to the release of debtors, under the indenture secondly stated, and the schedule thereunto, were not sufficient, from the great change in the value of money, to attain the object of the donor in the release of deserving debtors,—It was resolved by the court that the masters and wardens of the Company should be authorized in future to apply the charity annually as they should see best, so as to release the greatest practicable number of deserving debtors, and that in consequence of this resolution the sums appropriated to each case had been extended where necessary, to £3.

The annuity of £20 a year given to Christ's Hospital by Sir Thomas Bennett, was purchased by the Company of Mercers in the year 1811, under the authority of the act made and passed for the redemption of the land tax.

The sums actually paid by the Company from the [174] rent of the estate and premises were as follows: the annuity of £100 to William Watson. The rent of £20 reserved by the aforesaid letters patent and now paid to a purchaser from the Crown, and £20 to the corporation of Wallingford; £5 each to four poor brethren of the company appointed for life at a general court, amounting together to £20. The prisoners in the two Compters and Ludgate, £24. To the Renter Warden, to be applied by him, at his discretion, in clothing or otherwise relieving poor and distressed objects in the city of London, £14. To the Renter Warden, £1. To the clerk, £1. To the beadle, 10s. For the annual insurance of the premises from fire, £11 12s.; which amounted in the whole to the sum of £521 2s. The residue of the rents of the estate had been for many years carried to the general account of the company, and had been applied by them to their own use and benefit.

These facts coming to the knowledge of the Commissioners, appointed under the statute 59 Geo. 3. c. 91, in the course of their inquiry, and it appearing to them that the Appellants were not entitled to retain such surplus for their own use, but that the whole of the rents ought to be applied to the purposes specified by the donor, they certified the particulars to the Attorney General, who thereupon filed an information in the Court of Exchequer against the Appellants and their trustees, stating the above circumstances, and praying that it might be declared that the Appellants were mere trustees for the distribution of the rents and profits of the estate, and ought to apply the whole of such rents and profits, as well as the dividends of the stock which had been purchased with a part of that fund, to the purposes prescribed by the donor, or some similar thereto, or to such other cha-[175]ritable purposes as His Majesty or the court should direct; and that they might be decreed to account for all the surplus rents which they had received, so long back as the court should think proper; and to pay what upon such account should appear to be due from them; and that it might be referred to a Master to approve of a scheme for the due application of such arrears, as well as of the future rents of the estate and dividends arising from the stock.

To this information the Appellants and trustees put in their answer, admitting the above facts; and the answer having been replied to, the cause came on to be heard before the Lord Chief Baron of the Exchequer, on the 27th of April, 1826, when the deeds by which the charity was founded having been produced and read in evidence, the cause stood for judgment, and on the 30th of May following, the Lord Chief Baron

pronounced his decree, whereby it was declared that the Appellants were trustees of the rents, and of the augmented rents of the estates in the pleadings mentioned, and that the surplus rents, after answering the several payments directed to be made by the said deed of the 17th of January, 1616, are applicable to such and the same purposes as Sir Thomas Bennett has pointed out and directed the rents of such estate to be applied to, by the aforesaid deed of the 17th of January, 1616, without prejudice nevertheless to the question, how far the Appellants were entitled to partake of or share in the said increased or augmented rents, with reference to their share or benefit in the said original rent of £150, given to the Appellants by the deed of the 17th of January, 1616, and the decree directed accounts of the rents to be taken accordingly.

From this decree the appeal was presented.

[176] For the Appellants: Mr. Bickersteth and Mr. Monro.

For the Respondent: The Attorney General and Mr. Pemberton.

For the Appellants it was argued: That the donor had given the estate absolutely in use to the Appellants, and by the declaration of trust he had imposed on them the obligation of making certain specific annual payments out of the rents, which at the time of the gift did not amount to the annual produce of the estates: that there was an excess, and the amount of the excess was not material (*Mocatta v. Lonsdale*), therefore, instead of there being any ground of implication that the donor intended to dedicate the whole usufruct of the land to charitable purposes, on the contrary, the direct conclusion of the law is, that there was no such intention, and that a Court of Equity cannot imply a further intention, because the subject relates to public charity: that the Appellants were the express objects of the donor's regard: and as one of the purposes he had in view in making the gift, is declared to be to manifest his love and affection to his brethren, the Freemen of the Mercers' Company, it might be reasonably concluded that he intended to effect this purpose, by giving to the Appellants the surplus rents which should remain after the purposes particularly specified were answered: that in conferring the trust, the donor made the Appellants liable to responsibilities in respect of the rent reserved to the Crown and otherwise, and must therefore be understood to have intended the Appellants to receive any benefit which might remain after they had fully performed the [177] trusts particularly declared (*Att. Gen. v. Corp. of Bristol*, 2 Jac. and W. 294); and that length of time, although it was not an absolute limitation in the case of a charity, was nevertheless a circumstance to be considered (per Lord Holt in *The Att. Gen. v. Coventry*, cit. 3 Mad. 353).

For the Respondents it was argued: That upon the whole frame of the deeds by which the property in question was vested in trustees, and the trusts thereof declared, it was manifest that the Appellants were intended to receive the whole of the rents as trustees for the purpose of distribution amongst the objects of the charity, and were not intended to take the estate as beneficial owners, subject to certain specific charges in favour of the charity.

(16th July.) The Lord Chancellor (after stating the substance of the deed and schedule):

This property, which was at the period in question of the annual value of about £150, is at present of a value greatly exceeding that amount, and the question is, to whom the surplus rent belongs. The Mercers' Company contend that, according to the terms of this trust, they are entitled to the surplus rent, and on the other side it is contended, on the part of the Attorney General, who has filed this information, that the surplus rents, the increased rents, are to be applied to charitable purposes, similar to those designated in this schedule. In looking at the terms of this trust, your Lordships will find that the donor adverts, not merely to the standing rent of £150 a year, but he looks forward to a possible alteration in the rent. The trustees are directed to pay over to the Mercers' Company all the rents which shall from time to time accrue: [178] and then it is directed that they shall receive the said yearly rent of £150, and "all other the rents, issues, and profits thereof, from thenceforth to grow due and payable, and that the monies thereof arising, shall yearly be delivered to the Mercers' Company, so that the £150 a year during the continuation of that lease is to be paid over by the trustees to the Mercers' Company: the future rents, however large they may be, are from time to time to be paid over to the Mercers' Company, and the direction is that the Mercers'

Company, yearly and for ever pay and dispose of all the said monies, so from time to time to be paid and delivered as aforesaid." So that they are to receive the rents, whatever may be the amount of those rents, from time to time, and they are to pay over those rents, whatever their amount may be, to the purposes specially pointed out in this schedule. Therefore, upon the fair and obvious construction of that instrument, up to the point to which I have directed your attention, it appears that all the rents, however large, were to be applied to the purposes of those trusts.

But an argument has been raised out of the circumstance, that in the application of the first £150, £149 11s. only is appropriated, that there is a surplus of 9s., and that that surplus belongs to the trustees, being unappropriated, which is therefore evidence to shew that it was the intention of the donor that whatever surplus rents at any future period might arise, it was not intended that those surplus rents should be applied to the purposes designated in the deed the special and particular purposes, but that they should become the absolute property of the Mercers' Company.

The case of the *Attorney General v. The Mayor and Corporation of Bristol* (2 J. and W. 294), was referred to for the [179] purpose of establishing this position: now the only principle established, or rather confirmed by that case, was, that where there is a surplus under circumstances similar to the present, that is, where there is an annual sum granted, and a part of that annual sum only is appropriated to special objects, and there is a residue which the trustees hold, that is evidence of the intention of the donor, that the surplus rent should belong to the persons to whom this property is in the first instance conveyed, but it is only evidence of the intention: it is liable to be repelled by any other evidence arising out of the instrument upon which that fact appears. It is quite obvious that if it is made use of merely as evidence of the intention of the donor, something must depend upon the amount of the sum; and surely no very strong evidence of intention can arise out of an instrument of this kind where it appears that the whole sum at that period amounted to £150 a year, which is applied to a great number of special objects, and that the only balance remaining unappropriated is the fractional sum of 9s. No very strong evidence of intention can arise from a circumstance of that description, that it was the intention of the donor that any surplus funds at any future time, however large, should become the property of the Mercers' Company. Whatever slight inference of intention may arise from the omission to appropriate that small fractional sum, is repelled by the very strong terms in the former part of the deed, in which it is expressed, not only that the existing rent of £150 a year, but all the rents should be received by the trustees and handed over to the Mercers' Company; and the Mercers' Company are directed to apply not the present rents only, but all the rents to the purposes of the will. That direction is so specific [180] as to overrule any inference arising from the small extra fractional sum not being appropriated.

It was stated by the counsel at the bar, in arguing this case, that one object of the grant was, the love and affection Sir William Bennett bore to the Mercers' Company; and that it did not sufficiently appear by looking at this instrument, that the donor had, by the special purposes pointed out in the schedule, indicated any intention of providing beneficially for the Mercers' Company; that, therefore, it was fair to assume that he meant them to profit in some way from the increase of the rent. But you will find, by referring to the objects pointed out in this instrument, that they are all specially provided for in the particular appropriations mentioned in the schedule. The objects are these: "For the relieving and maintenance of the poor of the borough or town of Wallingford, being near unto the place where the donor was born; and of the poor within the city of London, where he hath been brought up, and doth now inhabit and dwell; and of the poor of the Mystery of the Mercers of the same city of London, of which company he is free; and the better to manifest his love and affection towards his brethren, the freemen of the same company." Now on looking into the schedule, you will find all those objects provided for: first there is "to the mayor, burgesses, and commonalty of the said borough or town of Wallingford, to be disposed of in manner therein mentioned, £20 a year." So that the first object is provided for; namely, his regard to the inhabitants of Wallingford. "To four poor brethren of the Company of Mercers, the yearly sum of £20, that is to say, £5 a-piece;" Another object intended specially

to be provided for: "For redeeming twelve [181] persons lying for debt in the prisons of London, called the two Compters and Ludgate, £24, to be distributed in manner therein mentioned; and for clothing with hose, shoes, shirts, and such like, of poor and naked men, women, and children, wandering in the streets of the city of London, and that have no dwelling to be bestowed as therein mentioned, £14 a year." That is another object specially provided for; then "For the charges of a dinner to be provided for the wardens, assistants, and livery of the Mercers' Company, £20 a year." That is to shew his regard to the company of which he was a member. There are other sums, to which it is unnecessary for me to direct your attention; but you will find that he provides specially in this schedule for the different objects which, in the recital of the deed of trust, he declares it his intention to provide. Therefore, no argument of that description can, in my apprehension, arise out of this recital of the deed.

An argument was attempted to be raised out of the concluding clause, "That if it shall happen that the said rectory of Kirton and other the premises shall at any time hereafter be lawfully evicted, or that by the alteration of times, the rents and profits thereof shall so much decay and fall that the good uses above mentioned cannot be supported and maintained therewith, in such case the said wardens and commonalty shall not be charged with any further payment than the said rectory and other the premises shall in true and just value amount to: and from thenceforth it shall be lawful for the said wardens and commonalty and their successors, to make proportionable abatement of the monies hereinbefore limited to the said several uses, answerable to such decay or fall of the rents thereof, as shall so happen." No [182] provision is here made for any increase of rent; the provision is made only with a view to the possible decrease of rent; but it is easy to understand why the provision was framed in that way: it was to prevent all disputes in case there should happen to be decrease of rents; in that case, instead of any particular object being entirely defeated, the Mercers' Company were directed to reduce each of them in proportion. It was with that view, and that view only, as it appears to me, that the clause was introduced.

I have gone further into detail than I should otherwise have done, because it has been contended at the bar that, to confirm this decision of the Chief Baron of the Exchequer, would be to overrule the decision in the case of the *Attorney General v. the Corporation of Bristol*. The principle of that decision is that which I have stated: that if there is a part of the sum unappropriated, it is a circumstance which courts of justice (and particularly in that case,) have considered as an evidence of the intention of the donor, as to what should take place with respect to any future increase of that sum; but it is only evidence of the intention; and I apprehend the circumstances to which I have adverted, are in this case sufficient to rebut any inference of such an intention, arising from the non-application of the small fractional sum to which I have adverted. I was extremely desirous of knowing what was the opinion of the noble and learned lord by whom that case of the Corporation of Bristol had been decided. The noble and learned lord has looked into the decision in this case, and he does not consider it at all inconsistent with the decision of that case. On the contrary, he agrees with me in opinion, that the decision of the court below [183] is perfectly correct. Under these circumstances, I should propose to your Lordships that this judgment be affirmed.

Judgment affirmed.

[184]

ENGLAND.

(COURT OF EXCHEQUER.)

The Wardens and Commonalty of the Mystery of MERCERS of the City of London,—
Appellants; HIS MAJESTY'S ATTORNEY GENERAL,—*Respondent*.

[Sec 2 Bli. N.S. 165.]

By a deed granting lands, etc. to a Corporation of the City of London, to be

applied to charitable uses, it was provided, that if the premises should be evicted, the company should be discharged from any further payment or continuance of the uses; and if the premises, by alteration of times, should so much decay in rent that the uses could not be supported therewith, the company should only be chargeable with the payments appointed to Christ's Hospital and to the Company of Barber Surgeons, being £6 yearly; and from thenceforth it should be lawful for the said company to make such abatement of the sums before limited, except the £6 to Christ's Hospital and the Barber Surgeons, as should be answerable to the fall of the rents which should so happen.

Held, that this was conditional, and not a positive charge upon the grantees to be paid by them, at all events so as to furnish an inference, that, being subject to such charge, they must be entitled to a surplus of the rents arising by an increase in the value of the property.

By indenture, dated the 12th of May, 1619, John Bancks, citizen and mercer of London, granted, bargained, and sold to Sir Baptist Hicks, and others therein mentioned, and their heirs and assigns, a messuage or tenement, with all buildings, gardens, and other appurtenances thereto belonging, situate in Holloway, in the parish of Islington, in the county [185] of Middlesex; and also three crofts, or closes of pasture-ground, with the appurtenances, containing by estimation six acres, to the said messuage adjoining.

By a further indenture, also dated the 12th of May, 1619, and made and executed by and between the said John Bancks, of the first part; the said Sir Baptist Hicks, and the other trustees of the second part; and the wardens and commonalty of the Mystery of Mercers of the city of London, of the third part; and by a schedule thereunto annexed, it was declared that the conveyance thereinbefore mentioned, was made upon trust, that the said Sir Baptist Hicks, and the other trustees, should permit the said John Bancks to receive the rents and profits during his life; and that, after his death, they should receive the yearly rent of £17, for which the said premises were then demised, under a lease granted by the said John Bancks, and all other rents and profits thereof to grow due and payable, and the monies thereof arising, should yearly and for ever, well and truly pay and deliver to the renter-warden of the Company of Mercers for the time being; and that the wardens and commonalty of the Mercers, and their successors, should, from and after the decease of the said John Bancks, yearly, for ever, pay and dispose all the said monies, so from time to time to be paid and delivered to them as aforesaid, to the purposes following: viz. to the governors of Christ's Hospital in London, yearly, the sum of £5, to be distributed as follows: for a sermon on the day of election of the governors, £1 2s.; for a dinner for the governors, £1 6s. 8d.; for the two clerks, 2s. each; for cakes and wine, £1 6s. 8d.; for the stewards, 2s. 6d., the matron, 2s. 6d., the beadles, 4s., making together 9s.; for the poor of Christ Church parish, if the sermon should be preached there, 6s. 8d. [186] for the minister of Christ Church, 2s.; for the two clerks and sexton, 3s.; and also the sum of £7 11s. for seven sermons, to be preached by learned divines in the Mercers' Church, yearly, upon Midsummer-day, Michaelmas-day, the day of the confirmation of new wardens of the company, and the four general court days of the said company, every sermon 22s.; and also to the renter-warden of the said company, the sum of £1; and also to the said company's chaplain, 6s. 8d.; and also to the clerk of the said company, 10s.; to the beadle, 3s. 1d.; to the sexton and keeper of the chapel, 6s. 8d.; and also for a dinner, every third or fifth year, for the wardens and some of the feoffees, with three workmen to view the reparations, £3; and to each of the three workmen, 2s. each; and also to the Company of Barber Surgeons, London, 20s. yearly, to be distributed on the 11th day of May, yearly, to twelve poor householders or widows of the said company, in beef, bread, and two pence a piece in money, and each of them one wooden platter; and to the clerk of the same company, 2s.

New trustees had been from time to time chosen out of the Mercers' Company, to whom the estate had been from time to time conveyed.

The trust estate consisting of a dwelling-house, and about six acres of land, were let from the year 1631, when the rents became first receivable by the trustees,

to 1733, for the annual sum of £17; and from the year 1733 to 1776, for the annual sum of £14. About the year 1749, the rent of £14 being insufficient to defray the expenses of the several purposes specified in the indenture hereinbefore mentioned, the seven annual sermons above mentioned were reduced, by a resolution of a general court of the Company [187] of Mercers, to the number of four, which last mentioned number continued to be preached till the year 1820, when at a general court of the company, held on the 30th of March, the former resolution was rescinded, and the seven sermons had since been preached in the manner directed in the deed.

The premises were let from the year 1776 to 1797 at the rent of £21 per annum; and from the year 1797 to 1816, at a rent of £30 per annum. In the year 1816 the premises were let for the term of seven years, at the annual rent of £84, which was the rent at the date of the appeal.

All the other payments specified in the indentures, had been satisfied by the company, excepting that as no periodical visit to view the repairs of the tenement took place, no specific dinner was provided, nor were any workmen paid as directed on such visitations, and except that the annuity of £5 to Christ's Hospital, in the year 1811, was purchased by the Company of Mercers from the hospital, under the authority of certain acts of parliament, made and passed for the redemption of the land-tax.

The payments directed to be made under the indenture, amounted to about the sum of £17, being the then annual value and proceeds of the premises; and the sum of £67 per annum, the excess of the improved rent of the premises, had been, ever since the year 1816, carried to the general account of the Company of Mercers, and applied, with their other funds, for their general purposes, and not to any charitable purpose.

John Bancks, by his will, dated the 20th of May, 1630, among other things, gave and bequeathed to the Company of Mercers the sum of £200, and he thereby directed and empowered the company to [188] lend out from time to time for ever, the said sum to two young men of the said company for the term of five years successively, at the rate and interest of three per cent. per annum; the yearly benefit thereof to be put to the account of his lands at Holloway. This sum was received by the company, but at the time of hearing the cause, the money had not been lent out in the manner directed by the will, no application having been made for the loan.

These facts coming to the knowledge of the commissioners, appointed under the statute 59 Geo. 3. c. 91, in the course of their inquiries, it appeared to them that the Appellants were not entitled to retain such surplus for their own use, but that the whole of the rents ought to be applied to the purposes specified by the donor. They accordingly certified the particulars to the Attorney General, who thereupon filed an information in the Court of Exchequer against the Appellants and their trustees, stating the above circumstances, and praying that it might be declared that the Appellants were mere trustees for the distribution of the whole income of the Charity Estate, and ought to apply the increased rents to the purposes mentioned in the original deed of foundation, or such other charitable purposes as the court should direct; and that they might be decreed to account for all the surplus rents received by them since 1816, as well as for the interest of the sum of £200 bequeathed by the donor's will, and to pay what might appear to be due from them into court, and that it might be referred to one of the Masters of the court to approve of a scheme for the due application of such arrears, and of all the future income.

To this information the Appellants and trustees put in their answer, which admitted the facts alleged.

[189] The answer having been replied to, the cause came on to be heard on the 27th of April, 1826, before the Lord Chief Baron of the Exchequer, when the deeds of foundation having been read, the cause stood for judgment, and on the 30th of May following the Lord Chief Baron pronounced his decree, whereby it was declared, that the Appellants were trustees of the rents, and of the augmented rents of the estates, and of the interest of the sum of £200 in the pleadings mentioned; and that the surplus rents and the said interest, after answering the several payments directed to be made by the said deed of the 12th of May, 1619, were applicable to such and the same purposes as the testator, John Bancks, directed the rents of such estate to be applied to, by the aforesaid deed of the 12th day of May, 1619, without prejudice nevertheless to the question how far the Appellants were intitled to par-

take of or share the said increased or augmented rents, with reference to their share or benefit in the said original rent given to the Appellants by the said deed of the 12th of May, 1619, and directed accounts of the said rents to be taken accordingly.

From this decree the appeal was presented.

For the Appellants: Mr. Bickersteth and Mr. Monro.

For the Respondents: The Attorney General and Mr. Pemberton.

The Lord Chancellor: There is another case of a similar description to that which your Lordships have just decided, a case in which the Wardens and Commonalty of the Mystery of Mercers of the City of London, are Appellants, and His Majesty's Attorney [190] General, is Respondent. That was a case arising out of a Charity, founded by a person of the name of Baucks. The provisions of the deed are extremely similar, and it does not appear to me that there is any material distinction between the two cases. The only distinction adverted to, was, that it was supposed that to the extent of £6 the Corporation would at all events be chargeable; and therefore if they were liable in case of diminution of rents, to the extent of £6, it was contended that they would be entitled to the surplus: I think this arises entirely from a misapprehension of the nature of the clause. It concludes with a proviso in these terms: "That if it should happen that the messuage and premises should at any time thereafter be lawfully evicted, then and immediately from thenceforth the said company should be discharged from any further payment or continuance of the uses aforesaid, or if the said messuage and other premises should by alteration of times so much decay in rent, that the uses above mentioned could not be supported therewith, in such case the said company should only be chargeable with the payments appointed to Christ's Hospital, and to the Company of Barber Surgeons, being £6 yearly; and from thenceforth it should be lawful for the said Mercers' Company to make such a defalcation and abatement of all the sums of money therein before limited, except the said £6 to Christ's Hospital and the Company of Barber Surgeons, as should be answerable to the fall of rents which should so happen, and as the said Mercers' Company should think fit." I do not think, taking this clause altogether, that it was the intention to make the company at all events chargeable for the payment of £6 to Christ's Hospital and the Company of Barber Surgeons, but that the obvious import of the clause was this: If the [191] parties are evicted, if the Mercers' Company are entirely evicted from the property, they are to be relieved from all liability; and if there shall be a reduction of the rents, then in the first instance the £6 is at all events to be paid to the Barbers' Company and Christ's Hospital, and the surplus above £6 to be divided among the other objects of the charity, rateably. But on a supposition which it was not very easy to make, that the rents should be reduced below the £6: it was never intended, as I conceive, on the fair construction of this instrument, that the Mercers' Company would be bound to pay the £6 to the Barbers' Company and Christ's Hospital, but only so much as they should receive. I apprehend that the argument built upon the interpretation of this clause, putting that interpretation upon it, which it was supposed at the bar to bear, cannot be supported, and therefore that this case falls precisely within the principle of the former decision, and therefore I recommend to your Lordships that this Judgment also should be affirmed.

Judgment affirmed.

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ENGLAND.

(COURT OF EXCHEQUER.)

HANNAH RUSCOMBE, *Appellant*: RICHARD HARE, MARY RUSCOMBE, WILLIAM LONG, and RICHARD MEADE, *Respondents*.

[*Mews' Dig.* vii, 1181, ix, 1169. S. C. 6 Dow P. C. 1 (1817-1818). See *Jackson v. Innes*, 1819, 1 Bl. 401; *Clark v. Burgh*, 1815, 2 Coll. 221.]

N. being intitled to certain lands as issue in tail, conveys them in 1719 by lease and release to a mortgagee in fee to secure £800 borrowed, and levies a fine

of the lands pursuant to covenant for the purpose of perfecting the security. In 1762 N. borrows £450, and charges it upon the same lands by deed-poll. N. died in 1764, leaving the charge upon the lands of the aggregate sum of £1250, with an arrear of interest, and he by his will devised all his lands to M. his wife. In 1766, M. having married A. B., they by lease and release reciting the mortgage, and that A. B. had paid the interest, grant and confirm the mortgaged lands to the mortgagee, reserving the equity of redemption to A. B., his heirs, etc. By a deed in 1789, £300, an arrear of interest, is added to the principal, and the aggregate sum of £1550 is charged on the lands, subject to redemption as by the former deed. M. died in 1794, leaving R. H., a son by the first husband, her heir at law. In 1797 A. B. sold part of the mortgaged lands, and in consideration of £2000 principal and interest, paid to the mortgagee, and £600 paid to A. B., he and the mortgagee conveyed such part of the lands to R. H., the purchaser. The rest of the lands was conveyed by the mortgagee to A. B. who died in 1799. Under these circumstances the heir at law of M. filed a bill in the Exchequer to redeem the lands, and the court decreed that he was intitled to redeem on payment of the principal money due upon the mortgage, and interest calculated from the death of A. B. Upon appeal to the House of Lords from this decree, it was declared that R. H., as heir at law of M., was intitled, notwithstanding the proviso for redemption reserved to A. B. by the deed made between him and the mortgagee, to redeem the lands "on payment of the principal money and interest, *due at the death of M.* on the aggregate sum of £1250. *Such in-[193]terest to be computed according to the proviso in the indenture of release and mortgage.*" A. B., being intitled in equity to have the interest due at the death of his wife added to the principal, and considered as an aggregate sum with the principal, A. B. and M. his wife not being bound to keep down the interest during her life for the benefit of her heir at law, etc. and that an account should be taken of what was due for principal and interest on the mortgage at the death of M. The decree of the Exchequer being varied according to this order, it was referred to the Master to take the accounts so directed, and it appeared in evidence before him that A. B. and M. his wife, during her life, paid to the mortgagee, on account of interest, £1500; that the Master in his report did not include this sum, but reported that there was due upon this account for principal £1250, and for interest at the death of M. £286 9s. 2d. On this ground exceptions were taken to the report, which being in this respect confirmed, and a decree made upon further directions accordingly, a farther appeal was presented to the House of Lords.

But the decree was affirmed, the House being of opinion that the representative of the husband was not intitled, as against the heir of the wife, to an allowance of interest actually paid by the husband during the life of his wife, and that the former order of the House, directing the account of interest due on the mortgage at the death of M. meant interest actually due.

By a will, made in the year 1724, Nicholas Hare devised the lands in question in this cause to his son Nicholas Hare for 99 years, if he should so long live; and after the determination of that estate, unto the issue of the body of that son, lawfully begotten, with remainders over.

Nicholas Hare, the son, entered upon the lands, and continued in possession till he died intestate, whereupon his son, Nicholas Hare, who was the grandson of the first named Nicholas Hare, became possessed of, and intitled to the lands. By indentures of lease and release dated the 1st and 2d days of March, 1749, the release being made between Nicholas Hare the grandson, on the one part, and William House of the [194] other part, Nicholas Hare, in consideration of £800 paid to him by William House, conveyed unto the said William House, his heirs and assigns, all and singular the estates devised by the said will, as also other estates, of which Nicholas Hare the grandson was seised in fee, to hold the same unto and to the use of William House, his heirs and assigns, with a proviso for redeeming the same on payment of the sum of £800, with interest at the rate of £4 5s. per cent. per

annum, which William House agreed to accept in lieu of £5 per cent. per annum, in case of punctual payment; and Nicholas Hare covenanted with William House to levy a fine of the estates, which was afterwards duly levied accordingly.

In a few years afterwards Nicholas Hare borrowed a further sum of £450 from William House, on the security of the same estates, and in order to perfect the security, Nicholas Hare executed a deed-poll, dated the 1st day of June, 1762, whereby he charged all the lands with the payment of the sum of £150, and interest at the rate of £1 5s. per cent. per annum.

Nicholas Hare, the mortgagor, never redeemed the lands, but died in the year 1764, having by his will, dated the 21st of June, 1757, devised all his freehold estates and lands of inheritance whatsoever, to his wife Mary Hare, her heirs and assigns, and he appointed her sole executrix of his will, and she duly proved the same.

In the year 1765, Mary Hare intermarried with Alexander Bruford the elder, and Alexander Bruford the elder, and his wife, were in the possession of the mortgaged estates from the death of Nicholas Hare, the mortgagor, until the death of Mary Bruford.

In the year 1766 Alexander Bruford the elder, and Mary his wife, executed certain indentures of lease and release, bearing date the 2d and 3d of February, [195] 1766, which were made between Alexander Bruford and Mary his wife, of the one part, and William House of the other part, whereby, after reciting the indentures of lease and release of the 1st and 2d of March, 1749, and the deed-poll of the 1st of June, 1762, and that the sums of £800 and £450 thereby secured, were not paid; and after also reciting the death of Nicholas Hare, and his will, and the marriage of Mary Hare with Alexander Bruford, and that the sums of £800 and £450 were still due, but that *all the interest had been paid up to that time by Alexander Bruford*; it was witnessed, that for the better securing the two several sums of £800 and £450 unto William House, his executors, administrators, and assigns, together with interest for the same, as therein mentioned, Alexander Bruford and Mary his wife granted, etc. to William House, his heirs and assigns, all the estates, to hold the estates unto and to the use of William House, his heirs and assigns, discharged of the former proviso for redemption, but subject to the proviso therein contained, viz. that in case Alexander Bruford, his executors, administrators, or assigns should pay the two several sums of £800 and £450, and all interest due thereon, at the time therein mentioned, to William House, his executors, administrators, or assigns, clear of all incumbrances, the said William House, his heirs or assigns, would at any time or times thereafter, at the request, and at the costs and charges in the law of Alexander Bruford, his heirs or assigns, release and convey the messuages or tenements, lands, and premises thereby released, to the said Alexander Bruford, his heirs and assigns for ever, or as he or they should in that behalf direct or appoint; and it was thereby declared and agreed, by and between the parties thereto, and Alexander Bruford and [196] Mary his wife did jointly and separately declare and agree, that all fines and recoveries, conveyances, and assurances theretofore, made, levied, or suffered of the said premises, and particularly a fine then agreed to be levied, and which Alexander Bruford covenanted for himself and Mary his wife, to levy to William House, his heirs and assigns, should be and enure to and for the proper use of William House, his heirs and assigns, subject to the condition of redemption, above mentioned.

The fine was afterwards levied according to the covenant, and Alexander Bruford executed a bond to William House, as a collateral security for the due payment of the said mortgage money.

The interest on the mortgage was not duly paid, and in the year 1789 there was due to William House, the sum of £300 for interest on the £1250; whereupon Alexander Bruford the elder and William House agreed that the interest should be added to the principal sum, and that a further mortgage should be made to secure the same, and that accordingly an indenture, dated the 3d of February, 1789, was made between Alexander Bruford of the one part, and William House of the other part, whereby it was witnessed, that in order to secure the two sums of £1250 and £300, making together £1550, the said Alexander Bruford did grant, release, and confirm to William House, his heirs and assigns, all the aforesaid estates, to hold the same in fee, subject to redemption, on payment by Alexander Bruford, his heirs or assigns, of the principal sum of £1550 with interest.

William House, the mortgagee, died on the 21st of May, 1791, leaving his son William House his heir-at-law, and having by his will appointed his son his sole executor: William House, the son, proved [197] his father's will, and thereby became his legal personal representative.

Mary Bruford, the wife of Alexander Bruford the elder, died in the year 1794, leaving Richard Hare, her only child by her first husband, Nicholas Hare, her heir-at-law, Alexander Bruford the elder, her second husband, and Alexander Bruford, her eldest son by her second marriage.

In the year 1797 Alexander Bruford the elder agreed with Richard Ruscombe for the sale to him of part of the mortgaged estates, and thereupon indentures of lease and release, bearing date respectively the 20th and 21st of June, 1797, were made between William House, the son of the mortgagee, of the first part, Alexander Bruford of the second part, Richard Ruscombe of the third part, and William Long of the fourth part: whereby after reciting, amongst other things, that upon an account that day made up and fairly stated by and between Alexander Bruford the elder and William House, there appeared to be due and owing to William House, for principal and interest, on and by virtue of the several therein recited securities, the full sum of £2000: it was witnessed, that in consideration of the sum of £2000 to the said William House, paid by Richard Ruscombe, and of the further sum of £600 paid by Richard Ruscombe to Alexander Bruford the elder, William House released and conveyed, and Alexander Bruford the elder granted, ratified, and confirmed unto Richard Ruscombe and William Long, the estates and premises therein particularly described, which were part of the mortgaged estates, to hold to Richard Ruscombe and William Long, to the use of such person, and for such purpose, as Richard Ruscombe by deed or will should appoint: and in default thereof, to the [198] use of William Long, his heirs and assigns, during the life of Richard Ruscombe, but in trust for Richard Ruscombe: and after the determination of that estate, to the use of the right heirs of Richard Ruscombe.

Upon the execution of the conveyance, Richard Ruscombe paid his purchase money, and was let into possession of that part of the estate which was so purchased by him, and he continued in possession thereof to the time of his death.

The mortgage to William House was, by means of the £2000 paid to him, fully paid off and satisfied, and William House reconveyed the remainder of the estates to Alexander Bruford the elder, and the same was held and enjoyed by Alexander Bruford the elder during the remainder of his life.

Alexander Bruford the elder died in the month of May, 1799, having by his will appointed his sons, namely, Alexander Bruford, who was his heir-at-law, and Francis Bruford, his executors: and he also devised to them, in fee, all his real estates.

Alexander Bruford and Francis Bruford proved the will of their father, and on his death entered upon and took possession of the remainder of the mortgaged estates so reconveyed to their father by William House as aforesaid, and they continued in possession thereof at the time when the present suit was instituted by Richard Hare, the heir-at-law of Mary Bruford.

The suit was instituted in the Court of Exchequer in Trinity Term, 1800, by Richard Hare, against William House, Richard Ruscombe, Alexander Bruford, Francis Bruford, and William Long; and William House having died, the suit was revived against Mary Woodland, his heiress-at-law and executrix, and Francis Bruford having become bankrupt, a supplemental bill was filed against William Gray and [199] John Slade, his assignees, and the original bill was amended: and by the bill it was stated to the effect aforesaid, and that Richard Hare was entitled to the possession of the estates, subject to the mortgages which affected the same, and therefore prayed that the usual accounts might be taken, and that upon payment by the said Richard Hare of what should be found due to the said William House upon taking the accounts, Richard Hare might be at liberty to redeem the premises: and that William House, and all necessary parties might be decreed to convey the premises to Richard Hare, and to deliver to him the possession thereof, and of all deeds, papers, and writings relating thereto.

Alexander Bruford and Francis Bruford, by their answer, submitted, that under the several assurances and transactions therein stated, the mortgaged estates absolutely

vested in their father, Alexander Bruford the elder, in fee, subject only to the payment of what was due on the mortgage to William House, and they respectively claimed to be entitled to the absolute fee simple and inheritance, as tenants in common, of all such part of the estates and premises contained in the indentures of the 1st and 2d March, 1749, as had not been purchased by and conveyed to Richard Ruscombe.

Richard Ruscombe, by his answer, set forth his purchase deed, and claimed to be entitled in fee to the estate and premises therein conveyed, as a purchaser for a valuable consideration, without notice of Richard Hare's alleged title or claim.

William Long, by his answer, stated that he was seised of the estate sold to the Appellant Richard Ruscombe, as his trustee only; and that he had not any beneficial interest therein.

[200] William Gray and John Slade having also answered the bill, the answers were replied to, and the cause was heard on the 17th of December, 1813; and by the decree which bore date the 2d of July, 1814, (being then passed and entered,) it was declared that Richard Hare was entitled to redeem the estates, and such accounts as therein mentioned were directed to be taken. In the directions for taking such accounts no interest was directed to be allowed to Richard Ruscombe upon the mortgage, prior to the death of Alexander Bruford the elder.

From this decree Richard Ruscombe and Alexander Bruford appealed to the House of Lords, praying that the decree might be reversed, and submitted that if the same ought not to be wholly reversed, yet that the same should be varied, because, at the death of Alexander Bruford the elder, no interest had been paid upon the mortgage for many years, which amounted in the year 1797, together with the principal money, to the sum of £2000, as appeared by the deeds of the 20th and 21st of June, 1797; whereas by the decree no interest was allowed to Richard Ruscombe upon the mortgage, prior to the death of Alexander Bruford.

Pending the appeal Richard Ruscombe died, having made his will, whereby he devised all his estates to William Long and Richard Meade, in trust for Hannah Ruscombe his widow, and Mary Ruscombe his daughter; and he appointed Hannah Ruscombe his sole executrix and residuary legatee, who proved the will; and upon the petition of Alexander Bruford, William Long, Richard Meade, Hannah Ruscombe, and Mary Ruscombe, the appeal being revived, it was heard on the 23d of June, 1817, and the 6th of February, 1818; and by an order of the House of [201] Lords, dated the 9th of June, 1818, it was ordered and adjudged that the decree of the Court of Exchequer should be varied as therein mentioned; and that it should be referred back to the court, to review the decree, and to vary the same accordingly, and to make such further order as should be consistent therewith, and as the nature and circumstances of the case, and the deaths of parties might require.

In pursuance of the order of the House of Lords, and by an order of the Court of Exchequer, dated the 27th of February, 1819, it was ordered, that the said order of the House of Lords should be incorporated in the decree, and the decree varied accordingly. By the decree so varied, it was declared that the Plaintiff Richard Hare, as the heir-at-law of Mary, his late mother, by Nicholas Hare, her first husband, became entitled in equity, upon the death of his mother, to retain the estates in question, subject to the interest for life therein, of Alexander Bruford the elder, deceased, her second husband, notwithstanding the words of the proviso for redemption, contained in the indenture of release and mortgage of the 3d of February, 1766, in the pleadings mentioned, made between Alexander Bruford the elder, deceased, and Mary, then his wife, of the one part, and William House, deceased, of the other part, upon payment of the principal money and interest, due at the death of the said Mary, on the principal sums of £800 and £150, making together the sum of £1250 in the indenture of release and mortgage mentioned, such interest to be computed according to the proviso in the indenture of release and mortgage, Alexander Bruford the elder being entitled in equity to have the interest due at the death of his wife, added to the principal, the said Alexander Bruford and Mary his wife not being [202] bound to keep down the interest during her life for the benefit of her heir-at-law: And it was further declared that Alexander Bruford the elder, as tenant by the courtesy, was bound to keep down the interest of such aggregated sum out of the rents and profits of the estates, which afterwards accrued during his life; and that the Defendant Richard Ruscombe having purchased part of the

estates, and out of the purchase money paid the principal and interest on the mortgage, was entitled to stand as mortgagee of the part of the estates conveyed to him for the aggregate sum of principal and interest, due at the death of Mary, as an aggregate principal sum, which Alexander Bruford the elder had a right to have charged on the mortgaged estates: but that the Defendant Richard Ruscombe, standing as a purchaser in the place of Alexander Bruford, who was entitled to the whole of the estates for his life, as tenant by the courtesy, was bound to keep down the interest of such aggregate sum, during the life of Alexander Bruford the elder, so far as the rents and profits of the estates conveyed to him, and accrued during that time, would extend: And it was by the decree referred to the Deputy Remembrancer of the Court, to take an account of what was due to the Defendant Richard Ruscombe for principal and interest, on the indenture of release and mortgage of the 3d of February, 1766, in the pleadings mentioned, at the death of Mary Bruford: and it was ordered that the sum so due to the Defendant Richard Ruscombe, for principal and interest, at the death of Mary Bruford, should form an aggregate sum chargeable on the estates, by virtue of the last-mentioned indenture of mortgage. It was also referred to the Deputy Remembrancer to take an account of what was then due for interest on such aggregate [203] sum, computing such interest from the death of Mary Bruford, according to the rate of interest provided by the last-mentioned indenture of mortgage: And the Deputy Remembrancer was also to take an account of what (if any thing) had been paid, laid out, or expended by the Defendant Richard Ruscombe, in his lifetime, or by Hannah Ruscombe since his decease, for necessary repairs and lasting improvements in and upon the mortgaged premises, and to tax the Defendant Hannah Ruscombe, and her late husband Richard Ruscombe, their costs of this suit, except such parts of the costs as related to, or had been occasioned by, the Defendant Richard Ruscombe, insisting upon being a purchaser of the estates for a valuable consideration: And the Deputy Remembrancer was also to take an account of the rents and profits of part of the estates conveyed to Richard Ruscombe, and received by him in his life time, or by Hannah Ruscombe since his decease, or which, without their wilful default, might have been received after the death of Mary Bruford: and if it should appear that such part of the rents and profits, as accrued due during the lifetime of Alexander Bruford the elder, and received by Richard Ruscombe, after allowances for repairs and improvements, exceeded the interest of the aggregate sum computed from the death of Mary Bruford to the death of Alexander Bruford the elder, it was declared that Richard Ruscombe was entitled to retain such excess, as standing in the place of Alexander Bruford the elder: but if such last-mentioned rents and profits, after such allowance as aforesaid, should appear not to have been sufficient to keep down the interest which accrued during the same time on such aggregate sum, then the court declared that Richard Ruscombe was entitled to stand as a creditor on the part [204] of the estates so conveyed to him for the difference, such difference to be paid out of the future rents and profits of such part of the estates which were received by him: And for that purpose it was further ordered, that it should also be referred to the Deputy Remembrancer to take distinct accounts, as against Richard Ruscombe, on the interest of the aggregate amount of principal and interest due at the death of Mary Bruford, from the time of her death to the death of Alexander Bruford the elder: and also of the rents and profits which accrued due in the lifetime of Alexander Bruford, after the death of Mary Bruford, received by Richard Ruscombe: and if such rents and profits, after the allowances aforesaid, should appear not to have been sufficient to keep down the interest of such aggregate sum during the life of Alexander Bruford the elder, then the Deputy Remembrancer was to carry the deficiency to the account of the rents and profits received by Richard Ruscombe after the death of Alexander Bruford the elder, and to add the same to the interest which accrued due on the aggregate sums after his death: and it was further ordered that the rents and profits, which accrued after the death of Alexander Bruford the elder, should be applied, by the said Deputy Remembrancer, first, in payment of the deficiency (if any) of the rents and profits accrued in the lifetime of Alexander Bruford the elder, to pay the interest accrued in his lifetime as aforesaid: and after such application, or in case there should be no such deficiency, then in the discharge of the interest of the aggregate sum accrued after the death

of the said Alexander Bruford the elder; and that the Deputy Remembrancer should ascertain the balance due to or from Richard Ruscombe accordingly; and that the rents and profits [205] from time to time accrued after the death of Alexander Bruford the elder, should be applied by the Deputy Remembrancer, first, to keep down the interest, and then to diminish the principal of such aggregate sum; and in taking the said accounts, the Deputy Remembrancer was to make such annual rests as he should think fit; and he was to appoint a time and place for payment by the said Plaintiff to the said Defendant Hannah Ruscombe, of what he should find to be due to the said Hannah Ruscombe, upon taking the aforesaid accounts; and it was further ordered by the court, that in default of payment by the Plaintiff, of what the Deputy-Remembrancer should find to be due to the Defendant Hannah Ruscombe as aforesaid, the Plaintiff's bills should be, and they were thereby dismissed out of the said court, so far as they regarded the Defendant Hannah, and the late Defendant Richard Ruscombe, with costs, to be taxed by the Deputy Remembrancer, to whom it was thereby referred to tax the same accordingly; and it was further ordered and decreed by the court, that upon payment of what (if any thing) should appear to be due to Hannah Ruscombe on the account so to be taken, together with her and Richard Ruscombe's costs as before directed; or if it should appear that Hannah Ruscombe had been over paid, according to the manner of taking the accounts before directed, then that Hannah Ruscombe, and all proper parties, should convey the mortgaged premises, so conveyed to Richard Ruscombe as therein mentioned, to Richard Hare, and his heirs, or as he should appoint, freed from any charges or incumbrances, made, done, or suffered by Richard Ruscombe, or any person or persons claiming by, from, or under him, such conveyance to be settled by the Deputy Remembrancer, [206] in case the parties differed about the same; and that Hannah Ruscombe should pay to Richard Hare, the balance (if any) of the rents and profits which should be found to be due to her, according to the accounts before directed to be taken; and the Defendants were to deliver up to the Plaintiff Richard Hare, or as he should direct, upon oath, all deeds, evidences, and writings in their, or any or either of their custody or power, relating to the mortgaged premises, so to be conveyed to them; and the decree contained such further directions as therein mentioned, in relation to the part of the said estates which was not sold to the said Richard Ruscombe.

By the evidence produced before the Master, to whom the reference mentioned in the decree was transferred, it appeared that Mary Bruford died on the 3d of September, 1791; and that, at the time of her death, the principal sum of £1250 remained due on the mortgage; and the sum of £286 9s. 2d. for interest thereon, was due and unpaid to the mortgagee; but that all interest thereon, except the sum of £286 9s. 2d., had been paid; and that Alexander Bruford the elder had paid interest to the amount of £1500; and thereupon it was claimed, on the part of Hannah Ruscombe, as representing Richard Ruscombe, the purchaser, that the mortgage money, or sum of £1250, together with the sum of £1500 interest thereon, paid by Alexander Bruford the elder, and the further sum of £286 9s. 2d. interest, due at the death of Mary Bruford, ought to form the aggregate sum, on the payment of which, with interest from the death of Mary Bruford, the plaintiff was declared to be entitled to redeem the premises. But the Master did not admit such claim; but, by his report, dated the 2d of March, 1825, found that, at [207] the death of Mary Bruford, there was due on the mortgage, for principal money, the sum of £1250, and for interest, the sum of £286 9s. 2d., making an aggregate sum of £1536 9s. 2d., on which he calculated interest as in his report mentioned; and upon such computation, and making such several allowances as in his report mentioned, he found that, on the 2d of September, 1825, the principal money and interest due on the mortgage would be reduced to the sum of £214 10s. 4d., which, being added to £175 6s. 5d. allowed for costs, made the sum of £389 16s. 9d., which he appointed to be paid by the plaintiff to Hannah Ruscombe.

The Defendant, Hannah Ruscombe, took six exceptions to the report; the first exception was to the following effect, viz.: For that the Master had, by his report, stated, that at the death of Mary Bruford, there was due, for principal money on the indentures of lease and release, and mortgage of the 3d of February, 1766, the sum of £1250, and for interest thereon to that time, the sum of £286 9s. 2d.; whereas it

was declared by the decree in the causes bearing date the 17th of December, 1813, as varied by an order of the court, bearing date the 27th of February, 1819, that Alexander Bruford the elder, and Mary his wife, were not bound to keep down the interest of the mortgage during her life for the benefit of her heir-at-law: And it was in evidence before the Master that Alexander Bruford, and Mary his wife, did, during her life, make divers payments to the mortgagee, on account of the interest of the said mortgage, to the amount in the whole of the sum of £1500; in respect whereof, and as against the heir of the mortgagor, Alexander Bruford the elder was entitled to stand in the place of the mortgagee: and the Master ought therefore to have found, and stated in his report, [208] that at the death of Mary Bruford there was due to Alexander Bruford, for interest on the mortgage, not only the sum of £286 9s. 2d., but also the further sum of £1500: and that the principal money and interest, due on the mortgage at the death of Mary Bruford, made an aggregate sum of £3036 9s. 2d.

By the second exception, objection was taken to the Master's report in respect of the computations he had made, upon the footing that no more than £286 9s. 2d. was due for interest on the mortgage at the death of Mary Bruford.

The fifth exception was as follows: For that the Master hath, by his report, stated that he hath proceeded to calculate interest on the aggregate sum of £1536 9s. 2d. accrued subsequent to the death of Alexander Bruford the elder, down to the date of his report: and that by making such application as therein mentioned of the rents and profits of the estate, and making such rests as therein mentioned, he found that the principal money due on the mortgage, after satisfaction of all interest accrued in respect thereof, would, on the 2d of September, 1825, six months from the date of his report, have been reduced to the sum of £214 10s. 4d.; whereas the Master ought to have calculated interest on the aggregate sum of £3036 9s. 2d., and to have found that after applying the rents and profits of the estate as directed by the decree, there would, on the 2d of September, 1825, be due for principal money and interest on the mortgage the sum of £5264 8s. 7d.

The exceptions were heard before the Lord Chief Baron of the Court of Exchequer on the 13th of July, 1825; and his Lordship was thereupon pleased to order that the first, second, and sixth of the exceptions should be, and the same were accordingly overruled: and that it should be referred back to the said [209] Master to review his report, so far as the third and fifth of the said exceptions had relation thereto; and that the fourth exception should be allowed.

The Master made his further report on the 24th of April, 1826; and therein again found, that on the death of Mary Bruford there was due on the mortgage, for principal money, the sum of £1250, and for interest the sum of £286 9s. 2d., making an aggregate sum of £1536 9s. 2d.: on which he proceeded to compute interest, without allowing any thing for the interest of the mortgage debt, which had been voluntarily paid by Alexander Bruford the elder, in the lifetime of his wife; and by making such allowance as in the report mentioned, he found, that on the 24th of October, 1826, the principal money due on the mortgage would be reduced to the sum of £602 10s. 2d., which being added to the sum of £175 6s. 5d. allowed for costs, amounted to the sum of £777 16s. 7d., which he appointed to be paid by the Plaintiff to Hannah Ruscombe on the 24th of October.

On the 1st of June, 1826, the cause came on to be further heard, on the coming in of the reports, before the Lord Chief Baron, who thereupon ordered that the report dated the 2d of March, 1825, except so far as the third, fourth, and fifth of the exceptions taken to the same had relation thereto, and that the report of the 24th of April should be confirmed: And it was further ordered and decreed by the court, that it should be, and it was thereby referred to the Master, to tax the Defendant Hannah Ruscombe her costs of the suit, incurred subsequent to the last taxation; and also to tax the Defendant William Long his costs of that day's appearance: And it was thereby also referred to the Master to appoint a time and place for the payment of such taxed costs as thereafter directed, and for the other purposes thereafter mentioned: And it [210] was thereby also referred to the Master, to carry on the account of interest on the indenture of release and mortgage of the 3d of February, 1766, in the pleadings mentioned: and of the rents and profits of the mortgaged premises in the pleadings mentioned, conveyed to the late Defendant Richard Ruscombe, up to the time to be appointed by him: And it was further

ordered by the court, that the Plaintiff Richard Hare should, at such time and place as the Master should appoint, pay to the Defendant Hannah Ruscombe, as the personal representative of the late Defendant Richard Ruscombe what the Master should find to be due in respect of principal and interest on the mortgage at the time so to be appointed by him, together with the sum of £175 6s. 5d. taxed and allowed by the Master, by his report of the 2d of March, 1825, for the costs of this suit, of the Defendant Hannah Ruscombe, together with the sum of £25 17s. 4d. taxed and allowed by the Master, by his report of the 24th of April, 1826, for the subsequent costs of Hannah Ruscombe, together also with the amount which the Master should allow to the last-named Defendant for her costs incurred subsequent to the last taxation, and directed to be taxed as aforesaid; and that the Plaintiff Richard Ruscombe, should pay the amount which the Master should allow for the taxed costs of the Defendant William Long of appearing upon the hearing, to the Defendant William Long, or to Mr. Bryan Holme, his solicitor: And it was further ordered and decreed by the court, that the Defendant Hannah Ruscombe and the several other parties to these suits, who appeared to have any interest in the mortgaged premises conveyed to the late Defendant Richard Ruscombe, as in the pleadings of these causes mentioned, at the time and place so to [211] be appointed by the Master, as thereinbefore directed, should convey the mortgaged premises to the Plaintiff Richard Hare, and his heirs, or as he should appoint, free and clear of and from any charges or incumbrances made, done, or suffered by Richard Ruscombe, or by any person or persons claiming by, from, or under him: And it was thereby referred to the Master to settle such conveyance, in case the parties differed in settling the same: And it was further ordered and decreed by the court, that the Defendants, at the time and place so to be appointed by the Master as aforesaid, should deliver up to Richard Hare, or as he should direct, upon oath, all deeds, evidences, and writings in their, or any or either of their custody or power, relating to the said mortgaged estate and premises, or any part thereof: And it was further ordered, to the effect in the decree mentioned, in relation to such part of the estate as was not sold to Richard Ruscombe.

The Master, in pursuance of the last mentioned decree, found and certified that on the 22d day of February, 1827, the sum of £806 2s. 6d. would be due to the Appellant from Richard Hare, and he appointed the same to be then paid.

The appeal was against so much of the order of the 13th of July, 1825, as overruled the first and second of the exceptions, and so much of the order of the 1st of June, 1826, as confirmed the report of the 2d of March, 1825, except so far as the third, fourth, and fifth of the exceptions had relation thereto, and as confirmed the report of the 24th of April, 1826, and as directed the Appellant to convey the mortgaged premises on payment of the money therein mentioned, without making any allowance for the interest which was paid on the mortgage by [212] Alexander Bruford the elder, in the lifetime of his wife.

For the Appellant: Mr. Bickersteth and Mr. Jacob.

For the Respondents: Mr. Agar and Mr. Pepys.

For the Appellant it was argued, that the order of the House of Lords did not conclude the question as to the claim for interest; that Alexander Bruford the elder, and Mary his wife, being under no obligation to pay the interest of the mortgage for the benefit of her heir, ought to be considered to have advanced the money which they paid to the mortgagee on security of the estate: that Alexander Bruford was therefore entitled to add the same to the money which was due to the mortgagee on the death of his wife, so as to form the aggregate sum then chargeable on the estate: and that Richard Ruscombe, as purchaser from Alexander Bruford and the mortgagee, was entitled to the full benefit of such charge.

It was further argued, that where parties had a qualified interest in an estate tail, or paid off an incumbrance under a misapprehension as to their interest, the charge is held, in a Court of Equity, to be still subsisting, although no assignment of the security and debt has been taken to keep it alive. *The Countess of Shrewsbury v. The Earl of Shrewsbury*, 3 B. C. C. 120, 1 Ves. J. 227. *Kirkham v. Smith*, 1 Ves. 258. *The Earl of Bucks v. Hobart*, 3 Swa. 186 (see also *Ware v. Polhill*, 11 Ves. 257, 271; *Redington v. Redington*, 1 Ba. and B. 131).

For the Respondents it was contended, that the decision of the court below was according to the true [213] construction of the order of the House of Lords on the former appeal.

As to the principal question, if not concluded, they contended that the case of *Amesbury v. Brown* (1 Ves. 477) was conclusive.

At the conclusion of the argument the Lord Chancellor said he entertained no doubt whatever on the subject that the word "due" must mean the interest actually due; but as Lord Eldon had expressed a desire to be present on the question for judgment he should defer proposing it.*

The Lord Chancellor (18 July, 1828): There is a case of *Ruscombe v. Hare*, which was heard at the bar of this House on Wednesday last. At the close of the hearing of the cause I expressed to you what my opinion was upon the general law as applicable to the subject, and with reference to the construction of a particular order which was the subject of discussion. I declined recommending to you to pronounce a final judgment upon the question, until I had had an opportunity of having some communication with the noble and learned Lord, by whom it was supposed that order was framed. I have since had an opportunity of conversing with that noble and learned Lord, and he has informed me that the order was not framed by him, but was framed by another noble and learned Lord, a member of this House. Both those noble Lords are of opinion, with respect to the general law, that what I took the liberty of stating to you was [214] correct; and they are also of opinion that I put the proper interpretation upon the order which was so framed. I should, therefore, recommend to you that the judgment of the Court of Exchequer be affirmed.

Judgment affirmed.

[215]

ENGLAND.

(COURT OF CHANCERY.)

GEORGE BURNAND and MARY, his Wife, and WILLIAM BROUGHTON FLEXNEY,—*Appellants*; JAMES NEROT,—*Respondent*.

Mews' Dig. x. 396, S.C., in Court of Chancery, 6 L.J. (O.S.) Ch. 81: 4 Russ. 247. See *Payne v. Hornby*, 1858, 25 Beav. 280; *ex parte Morley*, 1873, L.R. 8, Ch. 1026; also Partnership Act, 1890 (53 and 54 Vict. c. 39) s. 2 (3) (c).]

A., by his will declaring a purpose to assign the lease of the Hotel, in which he carried on business, with the effects in the Hotel, and the business of it, to a trustee in trust for the benefit of his son and daughter, in consideration of an annuity to be paid to him for his life, bequeathed the residue of his personal estate and effects to his son and daughter in equal shares. The testator died without having carried into effect the purpose declared in his will. His daughter being executrix carried on the business from the death of the testator to the year 1819 in the house where the testator had carried it on. In that year she purchased, chiefly by means of the assets, the freehold of another house to which she removed the business, and carried it on there alone until 1819, when she married. Upon the marriage, the freehold house and effects were conveyed and assigned to a trustee for the daughter and her husband, and the children of the marriage in the ordinary course of settlement. In 1820 the son filed a bill against the daughter and her husband, praying that the deed of settlement might be set aside; that the freehold house might be declared to be part of the assets, and sold with the effects, etc.; that an account might be taken of the profits of the business, from the death of the testator to 1819, the date of the marriage; and that half the assets and half the profits of the business might be paid to him as residuary legatee and partner.

The case of the Plaintiff as to the partnership was supported by the evidence of the will, and of acts and admissions on the part of his sister at various times before the marriage, of her liability to account as partner. The Defendants insisted upon an agreement between the Plaintiff and his sister, shortly after

* This was in substance and form the whole matter of the observations made by the Lord Chancellor at the close of the argument.

the [216] death of the father, that the lease of the Hotel and the effects should be valued, and the produce divided between them; that they were accordingly valued, and that the half of the amount of the valuation had been paid to the Plaintiff by his sister; but this alleged agreement did not include any consideration for the good will of the business. The Defendants also produced in evidence a letter written from Paris by the Plaintiff, in which he spoke of the business as not belonging to him; but this letter he sought to explain, by stating that he could not with safety, being in France, acknowledge that he had any property or concerns in England. Upon these pleadings and evidence at the hearing, issues were directed to try: 1, whether there was any agreement for the sale of the lease, effects, and goodwill of the business; and if so, 2, whether such agreement had been abandoned. Upon the trial of these issues verdicts were given for the Respondent on both issues. Upon further directions the court (Vice Chancellor) declared that a partnership in moieties subsisted between the son and daughter, from the death of the father to the marriage of the daughter, when the partnership was dissolved, and that the freehold house was part of the assets, and an account was directed accordingly.

Against this decree the Defendants appealed to the Chancellor, and the decree being affirmed with a slight variation, the Defendants further appealed to Parliament, and insisted that an issue should be directed to try the question of fact whether a partnership subsisted; but the decree was affirmed, the House being of opinion that it was too late in that stage of the cause to ask for such issue.

John Nerot for many years preceding, and at the time of his death, carried on business as an Hotel-keeper, in a house known by the name of Nerot's Hotel. On the 30th of January, 1798, he made his will, whereby, after directing that all his debts, funeral and testamentary charges and expenses, should be paid by his executors; and after declaring it to be his intention to assign to John Dax the Hotel wherein he, the testator, then resided in King-street, for the [217] remainder of the term therein, under the lease, whereby he held the same, and also all his effects whatsoever which then were in the said Hotel, and the business thereof, in trust for the benefit of his son and daughter, the Appellant, Mary Burnand, then Mary Nerot, and the Respondent, as had been proposed and agreed to by him, subject to their paying to him an annuity to be agreed upon between them for his life, he thereby disposed of the residue of his personal estate and effects in manner following: that is to say, he thereby directed that all such sums of money as had been, or should be, advanced or paid by him to his son and daughter, or for their use or benefit, should be retained and kept by each of them respectively, and should not be accounted for or paid by either of them as a debt due to him or his estate at the time of his decease, or for making an equality between them, or otherwise; but in order to put his daughter upon an equal footing with his son, as near as might be in regard to such advancements, he thereby bequeathed to his daughter the sum of £260 to be paid to, or received and taken by her, out of the monies arising from his personal estate and effects, as and when she should think fit after his decease; and he thereby also bequeathed to his son and daughter, £10, and the like sum of £10 to John Dax, for mourning and a ring; as to all the residue and remainder of his personal estate and effects, of what nature or kind soever, which he should be possessed of, interested in, or entitled to, at the time of his death, except the Hotel, and the plate, furniture, and effects in the same, and which he intended to assign and make over in trust for the benefit of his daughter and son, upon the terms therein mentioned, he thereby bequeathed the same, and every part thereof, unto his daughter and [218] son, the Appellant, Mary Burnand, (then Mary Nerot) and the Respondent, in equal parts or shares for their respective use and benefit; and he directed that the annual income and produce of such part of his estate, as his son would be entitled to, should, during his minority, be applied for his maintenance and support; and he thereby appointed his daughter, the Appellant, Mary Burnand, and John Dax, executrix and executor of his will.

The testator died in 1801, without having revoked or altered his will, leaving the Respondent, his only son, and the Appellant, Mary Burnand, his only daughter, and they were the only next of kin of the testator at his death.

The Appellant, Mary Burnand, alone proved the will, the other executor, John Dax, having declined to act in the executorship.

The testator at the time of his death was possessed of a very considerable personal estate, consisting among other things, of the lease of his Hotel, and the household goods and furniture, plate, linen, wine, liquors, and effects, in the same.

He did not before his death make any such trust assignment as in his will was mentioned, and upon his death, the Respondent and the Appellant, Mary Burnand, became entitled in equal shares by virtue of the will, to the clear residue of the testator's personal estate, after payment of his funeral and testamentary expenses, and his debts and the legacies.

At the date of the will the Respondent was a minor. His sister, the Appellant, Mary Burnand, who was several years older, upon the testator's death, as his executrix, possessed herself of the Hotel and all the property and effects in the same belonging to him at the time of his decease, and also possessed [219] herself of all other the personal estate and effects of the testator at the time of his death, and thereout paid all the debts owing from him at the time of his death, and his funeral and testamentary expenses and legacies.

The Appellant, Mary Burnand, for several years after the testator's death, with the acquiescence of the Respondent, continued to reside in the Hotel, and to carry on the business therein with the property and effects of the testator; but no settlement of accounts ever took place between the Appellant, Mary Burnand, and the Respondent, touching the business of such Hotel, and the gains and profits derived therefrom, or touching the personal estate and effects of the testator.

The Appellant, Mary Burnand, continued to carry on the business of the Hotel in King-street until the latter end of the year 1809, or the beginning of the year 1810, when the lease of the Hotel expired, and a renewal could not be obtained upon advantageous terms. She therefore, while the Respondent was in France, entered into a contract without his participation or concurrence, with Lady Downe and her son Mr. Dawney, for the purchase of the freehold and inheritance of a house in Clifford-street, for the purpose of carrying on the business of the Hotel. The Appellant, Mary Burnand, accordingly completed the purchase of the house in Clifford-street, and caused the same to be conveyed to herself in fee simple, and the purchase money was paid by her chiefly out of money arising from the gains and profits of the business of the Hotel in King-street, or out of money arising from the personal estate of the testator, or out of money which had been produced from the [220] business of the Hotel carried on upon the premises in Clifford-street.

The Appellant, Mary Burnand, caused certain rooms to be built and added to the house in Clifford-street, and to be converted into and fitted up for baths, and also caused all the goods, furniture, property, wines, liquors, and effects, in the Hotel in King-street, to be removed into the Hotel in Clifford-street; and caused it to be completely furnished and fitted up in all respects for business as an Hotel, with accommodation for bathing. The purchase of the house in Clifford-street, and fitting up the same for business as an Hotel and for baths, amounted in the whole to several thousand pounds.

The Appellant, Mary Burnand, continued to carry on the business of the Hotel and baths, from 1809 until September 1819, at the house in Clifford-street, and during that time occasionally advised with the Respondent as to such business, and he occasionally interfered therein, and conferred with her respecting the same, and she during that time received from the Respondent or his agents, considerable sums of money to be employed by her in the business, and the Respondent occasionally supplied wine for the business of the Hotel.

The business of the Hotel and baths in Clifford-street, during all the time before mentioned, was very profitable. But no account was at any time, prior to September, 1819, settled between the Respondent and the Appellant, Mary Nerot, relating to the business of the Hotels and baths, carried on in Clifford-street and King-street, or either of them, or relating to the personal estate of the testator; but the Respondent, at different times, received from the [221] Appellant, Mary Nerot, various sums of money on account of the business, and the profits arising from it.

In 1819 the Appellant, Mary Nerot, intermarried with the Appellant, George Burnand, and he, as her husband, took possession of the Hotel and all the goods,

furniture, wines, liquors, property, and effects in the Hotel, and the business was afterwards conducted by him and his wife.

In 1820 the Respondent filed his Bill in Chancery against the Appellants, which Bill was afterwards twice amended, and the Appellant, William Broughton Flexney, made a party defendant, the Appellant, Mary Burnand, having, antecedently to her marriage with George Burnand, conveyed the Hotel and premises to the Appellant, William Broughton Flexney, upon the trusts therein stated. The Bill, when amended, after stating the facts above mentioned, prayed that the deeds or instruments in writing, executed by George Burnand, and Mary his wife, as therein mentioned, so far as regarded one moiety of the freehold house and premises in Clifford-street, and half the property in the same, might be declared void as against the Respondent, and might be set aside; and that the co-partnership between the Appellant, Mary Burnand, and the Respondent, might be declared to have ceased on the marriage; that the same might be decreed to be dissolved; and that the dwelling-house and Hotel in Clifford-street, and the goodwill of the same, and all the goods, furniture, wines, liquors, property, and effects, in such house and Hotel, might be decreed to be sold and disposed of in such manner as the Court should direct; and that one moiety of the money arising therefrom might be declared to belong to the Respondent, and might be decreed to be paid [222] to him accordingly; and that the Appellants, George Burnand, and Mary his wife, might be decreed to come to a settlement of accounts with the Respondent, touching the several matters therein mentioned; and that the necessary accounts might be decreed to be taken accordingly; and that all accounts between the Respondent and the Appellants, George Burnand, and Mary his wife, touching the matters therein mentioned, might be settled in or under the direction of the Court; and that what should appear on such settlement to be due or coming to the Respondent, might be decreed to be paid to him by the Appellants, George Burnand, and Mary his wife, or might be decreed to be paid out of their moiety of the money to arise from the said sale; and that the Appellants, George Burnand, and Mary his wife, might be restrained by the order and injunction of the Court, from letting, or selling, or disposing of the said house and Hotel in Clifford-street, and from letting or disposing of the goodwill thereof, or any of the goods, furniture, wines, liquors, property, or effects in and about the same, or from removing or taking away any of such effects, and from receiving any monies on account of such Hotel or the business thereof; and that some proper person might be appointed by the Court to manage and carry on the business of such Hotel, and to keep possession of such Hotel and all the effects therein, until the said sale; and to receive all debts or sums of money due to the Appellant, Mary Burnand, and the Respondent, or either of them, or to the Appellant, George Burnand, in respect of such Hotel and the business. But if the Court should be of opinion that a partnership did not take place between the Appellant, Mary Burnand, and the Respondent in the Hotel business, then that [223] an account might be decreed to be taken of all the personal estate and effects of the Testator, and of his debts, funeral and testamentary expenses, and legacies; and also an account of the sums of money which the Respondent, James Nerot, since the death of the testator advanced to the Appellant, Mary Burnand, for the purposes of the trade or business, or otherwise, together with interest, and of the value of the wine supplied by the Respondent, as therein mentioned, to and for the purposes of the trade or business; and that under the circumstances therein mentioned, it might be declared that the Respondent was entitled to a moiety of the freehold house and premises in Clifford-street, and to half the property, effects, and things then in the same, and to half the gains and profits which had been derived and made by the Appellant, Mary Burnand, from carrying on the said trade or business in King-street and Clifford-street, since the death of the testator; and that it might be declared that the Respondent had a lien upon the freehold house and premises, and the property, effects, and things in the same, for what should be found due to him in respect of the moiety or share of the clear residue of the testator's personal estate and effects, after payment of his funeral and testamentary expenses and debts; and that the Appellants might be decreed to pay to the Respondent what, upon taking the said accounts, should be found due to him.

The Appellants, George Burnand, and Mary his wife, by their answer, admitted the will of the Testator, as stated in the Bill; that she and Respondent were his

only next of kin; that she proved the will, and possessed the effects, including the Hotel, in which she continued to live and carry on the business until [224] the expiration of the lease in 1809, and one year longer; that the business was carried on with the property of the testator left therein, and the monies of the Appellant, Mary Burnand; but she denied that it was so carried on for the joint benefit of her and the Respondent as co-partners, and contended that it was carried on for her sole, separate, and exclusive benefit.

The Appellants, George Burnand, and Mary his wife, by their answer further stated that the Appellant, Mary Burnand, and the Respondent, soon after the death of the testator, caused an inventory of the testator's property and effects to be made, and that they had several meetings together to consider and determine upon the mode of disposing of the same; and that it was agreed that the household furniture, plate, linen, and china, in or about the dwelling-house in King-street, and the lease for the unexpired term thereof, and the good-will of the trade, should be valued, and that the Appellant, Mary Burnand, should become the purchaser of the Respondent's moiety therein at such valuation; and that such valuation was accordingly made, and amounted to the sum of £2366; that the Respondent appointed Mr. Harry Phillips, of Bond-street, to value, on his part; and that the Appellant, Mary Burnand, appointed Mr. Winstanley, of Paternoster-row, to value the same, on her part; and that in the month of June, 1801, the valuers proceeded to make, and did make, their valuation; and that she, the Appellant, in pursuance and execution of the agreement, paid or caused to be paid to the Respondent, or for his use, at various times, monies to the amount of £1193, being the Respondent's full moiety of such valuation; and that she had at different times paid to the Respondent other sums of money, [225] and to an amount exceeding his proportion of the testator's residuary estate; that in the month of April, 1809, the freehold and inheritance of the hereditaments and premises in Clifford-street, where the business of the Hotel was then carried on, was conveyed to the Appellant, Mary Burnand; and that the money to pay for the same was raised by mortgage, which has since been paid off, and with the gains and profits of the business, which she had carried on for many years before in King-street, and afterwards in Clifford-street; and that the goods, furniture, property, and effects, which were in the hotel in King-street were removed to the hotel in Clifford-street. In a Schedule to their answer to the amended Bill the Appellants set forth an account of the sums of money alleged by the Appellant, Mary Burnand, to have been paid by her to the Respondent.

The Appellant, William Broughton Flexney, by his answer, stated that by an indenture of settlement, dated the 21st of August, 1809, and made antecedently to the marriage of the Appellants, George Burnand and Mary his wife, the Appellant, Mary Burnand, conveyed and assigned the freehold Hotel and premises in Clifford-street, and the furniture, goods, and effects in or about the same, to him, the Appellant, William Broughton Flexney, upon trust, with the consent of the Appellants, George Burnand and Mary his wife, to sell such premises, furniture, and effects, and to invest the money to arise from such sale in the public funds, or upon real securities, and to pay the annual produce thereof to the Appellant, Mary Burnand, for her separate use, for her life; and after her death to the Appellant, George Burnand, for his life; and after the death of the survivor of the Appellants, George Burnand, and Mary his wife, to [226] pay the principal of such money to the child or children of the marriage of the Appellants, George Burnand, and Mary his wife, or their issue in manner therein mentioned, with a power to raise the sum of £1200 for the separate use of the Appellant, Mary Burnand.

There was no issue of the marriage of the Appellants, George Burnand, and Mary his wife.

Witnesses were examined on the part of the Respondent, and documentary or written evidence produced to shew that the Respondent and the Appellant, Mary Burnand, were, from the testator's death down to the marriage of the Appellants, George Burnand, and Mary his wife, jointly interested and partners in the business of the Hotel carried on in King-street and Clifford-street; and that the purchase of the house in Clifford-street was effected partly out of the partnership funds.

On the part of the Appellants, George Burnand, and Mary his wife, evidence was produced to shew an agreement on the part of the Respondent to sell his interest in the Hotel, furniture, and effects, to the Appellant, Mary Burnand, or to prove cir-

cumstances from which such agreement was to be inferred; and they gave in evidence a letter from the Respondent to the Appellant, Mary Burnand, dated at Paris, the 16th of August, 1810, wherein the Respondent appeared to treat the Hotel and the business as if he had no interest therein.

It was in evidence on the part of the Respondents, that at the time of writing such letter, the Respondent was in France, under his Majesty's license, for the purpose of recovering and shipping British property for England; and it was suggested that any declaration or intimation on the part of the Respondent, that [227] he was in any manner connected with England, or had any property there, would have been attended with personal danger to the Respondent; and that all the Respondent's property in England was conveyed to other persons, and appeared to belong to such persons; and that all letters written by the Respondent while he was abroad were worded in a manner to prevent the French Government from knowing that the Respondent had any concerns, or interest, or property in England, which was then at war with France.

On the 5th of March, 1824, the cause came on to be heard before the Vice-Chancellor, and by the decree then made it was ordered that the parties should proceed to a trial at law in the Court of Common Pleas, on the issue, whether there was in the year 1804 an agreement for sale by the Respondent to the Appellant, Mary Burnand, of his share and interest in the goodwill, lease, stock in trade, and other property and effects, in the pleadings mentioned; and in case the jury should find that there was an agreement for such sale, then it was ordered that the parties should proceed to trial on the issue, whether the agreement was abandoned; and in the first of the issues the Appellants, George Burnand, and Mary his wife, were to be plaintiffs at law, and the Respondent to be defendant at law; and it was ordered that the Respondent and the Appellant, Mary Burnand, should be examined as witnesses upon the trial of the issues respectively; and the court reserved the consideration of all further directions, and of the costs until after the trial of the issues or issue.

The first issue was tried in the Court of Common Pleas by a special jury on the 6th of December, 1824, when a verdict was given for the Respondent.

[228] On the 23d of April, 1825, the cause came on to be heard before the then Vice-Chancellor of England, upon further directions, when it was ordered "that the Appellant, George Burnand, should pay unto the Respondent all costs attendant upon the said issue and the trial thereof; and the Court declared, that the Hotel business carried on in King-street, Saint James's, and Clifford-street, Bond-street, under the name or designation of Nerot's Hotel, from the death of John Nerot, the Testator in the pleadings mentioned, until the 16th day of September, 1819, on which day the Appellants, George Burnand and Mary his wife intermarried together, was carried on by the Appellant, Mary Burnand, formerly Mary Nerot, spinster, in co-partnership with the Respondent, James Nerot, in equal shares and proportions, and that such partnership, on the 16th day of September, 1819, was dissolved; and that the freehold messuages and hereditaments in Clifford-street, and all and singular the household goods and furniture, plate, linen, china, and wine, stock-in-trade, implements, and all other property, effects, and things, being in or about the said messuage or premises, formed a part of the co-partnership property." The decree then proceeded to give the usual directions for sale and accounts.

The Appellants appealed to the Lord Chancellor of Great Britain, from this decree or decretal order of the Vice-Chancellor, pronounced on the hearing of the cause, for further directions.

The Appeal came on to be heard before the Lord Chancellor on the 22d of December, 1827, when his Lordship ordered, that the decretal order bearing date the 23d day of April, 1825, should be varied, by omitting the words following, viz.:

"And doth declare, that the freehold messuage and hereditaments [229] in Clifford-street aforesaid, and all and singular the household goods and furniture, plate, linen, china, and wine, stock in trade, implements, and all other property, effects, and things, being in or about the said messuages or premises, form a part of the co-partnership property;" and inserting instead thereof, the words following, viz.

"And doth declare, that the freehold messuage and hereditaments in Clifford-street aforesaid, and all and singular the household goods and furniture, plate, linen, china, and wine, stock in trade, implements, and all other property and effects, which were in,

upon, about, or belonging to the said messuages and premises, and used or employed in the trade or business of the Hotel and baths there carried on, upon the 16th day of September, 1819, the time of the dissolution of the said partnership, formed part of the co-partnership property;" and also by omitting the following words, viz.:—" And it is ordered, that the household goods, furniture, plate, linen, china, stock in trade, wines, and other effects, in and about the said premises, be also sold in such manner as the Master shall direct, by a proper person to be appointed by him;" and by inserting instead thereof, the words following, viz.:—" Let the Master take an account of the household goods, furniture, plate, linen, china, stock in trade, wines, and other effects, remaining in and about and belonging to the said house and premises in Clifford-street, and used or employed in the trade or business of the Hotel and baths there carried on upon the 16th day of September, 1819, the time of the dissolution of the partnership, and let him state the particulars of what the same consisted, and the value thereof, at that time, and what part [230] thereof now remains in specie;" and the Master was to be at liberty to make a separate report thereof. And with such variations the said Order was affirmed.

From the Decree or Decretal Order of the 23d of April, 1825, pronounced by the then Vice-Chancellor; and from the Decree or Decretal Order of the 22d of December, 1827, pronounced by the then Lord Chancellor, the Appeal was presented.

For the Appellants: Mr. Sugden and Mr. Barber.

For the Respondents: Mr. Horne and Mr. Roupell.

The Lord Chancellor (18th July): I have heard this case to the end because I thought it my duty to do so, in consequence of its being an appeal from my own judgment. The question came first before the Vice-Chancellor: it was a question as to whether or not Mr. Nerot was a partner in the concern known by the name of Nerot's Hotel; the circumstances are of this description. It appears that this business was carried on by Mr. Nerot's father for a considerable number of years, and during the latter period of his life, it was conducted principally for Mr. Nerot by his daughter; it appears that about five or six years before the death of Mr. Nerot, he being desirous, I suppose, of retiring entirely from the business, made his will, and excepted this property from the dispositions contained in that will. The reasons why he excepted this property from the dispositions contained in the will, were these:—upon the face of the will he stated that it was his intention to assign the property for the joint benefit of his son and daughter, to a gentleman of the name of Dax, in consequence of an arrangement he had made with them, that during the remainder of his life [231] they should pay him a certain annuity. It appears, however, that he did not act immediately upon this agreement—he did not act upon it during his lifetime, and the result was that he made no alteration whatever in the dispositions contained in his will, and we are to infer therefore, I think, from the will itself, that it was his intention that his son and daughter should take a joint interest in this property. Now what took place immediately upon the death of Mr. Nerot? the daughter had conducted the business for her father in the name of Nerot's Hotel—she was several years older than her brother, and he appears to have had no disposition to implicate himself personally in the concern: the business therefore was carried on after the father's death, precisely as it was carried on during his lifetime by Miss Nerot, ostensibly in her name as Nerot's Hotel. It was a valuable property, and if, as it is contended, at the death of Mr. Nerot it became her property in consequence of her character as co-executrix, Mr. Nerot would of course be entitled to call for an account of it: and it is a most singular circumstance that it does not appear that during the long period of years which elapsed, any such account ever was taken; nor does it appear that she accounted for the profits of this concern to him at any period.

It appears that the defendant in this suit was very much pressed by the consideration of the circumstance of her never having settled her father's affairs, as far as relates to this concern, with Mr. Nerot, her brother; and upon the face of her answer, being called upon to account in consequence of the bill that was filed on her marriage with Mr. Burnand, she says, that shortly after her father's death, (and she states this upon her oath) an agreement was entered into, and that the agreement was of this description:—that the property was to be [232] valued and appraised; she was to pay one half, she being jointly interested in it with her brother, and take the other half to herself. This is the defence she sets up upon the Record. Then in her

answer she says, this business was not carried on between us as partners—it was carried on for my sole exclusive benefit. An arrangement was made between us soon after my father's death, by which it was stipulated that I should purchase this property. A valuation was made in pursuance of that agreement—I did purchase the property and paid you the valuation for your share. This is the answer she gave to this suit.

The case coming before the Vice-Chancellor in this shape, he directed issues on the application of the parties, and he allowed Mrs. Burnand in those issues every possible advantage, for he allowed her to be examined. She was on one side examined, and Mr. Nerot on the other: this being a family transaction, and many circumstances probably having occurred to which they alone were parties, it was of importance for the purpose of investigating the truth, that both of them should be examined before the jury. The issues were tried by a Special Jury in the Court of Common Pleas, before the Lord Chief Justice. The investigation was carried on with the utmost minuteness for a long period of time, and the result was, after hearing and judging of the examination of Mrs. Burnand on the one side, and Mr. Nerot on the other, that the Jury decided that no such agreement as that on which she insisted had been ever entered into between these parties. That was the main ground of defence which she set up to the suit of Mr. Nerot.

Now then, look at the probabilities of the case, for we are to look at the case on the footing of probability. They were jointly interested in this valuable [233] concern—no agreement was made by Mr. Nerot to part with that interest. The business was carried on in the same form and manner in which it had been carried on during the father's lifetime; and no settlement of accounts having been, as it is said, ever called for by Mr. Nerot, it is supposed that Mr. Nerot had abandoned all interest in this concern, except, as it stood on the footing in which it was placed at the period of the father's death, namely, according to the valuation then taken. The story is in itself most improbable; it is not likely that Mr. Nerot should have abandoned his interest in this concern, without some valuable consideration; and there is no evidence whatever for the purpose of shewing that he did do it. An attempt was made to prove an agreement of that description, and that attempt entirely failed. But the question does not rest upon presumption; a witness has been examined in the cause, to whose deposition I will refer, and that witness was examined at the trial, which is a most material circumstance, because it obviates all objection to his credit. He was examined and cross-examined upon the trial, and the verdict must have proceeded principally on the reliance the jury placed on his testimony. Indeed, I may say, that if it is impossible they could have found the verdict they ultimately pronounced unless they believed the testimony of Mr. Cary, and if the testimony of Mr. Cary is to be believed, there is absolutely an end to the case. In the first place I say, it is highly improbable, that Mr. Nerot should have abandoned his interest in this concern unless some arrangement of that kind had been entered into between the parties, and he had received an equivalent for it; and not only is there no evidence of such an agreement being entered [234] into, but being insisted on, it is negatived by the Jury.

The probabilities are, therefore, all against the presumption of Mr. Nerot's having entered into such an agreement. But what is the result of the positive evidence? Mr. Cary says, "I was employed by Mr. Nerot as his agent, from time to time, to inspect the accounts. I was well acquainted with both parties. I had interviews with Mrs. Burnand from time to time, and she over and over again declared that the business was carried on for the joint benefit of herself and her brother." If Mr. Cary is to be believed in the statement he thus makes, (and the jury believed his statement upon the occasion to which I am referring), is it not obvious that there is at once an end to this cause? If the business was carried on for the joint benefit of these parties, it is perfectly clear they were partners in the business so carried on. The business, under these circumstances, could not have been carried on for their joint benefit unless they were partners in the concern. He does not state that on one occasion alone, but he repeats this over and over again at different periods of his evidence, and his evidence is irreconcilable with any other supposition. He says, "I was directed to investigate the accounts from time to time;" and as he acted upon these directions he waited on Mrs. Burnand. The accounts were produced to him, he was dissatisfied with the manner in which they were kept—he remonstrated

with her. In the first instance she stated that she could not make that particular account more perfect, but she said, "my brother has nothing to complain of, for I have made no purse for myself." If that account be true, it is quite obvious that at that particular time she consi-[235]-dered that he had an equal interest in the concern with herself. At subsequent times, he says, she repeatedly declared to him when he was examining and investigating the accounts, that the business was carried on for their joint interest and joint benefit. This goes down to a late period. It is supposed some settlement of account had taken place between these parties; that money had been paid, and that Mr. Nerot had no claim whatever on Mrs. Burnand. It appears that the last time these accounts were investigated, was in the year 1816, six years after the period when the business was transferred to the house in Clifford Street. I do really think, therefore, it is impossible, if you are disposed to place reliance on the testimony of Mr. Cary—if you believe him to be a witness of truth, that you can come to any other conclusion than that they were partners in the transaction.

I again advert to a circumstance which I think most material: that Mr. Cary is not here merely giving evidence in the shape of depositions, but with respect to the substance of the evidence he has given in the shape of depositions, he has been examined *vide voce* in the presence of a Jury, and the Jury have pronounced on the degree of credit to which he is entitled. Now how is this evidence met? I admit that it is met in the first instance by the evidence of Mr. Tetsall. Mr. Tetsall says, "I conducted this business, or managed this business on the part of Mrs. Burnand." He was the head waiter, I believe, in the concern; he kept the accounts and superintended the business, but there is nothing in the evidence of Tetsall inconsistent with the evidence of Mr. Cary. It does not appear that Mr. Nerot ever intended publicly to declare himself a partner in this [236] business. The business was always carried on under the name of Nerot's Hotel. Mr. Nerot's particular pursuits were of a different description; he never interfered in the management of the Hotel, and there was, therefore, no reason why Tetsall, who was a waiter, should know that Mr. Nerot was a partner. The evidence of Mr. Cary, therefore, is perfectly reconcileable with that of Mr. Tetsall.

But I do admit that the case is considerably, in point of evidence and effect, assailed by the letter to which so much reference has been made in the progress of this cause. In the early stages of it I read and considered that letter over and over again, and considered the explanations which were given to it, and I confess it was a long time before I could satisfy my mind, taking the whole case together, that this evidence was such as to outweigh the inferences to be drawn from that letter. But I considered this circumstance which I think material, and which has been hinted at at the bar—the letter was most material evidence in the case before the Jury. The question before the Jury was this: was there an agreement entered into and executed, by which Mr. Nerot parted with his interest in the concern? That was the question at issue before the Jury:—to impeach that it was most material to produce this letter, in which he called this property her's. And those arguments which have been raised in this instance, were raised before the Jury, and were considered by the Jury. They were investigated, sifted, and examined by the Judge, and the result of the whole was, that notwithstanding that letter, the Jury found a verdict negating the fact of such an agreement. I conceive, that under the circumstances the letter has with reference to the substantial question which you are now considering [237] been weighed, sifted, and examined by the Jury; and I think, taking the case altogether, whatever suspicions that letter may raise in my mind, and whether or not I am perfectly satisfied with the explanation given in respect to it,—taking the whole case together, I think the balance of evidence is so strong in favour of the Respondent, that I am bound to consider that a partnership has existed between the parties.

I admit there is evidence on both sides, and in the earlier stage of this inquiry, perhaps before the Vice-Chancellor, if I had been sitting in that court, and I had been asked to direct an issue, for the purpose of trying the question concerning partnership, I should, without hesitation, have acceded to that proposition, and directed it; but the parties never requested an issue to try the question of partnership, which it was competent for them to ask for. When the case afterwards came before Lord Eldon, and was there examined, sifted, and discussed, they never requested an issue for the purpose of trying that question. The question afterwards

came before me, and was again examined and discussed at a considerable length, but the parties never, during any of those discussions, requested such issue.* Thinking, and indeed being satisfied, as I am, that the balance of evidence is strong in favour of a partnership, I cannot recommend to you in this last stage of the cause, to direct an issue for the purpose of commencing again, as it were, the investigation and trial of a case which has already lasted so many years.

Having paid great attention to the evidence, (and it is a question of fact), I recommend to you, under these [238] circumstances, to find that a partnership has been sufficiently established. If a partnership has been sufficiently established, the next question is as to the house in Clifford Street. It appears to me that it must follow the fate of the other question; because, looking to the evidence of Mr. Cary as to sums of money advanced, looking to the answer and the manner in which that answer is sworn as to the fund out of which the purchase money was paid, it is quite impossible not to come to the conclusion that it was out of the proceeds of that concern this house was purchased;—it was purchased out of the proceeds of the concern for the purpose of the concern, in order to carry on the business of the partnership; and if this lady has herself paid more than her share of the purchase money, she will have the benefit of that in taking the account; but being purchased for the purpose of carrying on the concern, in consequence of the expiration of the former lease, the establishment having been removed into that house, the furniture and stock having been all taken there, that house having been employed for the purpose of the trade, Mr. Nerot, having, during the progress of the negotiation advanced money for the purpose of completing the purchase; and the purchase having been paid for principally out of the proceeds of the concern; if the concern is to be treated as a partnership concern, this house also must be considered partnership property. Under these circumstances, I should humbly recommend to you that the Decree in the Court below be affirmed; and I think it ought to be affirmed with £100 costs.

Judgment Affirmed, with £100 costs.

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IRELAND.

(COURT OF CHANCERY.)

The Right Honourable HENRY AUGUSTUS, LORD VISCOUNT DILLOX, and CHARLES BUTLER, Esq.,—*Appellants*; WILLIAM PLASKETT and JAMES BRETT,—*Respondents*.

[Mews' Dig. vi. 1163, 1161. S.C. 1 Dow and Cl. 320. Commented on in *Anglo-Italian Bank v. Davies*, 1878, 9 Ch. D. 284; and see *In re Potts, ex parte Taylor* (1893), 1 Q.B. 651.]

D. having an estate for life in lands, situate in England and Ireland, assigned them, together with his furniture, etc., by several indentures, to Trustees for a term of 99 years, if he should so long live, in trust, out of the rents and profits, after satisfaction of a jointure, prior to the life estate and the interest of a mortgage, and certain annuities created by the Appellant, to pay to the Appellant an annuity of £5000, and to his creditors by bond, judgment, and simple contract, (parties to the deed of assignment), interest at the rate of £5 per cent. upon their respective debts; and to apply the surplus from time to time in the gradual extinction of the capital of the debts.

The creditors generally executed the deed of trust and assignment, by which they covenanted not to sue the Appellant. But P. and B., creditors of D., by simple contract, having obtained judgment for their debts, first in England and afterwards in Ireland, sued out a writ of *fieri facias*, directed to the Sheriff of the county of R. in Ireland, who seized the goods of D., but refused to sell them, in consequence of a claim made by the Trustees to whom they had been assigned by D. Whereupon P. and B., in 1820, filed a Bill in Chancery in Ireland, on behalf of themselves and other creditors of D., which stated

* See the *dictum* of Lord Redesdale in *McNeill v. Cahill*, 2 Bl. (1st Ser.) p. 261.

these facts; and, setting forth, in part, the deed of trust and assignment as it appeared in the registry; but, alleging that they were ignorant of the trusts, prayed that the Defendants might set forth the deed, and that the creditors might have power to elect to take the benefit of the deed; or otherwise, that it might be declared fraudulent and void as to them, and that in the meantime a receiver of the rents might be appointed, and that they might be applied in [240] payment of the debts. After the bill was filed two of the trustees died, and two new trustees were appointed. D. and the surviving trustee put in their answers.

In 1824 P. and B. filed a supplemental bill against D., and the surviving trustee, stating the deed of assignment and trust; that under it D. was entitled to a rent charge issuing out of the lands held in trust by the surviving trustee, and that they had sued out an *elegit* against D. for the sum of £1027, directed to the Sheriff of R., who returned that D. or his trustee was seised of a freehold rent issuing out of lands in the county of R.; one moiety of which he had delivered to P. and B. to hold, etc., till they had levied the damages marked on the writ. They claimed by the bill to be entitled either to a moiety of the lands or of the rent charge, or to have satisfaction of their judgment out of the annuity payable to D. under the trusts of the deed. Upon these grounds they prayed by their bill a receiver either of a moiety of the lands comprised in the Sheriff's return to the writ, to the extent of one moiety of the £5000 per annum, or of the lands comprised in the deeds of assignment and trust; and after satisfaction of the charges having priority according to the trusts of the deed, that a moiety or a competent part of the £5000 per annum might be applied in payment of their demand, and that the trustee might be restrained from paying the annuity to D. till the demand was satisfied.

After the filing of the bill two orders were made, one for the appointment of a receiver, the other restraining the trustee from paying the annuity to D., to the amount of £1260. The trustee, by his answer, suggested that his co-trustees and the creditors of D. were necessary parties to the suit. D., by his answer, insisted upon the validity of the deed and priority of the trusts, (including his own annuity), over the judgment of P. and B. As soon as the answers were filed, applications were made to the Master of the Rolls on the part of D., to discharge the receiver and rescind the injunction; and on the part of P. and B. to continue the receiver and injunction till the hearing, which was granted, and the motion of D. was refused; and this decision was affirmed on appeal to the Lord Chancellor of Ireland.

Held affirming the judgments of the courts below, that under the circumstances above stated, the orders appointing a receiver, and restraining the surviving trustee from paying the annuity to D., were properly made; that it was not necessary [241] for this purpose that the prior incumbrancers, nor the creditors, parties to the deed of trust, nor the substituted trustees, should be parties to the suit. Held, also, that the defects in the Sheriff's return to the *elegit* were immaterial, as no return is necessary, and the suing out an *elegit* is sufficient to ground the equity. Held, further, that one *elegit* is sufficient, although the rent was payable out of the lands in three counties.

By an Indenture bearing date the 4th of July, 1815, and made between the Appellant the Viscount Dillon, of the first part; the several persons whose names and additions were written in the first schedule to the indenture, creditors of Viscount Dillon, by jointure, rent-charge, or annuity, of the second part; the several persons, whose names and additions were written in the second schedule to the indenture, creditors of Viscount Dillon, by bond and judgment, or by one of such securities, of the third part; the several persons whose names and additions were set forth in the third schedule to the indenture, creditors of Viscount Dillon by simple contract, of the fourth part; and the Appellant Charles Butler, and Edward Jerningham, and John Hosier, deceased, on the fifth part: After reciting, that by virtue of indentures of lease and release, bearing date respectively the 13th and 14th of July, 1803; and in consequence of the subsequent decease of Charles Viscount Dillon, the Appellant Viscount Dillon, was seised or entitled, during the term of his life, without

impeachment of waste, and with several remainders over in strict settlement, and with various special powers and authorities, of or to several manors, capital and other messuages, lands, tenements, and other hereditaments, situate in the county of Oxford; and of or to several castles, manors, messuages, lands, tenements, [242] and other hereditaments, situate in the counties of Mayo, Roscommon, and Westmeath, in Ireland; but that such of the said estates as were situate in Ireland were subject to a rent-charge of £2000 by the said indenture of release and settlement, limited to Mary Viscountess Dowager Dillon, and her assigns, for her life, and to the powers and remedies thereby given, and to a term of 200 years thereby created, for enforcing payment thereof; and further reciting that the Appellant Viscount Dillon had charged or otherwise secured upon the English and Irish estates, or some of them, divers annuities payable during his life, or during terms of years determinable on his decease, and the amount of each of the said annuities, and the name or names of the person or persons to whom the same were payable were set forth in the first schedule thereto annexed; and that the Appellant Viscount Dillon was indebted to different persons by bond or judgment, or both such securities, in considerable sums of money, and the same, or a principle part thereof, were set forth in the second schedule thereunto annexed; and that he was also indebted to several other persons by simple contract in various other sums of money, and that the same, or the principal part thereof, were set forth in the third schedule thereto annexed: And that in order to provide for the discharge of the said several annuities and debts, and for the subsistence of the Appellant Viscount Dillon, and the management of his affairs in the interim, it had been agreed between the several parties thereto, that the Appellant Viscount Dillon should grant and demise the lands in Ireland and England, of which, under the indentures of the 13th and 14th of July, 1803, he was tenant for life, but subject to the several charges and incumbrances affecting the same estates, or any of them, unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, or assigns, for the term of ninety-nine years, if the Appellant Viscount Dillon should so long live, upon the trusts and subject to the powers, provisos, and agreements thereafter expressed: And that he should assign all his household goods and furniture in his mansion house at Ditchley, in the county of Oxford, and at Loughglyn in Ireland, unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, upon the trusts, and subject to the powers, provisos, agreements, and declarations thereafter contained: And also that the Appellant Viscount Dillon should effect one or more insurance or insurances on his own life for the sum of £15,000, or for several sums of money amounting in the whole to that sum; and that the said policy or policies should be taken in the name of Viscount Dillon, and assigned by him to Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, upon such trusts as are thereafter expressed: And that in consideration of the provisions so to be made by Viscount Dillon for the payment of debts owing by him to the parties thereto of the third and fourth parts respectively, they should enter into the covenants and agreements thereafter contained, and that in pursuance of the said agreements, Viscount Dillon had effected such insurances: And that by an indenture bearing even date, and made between Viscount Dillon of the one part, and Charles Butler, Edward Jerningham, and John Hosier of the other part, Viscount Dillon had granted and demised unto Charles Butler, Edward Jerningham, and John [244] Hosier, their executors, administrators, and assigns, all and every the freehold castles, baronies, manors, farms, towns, rents, messuages, mills, lands, tenements, tithes and hereditaments, situate, arising, and being in the counties of Mayo, Roscommon, and Westmeath, and in the baronies of Costello and Boyle, in Ireland, and therein particularly mentioned and set forth, with their respective rents and profits, in the schedule written under or annexed to the said indenture; and all other the castles, baronies, manors, messuages, lands and other hereditaments whatsoever, situate and being in the said counties, or any of them, or elsewhere in Ireland, which he the said Viscount Dillon, or any person or persons in trust for him, or for his use, was or were seised of or entitled to for the term of his life, or for any other estate of freehold, or right or interest whatsoever, in possession, reversion, remainder, use, trust, or expectancy, under or by virtue of the said indentures of lease and release, or otherwise, to hold the same, (subject and charged as therein

mentioned, and also subject and without prejudice to the powers by the said indentures of release and settlement created and in anywise relating, annexed, or collateral to the life estate or interest thereby limited to Viscount Dillon, in the said hereditaments, and to the uses, trusts, and charges to be created by an exercise of the said powers, or any of them), unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, from thenceforth for the term of ninety-nine years, if Viscount Dillon should so long live, without impeachment of waste, upon such trusts, and subject to such powers, provisoes, declarations, and agreements as should be expressed concerning the same, in an indenture [245] therein mentioned, to be then already prepared and engrossed, and to be intended to bear even date with the same, and to be made between the persons therein named, being the same persons as are parties to the indenture now in recital: And that by the said indenture the Appellant Viscount Dillon, in further pursuance of his said agreement, assigned to Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators and assigns, all and singular the household goods, furniture, plate, linen and china of him the said Henry Augustus Viscount Dillon, then being in or about his capital messuage or mansion house at Loughglyn (being part of the estates thereinbefore demised), to hold the same unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations, as were or should be expressed or contained of or concerning the same, in and by the said indenture thereinbefore mentioned, to be then already prepared and engrossed, and to bear even date with the same; It is by the indenture now in recital witnessed, that in pursuance of the said recited agreement with respect to the demise agreed to be made of the said Oxfordshire estates thereafter mentioned, and in consideration of the covenant and agreement thereinafter entered into by the parties to the indenture now in recital of the third and fourth parts, and for the nominal consideration therein mentioned, the Appellant Viscount Dillon granted and demised unto Charles Butler, Edward Jerningham, and John Hosier, their executors, and administrators, all and every the manors, farms, capital and other messuages [246] mills, lands, tenements, tithes, and hereditaments, situate, arising, and being in the county of Oxford, or elsewhere in England, of or to which he, Viscount Dillon, or any persons in trust for him, were seised or entitled for the term of his life, or for any other estate of freehold or right or interest whatsoever, in possession, reversion, remainder, use, trust, or expectancy, under the said recited indentures of lease and re-lease as aforesaid, or otherwise, and which, or the principal parts whereof, were in the same indentures, or one of them, particularly described and set forth, with their appurtenances; to hold the same, subject and charged as thereinbefore is mentioned, and subject and without prejudice to the powers by the said indentures of release and settlement, created, and in any wise annexed or collateral to the life estate and interest thereby limited to Viscount Dillon, and to the uses, trusts, or charges to be created by an exercise of the said powers, or any of them, unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, from the day next before the day of the date thereof, for and during and unto the full end and term of ninety-nine years from thenceforth next ensuing, if Viscount Dillon should so long live, without impeachment of waste; upon the trusts, and subject to the powers, provisoes, agreements, and declarations thereafter expressed: And it is further witnessed that for the considerations aforesaid, and in further pursuance of the said agreement, the Appellant Viscount Dillon bargained and set over unto Charles Butler, Edward Jerningham, and John Hosier, their executors and administrators, the household goods, furniture, plate, books, pictures, engravings, drawings, statues, linen and china, and other articles for [247] household use or ornament, then being in or about his mansion house at Ditchley in the county of Oxford: to hold the same unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, from thenceforth as fully and effectually as Viscount Dillon, his executors, administrators, or assigns could or might have otherwise had or been entitled to the same; but upon the trusts, and subject to the powers, provisoes, and agreements thereafter declared; (that is to say) upon trust, that Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns,

should forthwith enter into the possession and receipt of the rents and profits of the and several mansion houses, manors, farms, messuages, lands, tithes, hereditaments, furniture, and other the premises so severally demised and assigned as aforesaid; and should, during the continuance of the trusts thereafter declared for the payment of the said debts, remain in such possession and receipt, and in the management of the said estates, and every of them, by means of such agents and receivers as thereafter mentioned: And it was thereby agreed and declared, that Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, should from time to time apply the rents, issues, and profits of the mansions, manors, farms, messuages, lands, tithes, and other premises, so thereby and by the said indenture of equal date, therewith respectively demised, when and as the same should become due, and be actually received by them upon the trusts following: (that is to say,) in the first place to discharge thereout all taxes, rates, and assessments imposed and to be imposed upon the premises, and [248] the expenses of putting and keeping in repair the several mansion houses and other buildings thereon, and the wages and board of proper servants for taking care of the said mansions and the furniture therein, and also the reasonable salaries and allowances of the agents and receivers of the Irish and English estates; and likewise all expenses attending the execution of the trusts thereby declared, and for keeping and auditing the accounts, and paying the annual interest and other charges, and in preparing and engrossing deeds relative to the trusts intended to be thereby created; and in the second place, or if it should be so required by Mary, Viscountess Dillon, her executors, administrators, or assigns, prior to such of the foregoing purposes as respect the charges or debts subsequent in legal or equitable precedence to the jointure rent-charge of Mary, Viscountess Dillon, should by and out of the rents, issues, and profits of the estates in Ireland, pay to Mary, Viscountess Dillon, and her assigns, during so many years of the term of ninety-nine years, determinable as aforesaid, as she should happen to live, the said rent-charge of £2000 of lawful British money, provided for her by the indenture of the 11th of July, 1803, as thereby appointed; and, in the third place, should (but as to such of the premises in the county of Oxford as are charged with the thereafter mentioned mortgage debt of £1500 subject to the trusts therein-after expressed of and concerning the said sum of £1500, and the interest thereof,) by and out of the rents, issues, and profits of the manors and other the premises, by the indenture now in recital, and the indenture of equal date, pay to the several persons for the time being entitled to receive the same, as well the several annuities set forth in [249] the first schedule thereto annexed, with such addition to each as might be occasioned by any extra insurance, to be paid by each for extra risk of the Appellant Viscount Dillon at sea, or his residing out of the kingdom, as also any annuity or annuities which might be granted by Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, or assigns, together with the Appellant Viscount Dillon, under the power thereafter for that purpose contained: and likewise should, by such rents, issues, and profits, of the allotments or parcels of land and hereditaments already charged with the said sum of £1500, pay, or cause to be paid, according to the priority of security, to Richard Phillips, his executors, administrators, and assigns, the yearly interest of the sum of £1500, raised by way of mortgage, by Charles Viscount Dillon, the father of the Appellant Viscount Dillon, under the powers of an Act of Parliament passed for dividing and enclosing the open fields and common and waste lands in Spelsbury, in the county of Oxford, and secured on such of the premises thereby demised, as were allotted or otherwise affected by the said Act; and, in the fourth place, should, by and out of the rents, issues, and profits of the said several hereditaments, (but subject as aforesaid,) pay the yearly premiums to become payable upon, and all other expenses which might attend the policies of insurance, effected or to be effected in the name of the Appellant Viscount Dillon, and by him assigned or intended to be assigned to Charles Butler, Edward Jerningham, and John Hosier, and particularly the annual premium on a separate insurance of £3000, made or to be made on the life of the Appellant Viscount Dillon, for the benefit of the persons therein mentioned; and, in the fifth place, should, out of the [250] rents, issues, and profits of the hereditaments and premises thereby, and by the indenture of equal date therewith demised, (but subject as aforesaid,) pay to the Appellant Viscount Dillon, and his assigns,

during the term of ninety-nine years, determinable as aforesaid, an annuity of £5000 of British money, in such manner as therein mentioned; and should, by and out of the said last-mentioned rents, issues, and profits, pay to the several persons, parties thereto, of the third and fourth parts respectively, being creditors of the Appellant Viscount Dillon, by bond and judgment, or by one of such securities, and by simple contract respectively, and their several executors, administrators, and assigns, interest at the rate of £5 per cent. per annum upon their respective debts and demands set forth in the second and third schedules thereto annexed, or upon so much thereof respectively as should from time to time remain due and unpaid, with interest, to be paid as therein mentioned; and, in the sixth place, when the clear residue of the rents, issues, and profits of the manors, farms, messuages, lands, tithes, and other premises demised by the indenture now in recital, and the indenture of equal date therewith, which should remain after answering the several purposes aforesaid, should amount to the sum of 2s. 6d. in the pound of or upon the respective debts and demands of the several persons, parties thereto, of the third and fourth parts respectively, should apply such surplus rents, issues, and profits among the several persons, parties thereto, of the third and fourth parts respectively, or the several executors, administrators, or assigns, in proportion, and according to their several debts and demands set opposite their respective names in the said second and third schedules thereto annexed, in and towards the [251] discharge thereof, regard being had only to the quantity thereof, and not to the priority of time of, or the nature of the securities for the same, or any other circumstance of preference; and afterwards, from time to time, to apply the future residue or surplus of the rents, issues, and profits, when, and as often as the same should amount, after answering the several purposes aforesaid, to the sum of 2s. 6d. in the pound, of or upon the last-mentioned several debts and demands, in and towards the discharge thereof, in like manner until the same should thereby or otherwise be wholly discharged, or the Appellant Viscount Dillon should depart this life; reserving, however, upon the first, or any other distribution, the dividends which might belong to any disputed debts or demands until the same should be ascertained as thereafter directed; and lastly, should stand and be possessed of and interested in the ultimate residue or surplus, if any, of the rents, issues, and profits which should remain, after making the several payments and answering the several purposes thereinbefore directed and declared; and also of and in the said manors, farms, messuages, lands, tithes, and other premises demised, or intended so to be, by the indenture now in recital, and the indenture of equal date therewith, and every part thereof, when and as soon as the several trusts thereinbefore declared, should be fully performed, in trust for the Appellant Viscount Dillon, his executors, administrators, and assigns respectively; And it was thereby agreed and declared, that Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, should stand and be possessed of and interested in the monies to become payable, and be received upon or under the several policies of insu-[252]-rance effected or to be effected in the name, by and at the costs of Viscount Dillon; and also of and in all and every the rent, and arrears of rent, which might be due and owing at the time of his decease, upon the trusts following: (that is to say) in the first place, to pay in equal order and degree, the several debts and demands of the respective persons parties thereto of the third and fourth parts, being creditors of Viscount Dillon, by judgment bond and simple contract, and set opposite their respective names in the second and third schedules thereto annexed, or so much thereof as should remain unpaid at the death of Viscount Dillon; and as such last-mentioned monies, if insufficient to discharge the whole, would extend and be able to satisfy, together with all interest due thereon; and after full payment of such last-mentioned debts and demands and interest, in case there should then remain any residue of the monies to become payable and be received upon the aforesaid policies of insurance, to pay the same to the executors, administrators, or assigns of Viscount Dillon, as part of his personal estate; or else, if all the several debts and other purposes thereby provided for, should be discharged and satisfied in his lifetime, then to assign the policies of insurance, and the monies to become payable thereon, to Viscount Dillon, or his assigns, or as he or they should direct, for his or their own benefit: And as to the goods, furniture, linen, china, and other articles at Ditchley, thereinbefore

assigned to Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, it was thereby further agreed and declared, that it should be lawful for Charles Butler, Edward Jerningham, and John Hosier, and the survivors, etc. by any deed, etc. to demise, or to contract or agree to demise, the said goods, fur-[233]-niture, and other the articles, etc. to any person to whom they or he should let the mansion house at Ditchley, for the term or time for which the mansion at Ditchley should be letten, and to be held and go along with the same, at such rent, under such covenants and agreements, as Charles Butler, Edward Jerningham, and John Hosier, or the survivors, etc. should deem advisable: And it was thereby further agreed and declared between and by the parties to the indenture now in recital, that the rents to be received by Charles Butler, Edward Jerningham, and John Hosier, or the survivors, etc. from any lease to be executed by them or him under the power therein contained, should be applied upon such trusts and in such manner as is thereinbefore expressed, for the application of the rents, issues, and profits of the premises thereby demised: And it was thereby agreed and declared, that Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, should stand and be possessed of and interested in the household goods, furniture, and other premises in the mansion house at Loughglyn upon trust, that they, etc. should permit the then present or any future agent or receiver of the Irish estates who should reside in the house at Loughglyn, to have the use of the said household goods, furniture, plate, linen, and other premises, together and along with the mansion house, and its appurtenances, at Loughglyn, in part of the salary of his service: And it was by the said indenture further witnessed, that in consideration of the premises, each of the several persons, parties thereto, of the third and fourth parts, so far only as related to the acts or deeds to be done by himself or herself, and his or her heirs, executors, administrators, or assigns, and not further or other-[254]-wise, did thereby for himself and herself respectively, and for his and her respective heirs, executors, and administrators, covenant and agree with the Appellant Viscount Dillon, his heirs, executors, and administrators, in manner following: (that is to say) that they the creditors, parties thereto, and their respective co-partners, executors, or administrators, should not at any time or times thereafter, while the indenture now in recital should remain in full force and effect, and the trusts thereof should be duly performed, commence or institute or prosecute any action or suit, either at law or in equity against Viscount Dillon, in relation to any of the debts or demands respectively set forth in the second and third schedules thereto annexed, or take or sue out execution or sequestration against, or do or cause to be done any act, matter, or thing whatsoever, whereby or by means whereof the goods, chattels, or other personal estate or effects of Viscount Dillon, his heirs, executors, or administrators, in Ireland, England, or elsewhere, or his or their lands or tenements should be seized, detained, or taken in execution, for or in respect of any debt or debts whatsoever, then due or owing unto them, or any of them, from Viscount Dillon: and moreover that they, or their respective executors or administrators, should, when and as the several debts or sums of money payable and owing respectively to them by Viscount Dillon, and set opposite their respective names in the second and third schedules thereto annexed, together with such interest and costs as thereinbefore are mentioned, should be by the means aforesaid, or otherwise, fully paid and satisfied, or should have ceased and be no longer payable, at the request, costs, and charges of the Appellant Viscount Dillon, his heirs, executors, or administrators, make, give, sign, or exe-[255]-cute unto him or them, good and sufficient releases, acquittances, and discharges, for the several debts then payable and owing to them the same several creditors respectively by Viscount Dillon as aforesaid, and of and from all actions, suits, costs, charges, claims, and demands whatsoever in respect thereof; and there is contained in the indenture now in recital the usual provision for the appointment of new trustees by the said Viscount Dillon, with the approbation of the surviving or continuing trustees or trustee in the said indenture mentioned.

By an indenture bearing date the 4th day of July, 1815, (being the indenture referred to in the indenture hereinbefore stated) and made or expressed to be made between the Appellant Viscount Dillon, of the one part: and the Appellant Charles Butler, and the said Edward Jerningham and John Hosier, of the other part: after

reciting, that the Appellant Viscount Dillon was entitled for life, without impeachment of waste, to several castles, manors, lands, tenements, and hereditaments in the counties of Mayo, Roscommon, and Westmeath, in Ireland, subject as therein and hereinbefore is mentioned; and that he, for the considerations set forth in the hereinbefore stated indenture, had agreed to demise the said estates to the Appellant Charles Butler, and to the said Edward Jerningham and John Hosier, their executors, administrators, and assigns, for ninety-nine years, if he should so long live, and to assign to them the household goods and furniture at Loughglyn House, upon the trusts thereafter mentioned concerning the same, it was witnessed, that for the considerations therein mentioned Viscount Dillon demised unto Charles Butler, Edward Jerningham, and John Hosier, their executors, adminis-[256]-trators, and assigns, all his estates in the counties of Mayo, Roscommon, and Westmeath, for ninety-nine years, if he should so long live, without impeachment of waste, upon the trusts declared concerning the same and also concerning the Oxfordshire estates in the indenture hereinbefore stated; and Viscount Dillon thereby assigned to the said trustees, their executors, and administrators, all the household goods, furniture, books, pictures, linen, and china in the mansion-house at Loughglyn upon the trusts declared concerning the same, by the same indenture.

The first of the indentures was not executed by any of the persons who had any charge or lien on the estates therein mentioned by way of jointure, mortgage, rent-charge, annuity, or otherwise, except the several creditors by judgment, who signed their names to the second schedule to the indenture.

All the bond, judgment, and simple contract creditors of the Appellant Viscount Dillon not having specific charges on the estates, with the exception of the Respondents, and a few other creditors, accepted of the provisions made by the indentures, and executed the first stated indenture.

The Respondents were simple contract creditors of the Appellant Viscount Dillon.

The estates in the counties of Roscommon, Mayo, and Westmeath, and Oxford, were respectively charged with the mortgages, jointure, rent-charges, and annuities specified in the first schedule to the first stated indenture annexed, the greater part of which had priority over the life estate of the Appellant Viscount Dillon, limited to him by the indenture of the 14th day of July, 1803.

The mortgages, (except the mortgage for £4500) were created in pursuance of powers reserved by the [257] same indenture, and thereby directed to have precedence and priority over the life estate of the Appellant Viscount Dillon, and the excepted mortgage, created by virtue of the Act of Parliament; and all the incumbrances had priority over the indentures of 4th July, 1815, and the annuity of £5000 by the first mentioned indenture of 4th July, 1815, reserved to the Appellant Viscount Dillon.

The legal estate was outstanding, and became vested in Richard Williams and Benjamin Brooks, for a term of one thousand years, for raising the sum of £54,358, and interest, under and by virtue of an indenture bearing date the 21st day of July, 1804, and made, or expressed to be made between Charles Viscount Dillon, of the first part; Robert Skelton, since deceased, of the second part; and Richard Williams and Benjamin Brooks of the third part; and which term of years was created in pursuance of a power for that purpose given by the indenture of the 14th day of July, 1803, to Charles Viscount Dillon.

The rents and profits of the lands, as received by the agents of the trustees of the indentures, so far as the same were sufficient and applicable for that purpose, were from time to time applied towards keeping down the payments provided by the indenture.

The mansion-house at Ditchley, together with the furniture and other articles therein, had been from time to time let, and the rent received in respect thereof, and of the furniture, had been applied in like manner towards keeping down the payments prescribed and directed by the indenture.

On the 13th day of July, 1820, the Respondents filed their original bill of complaint in the Court of Chancery in Ireland, against the Appellants, and also against Edward Jerningham and John Hosier, [258] both since deceased, thereby stating, that the Appellant Viscount Dillon had become indebted to them for goods sold and delivered early in the year 1815, and that the Respondents had sued the

Appellant Viscount Dillon for the said demand in the Court of King's Bench in England, and had recovered judgment against him thereon, in or as of Michaelmas Term, 1818, for the sum of £898 10s. and that on the ground of the said judgment, they had also recovered judgment against the Appellant in the Court of King's Bench in Ireland, as of Trinity Term, 1819, for the debt aforesaid, besides costs, amounting in the whole to the sum of £1000 of lawful money of Ireland; that having so recovered the last-mentioned judgment against the Appellant Viscount Dillon, the Respondents, on the 23d of November, 1819, caused a writ of execution, (a *fiert facias*) against the goods of the Appellant Viscount Dillon, to issue, and that the same was delivered to the sheriff of the county of Roscommon, to levy the amount thereof; and that the sheriff seized the goods and chattels of the Appellant Viscount Dillon, in his mansion house at Loughglyn, and would have sold the same, and thereout levied the debt, but that the law agents of the Appellant caused a claim of property to be lodged with the sheriff, alleging that the goods were not the property of the Appellant Viscount Dillon, but of the Appellant Charles Butler, and of Edward Jerningham and John Hosier; and that the sheriff thereupon refused to execute the writ of execution by a sale of the goods: And further stating, that it appeared from a search made by the Respondents in the public registry office for deeds in the city of Dublin, that by indenture, bearing date the 4th of July, 1815, the Appellant Viscount Dillon granted and demised to [259] the Appellant Charles Butler, and Edward Jerningham and John Hosier, their executors and administrators, the freehold castles, baronies, manors, messuages, mills, lands, tenements, tithes, and hereditaments, situate, arising, and being in the counties of Roscommon, Mayo, and Westmeath, and the barony of Costello and Boyle in Ireland, and all other the hereditaments and premises in the said counties and elsewhere in Ireland, of which the said Viscount Dillon, or any persons in trust for him, was or were seised or possessed, to hold the same, subject and charged, as in the said memorial mentioned, unto the said Appellant Charles Butler, and Edward Jerningham and John Hosier, from the day next before the day of the date thereof, for the term of ninety-nine years, if he the said Viscount Dillon should so long live, without impeachment of waste, upon the trusts, by the said memorial stated, to be mentioned in an indenture of the 1th of July, 1815: And further stating, that it appeared by the said memorial, that the said Appellant Viscount Dillon did, by the same indenture, bargain and sell unto the said Appellant Charles Butler and his said co-trustees, their executors, administrators, and assigns, all the household goods, furniture, and other chattels, of and belonging to the Appellant Viscount Dillon in and about his mansion house at Loughglyn aforesaid, to hold the same to the said trustees, as fully and effectually as the Appellant Viscount Dillon could be entitled to the same, upon the trust in said memorial alleged to be mentioned in the said other indenture, of even date therewith; that the said indentures were not registered until the year 1817, and that the Respondents were ignorant of the trusts thereof; that the Appellant Viscount Dillon was strict tenant for life of the said estates, and [260] that the said indentures were calculated to defeat proceedings at law against the said estates, by the Respondents and the other creditors of the said Appellant Viscount Dillon, who (as stated in the said bill) was indebted to divers other persons by judgments, bonds, and otherwise, to a very considerable amount: The bill prayed that the contents of the said deed of trust of the 4th of July, 1815, might be fully set forth by the said trustees, and that the Respondents and the other creditors of the Appellant Viscount Dillon, who should come in and contribute to the expense of the said suit, might be at liberty to elect whether they would agree to accept of the provisions of the said deed, in liquidation and satisfaction of their respective demands or not; and that in case they should not elect to agree to accept the same, that then the said indenture of the 1th of July, 1815, and the said deed of trust therein mentioned and referred to, might be deemed fraudulent and void, and of no effect against the Respondents and others of such creditors of the Appellant Viscount Dillon as aforesaid; and that the temporary bars raised thereby might be removed, if necessary, to give effect to the Respondent's said judgment at law; and that, in the mean time, and until the hearing of the cause, a receiver should be appointed to receive the rents and profits of the said towns, lands, and premises, and that the same should be brought in and lodged in the Bank of Ire-

land to the credit of the said cause, and applied in the payment of the said judgment debts and incumbrances of the said Appellant Viscount Dillon, according to their respective priorities; and that the Respondents and the other creditors as aforesaid, might be paid thereout their several and respective demands, according to their respective priorities, and that all neces-[261]-sary accounts might be directed to be taken at the hearing of the cause.

Before any further proceedings were had in the cause, Edward Jerningham and John Hosier died; and the Appellant Charles Butler, the surviving trustee, afterwards put in his answer to the bill: the Appellant Viscount Dillon likewise put in his answer thereto.

In pursuance of the power for that purpose contained in the indenture of the 4th of February, 1815, the Honorable Douglas Kinnaird and Dominick Browne, were appointed trustees of the estates, in the place of Edward Jerningham and John Hosier.

On the 20th day of April, 1824, the Respondents filed a supplemental bill (called in the pleadings an amended bill) against the Appellants, stating, amongst other things, that since the filing of their original bill, they had seen the indentures of the 4th of July, 1815, and setting forth the trusts thereof: and further stating, that the Respondents, being unable, by reason of the deed of trust, to obtain any fruits from the writ of *fieri facias*, issued at the suit of the Respondents against the goods of the Appellant Viscount Dillon, and that having discovered that he was entitled by the trust deed of the 4th of July, 1815, to an annual sum of £5000 out of the rents and profits of the estates vested in trust in the Appellant Charles Butler, as surviving trustee, they had caused a writ of *elegit*, grounded on the judgment obtained in the Court of King's Bench in Ireland against the Appellant Viscount Dillon, to issue, marked for the sum of £1027 11s. 4d. and directed to the sheriff of the county of Roscommon, who returned, that the Appellant Viscount Dillon, or the Appellant Charles Butler, in trust for him, was seised as of freehold of a clear, [262] yearly rent of £5000, issuing out of the lands and hereditaments in the county of Roscommon in the return and bill particularly mentioned and set forth; and that the sheriff had returned upon the writ, that he, on the day of taking the inquisition, by virtue of the writ had delivered one moiety of the rent of £5000 to the Respondents, to hold to the Respondents and their assigns as their freehold, according to the form of the statute in that case made and provided, until they should have fully levied the damages in the writ of *elegit* specified: and also stating, that they were entitled to have the moiety of the lands and premises comprised in the return, or of the rent of £5000 per annum, or that if they should not be deemed entitled to a moiety of the rent of £5000 by virtue of the *elegit*, that they were entitled to have satisfaction of the judgment out of the rent of £5000, or of such part thereof as in the order and course of priority, directed by the deed of trust of the 4th of July, 1815, should be payable to Viscount Dillon in pursuance of the trust: And thereby praying, that a receiver might be appointed to receive the rents, issues, and profits of one moiety of the lands and premises comprised in the sheriff's return on the writ of *elegit*, to the extent of one moiety of the yearly sum of £5000; and that the Respondents might be paid the same, or a competent part thereof, in discharge of their demand, or that a receiver or receivers might be appointed to receive the rents, issues, and profits of the several lands and premises comprised in the deeds of the 4th day of July, 1815; and that the rents of the Oxfordshire estates, and of a competent part of the trust estates, if necessary, might be applied in payment of the annual sums, charges, and expenses by the trusts of the deed directed to be paid [263] in priority to the £5000 a year, thereby made payable to the Appellant Viscount Dillon: and that after such satisfaction and discharge of the annual payments having such priority, one moiety of the sum of £5000 a year, or a competent part thereof, might be applied towards payment of the Respondent's demand; and that the Appellant Charles Butler might be restrained from paying over the yearly sum of £5000, or any part thereof, to the Appellant Viscount Dillon, or to any person for his use, until the demand should be thereout paid and satisfied.

By an order bearing date the 7th day of December, 1824, the Master of the Rolls referred it to the Master to approve of a proper person to be appointed receiver, upon process obtained against the Appellants, to receive such competent part of a

moiety of the rent-charge of £5000 per year, as would be sufficient for the purpose of the Respondents' rights in the cause; and that the Master should report what part would be a competent part of the moiety of the rent-charge of £5000 for that purpose.

In pursuance of the order, the Master approved of Charles Denroche to be receiver, and reported £1250 a year as a competent part of the moiety of the annuity for the Respondents' rights, which report was confirmed by an order of the court, bearing date the 16th of December, 1824.

By an order dated the 1st of Feb. 1825, the Master of the Rolls ordered that the Appellant C. Butler should be restrained until his answer to the last-mentioned bill and further order, from paying over to the Appellant, or for his use, the sum of £1250 per annum, and from making any payments out of the annuity, to the Appellant Viscount Dillon, or for his use, out of any funds which might come to his hands applicable [264] thereto, without first retaining sufficient to pay the sum of £1250 per annum.

The Appellant Charles Butler, on the 7th day of June, 1825, answered the supplemental bill; and after stating and submitting to the court, to the effect herein-after mentioned to be stated in the answer of the Appellant Viscount Dillon, he stated by his answer, that he claimed no interest in the matters in question in the suit, save as trustee, and that he was ready and willing to act as the court should direct; but he thereby submitted, that Douglas Kinnaird and Dominick Browne, who had, since the death of Edward Jerningham and John Bosier, been appointed trustees of the indenture with him, and the several persons named in the schedules to his answer annexed, marked Nos. 1 and 2, and which he prayed might be taken as part of his answer, having charges upon the estates by mortgage, jointure, and rent-charge and annuity, and also the several other persons in the same schedules named and described, and who, being creditors of the Appellant Viscount Dillon by bond, judgment, and simple contract, had executed the indenture hereinbefore first mentioned, were necessary parties to the suit.

By an order of the 27th day of July, 1825, it was ordered by the Master of the Rolls, that the Appellant Charles Butler should be restrained, as ordered by the order of the 1st of February, 1825, from paying the sum of £1250 a year to the Appellant Viscount Dillon, until he should answer the supplemental bill, and until further order.

The Appellant Viscount Dillon put in his answer to the supplemental bill on the 14th day of December 1825, whereby, after noticing that the relief prayed by the original bill, was essentially different from the [265] relief prayed by the supplemental bill, he stated, that the indentures of the 4th of July, 1815, were made for the benefit of and for the purpose of paying his creditors, at the date of the indentures, as well by specialty as simple contract, their several debts; and that as the judgment in the Respondents' bills stated was obtained after the execution and registry of the deeds of trust, the deeds were good and valid against the Respondents; and that he had not since the date and execution of the indenture, been in the receipt of the rents and profits of the estates in the indenture mentioned, or in possession of the personal effects therein also mentioned, or any part thereof; and that his trustees and the trustees thereafter named, had not been in such receipt since the date and execution of the indentures, except so far as the receipt of the rents and profits of the lands by Henry North and Matthew Wyatt, might be considered as the receipt of such rents and profits by the trustees, and except so far as letting the mansion-house of Ditchley, with the household furniture and effects in the same, and permitting Matthew Wyatt and Jarrard Edward Strickland respectively, who had been appointed agent in Ireland, in the place of Matthew Wyatt, to reside in the mansion-house at Loughglyn, and to use the furniture and effects therein, might be considered possession thereof by the trustees; and that Matthew Wyatt, Henry North, and Jarrard Edward Strickland, were appointed agents by the indentures of the 4th July, 1815, or in pursuance of a power for that purpose therein contained; and that so far as the rents and profits of the estates received by such agents as aforesaid, were sufficient and applicable for that purpose, they had been applied towards keeping down such and so many of the annual payments, as were [266] provided by the indentures to be paid to the persons who were made

parties to the indentures in the supplemental bill first mentioned of the second part; and that the present annual income derived from the estates in England and Ireland, might be calculated to amount to the sum of £18,850 British; but that some time back, in consequence of the great agricultural distress, the same did not exceed the gross annual sum of £15,000, out of which charges and expenses to a large amount were to be deducted; and that in consequence of such defalcation of the rents, the trustees recommended to the Appellant Viscount Dillon, to reduce the annuity of £5000 reserved to him, to an annual sum of £3000, the better to enable the trustees to pay the annual charges on the estates, and that he readily assented thereto; but that the receipt of the rents, after all necessary payments being deducted therefrom, did not allow the trustees to pay him the reduced annuity of £3000, and that there were then arrears due to him in respect of the same; that the total amount of the annual payments, charges, and incumbrances charged on the estates, and having priority to the yearly sum of £5000, amounted to £12,000 a year and upwards; and he submitted to the judgment of the court, whether the Respondents were unable, by reason of the said deeds of trust, to obtain any fruits from the writ of *pieri facias* in the original bill mentioned to have been issued at the suit of the Respondents against his goods and chattels; and that he was unable, as to his belief or otherwise, save as appeared by the supplemental bill, to state whether the Respondents caused a writ of *elegit*, grounded on the judgment obtained in His Majesty's Court of King's Bench in Ireland, to issue, marked for the sum of £1000 and [267] £27 lls. 4d. directed to the sheriff of the county of Roscommon or otherwise; or whether the sheriff returned upon the writ so to him directed, that the Appellant Viscount Dillon, or the Appellant Charles Butler, in trust for him, was seised as of freehold, in one clear yearly rent of £5000 sterling, issuing and payable out of the lands and other hereditaments in the supplemental bill mentioned; but that if the return of the sheriff was to the effect in the supplemental bill mentioned, he submitted that the return of the sheriff in the supplemental bill stated, was erroneous in setting forth that he, or some person in trust for him, was seised as of freehold in the yearly sum of £5000, inasmuch as the same was raiseable by virtue of the trusts of equitable terms of years subsisting in the estates respectively, comprised and demised by the indentures of the 4th of July, 1815, being the English and Irish estates of the Appellant Viscount Dillon, and also out of the gains and profits made by means of the furniture at Ditchley house, which is let with the same; that the return could not be acted upon in consequence of its great uncertainty, and that the rent of £5000 was not issuing out of the lands mentioned in the return alone, but also out of the other estates of the Appellant Viscount Dillon, in England and Ireland, and by means of the personal estate and effects; and that the return was further erroneous in returning that the sheriff of the county of Roscommon had delivered to the Respondents one moiety of the rent of £5000, such rent being payable out of all the Irish estates of the Appellant Viscount Dillon, which estates are situate in the counties of Mayo, Westmeath, and Roscommon, and out of the English estates, in the county of Oxford, and out of the personal estate and effects; and that the return, [268] if any such existed, had never been filed in the proper office, and is not on the records of the court whereout the *elegit* issued, or of any other court; and that the estates in Ireland, subject to the rent of £5000 as stated in the supplemental bill, were held by trustees under prior conveyances, whose interests therein were paramount to his, and that therefore they could not be properly taken under the *elegit* therein stated; and he thereby admitted that he continued seised of and entitled for his life, to the estates in the counties of Roscommon, Mayo, Westmeath, and Oxford, subject to the mortgage, jointure, rent-charges, and annuities, and the terms of ninety-nine years respectively created by the indentures; and that he was entitled to the absolute freehold thereof, subject to the several mortgages and incumbrances, and upon the trusts of the terms being satisfied; and he, by his answer, further stated, that part of the lands and hereditaments mentioned in the sheriff's alleged return, had long before been sold by virtue of a power for that purpose contained in the indenture of release and settlement, of the 14th day of July 1803, under which he is tenant for life of the Irish estates, and which power over-rides his life estate, and which life estate was displaced by the exercise of the power; and under the circumstances thereinbefore mentioned,

he submitted, whether the Respondents were entitled to be let into possession of one moiety of the lands and premises mentioned in the sheriff's alleged return.

After the answers were put in to the supplemental bill, on the 6th of December, 1825, applications were made to the Master of the Rolls, on the behalf of the Appellants, that the receiver appointed in the cause might be removed, and that Charles Butler, together [269] with his co-trustees, might be at liberty to pay over to the Appellant the sum of £1250 per annum, part of his annuity, in the order of the 27th of July then last mentioned, and all arrears thereof then due, and that the Appellant Viscount Dillon might be at liberty to call for and receive the same.

At the same time an application was made by the Respondents, to continue the receiver, and that the Appellant Charles Butler might be restrained from paying over the £1250 per annum to the Appellant Viscount Dillon but should be compelled, in case the court continued the receiver, to pay over the same to the receiver, or that the receiver should be at liberty to receive it from the tenants of the lands; and that the payment thereof should be computed from the gale day on which the annuity was payable to the Appellant Viscount Dillon, preceding the Master's report, which allocated the sum of £1250 to the Respondents, in payment and satisfaction of their demand.

By order bearing date the 14th day of December, 1825, the Master of the Rolls, making no rule on the application of the Appellants, ordered, on the application of the Respondents, that the restraining order of the 27th of July, 1825, should be continued until hearing and further order; and that the Appellant Charles Butler might be restrained as ordered by the last-mentioned order from paying over in any manner to the Appellant Viscount Dillon, the sum of £1250 per annum therein mentioned, or from making any payments out of the annuity in the order and report mentioned to the Appellant Viscount Dillon, or for his use, out of the funds that might come to his hands, applicable thereto, without first retaining sufficient to pay the £1250 per annum, until the hearing and further order; and that the Appellant Viscount [270] Dillon, be restrained, until hearing and further order, from receiving the £1250 per annum from the Appellant Charles Butler, and from receiving any payments out of the annuity, without first leaving sufficient to pay the said £1250 per annum.

The Appellants appealed to the Lord Chancellor of Ireland from the order of the Master of the Rolls of the 14th of December, 1825; and also from the order of the 27th of July, 1825, the order of the 7th of December, 1824, the Master's report thereunder, the order of the 16th of December, 1821, confirming the same, and the several proceedings thereon, so far as the same in any way related to the order of the 14th of December, 1825; and the Appellants by their counsel moved that the receiver might be removed, and that the Appellant Charles Butler, in conjunction with his co-trustees, might be at liberty, in execution of the trusts in the trust deed in the pleadings mentioned, to pay over to the Appellant Viscount Dillon, and that the Appellant Viscount Dillon might be at liberty to call for and receive the sum of £1250 per annum, part of the annuity, and all the arrears thereof; which motion, by way of appeal, came on to be heard before the Lord Chancellor of Ireland, on the 4th of February, 1827, whereupon his Lordship affirmed the order of the Master of the Rolls, with costs.

The appeal to the House of Lords was from the orders of the 7th of December, 1824, of the 16th of December, 1824, of the 27th of July, 1825, and the 14th of December, 1825, and of the 1th of February, 1827.

For the Appellants: Mr. Sugden and Mr. Lynch.

The question in the appeal depends upon the trust to pay out of the rents and profits an annuity of £5000 a year to Lord Dillon. The appeal is against the order of [271] the Master of the Rolls, restraining the trustee from paying the annuity, and the order of the Lord Chancellor confirming it. The previous orders being only until answer or further order, could not be the subject of appeal. The covenant on the part of the creditors, not to sue Lord Dillon, or take the property in execution, is a sufficient consideration for the conveyance. The deed itself is not impeachable in equity for fraud.

The supplemental bill praying relief, different from that which is prayed in the original bill, is irregular, and being so, no order could be made upon it; the

original bill should have been dismissed, and a new one filed (see *Davidson v. Foley*, 2 B. C. C. 203). There is also a defect of parties, the original trustees being dead and new trustees appointed: the appointment was in 1823, and the supplemental bill was filed in 1824. The Respondent, by the original bill, prays to have the deed rescinded: by the supplemental bill, he prays relief under the deed: these are opposite and inconsistent prayers.

The sheriff, as appears by his return, seized a moiety of the rent, which, as it is stated, he has delivered to the party. This is not a case, therefore, where the aid of equity is asked to obtain execution; there is no such case where equity has ever interfered: the interference of equity is only to remove impediments to the execution. The next question is whether the party is intitled to have the legal bars removed. Equity can only supply defects of the law. The case made in this suit is that the property was seized and delivered to the party. The first objection to the seizure is that the sheriff has no authority by law to seize a rent-seck; he must execute the writ by seizing the land, *Walsall v. Heath* (Cro. Eliz. 656); in which case, [272] the return being of a seizure of a rent, was held bad upon demurrer, because a rent-seck cannot be delivered as *liberum tenementum*.

Another difficulty is, that according to the finding and the facts, Lord Dillon had a life estate subject to prior charges: the sheriff should have seized a moiety of that life estate. The return is void on the face of it, and being void at law, it is unavailable in equity; no relief can be given upon it. If Lord Dillon had a legal estate for life, there could have been no proceeding upon such a return, and equity can only remove a legal bar where the proceeding is regular at law.

Supposing the rent to be subject to execution, the inquisition is void upon another ground, for the rent issues out of lands in England and Ireland, and also from goods, not from one subject or each severally, but from all jointly: the sheriff of Roscommon could not seize a moiety of that intire rent.

The order is defective also for want of parties; two of the trustees are not before the court: the relief is against all the estates: a receiver cannot be appointed unless all parties are before the court. The rule of equity, as to parties, is to prevent circuity of action and multiplicity of suits: a plaintiff is bound, therefore, to proceed against all estates and interests at once, not piecemeal; such an order cannot be made in the absence of trustees. If the defect of parties could be excused in a common case, not so in this, because the relief sought by the supplemental bill differs from that which was prayed by the original bill.

It may be said that by statute (29 Car. 2, 3) it is enacted that a seizure in execution against the trustee shall be good against the *cestui que* trust, but the sheriff had no [273] right to seize at all: the property was not subject to execution. In *Lyster v. Dollond* (3 B. C. C. 602, 1 Ves. J. 431), it was held that an equity of redemption is not subject to execution. So in *Scott v. Scholey* (8 East, 467), *Metcalfe v. Scholey* (2 B. and P. N. R. 461).

It is not a sufficient execution within the statute of frauds, and the statute does not apply to cases of complicated trust, but only to naked and simple trusts; it was an improvident attempt of the legislature to make trusts subject to execution: it is so confined in practice, that no instance has occurred in which execution ever issued against a trust estate of a term; the result is, that it is found in practice not to be a fit subject for execution: the creditor must proceed at law and come to equity to remove a legal bar: there should have been a *fiery facias* and a return, *Balsh v. Wastall* (1 P. W. 445), *Shirley v. Watts* (3 Atk. 200). All the authorities prove that to entitle himself to relief in equity, a party must proceed as far as he can at law. In *Davidson v. Foley*, Lord Thurlow said that "all he could gather from the cases was, that where the court could see there was a good judgment, it would not stop without aiding that title by what is called an equitable *elegit*, but he could not carry it higher than that: that the *equitas sequens legem* must be such as to assure the court that the case was such as could be followed by a legal execution: but that where it appeared that the judgment could not be followed by a legal *elegit*, the court could not follow it by an equitable *elegit*." In this case it is apparent on the face of the return, that the creditor could not have proceeded at law: Lord Dillon had the land, and the execution should have been against the land: there should have been a [274] return of *nulla bona*: whereas, on the face of the proceedings there is a legal seisin.

The sheriff states that he has delivered the property in satisfaction. Where then is the necessity for relief in equity? According to the return, it must be supposed that the creditor is in possession.

The Lord Chancellor: Suppose this had been a case merely at law, would not this have been the form of the return? It is not satisfaction. The sheriff does not deliver possession; but the party proceeds by ejectment: the usual return of the sheriff is, that he has delivered, although in fact he does not deliver.

Mr. Sugden: Where there is no adverse possession, he does actually deliver: the objection is, that there is no necessity for the interposition of equity.

Another objection fatal to the orders in the court below is, that they were made in the absence of parties who are interested in the administration of the funds. Where property is subject to incumbrances, relief in equity has always been granted in the shape of a power to redeem prior incumbrances. The annuity, in this case, can only be reached by considering it as part of the old reversion.

It is no answer to an execution against A. that the legal estate is in B. for A. The only case where he is stopped at law is, where there are trusts to be executed prior to his charge, and then he is entitled to redeem and remove the temporary bars. A court of equity never allows subsequent incumbrances to come in against prior ones, without offering to redeem. The only relief is an application to redeem the prior incumbrances. If a court of equity will enable a judgment creditor to proceed against a debtor's interest, he must bring before the court all the parties who have any interest to contest in the subject. The point [275] stands thus:—According to the trusts of the deeds, the fifth and sixth trusts are to pay Lord Dillon's £5000 per annum, and interest to the creditors. This £5000 per annum is not to precede the interest to the creditors.

The Lord Chancellor: They are all classed together, on the assumption that there was enough for all.

Mr. Sugden: There is no priority between the creditors' and Lord Dillon's allowance. The fund must be distributed *pari passu* between them. The objection to the orders is, that they have ordered £1250 per annum to be taken in the absence of the creditors, who have an equal right with him, and in the absence of Lady Dillon and a mortgagee. This objection is of a more limited nature than the general one before advanced. Suppose £1250 be ordered to be paid, and, from defalcation of rents, the jointress, mortgagee, and other prior creditors were not paid; would they not have a right to say that the court had taken away a fund which ought to have been applied to prior incumbrances? The consequence would be that all the prior creditors might file bills to have their rights declared. What is the common subject? The estate out of which the rent is to be paid. Lord Dillon is not entitled to the £5000 per annum, unless the prior charges are paid, and the interest to the creditors. A receiver ought not to be appointed to take £1250 per annum out of a common fund to which prior incumbrancers are entitled. The £1250 may be applicable to the payment of the former incumbrances. A court of equity had no right to touch it, unless they had all the parties to the trust deed before the court. The £5000 per annum is not a distinct subject. You cannot argue the question of priority unless you have all the parties before the court. A [276] court of equity does not grant a receiver on motion, unless they see on the face of the proceedings that they would give relief at the hearing. It is not stated in the bill that the return was filed, though they state it in the case; but the return was never filed. The only evidence was an affidavit of debt. The want of evidence is a sufficient objection to the order. In all the cases (*Bulch v. Wastall*) the sheriff made his return of *nulla bona*, etc.; but in this case he has made no such return, but has declared that he has delivered the property to the plaintiffs. How then are they obstructed? and until they are obstructed they have no right to relief in equity. The right was an entry on the land. Have they been obstructed in entering upon the rent? No. The return is fraudulent, illegal, and void. The sheriff had no right to deliver the rent seek; he ought, if any thing, to have delivered the lands by metes and bounds (*Faung v. Durant*, 4 B. and A. 10). The return is fraudulent for this reason: It is stated that the trustees were seised for Lord Dillon of the rent charge out of the lands in the county of Roscommon. The jurors must have had the deed before them; and having it, they must have known that it was issuing out of lands in other counties:

yet it is alleged to be issuing out of lands in the county of Roscommon alone. So the sheriff says there are no goods; yet on the face of the deed it appears there were goods in Roscommon. This is a rent-sock, and held in trust for Lord Dillon; it cannot, therefore, be taken in execution. If the cause were brought to a hearing, the Respondents would not be entitled to relief, because of the absence of parties and the irregularity of the return. The interlocutory orders ought [277] not therefore to have been made. A court of equity does not grant ancillary relief unless the right be clear. That Lord Dillon is abroad, and tenant for life, are new equities. It is not true that these parties are without remedy. The Respondents have the same remedy after as they had before the execution of the deed.

For the Respondents: Mr. Horne and Mr. B. Parry.

The question is not whether the annuity of £5000 a year is extendible, but whether under the circumstances a part should be impounded to abide the decision of the cause: although the £5000 a year is not extendible at law, it does not follow that it cannot be reached in equity; an equity of redemption of a leasehold for years is not extendible at law, but may be made available in equity (*Shirley v. Watts*, 3 Atk. 200. *Burdon v. Kennedy*, ib. 739. *Lyster v. Dolland*, 1 Ves. jun. 435). The court interferes, not to enforce the judgment of a court of ordinary jurisdiction, but because the party has no remedy at law, the property sought being of an equitable nature. In *Burdon v. Kennedy*, Lord Hardwicke said that the execution had no effect at law, and consequently that by the common equity of the court the creditor had a right to relief. In the present case there is no remedy at law. The property in question is the creature of and only exists in equity. The case of Bank stock and of debts is different: in those the debtor has the legal right, and they must be reached, it at all, in a court of law. As to Bank stock, it is the creature of the legislature, which forgot to provide a remedy for the creditor. But the property in this [278] case is the creation of the debtor, the creature of equity, over which the court has control, and will apply a remedy according to its doctrines. The cases where a judgment creditor is allowed to stand in the situation of a puisne mortgagee have no analogy to the present. In those cases the court gives relief, on the principle that the creditor who had his demand is entitled to stand in the place of the debtor, and therefore the creditor is allowed to redeem as the debtor might do. In those cases, the debtor having pledged his estate for a particular debt, he has the right to redeem; but in this case the debtor's estate is not pledged, but actually conveyed on trust. The principle of giving to a judgment creditor relief against an equity of redemption, applies in this case: it is to enable the creditor by the medium of equity to obtain the debtor's right in equity. Whether it is an equity of redemption upon a lease for years, or a trust for the debtor upon an annuity of £5000, it ought to be equally available for the creditor. The case of the Respondent does not rest upon the *eliget*: the annuity is a chattel interest; and to proceed in equity it is only required that the creditor should have taken out execution, which has been done; it is not necessary that the return should have been procured (Red. Pl. pa. 102).

The title of the Respondent is good under the *feri facias* (*Vandercom v. Miller*, 21 Jan. 1818, in Cha.): as to the objection that the *eliget* is directed only to the Sheriff of Roscommon, it is trifling: the annuity issues *per mie et per tout*: if the lands lie in twenty counties it cannot be necessary that there should be an *eliget* in each. The debt and the execution being admitted, and that the Respondent is not privy to the deed of trust, the title of the Respondent [279] is sufficiently clear for a receiver. Lord Eldon, in a similar case, has granted an order for a receiver. The plaintiffs were creditors who had obtained judgment, and delivered an *eliget* to the sheriff, but could not make the writ available without the aid of equity: the debtor being seized in fee subject to an annuity charged upon the estate, the lands being demised for a term to secure the payment. The counsel for the defendant relied on the objections that an equity of redemption of a term is not extendible, but that there was no inquisition. Lord Eldon held in such a case that there was a resulting trust for the defendant, and granted the order. But the Respondents rely upon the order for an injunction, and waive the right to a receiver, which was superseded by the order for the injunction. The orders appealed from do not declare the right. They only impound the fund to await the event of the cause. Lord Dillon being resident abroad, having no estate liable, and having neglected to put in his answer, the order

for the injunction is well founded. The creditors and incumbrancers are not necessary parties. Their rights are not disturbed. The relief sought is only against the £5000 a year, which is in equity the property of Lord Dillon. Whether he or the Respondents receive that sum, or any part of it, is immaterial to the creditors. The injunction only restrains the trustee from paying to Lord Dillon, and him from receiving the annuity, until enough is reserved for the Respondents. The new trustees having come in, *pendente lite*, are not necessary parties (*Metcalf v. Pulvertoft*, 2 V. and B. 205). In fact, the new trustees are now brought before the court below, and the Appellants might have called them as parties. But Mr. Butler is a sufficient representative of his co-trustees.

[280] The case is reduced to this question of equity: Can a man, by his own contract with some creditors, give himself an interest which shall *not be subject* to his other creditors? He could not do it *at law*, why can he in equity? If Lord Dillon could reserve to himself £5000 a year, he might reserve £19,000. Will equity enable a man to defraud his creditors? Will equity carry trusts into execution contrary to justice? Will equity, by means of trusts, its own peculiar creatures, take property out of the reach of creditors and give it to a debtor? This £5000 a year existing only in *equity*, is to be dealt with according to equity. This deed conveys EVERY thing to trustees. The Respondents have no possible means of payment except by application of the £5000 a year. Lord Dillon resides abroad, has only a life-interest, and unless the money is impounded as ordered, the Respondents may lose all any moment.

The Lord Chancellor (21st July, 1828): This is a case of appeal from certain orders made by the Master of the Rolls in Ireland, the Lords Commissioners of the Great Seal in Ireland, and the Lord Chancellor of Ireland. It appears that the Master of the Rolls in Ireland, the Lords Commissioners of the Great Seal in Ireland, and the Lord Chancellor of Ireland, have all concurred in their judgment in respect to the points to which I am to call your attention, but the parties were not satisfied without appealing to this House.

This case arises out of a debt due to the Respondents, Plaskett and Brett, who are wine merchants in this city. They had supplied Lord Viscount Dillon with wine to the amount of seven or eight hundred pounds. He did not pay the bill: in consequence of which they brought an action against him in 1817, in [281] the Court of King's Bench in this country, and recovered judgment. They were not, however, able to obtain any fruit of that judgment, in consequence of which it became necessary for them to proceed in Ireland. They brought an action there in 1819, and recovered judgment in that action to the amount of £1000, and £27 costs of their debt. A *fiery facias* was sued out upon that judgment, to take possession of the effects, for the purpose of obtaining the fruits of the judgment: but the moment the sheriff had taken possession, he received notice on behalf of Mr. Charles Butler, and other individuals whose names are mentioned in this paper, who describe themselves as trustees under a deed executed in the year 1815, by which they claimed the whole of this property. The consequence was, that the Sheriff was obliged to relinquish possession. Under these circumstances it became necessary for the Respondents to take other proceedings for the purpose of recovering their debt, and accordingly they filed a bill in the Court of Chancery in Ireland against Viscount Dillon, and against his trustees: answers were put in to that bill; and the result was, that it was discovered by the Respondents that a deed had been executed in the year 1815, of which they had not before been apprised: but when they became acquainted with all the particulars of that deed, it turned out that by that deed Lord Viscount Dillon, possessing estates in the counties of Roscommon, Mayo, and Westmeath, in Ireland, and in Oxfordshire in this country, which had been previously charged with certain incumbrances, and which were subject to those incumbrances, conveyed them to trustees for the purpose of securing to Lord Dillon £5000 a year for his life: and with respect to the surplus rents for the purpose of discharging the debts [282] due to certain persons who had executed that deed. It is quite obvious, therefore, that as there was £5000 a year not subject to the prior incumbrances, but reserved to Lord Dillon, Messrs. Plaskett and Brett had a right to look to that sum for the purpose of discharging the debt which he owed to them, to do which it was necessary to proceed in a court of equity. The Respondents sued out an *elegit*, directed to the sheriff of

the county of Roscommon: after that *elegit* had been sued out, and returned, they filed a supplemental bill: and to that supplemental bill answers were put in by Lord Dillon, and by Mr. Charles Butler, the trustee.

Before the answer to the supplemental bill was put in by Mr. Charles Butler, an application was made on the part of the Respondents to the Master of the Rolls in Ireland, to appoint a receiver; but before a receiver was appointed, one of the Masters of the Court was directed to ascertain what proportion of the £5000 a year it would be necessary to set apart to pay the debt of the Respondents. The Master having reported that £1250 of this sum would be necessary, a receiver was appointed, for the purpose of taking possession of the £5000 a year to the extent of £1250; and afterwards another order was made, by which Mr. Butler was restrained from paying over the whole of the £5000 a year, the sum of £1250 being made applicable to the purpose of discharging this debt. After the answer was put in by Mr. Butler, an application was made to discharge these orders; but the Master of the Rolls refused to discharge them: I think an application was also made to the Lords Commissioners, and they also refused. After the answer of Lord Dillon came in, a second application was made to discharge these orders; but the Master of the Rolls [283] refused to discharge them, and directed that the order by which Mr. Butler was restrained from paying over the £1250 should be continued till the hearing of the cause, and until further order.

It is against this last order, and the other orders which are the foundations of it, that the present Appellants have appealed. With respect to the merits, there can be no question: every possible delay has been interposed for the purpose of preventing the Respondents reaping the fruit of their judgment: but various objections have been made in point of form, which have been argued with great ability at the Bar, and to which I am to call your attention.

In the first place, it was said that there were not the proper parties to the suit; that the prior incumbrancers ought to have been made parties to the suit: but the prior incumbrancers had nothing to do with this order, for this order operates only on the £5000 a year that came into the possession of Mr. Butler; and the only question is, whether Mr. Butler has a right to take possession of it; therefore it is quite clear, that the prior incumbrancers need not have been called before the court. But then it is said, that the creditors who were parties to the deed of 1815 ought to be parties to this order. The same answer applies to them; they have no interest in this question, for they have no right to any of the rents and profits till the £5000 has been paid.

It is then said, there are two particular individuals who are now trustees, and ought to have been made parties to this suit. After the original bill was filed, and a short time before the supplemental bill was filed, two of the original trustees having died, two new trustees were appointed, but no communication was made, previously to the filing of the supplemental bill, of those additional trustees having been appointed, nor was it known till a late period of the cause that they had, in point of fact, been appointed: they stood in precisely the same situation and the same interest with Mr. Butler, and it does not appear that when this case came before the Lord Chancellor any objection was made that these trustees were not parties. If any objection had been made, it would have been obviated in an instant: they were merely formal parties, and their names might have been added. It appears to me, therefore, that even if there were originally an objection in point of strict law, it ought not to prevail at this period of the cause, with respect to an order of this description, a mere interlocutory order, the object of which is to secure a fund for these claimants, in the event of their claim being ultimately allowed.

Having disposed of these objections in point of form, the next difficulty raised was with respect to the *elegit*. It was said that the return of the *elegit* was defective in point of form, and various ingenious arguments were raised upon that point. The short answer to all those arguments is, that it was not necessary that any return whatever should be made: that the mere suing out the *elegit* was all that was necessary; therefore, as it appears to me, no injurious consequence follows in this cause from the circumstance of any defect in the return which the sheriff made to the *elegit*. Then it was contended, that it appears upon this return that satisfaction had been made to the present Respondents, that the property had been seized into the

hands of the sheriff, for the purpose of discharging this debt. The answer to that is, that it is quite clear from the whole nature of these proceedings, and the pleadings in this case, that there [285] had been no satisfaction; and it is quite clear from the answer of Lord Dillon himself that that is the case. I apprehend, therefore, that no objection can be raised from the supposition that any satisfaction has been received, that supposition being built on the inaccurate return of the sheriff.

The only remaining objection which I now bear in my mind is that there ought to have been an *elegit* in each county. The Irish property is situate in the counties of Roscommon, Mayo, and Westmeath; only one *elegit* is sued out, and that in the county of Roscommon. I think it is perfectly clear that one *elegit* was sufficient.

Having disposed of these questions of law, I should humbly recommend to you that the judgment of the court be affirmed; and as it appears to me that the proceedings have been conducted entirely for the purpose of delay, I conceive under such circumstances, there being no serious doubt in my mind, the judgment ought to be affirmed, with £150 costs.

Judgment affirmed, with £150 costs.

[286]

IRELAND.

(COURT OF CHANCERY.)

FRANCIS ARTHUR KNOX GORE,—*Appellant*; ROBERT EDWARD Viscount LORTON, DANIEL CUDDY, HENRY CAREY, and HARRIET KELLY,—*Respondents*; and R. E. Viscount LORTON,—*Appellant*; F. A. KNOX GORE,—*Respondent*.

[S. C. 1 Dow's Cl. 190.]

A., by marriage articles, bound himself "to pay to H. upon his marriage with E., (the said H. settling all the estates and money he was then entitled to on the issue of the marriage, and a suitable jointure to the fortune E. gave him,) the sum of £5000." H. in the same articles bound himself "to settle all the estate and money which he was then entitled to upon the issue of E., and a jointure of £500 a-year."

Four years after the date of these articles and the marriage, H. acquired an estate which was limited to the issue of the marriage, with a power reserved to H., under which, after a lapse of twenty-six years, he by deed appointed to his wife E. £500 per annum by way of jointure, and £6000 to the younger children of the marriage as portions.

Held in the Court below, and on appeal, that this was a performance of the condition upon which A. contracted to give to H. a marriage portion of £5000; and that so much of that sum as was not paid on the marriage became due on that event, and was a charge on the estate of A., payable with interest from the date of the marriage.

The original articles were not produced in the cause, but it was in proof that H. was the executor of A.; that the house of H. in Ireland had been occupied by a French and rebel army, and his papers ransacked and scattered; that L. was the executor of H., and that the houses of H. and L. had been searched, but [287] that the original articles could not be found. Under these circumstances secondary evidence—viz. a copy of the articles sent with a case laid before counsel; a charge in the solicitor's bill for the copy and case; a recital of the Articles in an Act of Parliament for settling lands on the issue of the marriage; and a deed appointing a jointure according to the articles and portions to children, under a power reserved by the Act, were admitted as proof of the existence and contents of the articles.

This decision was affirmed on appeal.

A. by his will limited his lands to E. his daughter, and H. her husband, for their lives, etc.; remainder to their sons successively in tail; remainder to M. his

daughter, and F. her husband, for their lives, etc.: remainder to their sons successively in tail; with divers remainders over, including C. and his sons, and their issue; and he declared and provided by the will, that in case M. or F., or the sons or son of F. and M., or either of them, should become entitled to the estate under the limitations of the will, a sum of £2000 should be charged on the lands in possession, for the use of the younger children of C., in certain specific proportions. E. and H. died without issue. The sons of M. and F. died before the estate became vested in them; and after the death of M. and F., and the expiration of the preceding life-estates, G., a grandson of M. and F., became entitled under the limitations of the will to an estate-tail.

Held in the court below, and on appeal, that the lands having vested in a grandson, and not in a son of M. and F., were nevertheless liable to the charge created by the will in favour of the younger children of C.

In the years 1758 and 1764 H. had paid the sums of £100 and £2000 of the debts of A., and had from time to time, and at the periods of these payments, received various monies belonging to A. from his agents. A bill being filed by the representatives of A. to ascertain and raise certain charges upon A.'s estate; H. in his answer made no claim in respect of the payments of the £200 or the £4000; and in two successive charges sent in by him before the Master, he did not make any such claim; but at last, in the year 1817, he produced a charge, in which those sums were claimed with interest.

Held in the court below, and on appeal, that under these circumstances, the claims were barred by *laches* and length of time, notwithstanding the pendency of the accounts; and were properly disallowed in the same account in which H. was charged with monies from time to time, and during the period in question advanced to him by the agents of A.

[288] On the 30th of June, 1757, Articles of Agreement were executed by Annesley Gore in the words and figures following: "I do hereby oblige myself to pay unto Henry King, Esq. upon his marriage with my daughter Elinor Gore, (the said Henry King settling all the estates and money he is now entitled to on the issue of said marriage, and a suitable jointure to the fortune I give him,) the sum of £5000 sterling. Witness my hand this 30th day of June, 1757. A. G. If Henry King recovers the Boyle estate left him by the late Lord Kingsborough, I in that case oblige myself to pay the said Henry King at my death, (provided he also settles said Boyle estate on the issue of said marriage, with an additional jointure on said estate of Boyle proportionably,) the sum of £5000. Witness my hand the 30th of June, 1757. A. G.

At the same time Henry King signed the agreement following: "I do hereby oblige myself to settle all the estate and money which I am now entitled to on the issue of Elinor Gore, and a jointure of £500 a-year. And if I recover the Boyle estate, I do oblige myself to settle the same on the issue of the said marriage, with an additional jointure on the said estate of Boyle of £500 a-year."

At the time of the execution of these articles there was a suit depending between Henry King and his eldest brother, Sir Edward King (afterwards Earl of Kingston), respecting one of the family estates called the Boyle estate.

The marriage between Henry King and Elinor Gore took place on the day of the date of the articles.

Henry King did not recover the Boyle estate; but [289] an amicable agreement having taken place between him and Sir Edward King, and a deed pursuant to that agreement, bearing date the 6th of May, 1761, having been executed by them, a private Act of Parliament was passed in Ireland, in the session of 1761, for settling the differences between them; by which it was enacted, according to the agreement, that certain lands, etc. in Ireland, therein mentioned, should be, and they were thereby settled to the use of Henry King for life, with a power to settle a jointure of £500 yearly on his wife, and also with a power to charge the lands, etc. with £6000 for the portions of younger children, with remainder to the issue of Henry King in tail male, with remainders over.

By a deed bearing date the 9th of May, 1787, and made between Henry King of

the 1st part, Elinor King of the 2d part, and James Stewart and the Reverend Thomas Stewart of the 3d part, reciting the articles: and the Act of Parliament and powers thereby created, Henry King, in consideration of the marriage, and of the sum of £5000 to which he became intitled as the marriage portion of Elinor King, and in performance of the agreement entered into by him with Annesley Gore, and in execution of the powers to him given by the Act of Parliament, granted and appointed to Elinor King his wife an annuity of £500, charged upon the lands vested in Robert French and Annesley Gore by the Act of Parliament, and also charged the same premises with £6000 for the portions of the younger children of the marriage.

This Deed of Appointment was registered on the 9th of May, 1787.

Annesley Gore died on the 4th of November, 1781. By his will, bearing date the 8th of August, 1780, after bequeathing two small annuities and a legacy of [290] £50, he directed that all his just debts should be paid out of his personal estate; that the deficiency (if any) in his personal estate to answer the purposes aforesaid, should be supplied and be charged upon his real estate.

He devised all his real estates in Ireland to certain trustees for the use of his daughter Elinor King, and his son-in-law Henry King, and their assigns, for the term of their respective natural lives, without impeachment of waste; and after the determination of that estate, to the use of such of the sons of Henry and Elinor King, and their heirs male, as the said Henry should appoint: and for default of such appointment, then to the use of the issue of the marriage in tail male; and in default of such issue, then to the use of the testator's daughter Mary, the wife of Francis Knox, for her life; and after the decease of Mary Knox, to the use of Francis Knox for his life; and after the decease of Francis Knox, to Francis Knox, junior, second son of Francis Knox, for life; and after his decease, to the use of his first and every other son in tail male; and in default of such issue, to the use of James Knox, father of the Appellant, who afterwards took the name of Gore, third son of Francis Knox, senior, for life; and after the decease of James Gore, to his first and every other son in tail male, with remainder to Henry Knox, fourth son of F. Knox, senior, for life; remainder to his first and other sons successively in tail male; remainder to Annesley, first son of F. Knox, senior, for life; remainder to his first and other sons in tail male; remainder to the Testator's daughter Anne, the wife of Henry Carey, for life; remainder to her husband for life; remainder to Henry Carey, junior, their second son, for life; remainder to his first and other sons successively in tail [291] male; remainder to Annesley Carey, their first son, for life; with remainder to his sons in tail successively.

The will then contained the following provision: "And my will and intention is, that in case and as soon as my said daughter Mary Knox, or the said Francis her husband, or the sons or son of the said Francis and Mary, or either of them, shall, by virtue of the limitations aforesaid, become entitled to my said estate, the same shall then be and become charged and chargeable with the payment of the sum of £2000 sterling, to and for the use of the younger children of the said Henry Carey and Anne Carey his wife, in manner following (that is to say):—The sum of £500 to Henry Carey, second son of the said Henry Carey, and the remaining £1500 to the five daughters of the said Henry and Anne, and the survivors and survivor of them, share and share alike.

He bequeathed all his leasehold interests for years, charged with his debts, to the same uses as his real estate, as near as the law would admit, with a power to his executors to sell such part of his real and leasehold estates as they should think proper for the discharge of his debts: and he appointed Henry King, Francis Knox, and Henry Carey, executors of his will, which was proved by Henry King; who entered into the possession of his real and personal estate.

In the year 1798 a French army landed at Killala, in the county of Mayo, a corps of which, accompanied by a body of rebels then in arms, occupied the mansion-house of Henry King, in the town of Ballina, as their head-quarters.

At the time when the French and rebel army took possession of the mansion-house, a considerable number of deeds and papers of Henry King were deposited there, and were, during the occupation of the mansion-house as aforesaid, taken from the place where they [292] had been kept, and a great part of them was lost or destroyed, and the remaining part was, after the retreat of the army, found scattered about in a state of confusion.

Search was made among the remains of the deeds and papers of Henry King, and at the house of Lord Lorton, his executor, for the original articles, but they could not be found. The secondary evidence of their contents rested on the following proofs, viz.:—the recital in the Act of Parliament, and in the deed of appointment; a copy of the articles, in the hand-writing of Henry Dixie Lyster, the clerk of William Lyster, who had been the attorney of Annesley Gore and of Henry King; a case which had been laid before Theobald Wolfe, a barrister, about the month of August, 1782, in the hand-writing of Henry Dixie Lyster, and referring to a copy of the articles, and on which case, Theobald Wolfe wrote that he had read the copy; and the bill of costs of Lyster, which appeared to have been paid by Henry King to William Lyster by bills of exchange drawn by Henry King on Messrs. Latouche, bankers, in which Lyster charges the cost of preparing the case and copy of the articles, and laying the same before Theobald Wolfe. It was also proved that the case, the copy of the articles, and the bill of costs, were found among the papers of Henry King, and that both William Lyster and Henry Dixie Lyster were dead.

The object of laying the case before Theobald Wolfe was to obtain his opinion whether the trustees named in the will of Annesley Gore, or Henry King, Francis Knox, and Henry Carey, could, by a sale or mortgage of a competent part of the estates of Annesley Gore, raise a sum for the payment of the marriage portion, and the interest thereof, under the power [293] given them by the will, to sell and dispose of such part of his real freehold and leasehold estates as they should think proper, for the discharge of the debts of Annesley Gore.

Elinor, the wife of Henry King, died in the year 1789, without having had issue.

On the 2d of December, 1814, Annesley Knox, Henry Knox, Arthur Knox, and John Knox, as executors of Francis Knox, exhibited their bill in the High Court of Chancery of Ireland against Henry King, Mary Knox (since deceased), then the widow of Francis Knox, and the then next tenant for life of the testator's estates expectant on the death of Henry King, James Knox Gore, since deceased, the then next tenant for life of the testator's estates expectant on the decease of Henry King and of Mary Knox, (his elder brother, Francis Knox the younger, having previously died without issue male), and also against the appellant, Francis Arthur Knox Gore, then a minor, the eldest son and heir apparent of James Knox Gore and first tenant in tail of the estates under the will, and against several others, in order to recover the amount of certain judgment debts affecting the estates that had so as aforesaid belonged to the said Annesley Gore in his lifetime.

Henry King answered the bill on the 3d of June, 1815, being then eighty-four years of age, and he by his answer admitted the plaintiff's demands, but denied that he was bound to pay them, having paid very large sums out of his own funds in discharge of the debts due by Annesley Gore at his decease, over and above the amount of the personal estate of Annesley Gore, for which sums he prayed by his answer to stand in the place of the creditors whose debts he had so discharged out of his own [294] funds, and to have the same decreed to be charges against the real estates of Annesley Gore.

The cause was heard before the Lord Chancellor of Ireland on the 25th of February, 1817, when it was decreed that the will of Annesley Gore was well proved, and that the trusts thereof should be carried into execution; and accordingly it was referred to one of the masters to take accounts: of the sums due to the plaintiffs on their judgments: of the personal estate of the testator, with the nature and amount of such personal estate: into whose hands same had come, and how the same had been applied and disposed of: also an account of the testator's debts, legacies, and funeral expenses: and in taking such accounts the master was directed to inquire and report whether any and which of the debts of the testator due at his decease had been paid by Henry King: and if he should find that Henry King had paid such debts, he was then to inquire and report out of what funds he had paid such debts, and if he should find that Henry King had paid any of the debts out of his own funds, then it was declared that Henry King should be entitled to stand in the place of the creditors whose debts he should have so paid.

Upon this reference the plaintiff filed a charge on the foot of the judgments, and proved the same; and on the 9th of September, 1817, Henry King filed a charge with two schedules, containing the particulars of such debts of Annesley Gore as had been

paid by Henry King. In the second schedule to the charge, the following items were inserted: "To the amount of money remaining due by the said Annesley Gore at the time of his decease to said defendant, and of sums paid by said defendant for said Annesley Gore £—. To principal sums due on foot of other bonds, and on foot of other judgments obtained [295] against said Annesley Gore at the time of his decease, paid by said defendant £—."

An additional charge was afterwards filed on behalf of Henry King, claiming the principal sum of £3000 on the foot of the marriage portion, with the sum of £4382 for the interest thereof, from the date of the marriage articles to the day of the death of Annesley Gore.

Henry King not having been able to discover the original articles of the 30th of June, 1757, the same could not be produced or proved before the master on taking the account, but the secondary evidence before stated was laid before the master.

James Knox Gore, on the 3d day of October, 1817, caused personal interrogatories to be administered to Henry King. He, in his answer, did not claim credit for certain sums afterwards claimed, of £100 and £2000, or the interest thereof. And as before he claimed only the principal sum of £3000 on the foot of the portion, and £4382 interest.

On the 20th of March, 1819, a further charge was filed on behalf of Henry King, on foot of the principal sums of £100 and £2000, and the interest thereof, which was claimed as due for monies paid by Henry King on account of Annesley Gore; it was entitled the further charge of Henry King, containing further particulars of the second item in the second schedule to the original charge of the said Defendant.

The Master, in taking the account, ruled that the portion of £5000 did not bear interest, and deducted from the amount of the principal sum of £5000 the sum of £2697, from time to time paid by Annesley Gore's agents to and for Henry King, and by his report, bearing date the 1st of May, 1824, found that the sum of £2303, and no more, remained due to Henry [296] King, on the foot of the £5000, at the time of the death of Annesley Gore, although the Respondent insisted that after the aforesaid deduction, he was manifestly entitled to interest on the foot of the marriage portion, from the 30th day of June, 1757, the date of the marriage articles, to the 4th day of November, 1781, the day of the death of Annesley Gore, and to have the said £2697 set off against the said two sums of £100 and £2000, and the interest thereof, which was also the desire of the Appellant, as appears by one of the exceptions filed by him to the report, in case the Master allowed the Respondent credit for the two last-mentioned sums.

In respect of the £2000 charged upon the estates, in favour of Henry, the second son of Henry Carey, and the surviving daughters of Henry and Anne Carey, in case Mary Knox, or Francis her husband, or the son or sons of Francis and Mary, should, under the limitations, become intitled to the estate; a charge was filed by the assignee of Henry, the second son of Henry Carey, and two surviving daughters, the Respondents Cuddy, Carey, and Kelly, to whom respectively the Master reported the principal sum of £2000, with interest, to be due, in the proportions specified in the will.

Pending the account, Henry King died, at the age of ninety-one years, having made his will, and appointed the Respondent sole executor; and the Respondent having obtained probate of the will, the cause was revived against him. The report of the Master having been filed, the Appellant took several exceptions thereto. The third exception was, because the Master had applied several sums of money, amounting to the sum of £2697 in liquidation of the sum of £5000, the portion of Elinor King, whereas he ought to have debited the Respondent with such several sums [297] of money, amounting to the sum of £2697, as so much money paid to and received by Henry King, to the use of Annesley Gore; or if the Master was warranted in making any specific application thereof, the same should have been applied, in the first instance, towards the discharge of the sums of £100 and £2000 in the Appellant's first and second exceptions mentioned.

The ninth exception was, because the Master allowed a credit to the Respondent for the sum of £5000, the portion of Elinor King; whereas the Master was not warranted by the evidence or by law, to allow any sum on foot of the portion.

An exception to the report was also filed on behalf of the Respondent; because the Master had only allowed credit to the Respondent for £2203 for the balance due

on foot of £5000, the portion of Elinor King; whereas he should have allowed to the Respondent the principal sum of £3000 and £4382 10s., the interest thereof, from the 30th of June, 1757, to the 4th of November, 1781, making together £7382 10s.

As to the £2000, with interest, reported due to the Respondents Cuddy, Carey, and Kelly, the Appellant excepted to the report on the ground that it was not upon the events a charge affecting the estate.

The cause was heard on the report, exceptions, and merits, on the 26th, 27th, and 28th days of July, 1824, when no question was raised respecting the existence or due execution of the marriage articles of the 30th of June, 1757, but only as to the right to interest on foot of the portion.

The exception, as to the £2000, was overruled.

Upon the third and ninth exceptions of the Appellant, and on the exception filed on behalf of Respondent, it was referred back to the Master, to take an [298] account of the sum due on the foot of the portion, the court declaring, that the portion was payable, with interest, from the day of the marriage of Henry King and Elinor Gore, and that the Respondent was not entitled to credit for the sums of £400 and £2000.

Against this decretal order, there was an appeal by the plaintiff in the suit below, and a cross appeal by Lord Lorton, as executor of Henry King.

Upon the direct appeal, it was contended, on behalf of the Appellant, that there was not a sufficient foundation laid in evidence to entitle the Respondent Lord Lorton to read secondary evidence of the alleged articles of the 30th of June, 1757, and that there was not any proof before the court of the said articles: That it did not appear that the sum of £5000 claimed under the articles of 1757, was at any time an existing charge against the Appellant's estate. The alleged articles of 1757 rested on mutual and dependent covenants, and the portion was not to be thereby payable until Henry King should settle on the issue of the marriage the estate and money he was then entitled to, and make a jointure for his wife pursuant to his covenant, which covenant did not appear ever to have been duly performed, and therefore it was argued that no debt existed on the foot of the sum of £5000 claimed by the Respondent Lord Lorton, even supposing the alleged articles to have been executed. If the sum of £5000 was a debt existing from the date of the articles, or at the marriage of Henry King with Miss Gore, it was barred by length of time, before the death of Annesley Gore, which did not take place for more than twenty-four years after the marriage, and the date of the articles, and should be presumed to [299] have been paid by Annesley Gore: and not being a debt due by Annesley Gore, at the time of his death, it could not be a charge on his real estate under his will.

If the execution of the alleged deed of 1757 made the sum of £5000 a debt of the testator, it could only have been a debt due and payable from the execution of the deed of 1787, the sum of £5000 not being sooner payable, if at all. Supposing the sum of £5000 to be a charge on the estates, it did not appear, from the copy of the articles of 1757, that interest was to be payable on the sum of £5000 therein mentioned, and now claimed by the Respondent Lord Lorton, and there is no evidence of a demand made of the principal sum, or any part thereof, from Annesley Gore. If interest was payable, it is, under all the circumstances, to be presumed, that all interest on the sum of £5000 was paid during the lifetime of Annesley Gore, and by the bill, filed by Henry King in 1788, he claims a balance of £3000 only, to be due on the alleged charges; and even if the settlement of 1787 were to be considered as a performance, by Henry King, of his covenant, in the alleged articles of 1757, it would not entitle him, or the Respondent Lord Lorton, to interest from the marriage, by relation back. Supposing the interest to have become in arrear, at the death of Annesley Gore, it is to be presumed, that Henry King, who received the rents and profits of the estates of Annesley Gore, retained the interest thereof; and at all events the decree or decretal order should not have decreed an account to be taken on the foot of the interest of the £5000, without decreeing an account of the rents and profits received by Henry King who was bound to keep down the interest out of the rents, if the real estate was charged with the £5000.

[300] As to the £2000, the estate of Annesley Gore was only to become chargeable with the sum of £2000 in the event of Mary Knox, or Francis Knox, her husband,

or the son or sons of Francis or Mary becoming entitled to the estate, which event has not yet taken place, and it does not appear that the testator intended to charge his estate at all events.

For the Respondent it was contended, that if the question of fact were now open, (which the Respondent submitted it was not, not having been made the ground of any distinct exception to the Master's report, nor any question raised thereon, upon the hearing below,) there is sufficient proof of the existence, loss, and contents of the marriage articles of the 30th of June, 1757, whereby Annesley Gore bound himself by deed, to pay to Henry King the sum of £5000, as the portion of Elinor Gore, the daughter of Annesley Gore: that Henry King was entitled to receive interest on the marriage portion, inasmuch as the portion was payable immediately upon the celebration of the marriage, and he had by articles bound himself to settle all his property on the issue of the marriage, and a jointure of £500 a year on Elinor, and by his marriage with Elinor, he subjected himself to her immediate support suitable to her rank in life, and to the support of the issue of his marriage, and if he had died at any time after the celebration of the marriage, Elinor would have been entitled under the articles, to an annuity or jointure of £500 a year, charged on all the property of Henry King, and the issue (if any) of the marriage would have been entitled to all his property, subject to the jointure, though Henry King had not executed any deed of settlement in pursuance of the articles.

Although the right of Henry King to enforce the [301] actual payment of the portion and the interest thereof, might be postponed until he had executed a deed securing to Elinor, and the issue of the marriage, the provisions intended for them by the articles: yet a delay in executing such a deed cannot affect his right to receive the interest of the portion, from the date of the marriage: for the articles having been executed for the valuable consideration of marriage, a court of equity would have compelled the specific execution of the agreement therein contained on his part.

Henry King did by deed of appointment of the 9th of May, 1787, make such provision for Elinor, and the issue of the marriage, as by the marriage articles he was bound to make for them. And he thereby at least entitled himself to be paid the portion with interest from the beginning.

The cross appeal turned upon the following facts:

In the year 1758 Annesley Gore became indebted by bond to one Anne Henry in the sum of £1000. In 1761 Henry King paid £400 in part of the debt owing upon the bond. In 1764 Annesley Gore became indebted to the Bishop of Killala by bond, in the sum of £2000. On the 6th of December, 1764, Henry King paid the money due on the bond. Between the years 1757 and 1775, Annesley Gore paid to Henry King various sums of money, amounting to £2697. In the answer filed in 1815, by Henry King, to the bill for ascertaining and raising the charges upon the real assets of Annesley Gore, as before stated, Henry King made no claim in respect of these payments of £400 and £2000. After the decree in September, 1817, Henry King brought into the master's office, a charge on the foot of debts of Annesley Gore paid by Henry King. These payments were not in-[302]-cluded in that charge. In October, 1817, he was examined upon interrogatories. In his answer he made no claim in respect of these payments. But in March, 1819, a further charge was filed on behalf of Henry King, claiming the sums of £400 and £2000 with interest from the respective times of payment, and the Master having reported in favour of these claims, exceptions were taken to his report, which, on hearing the cause in 1824, were allowed as to the £400, on the ground that the debt had been discharged by the application of bills, to the amount of £396, sent by Annesley Gore to Henry King; and as to the £2000, on the ground that the claim had been barred by the statute of limitations.

Against the decree and order allowing these exceptions, the cross-appeal by Lord Lorton was presented.

For the Appellants in the cross-appeal:

Francis Arthur Knox Gore did not by any exception to the report, claim credit for the sum of £396 mentioned in the decree or order, but had submitted to the Master's decision in respect thereof, the Master having refused to give him credit for that sum, and no exception having been taken to the report on that account. It did not appear by any evidence in the cause that bills to that or any other amount,

were sent by Annesley Gore to Henry King; the only evidence relating to the bills being an entry in the account book of Francis Moran, dated the 15th November, 1761, in the following words and figures,—“Bills to Mr. Gore to send to Henry King, Esquire, £396,” which is certainly evidence of nothing more than that those bills were handed to Mr. Gore, but no evidence of what further use they were applied to by him.

Supposing it had been proved that the bills had [303] been sent by Annesley Gore to Henry King, it would have been necessary to have shewn that the £396 was paid on account of the sum specified in the exception.

As to the second exception, an executor is not bound to insist on the statute of limitations, in bar of a fair demand, and is no more bound to insist upon it against his own demand than against any other.

Supposing the statute of limitations might have been set up as a bar to this demand of the Appellant, Francis Arthur Knox Gore did not rely on it, or allege it as a bar before the Master, or in his exceptions to the report, and therefore ought not to have had any benefit from the statute at the hearing on the exceptions.

Francis Arthur Knox Gore had been allowed credit by the Master in the account, on the foot of the marriage portion of £5000 for the several sums of money paid to Henry King, from time to time, in the lifetime of Annesley Gore, in the report specified, amounting altogether to the sum of £2697, the greater part of which had been paid by Annesley Gore to Henry King between the time of the payment of the sum to the bishop of Killala, and the death of Annesley Gore, not one of which sums appears by the Master's report to have been paid on any particular account; and the payments so made to Henry King, subsequent to the payment made by him of the sum of £2000 to the bishop of Killala, ought therefore to be presumed to have been paid to Henry King on account of the sum of £2000 which he had advanced to the bishop of Killala, or the amount thereof, and might have been so applied.

However the sums were to be applied, it appears by the Master's report, that not one of the sums was paid within six years previous to Annesley Gore's [304] decease. And therefore the statute of limitations ought not to have been allowed in bar of Appellant's right to credit for the £2000 so paid to the bishop of Killala, and the interest thereof, without expressly directing that the Appellant should not be charged in any way with the sums amounting to £2697, the statute of limitations operating in bar of the whole of the sums comprised in the said sum of £2697 upon any principle on which it can be held to operate against the Appellant's having credit for the £2000 so paid by Henry King, to the bishop of Killala. The Appellant ought either to have credit for the sum paid by Henry King to the bishop of Killala, or he ought not to be charged with the sum paid by Annesley Gore to Henry King; for if on the principle of there being cross demands and a running account between the parties, the items on one side are taken out of the statute, so also must those on the other side.

For the Respondent:

As to the First Exception: It appears by the receipt of the 18th of December, 1761, upon which the claim of £400 and interest is founded, that the payment was made by Annesley Gore, and that Henry King was only the agent in making it, and must be taken under the circumstances, and particularly at this distance of time, to have procured from Annesley Gore funds to enable him to make such payment.

If such a debt ever existed, this payment must, from the length of time that elapsed between the time of payment and the death of Annesley Gore, nearly twenty years, be presumed to be satisfied, and more especially as Annesley Gore was a man of considerable property, and such presumption is strengthened by the fact of Henry King, who survived Annesley Gore a number of years, not having made any claim on the foot of such payment until the year 1819.

[305] It appears that the said sum of £400 was discharged by the application of bills sent by Annesley Gore to Henry King.

The balance due upon the bond (after payment of £400) was paid by Annesley Gore, and the security taken up by him and cancelled by cutting off the seal, and under such circumstances, and in such state, the bond came into the hands of Henry King as executor of Annesley Gore, with all his other papers, and upon the death

of Henry King came into the hands of the Appellant as executor of Henry King, and King's possession of the bond is consistent with the fact of the discharge of the whole amount thereof, by and with the money of Annesley Gore. If such a debt ever existed, it was barred by the statute of limitations in the lifetime of Annesley Gore.

As to the Second Exception: The sum of £2000 in this exception mentioned does not appear to have been a payment made on account of, and for the proper debt of Annesley Gore, who was one only of two obligors in the bond; it might have been a payment for the debt of his co-obligor, or of Henry King himself, who held valuable renewable interests as tenant under the see of Killala.

If the payment was made on account of Annesley Gore, it should, under all the circumstances, at this distance of time, and especially as no claim was made on the foot of such payment until the year 1819, be presumed that Henry King (who acted as agent for Annesley Gore, in making other payments from the funds of Annesley Gore), had made such payment also with Annesley Gore's money, and not from the private funds of Henry King.

The production of that bond by the representative of Henry King is not in itself evidence that the pay-[306]-ment thereof was made with the money of Henry King, inasmuch as Henry King acquired possession of all the papers of Annesley Gore as his executor, and the papers afterwards came into the possession of the Appellant as executor of Henry King.

The Lord Chancellor: This was the case of an appeal from an order of the Lord Chancellor of Ireland, on exceptions taken to the Master's report: the exceptions are many in number, and embrace a great variety of complicated facts and considerations. It will not be necessary for me in suggesting the course to be pursued in this case to trouble your Lordships with all the particulars to which I have adverted. I will endeavour to confine the observations I have to make upon this case to those material points which in the course of the argument have been pressed on the consideration of the House.

Upon these exceptions one question related to the interest of certain persons of the name of Carey; two of them were the daughters of the third daughter of Annesley Gore. The question arose upon the construction of the will of Annesley Gore. I think that the interpretation which was put upon that part of the will by the Lord Chancellor of Ireland was perfectly correct, and so clear as to afford no reasonable ground whatever for doubt. I should therefore recommend that that part of the judgment of the court below should be affirmed.

The material question for consideration arises out of certain articles which were executed as far back as the year 1757, upon the marriage of the daughter of Annesley Gore with Mr. Henry King. One question, which was argued at great length at the bar, was of this nature, as to whether or not there was suf-[307]-ficient evidence of the contents and the execution of those articles. Now, in the first place, adverting to the form of the exception to the Master's report, it does not appear to me that the question is raised with respect to the sufficiency of the evidence as to the existence or contents of those articles. The terms of the exception are not such as very distinctly to raise that question, nor do I believe it was ever intended to raise that question. It is true that the terms, perhaps, are sufficiently large to embrace it. The exception is in these words: "For that the said Master by his said report allows a credit to the said Viscount Lorton for the sum of £2303, being an alleged balance of a sum of £5000, the alleged portion of Elinor Gore, one of the daughters of Annesley Gore, on her marriage with the said Henry King, on foot of the said alleged portion." Whereas the said Master was not warranted by evidence or law to allow any sum on foot of the said portion. There are questions existing in this case quite sufficient to satisfy these terms of the exception that the "Master was not warranted by evidence or law to allow any sum on the foot of the said portion;" and therefore, although the terms of that exception, perhaps, are large enough to embrace a question of this kind, I do not think it was the intention of the parties at the time when that exception was framed to raise this particular question, for I think as an objection was taken in the Master's office to the evidence for the establishment of those articles, if it had been intended before the Court of Chancery to agitate this question, the terms of the exception would have pointed to it more distinctly. It is stated in the Respondent's case (and there is nothing to throw doubt

upon it in the case on the other side) that in point of fact this objection was not insisted upon in the Court of Chancery: it is stated that some [308] allusion was made to it, but that so far from its being insisted upon, it was actually abandoned at the bar by the counsel. That was stated at the bar of the house in the course of the argument, and I did not hear it denied on the other side. I have since had some conversation with the noble and learned Lord before whom the case was heard, who, according to the best of his recollection, does not consider that this question was agitated at the bar of the Court of Chancery, but that the main question which was there agitated, was, whether or not Henry King, or the representatives of Henry King, were entitled to a claim of interest made upon the sum contained in those articles; and if in the result it should turn out that the question was not raised in the Court below, or when alluded to was abandoned, the House will not allow such an objection to prevail, coming here *per saltum* for consideration, and now raised for the first time at the bar of the House, especially a question of this nature.

But I would beg leave to call your attention to the evidence for the purpose of establishing the existence and the execution of this instrument, because I think it is impossible to advert to that evidence and to entertain any doubt whatever that these articles in this form did exist, and that they were executed by Annesley Gore.

Upon this enquiry, as the articles themselves were not produced before the Master, evidence was brought forward for the purpose of giving a satisfactory account of their having been lost or destroyed, and that evidence was of this description. These articles were supposed to have been executed in the year 1757. In the year 1798, in consequence of the rebellion which at that time existed in that part of Ireland, a body of troops, consisting of Irish rebels and French troops, took possession of the house of Mr. Henry [309] King; they established their head-quarters in that house, and held possession of it for a very considerable time; and a witness who gave evidence in the progress of this cause, proved that he was upon the premises at the time, and that all the closets and drawers were ransacked, and all the papers and deeds were scattered about the different rooms of the house. It is natural, therefore, to suppose, that under such circumstances, many of them must have been destroyed. Henry King was the representative and executor of Annesley Gore; if there were two parts, therefore, of this instrument, they would come into the possession of Henry King. Lord Lorton was the executor of Henry King: with a view to this inquiry, and with a view to this cause, the premises at Ballina, which was the house of Henry King, were searched for the purpose of discovering those articles, and the depositories of Lord Lorton, who was the executor of Henry King, containing any papers belonging to Henry King, both in Dublin and the country, were searched and carefully examined, and there was no trace whatever of those original articles. Upon this evidence, it was competent for this purpose, to admit secondary evidence of the existence, execution, and contents of these articles.

Now that evidence was of this description: Annesley Gore died in 1781, the articles having been executed in the year 1757. The very year after his death, Henry King, by means of Mr. Lyster, his attorney, stated a case for the opinion of Mr. Wolfe (at that time Attorney-General for Ireland, and afterwards Lord Kilwarden), with reference to those very articles. The object of the case was to ascertain whether or not a part of the property of Annesley Gore might be sold for the purpose of discharging this debt. In the case [310] itself, the substance of the articles was set out, but the case referred to a copy of the articles by which the case was supposed to be accompanied: there was an opinion upon the case in the hand-writing of Mr. Wolfe, which hand-writing was proved, and Mr. Wolfe, in his own hand-writing, has said with reference to the copy which is stated to have accompanied the case, "I have read it;" there is no doubt, therefore, that the case for the particular purpose to which I have referred was laid before Mr. Wolfe in the year 1782, the year after the death of Mr. Annesley Gore, that case being wholly written by a son of Mr. Lyster, who was the attorney of Mr. King, and had been the attorney of Mr. Annesley Gore.

There is also a bill of costs which was found among the papers of Mr. Henry King, in the hand-writing of Mr. Lyster's son, adverting to this very case, and making a charge for it, which bill of costs is proved afterwards to have been paid.

Under such circumstances, therefore, it can hardly be supposed that the copy which was thus sent to Mr. Wolfe for his opinion with reference to the subject to which I have adverted could have been any other than a genuine copy of the instrument; and the instrument probably existed at that time, for that was in 1782, many years before this supposed destruction of the instrument, by the means to which I have adverted, which was in the year 1798.

In an act of parliament passed in the year 1764, a very few years after the date of the execution of those articles, a power is given to charge those estates which belonged to Mr. Henry King, with a jointure of £500 a-year; and in the year 1783, a settlement is made on Henry King under this power, corresponding exactly with the sum mentioned in the articles.

[311] Now, taking this evidence, and taking all the circumstances of this case together, I think I should do wrong in suggesting to your Lordships any other course than that of confirming that part of the decree which relates to those articles. I am of opinion that I cannot, under these circumstances, recommend to your Lordships to set aside the decree, on the ground that there is no sufficient evidence to satisfy your Lordships that those articles did exist in the form in which they are represented in the copy, and that they were executed by Mr. Annesley Gore; I think if I did I should give your Lordships improper advice in a case of this description, particularly where there is great reason to doubt, whether this question was raised at the hearing in the court below. I think I ought not to recommend to your Lordships to reverse any part of this decree founded on the supposition that there was not sufficient evidence of the existence of those articles.

The only material question that remains to be considered, is the question of interest. That question arises out of the construction of the articles. The articles are in these terms. I have already read them, but I will advert to them again, to shew the precise terms on which the question depends.—“I do hereby,” says Mr. Annesley Gore, “oblige myself to pay unto Henry King, Esquire, upon his marriage with my daughter, Elinor Gore; and the said Henry King settling all the estates and money he is now entitled to on the issue of said marriage, and a suitable jointure to the fortune, I give him the sum of £5000 sterling:” it should seem, that after that part of the articles had been written, some treaty or negotiation must have existed between the parties, because your Lordships will find, that it is upon Mr. Henry King [312] making a suitable jointure to the fortune I give him, which is a sum of £5000 sterling. In a note written at the bottom, and signed by Mr. Henry King, he says, “I do oblige myself to settle all the estate and money which I am now entitled to on the issue of Elinor Gore, and a jointure of £500 a year:” so that it should seem, that between the period when the original memorandum was made by Mr. Annesley Gore, and the period of the memorandum adopting his proposition, signed by Mr. Henry King, who was to make a suitable jointure, according to the memorandum signed by Mr. Annesley Gore, that was settled between them as a jointure of £500 a year; and he says, therefore, in answer, “I do hereby oblige myself to settle all the estate and money which I am now entitled to on the issue of Elinor Gore, and a jointure of £500 a year; and if I recover the Boyle estate, I do oblige myself to settle the same on the issue of said marriage, with an additional jointure on said estate of Boyle, of £500 a year:” with respect to the Boyle estate, it is not necessary to advert to that matter, for it does not appear that he recovered the Boyle estate.

Now what took place upon that? It appears that there was an obligation on the one party to pay £5000: there was an express distinct obligation on the other to settle all the money to which the party was entitled, so as to create a jointure of £500 a year: there were mutual obligations of this description. What took place? It appears that there was at this period a contest between Henry King and his brother, Sir Edward King, with respect to a considerable part of the property in controversy. That was carried on for a considerable period, and at last, in 1762, it was settled by a mutual arrangement between the parties. [313] For the purpose of confirming the arrangement, an act of parliament was passed, and it appears, that by that act of parliament all the property which this gentleman, Mr. Henry King, was entitled to, all the real property he was entitled to, was included in that act of parliament, and became the subject of a settlement under that act. Now the settlement under

that act of parliament, so far as it is necessary to state it, is of this description:—Mr. Henry King took an estate for life, with remainder to his issue in tail; there was a power to raise £500, for the purpose of a jointure to Mrs. Elinor King his wife, and a portion, not exceeding a sum of £6000, for his younger children. If this power had been immediately executed, that would have been a fulfilment, as far as the real property was concerned; and it does not appear that he was possessed of any personal property; but in point of fact the power was not immediately executed, owing to some accidental circumstances which are not sufficiently explained in this case. It was not till the year 1787, but still during the lifetime of Mrs. King, that this power was executed; there was then a settlement executed, referring to these marriage articles, an appointment by which she was to have £500 a year, and £6000 was settled for the use of the younger children. In 1787, therefore, these articles were completely fulfilled, as far as the real property was concerned; and it does not appear that there was any personal property, as far as the interests of Mrs. King were concerned. Her interests, therefore, were completely satisfied by the execution of this instrument, which was executed during her lifetime, and she had the full benefit of this stipulation. The £5000 was to have been paid upon the marriage; the stipulation on the part of [314] Mrs. Henry King, which was a binding obligation upon him, was, that he would execute an instrument of a particular description, which settlement was afterwards executed so as to give Mrs. Elinor King, the wife, the full benefit of it. As the money was not paid at the time when it ought to have been, it follows, I think, that interest ought to be charged according to the opinion of the court below (which I think was perfectly correct), from the period of the date of the marriage, when the money ought, in point of fact, to have been paid; I think that is the proper construction of this argument, and under these circumstances, I am clearly of opinion, that this part of the judgment of the court below was perfectly correct.

There is another question relating to sums of £400 and £2000, which were monies supposed to have been paid by Mr. Henry King to the Bishop of Killala and others. With respect to that transaction, considering the time at which it was brought forward, considering the course pursued by Mr. Henry King himself, and considering the late period at which any claim was made on the part of Mr. Henry King, taking all circumstances into consideration, I am of opinion, that the judgment of the court below was just and proper in disallowing these claims.

I have referred to the cross appeal, and the minute considerations arising out of it, and I have read the papers with great attention. I should detain your Lordships too long if I were to go into them. I think it will be sufficient to say I am satisfied that the course pursued by the Court of Chancery in Ireland was correct, and that upon the whole, with reference to all the parts of it, this judgment ought to be affirmed.

With respect to costs in this case, it was a case of [315] great complexity, embracing a great many considerations, and perhaps it will be too much to say that it was not properly brought under the consideration of your Lordships; under such circumstances it may be proper to move that it be affirmed without costs. With respect, however, to the question of costs, I would take a little time to consider as to part of them: the question arising out of the claim of the two Careys and Mr. Cuddy, the representative of one of them. I think that with respect to that part of the case which appears to me too clear to admit of doubt, your Lordships might give an opinion that these parties were entitled to their costs; the rest is altogether so complicated, and involves so many questions of fact, and so many considerations of law, that perhaps it will be better to affirm the decree without costs. The difficulty and complexity of cases in the courts in Ireland, arises out of the extent of the causes in point of time. This originated out of articles executed in 1757, and out of an account, the first item of which was about the year 1760. It is not matter of surprise, therefore, that there should be complexity as to the facts and as to the law arising out of these circumstances.

Judgment affirmed.

[316]

IRELAND.

(COURT OF CHANCERY.)

ROGER MONTGOMERY HAMILTON M'NEILL, and DANIEL M'NEILL,—*Appellants*; MICHAEL CAHILL and ROBERT GROVE LESLIE,—*Respondents*.

The House of Lords having made an order, containing declarations as to the rights of parties, and remitting the case to the court below, with directions; it is not competent to the court below, upon the same state of evidence, to give any judgment inconsistent with the declarations and directions of the House of Lords.

The order which was made by the House of Lords in this cause, as reported *ante*, vol. ii. (1st ser.) [2 Bli. 229] was, by an order of the Court of Chancery in Ireland, dated on the 6th of November, 1820, adopted, and made an order of that court.

Upon the reference which took place upon that order, the Master made a Report on the 31st of January, 1821, the material parts of which are incorporated in the following (among sixteen) exceptions, which were taken to the Report by the Respondent, Michael Cahill:

First Exception: For that the Master has by his said report found that Roger Hamilton M'Neill, the father of the Plaintiff Roger, had no right to sell the estate of Taynish; whereas the Master, on the evidence laid before him, should have found that the said Roger Hamilton M'Neill had a right to sell the estate [317] of Taynish, and therefore the Defendant Michael Cahill excepts to said report.

Second Exception: For that the said Master has also in and by his said report stated, that the interest of the said Roger Hamilton M'Neill, in the purchase-money arising by the sale of the Taynish estate, after paying the heritable debts, amounting to £9000, and the sum of £2000 the fortune of Defendant Cahill's late wife, viz. the sum of £10,000 British, was that of tenant for life, and that the said son of Plaintiff Roger Montgomery Hamilton M'Neill, upon his death was entitled to the said sum, and by the law of Scotland had a claim in respect thereof, upon the estate of his said father, in the hands of the Defendant Cahill, as his executor; whereas the Master, upon the evidence laid before him, should have reported that the said Roger Hamilton M'Neill was not mere tenant for life of the said purchase money, but had the absolute interest therein, and that the Plaintiff Roger Montgomery Hamilton M'Neill was not, upon the death of his said father, entitled to the said sum of £10,000 or any part thereof, and had not by the law of Scotland, in respect thereof, a demand against the estate of his said father, in the hands of the Defendant Cahill, as his executor.

Third Exception: For that the said Master has, in and by his said report, found that the Plaintiff Roger Montgomery Hamilton M'Neill did not by his interference with the rents of the Raplock estate, as it appeared in evidence before him, forfeit his right under the settlement of 1743, in said Report mentioned, or his claim to the money arising from the sale of the said Taynish estate; whereas, etc.

Fourth Exception: For that the said Master has, in and by his said Report, found that certain suits were [318] instituted by the Plaintiff Roger Montgomery Hamilton M'Neill, in the Scotch courts, respecting the will of his said father, but has not reported, as he ought to have done on the evidence before him, that such suits related also to part of the purchase money of the said Taynish estate, which was claimed by the Defendant Cahill, as executor of the said Roger Hamilton M'Neill, deceased. And in which suits the said Plaintiff Roger Montgomery Hamilton M'Neill was an intervenient party, and claimed the same likewise.

Fifth Exception: For that even supposing that the said Roger Hamilton M'Neill had, as reported by the said Master, no right to sell the estate of Taynish, and that his interest in the purchase money arising from the sale thereof, was that merely of tenant for life; and that his son the Plaintiff Roger Montgomery Hamilton M'Neill became entitled to the said sum of £10,000, part of said purchase money, and by the law of Scotland had a claim in respect thereof, upon the estate of his father; yet upon

the evidence before the said Master, and particularly by the said proceedings in the said courts of Scotland, and the discharge and disclamation in said report mentioned, he should have found that the said Plaintiff Roger Montgomery Hamilton M'Neill had extinguished all claim against his said father's estate in the hands of the said Defendant Cahill, as his executor; and therefore Defendant Cahill excepts to the said report.

Sixth Exception: For that the said Master has stated in his said report that the said Roger Montgomery Hamilton M'Neill, upon the death of his said father, was entitled to the said sum of £10,000, and, by the law of Scotland, had a claim in right thereof against the estate of his said father, in the hands of Defendant as his executor, without sufficient evidence to warrant [319] him to do so: and therefore the Defendant Cahill excepts to the said report.

The cause was heard on the report, exceptions, and merits, in March, 1825, when the Lord Chancellor overruled the first and also the second exception, so far as the same depended on the construction of the deed of the 15th day of June, 1743, in the pleadings mentioned, but subject to the order to be made, on the result of the evidence produced before the Master, in regard to the fifth and sixth exceptions, and he overruled the third exception, subject to the order to be made on the fifth and sixth exceptions, and he allowed the fourth exception generally, and he also allowed the fifth and sixth exceptions, it being, as he declared, very doubtful from the transaction between the parties, the decree, and disclaimer, and all the other evidence in the cause, whether (the Appellant having in the year 1782 ratified the sale of Taynish) he had received any part of the produce thereof, or had in any manner compromised his rights thereto, no claim having been made in respect thereof until the year 1807 or 1808, and it being impossible, after the deaths of Roger Hamilton M'Neill, the father, and Dr. M'Neill, to ascertain (if any thing was due to the Appellant in that respect) the amount thereof; and the Lord Chancellor overruled the seventh, eighth, ninth, thirteenth, fourteenth, fifteenth, and sixteenth exceptions; and also the tenth, eleventh, and twelfth exceptions, subject to the return of the Master's report, and he referred it to the Master, to take an account of the rents of the purchased lands in the pleadings mentioned, received by the Appellant Roger Montgomery Hamilton M'Neill, from 1789 to the year 1816, when the Respondent got into possession, and also to take an account on the foot of [320] the principal and interest of the purchase money in the pleadings mentioned during the same period; and directed that a balance should be struck thereon, and in case any balance should appear to be due to the Appellant, Roger Montgomery Hamilton M'Neill, on such account the same, with interest thereupon, down to the time of payment, was to be computed and charged against him; but if any balance on such account should appear to be due to the said Respondent, the same was to be accordingly charged against the Appellant.

Against the order made upon the second, third, fifth, and sixth exceptions, and also the order upon the tenth, eleventh, and twelfth exceptions, and the order whereby it was referred to the Master to take an account of the rents of the purchased lands in the pleadings mentioned, received by the Appellant from the year 1789 to the year 1816, when the Respondent got into possession: and an account on the foot of the principal and interest of the purchase-money in the pleadings mentioned during the same period, and against the direction that in case any balance should appear to be due to Appellants on such account, the same, with interest thereupon down to the time of payment, should be computed and charged against the Respondent, but in case any balance on such account should appear due to Respondent, the same to be accordingly charged against the Appellants, this Appeal was presented.

For the Appellants: As to the order made upon the 2d, 3d, 5th, and 6th exceptions, the House of Lords, by their decree, had determined the Appellant's right to an inquiry, whether he had any claim against the Respondent as [321] executor of Roger Hamilton M'Neill, with respect to the purchase money of the Taynish estate by the law of Scotland, notwithstanding the evidence in this cause which was before the House, upon the hearing of the former appeal in this cause; and although it appeared upon the evidence before the Master, that the Appellant had such claims as reported by the Master, yet the Lord Chancellor professed to make the said order upon the evidence in the cause as barring the Appellant's right to any relief, notwithstanding the decree of the House and the finding of the Master.

Even supposing that, notwithstanding the order of the House, the court below was justified in taking into consideration the several matters stated in the said order, there is no ground for supposing that the Appellant had received any part of the purchase money of the Tainish estate, or compromised his rights thereto, the only evidence in the cause being that, after the discharge of the incumbrances affecting the estate, the purchase money had been paid to Roger Hamilton M'Neill, or to his agents, the Master having by his report so found, which is unexcepted to in this respect; and the Respondent having stated in his case, upon the former appeal in this cause, that a sum of £10,000, or thereabouts, part of £21,000, for which the Tainish estate was sold, was applied in paying off different incumbrances on the estate, including £2000, the portion of the Respondent's wife, as the only younger child of Roger, the father, and Elizabeth his wife; and that the remainder of the £21,000 except about £700, was received by Dr. M'Neill, on the account of Roger the father; and the Respondent, in his answer to the [322] Appellant's original bill in this cause, having relied upon Roger Hamilton M'Neill being seised in fee of the Tainish estate, and entitled to dispose thereof as he thought proper.

The 2d, 3d, 5th, and 6th exceptions are taken upon the ground, that the Master found by his report the several matters to which the said exceptions are taken, contrary to the evidence laid before him, yet the Lord Chancellor did not profess to make his order upon the evidence laid before the Master.

For the Respondent: Roger Montgomery Hamilton M'Neill cannot be considered as having had an estate or interest in the Tainish estate, under the contract, and must be considered as having relinquished all right to the purchase-money (if any such he had), by his having interfered with the Raplock rents, during the life of his father, and demanding a portion of them by his original bill, in this cause, and on account of deliberate acts of election, to abandon all benefit under the contract, and insist upon his rights against his father, and on account of his repeated acknowledgments of the right of Michael Cahill, as executor of his father, to receive the said purchase money, and particularly by the release and disclamation in the Scotch court.

Independently of the circumstances of this case, a court of equity ought not to favour so stale a demand as that made by the Appellant Roger Montgomery Hamilton M'Neill, respecting the purchase-money of the Tainish estate, particularly as he did not think proper to make such demand in the lifetime of the parties who were privy to the transaction, and at this distance of time, and referring to the circumstance of [323] Roger the father having paid a large sum of money out of the purchase-money, for and on account of Roger Montgomery Hamilton M'Neill, about the time he ratified the sale, and also the circumstance of Roger Montgomery Hamilton M'Neill receiving the Raplock rents, it must be presumed, that an arrangement was entered into between Roger, the father, and the Appellant Roger Montgomery Hamilton M'Neill, whereby the Appellant Roger Montgomery Hamilton M'Neill gave up all title and claim to the purchase money of the Tainish estate.

For the Appellants: Sir C. Wetherell and Mr. Shadwell.

For the Respondents: Mr. Hart and Mr. Lynch.

The Lord Chancellor (23d July, 1828): In this case, upon the former appeal, a very special order was made by the House, in pursuance of which a reference to the Master was made in the court below, on several points which were the subject of the order. The Master having made his Report, sixteen exceptions were taken on the part of the Respondent, many of which were allowed, and the present appeal is against that allowance. The parties are in this situation. One object of the bill filed in the court below was to set aside the sale of the Tainish estate; another object was to obtain an account. As to the estate, the father's interest vested in him under the limitations of a marriage settlement. The Appellant was the only son of that marriage. The estate was sold by the father, and the money received by him. The material question was in the result, whether the purchase money so received should form part of the account to be taken between the Appellant and the Respondent, as [324] executor of his father. It was contended in the former stage of the cause, that for this purpose the matter was not sufficiently put in issue, and the court below adopting this view of the case, dismissed the bill. Upon the appeal against this decree, it was in this point reversed, this House being of opinion that the question was

sufficiently put in issue by the pleadings to warrant an inquiry whether any part of the debts of the son were paid by the father, and out of the price of the Taynish estate, so as to form a subject of set-off in the account, to the extent of the debts so paid, but not as to any surplus. The order upon that occasion was framed with great accuracy and minuteness.—(Here the Lord Chancellor read the order, see vol. ii. p. 264, 1st series.) The House drew this distinction, that it was competent to the Appellant to give evidence to rebut the claim made against him by the Respondent as his father's executor, in respect of debts paid for him by his father, but that the matter was not sufficiently in issue to raise any question by evidence as to any thing beyond this pecuniary claim against him.

Upon this order, an inquiry being directed in the court below before the Master, the opinions of Scotch advocates were taken, but the result of the report was, that the purchase money of the estate, upon the death of the father, belonged to the Appellant, and he was to have a credit accordingly. The court below has founded its judgment on the evidence before the House on the former hearing, and as all the evidence referred to in the judgment was before the House at that time, an inquiry would not have been directed as to the law of Scotland, if the House had conceived that the right being established, it would not lead to a sufficient result.

[325] It must then have been supposed, that if it were established, that by the law of Scotland the money belonged to the Appellant, the consequence would follow, not as decided by the court below, but as before contemplated by the House. Moreover, the answer of the Respondent filed in the cause does not insist that he is entitled to the purchase money, as representative of the father, but that the father was entitled to the estate in fee. It must be assumed, in this state of the evidence, that the £10,000 which remained of the purchase money became the property of the son, and that it was not paid over to him. It is not probable it would have been paid, without deducting the counter claims against him. Out of this sum, according to the order in the former appeal, and the subsequent proceedings, he is entitled to have so much allowed on account as may balance the claims against him. So far the exceptions must be overruled, and the order of the court below reversed. In all other respects the decree must be affirmed.

Die Mercurii, 23d July, 1828. After hearing counsel on Monday, the 18th, Thursday, the 21st, and Friday, the 22d days of June, 1827, upon the petition and appeal of Roger Montgomery Hamilton M'Neill and Daniel M'Neill, Esqrs. which appeal was by order of this House, of the 11th of this instant June, revived against the Respondents Michael Cahill and Robert Grove Leslie. And also in the name of the Appellant Daniel M'Neill, complaining of an order of the Court of Chancery in Ireland, of the 8th of March, 1825, and praying that the same might be reversed, and the exceptions overruled, and that the report might be confirmed, [326] and that such further order might be made as should be agreeable thereto. As also upon the answer of Michael Cahill, and the separate answer of Robert Grove Leslie, put in to the said appeal, and due consideration had this day of what was offered on either side in this cause. It is declared by the Lords Spiritual and Temporal in Parliament assembled, That upon the evidence and circumstances of this case, the Appellant Roger Montgomery Hamilton M'Neill is entitled, out of the money arising by the sale of the Taynish estate to a credit in this cause, equal to the claim which the Respondent, as executor of Roger Hamilton M'Neill, deceased, has against the Appellant. And with this declaration, It is ordered and adjudged, That the second, third, fifth, and sixth exceptions be overruled, and that the said order of the Court of Chancery in Ireland, complained of in the said appeal, so far as regards the said exceptions, be and the same is hereby reversed; and that the said order, in all other respects be, and the same is hereby affirmed. And it is further ordered, That the cause be remitted back to the Court of Chancery in Ireland, to proceed further therein, as shall be just and consistent with this judgment.

W. Courtenay, Dep. Cler. Parliament.

[327]

IRELAND.

(COURT OF CHANCERY.)

MARY KELLY,—*Appellant*; JOHN BATEMAN, and MARY his Wife, and JOHN BURKE BATEMAN, a Minor,—*Respondents*.

[News' Dig. ix. 1500.]

A bill for an account was filed in 1718. A decree was made in 1720. The account was pending in the Master's office until 1734, when it was referred to arbitration. The award was made in 1738, by which a sum of £5369 16s. 1d. was awarded to the Plaintiff, and the award was made a decree of the Court, which was affirmed upon appeal to Parliament in 1739.

In 1741 the Plaintiff, to enforce the payment of the sum awarded and decreed, filed a new bill in the nature of a bill of amendment and revivor, against the representative of the Defendant in the former suit, charging that a certain mortgage held by him was part of the assets, and praying that it might be applied in payment of the demand. The Defendant to the last suit, by his answer, admitted the mortgage. In 1742 the Plaintiff filed an amended bill. In 1747 he filed another amended bill, praying in default of personal estate a foreclosure of the mortgage, and that the principal and [328] interest might be applied in satisfaction of his demand, stating, among other things, that he had obtained a sequestration against the lands of G. B., the Defendant in the first suit, who had died before it could be executed, having by his will charged his lands with the payment of his debts. The object of this bill was to obtain payment of the sum awarded from the assets of G. B., part of which assets, as the bill charged, consisted of a mortgage upon an estate called Tyaquin, and that G. B., and his representative, had been in possession under the mortgage, and had received out of the rents and profits sufficient to satisfy the Plaintiff's demand.

In the years 1748, 1751, and 1754, upon the death of parties, bills of revivor and amended bills were filed. From this time no proceedings were taken until the year 1771, when a bill was filed by the representative of the original Plaintiff against the representative of the original Defendant, stating impediments to the prosecution of the suit, and praying an account of the rents received from the lands mortgaged. In 1772 the Defendant filed an answer refusing the discovery, and in 1773, upon exceptions he filed a further answer, still refusing the discovery, which was reported insufficient.

From this time no further proceedings were taken in the cause until the year 1785, when the representative of the Plaintiff in the last suit and of the original Plaintiff filed a bill of revivor and amended bill against the representative of the Defendant in the last suit, and against J. B. the heir of the alleged Mortgagor, stating impediments to the prosecution of the suit from the litigation in which his testatrix had been involved; and that a deed had been made by collusion between the representative of the mortgagee and J. B., the heir of the mortgagor, by which the former conveyed the lands to the latter in consideration of an annuity; charging that the deed was a fraud upon the Plaintiff, and a *devastavit* of the assets, and praying an account of the real and personal estate of the first representative of the original mortgagee, who had charged his debts on his real estate, and devised it and bequeathed his personalty to the Defendants, his representatives.

In 1787 the Defendants, the representatives, by their answer admitted that the deed as charged by the bill was fraudulent, and contended that the Plaintiffs should first have recourse against the lands mortgaged. From 1787 to 1795 no step was taken in the cause. Between the years 1795 and 1804, nine [329] bills of revivor and amended bills were filed. By a decree in 1808, accounts were directed to be taken of the personal and real assets of the original Defendant and his first representative. In 1810 the Master reported

that £28,657 was due to the Plaintiffs; that the assets of the original Defendant consisted partly of a mortgage of the lands of T. which came into the hands of his representative, who had received of the rents and profits sufficient to answer the demand.

Upon exception to this report, the Master by a decree upon further directions was ordered to inquire under what title the representative of the original Defendant entered into the lands of T. Upon which reference the Master reported that he entered as mortgagee. Exceptions being taken to this report, upon the ground (among others) that notwithstanding the existence of apparent securities, and various accounts between the parties on the foot of an apparent mortgage, there was evidence before the Master that the deeds were in reality only deeds of trust to secure the estate against the claims of adverse creditors; and farther, that there were existing judgments, being charges upon the lands prior to the Plaintiff's claim, and that the representative of the original Defendant entered upon the lands not by virtue of the mortgage, but under the limitations of a marriage settlement; by a farther decree upon farther directions, the exceptions on these points were allowed, and the account was directed to be taken excluding the alleged mortgage, and the bill as against J. B. was dismissed.

Held on appeal that the decree was right.

Whether delays such as appear to have occurred, and under such circumstances as in the case reported, ought to operate as a bar to a demand in a Court of Equity? *Quare.*

Whether under the circumstances stated in the case, J. B. the heir of the supposed mortgagor, and relessee of the lands in question, was a necessary party to the appeal? *Quare.*

This suit arose out of a joint purchase of certain wood lands made in the year 1711.

On the 22d of November, 1717, Gerald Burke filed his original bill in the Court of Chancery in Ireland, against Sir Walter Blake, stating that in the year 1711, he, in partnership with Gerald [330] Burke and Ulick Burke, purchased from the then Earl of Clanricarde certain woods in the County of Galway; and praying as against Sir Walter Blake an account of the profits made of the woods, and payment of any balance which upon taking the account might appear to be due to him. Sir Walter Blake put in his answer claiming a balance to be due to him.

On the 16th of December, 1718, Sir Walter filed a cross bill, charging amongst other things that he had paid down his proportion or third part of the purchase money, and joined Gerald and Ulick Burke in securities for the remaining two third parts thereof which he afterwards paid; and praying that all proper accounts might be taken, and an account of what was due to him by the said Gerald, and that he might be decreed entitled to the benefit of a judgment entered against the said Gerald.

On the 27th of May, 1720, a decree to account was pronounced in both causes, whereby it was referred to one of the Masters of the Court to examine and report whether Sir Walter Blake had paid his part of the purchase of the said woods, and how far he was indemnified on account of his said securities so entered into for the said Gerald, which decree was afterwards affirmed upon re-hearing.

The account before the Master having been protracted until the year 1734, it was upon the argument of certain exceptions taken to the Master's report by both parties, agreed to by both parties to refer the subject matter of the causes to arbitration, and the same were accordingly referred.

[331] In 1738, the arbitrators made their award, and awarded that Sir Walter had paid his share of the purchase money, and had been obliged to pay the remainder thereof under the said securities; and they therefore awarded the sum of £5369 16s. 1d. to be paid by the said Gerald Burke to the said Sir Walter Blake, which award was afterwards made a decree of the said Court.

On the 21st of December, 1738, the Court pronounced an order, confirming the award, and decreeing that pursuant to the submission, award, and order, the sum of £5369 16s. 1d., being the sum awarded to be justly due and owing by Gerald

Burke to Sir Walter Blake, together with interest for the same from the 2nd day of July then last, should within six months from the date of the award, be brought in, and deposited by Gerald Burke with the Usher of the Court, to be paid to Sir Walter Blake, his executors and administrators.

Gerald Burke having appealed from this decree on the 9th of June, 1739, it was affirmed by the House of Lords.

Gerald Burke died after the date of this affirmance.

On the 19th of May, 1741, Sir Walter Blake filed his bill, in the nature of an amended bill, and bill of revivor against Thomas Gerald Burke, the son and heir, and against the executors of Gerald Burke, and against Ulick Burke.

Thomas Gerald Burke filed his answer to the bill on the 18th of December, 1741, and by his answer admitted the existence of the mortgage.

Sir Walter Blake filed an amended bill on the 17th of August, 1742, charging more particularly [332] than in his former bills, the several matters aforesaid, and praying like relief.

On the 3d of June, 1747, Sir Walter filed an amended bill, which charged, among other things, that Mary Burke and Alexander Carroll, the executors of Gerald Burke, had died, and that administration with the will annexed of the said Gerald was granted to Thomas Gerald Burke, who was also administrator of the said Mary; and among other things the bill prayed that in default of sufficient personal estates of Gerald to pay the amount of the demands, the same might be charged on the real and freehold estate of the said Gerald, and that the decree might be carried into execution; and also prayed a foreclosure of the mortgage, and that the principal and interest due thereon should be applied in satisfaction of the said demands.

On the 20th of August, 1748, Dame Agnes Blake filed a bill of revivor, which stated that Sir Walter Blake had died, and by his last will had appointed his wife, the said Dame Agnes Blake, his executrix, who obtained probate thereof, and prayed that the suit might be revived.

On the 17th of November, 1748, Catharine Daly, widow, filed an amended bill and bill of revivor, which charged, that Dame Agnes in the year 1748, and immediately after she had filed a bill of revivor, had died, having made her will, whereby she appointed Catharine Daly her sole executrix, and that she had obtained probate of the said will, and praying that the cause might be revived, and such relief as had been prayed for by Sir Walter Blake.

On the 19th of October, 1751, and the 25th of [333] April, 1751 respectively, Catharine Daly filed further bills of revivor and amendment, which charged the deaths of several of the parties to the suit, and prayed that the cause might stand revived, and such relief as prayed in the original bill of Sir Walter Blake.

On the 27th of April, 1771, Catherine Daly filed an amended bill against Thomas Gerald Burke and several others, charging that in consequence of several abatements and new parties becoming necessary, and of a claim being set up by Sir John Browne, under the pretence that he was the husband of the said Catherine Daly, and which claim she was not able for several years to get rid of, and the delays practised on the part of Thomas Gerald Burke, the cause was greatly retarded; and setting out the particulars of the proceedings so instituted by Sir John Browne, and the various alleged causes of delay which had obstructed the prosecution of the cause: the bill further stated, that in the year 1763 John Burke became entitled to the equity of redemption in the lands subject to the mortgages and securities: that Thomas Gerald Burke, although in his former answer he had denied that he had in his possession the mortgage deeds of the Tyaquin estate and the accounts, yet he had stated those deeds and accounts in a bill filed by him in the Court of Exchequer in the year 1751, against Rickard and Thomas Burke, and had referred to them as being in his possession; and charged that Thomas Gerald Burke had been in possession for many years of the mortgaged premises, and required Thomas Gerald Burke to set out the mortgages, securities, and accounts, [334] and the sums he received, or without wilful default might have received, as mortgagee in possession under the securities; and prayed, amongst other things, that an account might be taken of the rents of the mortgaged premises, and by whom received.

On the 28th of May, 1772, Thomas Gerald Burke answered the bill, and refused to give such discovery as to the mortgage deeds and accounts, or as to the sums

received by him out of the mortgaged premises; and exceptions having been taken to the answer, were allowed.

On the 7th of July, 1773, Thomas Gerald Burke filed a further answer to the bill, still refusing to give the discovery sought for, which being also excepted to, and reported insufficient, he never filed any further answer in the cause.

On the 2nd of August, 1785, Edmund Kelly filed a bill of revivor and amended bill against John and Mary Bateman and John Burke, charging, amongst other things, that in the year 1773, Thomas Gerald Burke finding that he was pressed for a discovery of the assets of his father, entered into a conspiracy with John Burke, to whom the lands subject to the mortgage descended, to defeat Catherine Daly in the recovery of her demand, by depriving her of the funds applicable to the payment thereof; and with that view, on the 4th of November, 1773, a deed was made between Thomas Gerald Burke and John Burke, by which Thomas Gerald Burke, in consideration of £500 yearly, thereby secured to him, chargeable on the lands for his life, and several other considerations therein mentioned, released the lands to John Burke, discharged from the mort-[335]-gages and incumbrances; and further charging that £30,000 had been received by Thomas Gerald Burke from the mortgaged premises, as mortgagee in possession: the bill then stated the death of Catherine Daly, and that, after various impediments, on the 10th of March, 1779, Edmund Kelly had obtained probate of her will and administration to Sir Walter Blake; that Edmund Kelly had found himself surrounded with suits and difficulties respecting the effects of Catherine Daly, having been involved in several suits at law and in equity concerning the property of his testatrix, which had prevented him from taking any further step in this cause until after the death of Thomas Gerald Burke, who died in the year 1782, having made his last will, by which he devised all his estates real and personal to his daughter, one of the Plaintiffs, (who afterwards intermarried with John Bateman the other Plaintiff) subject to the payment of his debts; and appointed the Respondent, Mary, his executrix, who proved the will, and also took administration to Gerald Burke; and further charged that the deed of the 4th of November, 1773, was executed in fraud of the Plaintiff, and was a *devastavit* of the effects of Gerald Burke; the bill prayed among other things that the estates of Thomas Gerald Burke devised by him might be sold for the Plaintiff's benefit, and applied in part discharge of the Plaintiff's demand, and that the Defendants might set out an account of the real and personal estate of Thomas Gerald Burke, and for payment of the Plaintiff's demand.

The Respondents, by their answer in 1787, admitted the fraud charged as to the deed of 1773, [336] and contended that the Plaintiff must first have recourse to the mortgage of the lands of Tyquin. No further proceedings appear to have been taken until 1795. Between that year and 1804, nine bills of revivor and amended bills were filed. The cause came on to be heard on the 19th of May, 1808, when the Court pronounced a decree, whereby it was ordered and decreed that Edmund Kelly was entitled to the benefit of the decree on award of the 15th of July, 1738, and referred it to one of the Masters of the Court to take an account of the sum due for principal, interest and costs on foot of the decree, and accounts of the personal and real assets of Gerald Burke and Thomas Gerald Burke.

In pursuance of the decree the Master reported (among other things) that a sum of £28,657 4s. 9d. was due to Edmund Kelly for principal and interest on the decree of the 15th of July, 1738, and reported that the personal estate of Gerald Burke, which came into the hands of Thomas Gerald Burke, consisted in part of a mortgage charged on the lands of Tyquin, and that there was due on foot thereof, at the time of the death of Gerald Burke in the year 1740, the sum of £7834 4s. 9½d., being more than sufficient to pay the amount of the debt then due on the demand of the Plaintiff; and that shortly after the death of Gerald Burke in the year 1740, Thomas Gerald Burke, his son and heir at law, and who afterwards became his personal representative, entered into possession of the lands as mortgagee in possession, and received the rents of the said mortgaged premises, save four denominations, from the year 1740 to the year 1763, and of the entire profits from the [337] year 1763, until the 4th day of November, 1773, when he by indenture of that date conveyed the said mortgaged premises in trust for the said John Burke, who claimed the equity of redemption and inheritance thereof; and further reported that during the time aforesaid the said

Thomas Gerald Burke applied the rents and profits of said mortgaged premises to his own use, being more than sufficient to pay the demand of the said Edmund Kelly.

On the 20th of November, 1810, the Respondents Bateman and wife filed two exceptions to the report, by one of which they excepted to that part of the report which stated that the mortgage debt charged on the lands of Tyaquin, came into the hands of Thomas Gerald Burke, as part of the personal estate of Gerald Burke; and by the other exception the Respondents excepted to the amount of the interest calculated upon Edmund Kelly's demand.

On the 29th of January, 1811, the cause came on to be heard upon the report, exceptions and merits, when it was ordered that the matter should go back to the Master to enquire and report whether Thomas Gerald Burke at any time, and when, and under what title, entered into the possession of any and what part or parts of the Tyaquin estate, or received the rents and profits thereof for any and what period, and how he applied the same.

On the 12th of December, 1812, the Master made his further report, by which he found that Thomas Gerald Burke entered into certain parts of the Tyaquin estate, under a mortgage made in 1711 to Gerald his father, and as his representative; that he received of the rents and profits from 1740 to 1763, £500 a year, and from 1763 to 1773, £1000 a year.

On the 11th of February, 1811, the Respondents filed fifteen exceptions to the report. The principal question which arose upon these exceptions was whether Thomas Gerald Burke was in possession of the Tyaquin estate as representative of his father as mortgagee, or as the Respondents contended as a purchaser under the marriage settlement of his father and mother, the deeds of supposed mortgage being in fact deeds of trust, executed to secure the lands of Tyaquin, from the claims of adverse creditors.

The exceptions also alleged that there were on record unsatisfied judgments against Gerald Burke, at the time of his death, to the amount of £25,000, all prior to the demand of the Appellants. The most material of these exceptions were allowed.

The evidence was principally as follows:

A deed, bearing date the 1th of October, 1741, entered into between Ulick Burke and Peter Daly, whereby it was referred to Peter Daly to ascertain what was due on foot of the demands due to Gerald Burke or his representatives; an attested copy of an ejectment on the title brought by Rickard Burke and Thomas Rickard Burke his son, as of Easter Term, 1754, for recovery of that part of the Tyaquin estate, in the possession of Thomas Gerald Burke; a bill filed by Thomas Gerald Burke, in the Court of Exchequer in Ireland, on the 10th of August, 1754, stating the several mortgages, securities, and accounts, and charging that there was then due on foot thereof [339] a large sum; and praying an injunction against the ejectment, and that he might be decreed to the possession of the remainder of the Tyaquin estate; Rickard Burke and Thomas Rickard Burke's answers to the bill, admitting the possession of Thomas Gerald Burke since the year 1740, under the several securities; an order, bearing date the 8th of July, 1756, whereby the Court of Exchequer granted an injunction until the hearing of the cause, on the equity confessed in the Defendant's answer; an attested copy of a bill filed by Thomas Gerald Burke, in the Court of Chancery in Ireland, on the 24th of August, 1773, against John Burke, the son of Thomas Rickard Burke, stating the deed of mortgage of 1711 from Thomas and Ulick Burke to Gerald Burke, and the deed of 1711, to Peter Daly, and that Gerald Burke, under the mortgage of 1711, was in the possession of the greater part of the lands for several years; and that upon his death, Thomas Gerald Burke, under the mortgages and securities, entered into possession of that part of the lands of which his father had been in possession; that on the 20th of January, 1763, Thomas Gerald Burke entered into possession of all the lands mentioned in the deed of 1711, (except Carrownamoneen), that is, the whole of the Tyaquin estate, under the mortgages and securities, and that he continued in the quiet and peaceable possession of the lands, under and by virtue of same, until the 9th of March, 1773, when John Burke took forcible and illegal possession of part of the premises; and praying an injunction to restore him to the possession thereof; depositions of Peter Haverly, John Allen, and [340] Rickard Burke, who proved that from the year 1710 to the year 1763 Thomas

Gerald Burke continued in possession of part of the Tyaquin estate, under the mortgages, and received thereout £500 a year during that period: and that from the year 1763 Thomas Gerald Burke continued in possession of the whole estate, and during that period received thereout £1000 a year: depositions of Ceseur Trench, William Kelly, and Ulick Burke O'Brien, proving that from the year 1763 to the year 1773 Thomas Gerald Burke was in possession of the whole of the Tyaquin estate, producing £1000 a year: evidence that Thomas Gerald Burke protected his possession of the lands, under and by virtue of the mortgages, against various proceedings and *elegits* which were adopted against the lands: a settlement, dated 1700, executed on the marriage of Rickard Burke, (by Thomas Burke therein described as tenant for life), the second son of Thomas Burke the settler, by which Thomas Burke conveyed several lands, and among others the lands of Tyaquin, to the use of himself for life, remainder as to a part of the lands to Margery his wife for life, as a jointure, remainder as to the other lands of Tyaquin, being the mortgaged lands and the lands of Tample, to the use of Ulick Burke for life, with remainder to his first and every other son, remainder to Rickard Burke for life with remainders over: but in the deed there is contained a power of revocation, by which the settler was at liberty to revoke all the limitations therein mentioned, except the lands limited in jointure to Margery: a deed bearing date the 10th of December, 1709, and executed [341] by the settler, whereby he revoked the several uses, estates, and limitations aforesaid.

There was also evidence, that after the execution of the deed of 1700, the heir of Rickard Burke altered the words in the power of revocation: "excepting the lands limited in jointure to Margery" were erased, and the words "excepting the uses limited to Rickard and the heirs male of his body" substituted, and the erasures appearing upon the face of the deed were admitted by the answers of Thomas Gerald Burke, and of the Respondents in the said cause, which were given in evidence, in which the Respondents swear that the heir of Rickard Burke having, under the deed of 1700, brought an ejectment for the recovery of the Tample estate, the Respondents took defence thereto, and the cause was tried at Galway in the year 1802, and the Respondents protected themselves by proving the deed of revocation, and that the deed of 1700 was altered, and thereupon Respondents obtained a verdict; settled accounts of the 19th of October, 1733, purporting that Gerald Burke was as mortgagee in possession of part of the premises; sequestration grounded on the decree obtained by Sir Walter Blake against Gerald Burke, under which the tenants of the lands were served with orders to pay their rents to the sequestrators: a memorial of a lease dated the 1st of May, 1745, whereby Thomas Gerald Burke demised to Jeffry Davis the lands of Carintarman, part of the Tyaquin estate, for thirty-one years, at £40 per year.

The cause was heard on report, exceptions, and merits, on the 25th of May, 1813, when it was referred back to the Master to take an account of [342] the personal estate of Gerald Burke, into whose hands the same came, and how applied, except such part thereof as was alleged to consist of the mortgage or charge on the Tyaquin estate, also on account of the debts of Gerald Burke, and the priorities thereof, and whether any and which thereof was paid, and when, and out of what fund: and as to the Defendant John Burke, the bill was dismissed without costs, and the Master was to rectify his report pursuant to the rules so made on the exceptions, and all further directions were reserved until the return of the further report, which last mentioned decree was on the 29th of June, 1815, when the cause came on to be re-heard upon a petition presented by the Plaintiff by the same Court affirmed.

John Burke Bateman having died, the cause had been revived against the Respondent Thomas Burke Bateman, the eldest son of the Respondents John and Mary Bateman.

It was contended on behalf of the Appellants, that the original decree, the rules made on the exceptions to the original and further report, and the decrees made on further hearing and re-hearing, were erroneous, and not warranted by the pleadings and evidence, and ought to be reversed.

For the Appellants: As to the rules made on the exceptions and original report, there were sufficient grounds, without any further enquiry as to the receipt of the rents of the mortgaged premises by Thomas Gerald Burke, to have charged him with the mortgage debts, as assets which he might have received, or upon the ground of his having [343] released the mortgaged premises by the deed of 1773, which deed,

though fraudulently contrived by its recitals to colour and conceal the truth, was in this respect contradicted by the other evidence in the cause, and was executed at the time when Catherine Daly claimed those securities as the assets of Gerald Burke, applicable to the payment of the demands, and while Thomas Gerald refused to give the discovery touching the assets required by the bill, and it is admitted by the defendants in their answer, to have been a fraudulent deed, the result of which was to give Thomas Gerald an annuity of £500 per annum for his life, to release all accounts of what he theretofore received out of the mortgaged premises, and to extinguish the mortgagee, to the prejudice of Gerald's creditors.

As to the rules made on the seven exceptions to the last report, and the decree founded thereon, it appeared by the several deeds, securities, mortgages and accounts between Thomas and Ulick Burke, and Gerald Burke, that Gerald Burke was himself, as mortgagee, in his life time in possession of part of the Tyaquin estate, inasmuch as in the accounts he gives credit for certain rents thereof; although it is alleged in the defendant's exceptions to the report, that Gerald Burke did not enter into possession of the estates as mortgagee, no satisfactory evidence has been produced by the defendants to shew in what other right, or by what other title he entered into possession.

Although the defendants in their exceptions to the report relied upon the fact that Thomas Gerald Burke did not hold the possession of the premises [344] as mortgagee, contrary to the admission of Thomas Gerald Burke himself, made by the several proceedings, and by which admissions, as his representatives, the Defendants are concluded—yet even admitting the Defendants not to be so concluded, they have given no satisfactory evidence in answer to the admissions, and the several documents so produced and proved in the cause.

The Defendants, in their exceptions supposed that such possession was not referable to the title of Thomas Gerald Burke as mortgagee, or under the securities, but they gave no satisfactory evidence in support of their exceptions.

The Respondents in the Master's office, impeached for fraud and want of consideration, the several securities and accounts under which Thomas Gerald Burke entered into possession of the Tyaquin estate, and for that purpose referred to a bill filed by Ulick Burke the mortgagor, against Gerald Burke, impeaching these securities, but it was not proved that he obtained any relief upon the bill, nor was any evidence given to impeach the securities.

It was further made clearly to appear that Ulick Burke could not have been tenant for life, inasmuch as Ulick died in the year 1750, and from thence until the year 1773, a period of twenty-three years, it appeared in evidence in the cause, that Thomas Gerald Burke protected his possession against Rickard and Thomas Rickard Burke under the mortgages against the most adverse proceedings, all of which were proved in the cause and before the Master.

The Respondent by the exceptions relied upon the fact that the possession of Thomas Gerald [345] Burke was not as mortgagee of the Tyaquin estate, yet the Plaintiff gave the most decisive evidence to shew that Thomas Gerald Burke was in possession of the lands as mortgagee for his own benefit.

It was contended by the exceptions, that Thomas Gerald Burke had not received from the lands so much as the Master had by his report stated him to have received, yet no satisfactory evidence was given by the Respondents to shew what he did receive from the lands, and there was given by the Plaintiff the most satisfactory evidence that could be expected after a period so remote, to shew the amount of the rents received by Thomas Gerald Burke; but supposing that such evidence was defective, Thomas Gerald Burke, in his first and second answers to the bills of 1771, filed by Catherine Daly, having refused to set out an account of the rents received by him out of the mortgaged premises, and while he thus refused to render such account, having executed the deed of the 4th of November, 1773, thereby releasing to the heir of Rickard the mortgaged premises in consideration of £500 a year, granted to Thomas Gerald Burke for life, and which he executed pending the bill of 1771, must be considered as having admitted that he had received the entire amount of such mortgaged sum, and was liable in his life time, and that the Respondents, as his personal representatives and devisees, are now liable, as if the whole of the mortgage debt had come to the hands of Thomas Gerald Burke.

The Defendants before the Master relied particularly upon the recitals in the deed of 1773, as [346] shewing that Thomas Gerald Burke was in possession of the lands, under the unregistered settlement of the 4th of July, 1711, alleged to have been executed on the marriage of Gerald Burke with Mary Davis, and that by the settlement it was covenanted, that the fortune of Mary Davis, amounting to £2000, should be laid out in the names of trustees therein mentioned in the purchase of land or on securities; and they alleged that part or all of the fortune of Mary Davis was, pursuant to the covenant, laid out in the mortgages of the Tyaquin estate, but no evidence of that fact was given by the Respondents, and it appeared from the settled accounts and evidence given in the cause that no greater sum than £483 of the fortune of Mary Davis was laid out upon any securities charged upon any part of the Tyaquin estates, which consisted of sixteen denominations, and that the same was only chargeable upon three denominations thereof, namely, Tyaxon, Knockbrac, and Knuck-aniskirtane; and it also appeared that the mortgages and securities were taken in the name of Gerald Burke, and not in the name of the trustees of the settlement, and from the nature of the accounts and the dealings between the parties, it appears that the sums were advanced by Gerald Burke himself, to and for the use of Thomas and Ulick Burke, and not by the trustees of such settlement; and by the Master's first report it was reported, and not excepted to, that a sum of £7834 remained due upon the foot of the mortgages and securities at the time of the death of Gerald Burke, so that even if the whole of the fortune of Mary Davis (of which Gerald was entitled to a use for life) was lent out upon [347] the securities, still there was exclusive thereof a sum remaining due thereon, sufficient to pay the then Plaintiff's demand, besides that in the answer of Thomas Gerald Burke, it is sworn by him that a part of the fortune was laid out in the purchase of lands, and it appears in addition that the marriage settlement never was registered, and so could not affect the claims of the Plaintiff under the mortgages and securities, and also that the marriage settlement was fraudulent, because although it appeared in evidence that at the date of the settlement, Gerald was considerably in debt, yet the articles covenanted that all his future acquisitions should be applied to the uses of the settlement.

The Respondents relied upon a supposition that Thomas Gerald Burke was in possession of the Tyaquin estate, as guardian of John Burke, the son of Thomas Rickard Burke, yet no evidence was given of such fact of guardianship, on the contrary such fact was clearly disproved by evidence of various hostile proceedings which had been carried on between Thomas Gerald Burke and the Tyaquin family, and at all events as Thomas Gerald Burke was administrator of his father, whose creditor had a bill depending to make the mortgage assets, it would have been his duty to have retained the amount of the debts out of the rents, as an incumbrance payable thereout.

The Respondents in their answers in the cause, have not relied upon the matter by which they endeavoured to sustain their exceptions, but on the contrary, by their answers to Edmond Kelly's bill, they have insisted that the mortgages and [348] securities were the funds applicable to the payment of Edmond Kelly's demand.

For the Respondents: The Appellant, and those through whom she claims, have neither taken those steps which they ought to have done to enter up satisfaction of certain judgments, mentioned in the award of 1738, nor have they brought those parties before the Court whom they were bound to bring before it, before they can have that benefit of the award of 1738, which is now claimed. The case now attempted to be established by the Appellant and her late husband, Edmond Kelly, is essentially different from that which was made and argued on behalf of the Appellant, and those through whom she claims, when it was first heard and determined by the Court below. Sufficient legal evidence has not been produced, that any part of the personal estate of Gerald Burke, or any part of the personal estate of Thomas Gerald Burke, except what has been admitted by the Respondent Mary Bateman, ever came into the possession of any of the Respondents: or to shew at this distance of time when, or how long, or of what parts of the Tyaquin estate, Gerald Burke or his son Thomas Gerald Burke was possessed, or what was the amount of the rents and profits thereof, then received by either of them: or whether any part thereof was applied by either of them, in discharge of the securities mentioned in the Master's last report, or to their own use; or that any of such rents and profits have come to the hands of any of the Respondents.

[349] All the evidence, oral as well as documentary, which has been produced, goes to prove, that all the rents and profits of the Tyaquin estate which Gerald Burke or his son Thomas Gerald Burke received, were received by them not as mortgagees, but as purchasers under the marriage settlements of Gerald and Mary Burke, and that such rents and profits are not answerable for any part of the Appellant's claim.

The endless delays which have taken place in the prosecution of the suit, by rendering it impossible for the Respondents, from lapse of time, and from the multitude and intricacy of the transactions which have occurred between all the parties connected with the cause, to produce the witnesses, books, papers and accounts, and particularly the account of the sales of wood during the years 1718, 1719, and 1720, which would have enabled them at an earlier period to destroy or reduce the balance which the award of 1738 finds due by Gerald Burke, amount to a degree of laches, which, when taken in conjunction with the Appellant's and Edmond Kelly's acquiescence, from 25th May, 1815, to the 10th of February, 1824, in the Chancellor's decree on the present exceptions and merits of the cause, do in equity and good conscience constitute a valid bar to the present claim.

The Respondents also raised an objection for want of parties, because the bill had been dismissed as against John Burke, who held the estate claimed by the Appellants as part of the assets of Gerald Burke; and it being an appeal against the whole decree, it might in some events [350] become necessary to resort to his estate, that is of a party not present in the appeal, and to direct a sale in his absence.

On this point the counsel for the Appellant contended, that the appeal in substance was confined to the matter of the exceptions; that the present object was mere matter of account against the representative of a party who had received the rents as mortgagee; and as to the consequent liability of any other party in a given event, it was matter of subsequent proceeding; that where the question in a cause relates to a debt received by an executor, it is not necessary that the debtor should be a party: that for the purposes of the present appeal, they would waive the relief against the heir of the mortgagor; that the representative of the mortgagee could not be affected by the presence or absence of the heir, in the question of taking the account; that it was contrary to the course of equity to adjudicate equities between co-defendants; that upon a question of *devastavit*, it was sufficient to bring before the Court the party charged with the delinquency, and it could not be necessary to bring other parties, as for instance, a debtor to whom the personal representative had released a debt.

Upon this question, in the course of the discussion, the Lord Chancellor made the following observations:

According to the pleadings, the appeal is in fact against the original as well as the subsequent decrees: the Appellants, in case of a deficiency of assets, ask for a sale of the estate now held [351] by John Burke. I do not at present understand upon what ground the bill was dismissed against him. Suppose there should not be assets otherwise, then the mortgaged property may be liable. The Appellants must have made John Burke a party, because they contended that he was not entitled to hold the property under the conveyance to his ancestors by Thomas Gerald Burke. The bill was dismissed as against John Burke. How then can the Appellants have a right to appeal against a decree which includes such a dismissal without calling John Burke before the House, as a party to the appeal? In this view, suppose the appeal was not against the whole, but only a part of the decree, would not John Burke be equally a necessary party? The Appellants certainly in their pleadings in the Court below prayed relief against John Burke. If they consent to abandon that part of the relief, and to confine the appeal to the question of the account against the executor, the case might perhaps proceed, as if the bill had originally prayed only relief against the executor.

On the 28th of July, the Lord Chancellor affirmed the judgment, observing only, that he had looked attentively through the papers, and saw no reason to disturb the judgment.

Judgment affirmed.

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IRELAND.

(COURT OF CHANCERY.)

DAVID RUTLEDGE, and WILLIAM RUTLEDGE, an Infant,—*Appellants*;
ROBERT RUTLEDGE,—*Respondent*.

[S.C. 1 Dow and Cl. 331.]

- P. being possessed of lands for a term of lives, with a covenant for perpetual renewal, by articles made upon the marriage of his son in the year 1743, covenanted to convey his estate and interest in the lands to W. and other trustees, to the use of himself for life, remainder to the use of his son T. for life, remainder, subject to a jointure, to the sons of the marriage successively in tail male, reversion to P. the settler.
- In 1749 the reversion of the lands subject to the lease, was granted to W. as trustee for P. to whom it was soon afterwards granted over by W.
- P. by his will, dated in 1766, devised all his real estate, including his leases for lives, in trust for T. his son, for life, remainder to P. (son of T.) his grandson for life, remainder to the sons of P. the grandson successively in tail male, with divers remainders over, reversion to the heirs of P. the devisor. The testator by his will declared, that "If his grandson P. should not settle such interest in that part of the lands which was settled on his father's intermarriage, and which he would become entitled to on the testator's and his father's decease, to the uses to which the testator's estates were thereby limited upon the desire of his father, his son T. at his will and pleasure, and in his discretion, might and was by the will empowered to deprive P. the grandson of the life estate in the lands thereby limited to him, so as such deprivation should not alter the limitations in remainder;" and in a subsequent clause he having provided, "that in case his grandson P. happened to die without issue male, and should settle the interest which was settled on his father's marriage in part of the real estates of the testator, and to the same uses as limited by the will, so that his acquisitions should go together," he gave to P. a power to charge the [353] lands devised with portions for daughters, and in a subsequent part of the will he gave a power to P. to charge a jointure upon the real estate of inheritance thereby limited to him, provided he settles his said interest in part of the real estate to the uses therein mentioned.
- P. the testator died in 1769. T. his son entered upon the lands under the limitations of the will, and remained in possession during his life. In 1776, T. and P. the grandson upon the occasion, and in consideration of his marriage and a portion, conveyed the term for lives with the right of covenant for perpetual renewal, in trust to secure a jointure to the wife, and subject thereto for the use of T. for life, remainder to P. for life, remainder to secure another jointure, and subject thereto to the sons of the marriage, and in default of issue male, to the trustees for a term to raise portions for daughters, and subject thereto for T. in fee.
- Upon a bill filed by a party claiming under this settlement against parties claiming the reversion, to compel a specific performance of the covenant for renewal, held, that according to the limitations, and upon the events above stated, the term of the lands was not merged in the fee; that no case of election arose upon the will of Peter Rutledge, binding those who took under that will to leave the term in question to go according to the limitations of the will.

The Right Honourable Henry Bingham, and John Bingham his eldest son, by indentures of lease and re-lease, bearing date the 2d and 3d of April, 1736, released and demised to Peter Rutledge, and his heirs, towns and lands in the county of Mayo, with the appurtenances, to hold to the said Peter Rutledge, his heirs and assigns, for the lives of the said Peter Rutledge, and of Thomas and William Rutledge, his sons, at and under the yearly rent of £160, with a covenant for the perpetual

renewal of the said term of lives, on payment of the sum of £1 3s. as a fine upon the fall of each life.

[354] By articles of agreement, executed previous to and in consideration of the marriage of the said Thomas Rutledge, the son of the said Peter Rutledge, with Mary Reddington, bearing date the 10th of November, 1743, and made between the said Peter Rutledge and Thomas Rutledge, of the first part; Thomas Reddington and the said Mary Reddington, of the second part; and William Rutledge and Nicholas Reddington, of the third part; the said Peter Rutledge, among other things, covenanted thereafter to convey his interest in the said lands, subject to the said rent and renewal fines, unto the said William Rutledge and Nicholas Reddington, and their heirs, to the use of himself the said Peter Rutledge, for life, with remainder to the said Thomas Rutledge, for life; and from and after his death, to secure a certain annual sum, by way of jointure, for the said Mary Reddington, and subject thereto, to the use of the first and other sons of the said Thomas Rutledge and Mary Reddington, in tail male; and in failure of such issue male, to the use of the said Peter Rutledge, his heirs and assigns.

No conveyance was executed in pursuance of the articles.

Henry Bingham died about the year 1717, leaving John Bingham, his eldest son and heir at law, who thereupon became alone seised in fee of the said lands, subject to the lease.

By a private Act of the Parliament of Ireland, passed in the year 1747, all the estate and interest of John Bingham, and the fee and inheritance of the lands subject to the lease, together with other lands, were vested in certain persons [355] therein named, in trust for sale; and the Trustees, in exercise of the powers thereby in them vested, by indenture of lease and release, bearing date respectively the 12th and 13th of May, 1749, in consideration of the sum of £6644 10s. conveyed and released all the lands comprised in the indenture of the 3d of April, 1736, and also several other denominations of land, situate in the counties of Mayo and Galway, to William Rutledge, of the city of Dublin, merchant, to hold to him his heirs and assigns.

The conveyance made to William Rutledge was in trust for Peter Rutledge, and the consideration money was the money of Peter Rutledge; and accordingly William Rutledge, by indentures bearing date respectively the 19th and 20th of June, 1749, and by a fine afterwards levied in Easter term 1751, released and conveyed all the lands, and the fee and inheritance thereof, unto and to the use of Peter Rutledge, his heirs and assigns.

Peter Rutledge, by his will, bearing date the 3d of December, 1766, bequeathed to his only son the said Thomas Rutledge, all his leases for lives and years, and all other his personal estate, subject to certain pecuniary legacies; and he gave and devised all his real estate of inheritance in the counties of Mayo and Galway, to Thomas Lindsey and Francis Lambert, and the survivor of them, and the heirs of such survivor, upon the trusts following (that is to say;) to the use of Thomas Rutledge for life, and from and after his decease, as to the estates of inheritance in the county of Mayo, to the use of Peter Rutledge the younger (the only son of the said Thomas [356] Rutledge, by Mary his wife) for life, with remainder to his first and other sons in tail male; with remainder to the testator's grandson Richard Rutledge for life; with remainder to his first and other sons in tail male; with remainder to the testator's nephew, William Rutledge, for life; with remainder to his first and other sons in tail male; with remainder to the said testator's nephew the Appellant, David Rutledge for life; with remainder to his first and other sons in tail male; with the reversion to the right heirs of the said testator for ever; and as to the said estates of inheritance in the county of Galway, from and after the decease of the said Thomas Rutledge, the said testator devised the same to the use of Richard Rutledge for life, remainder to his first and other sons in tail male, with remainder to the said Peter Rutledge the younger, for life; remainder to his first and other sons in tail male, with like limitations over, as were before declared respecting the said estates of inheritance in the county of Mayo. The will contained the following declaration: "I also devise, and my will is, that if my grandson, Peter Rutledge, should happen to marry in the lifetime of his said father, the said Thomas Rutledge, without the consent of the said Thomas Rutledge, or that my said grandson should not settle such interest in part of said lands which was

settled on his father's intermarriage, and which my said grandson will become entitled to after his said father's and my decease, to the uses which my said estates are hereby limited upon the desire of his said father; in either of such cases, my said son, Thomas Rutledge, at his will and pleasure, and [357] in his discretion, may and is by this my will, empowered to deprive him of the use for life thereby limited to him of my estates, so as such deprivation shall not otherwise alter the other uses hereby limited of my said estate of inheritance, to my said grandson Richard Rutledge, and my said nephews William and David Rutledge, and their respective heirs male; and I further will and devise, that if my said nephew, William Rutledge, shall not limit his estate of inheritance, in case of failure of issue male in himself, to my said son and grandson, and their issue male, so as his estate, under proper charges, shall, upon his decease without issue male, come to be enjoyed by my said son and grandsons, and their issue male, and their respective heirs in strict settlement, then and in such case the limitation herein to him, and his heirs male to cease, and be null and void, any thing in this my will to the contrary notwithstanding; I also devise, and my will is, that if my said grandson, Peter Rutledge, should happen to die, leaving no issue male of his body, lawfully begotten, living at the time of his decease, or who shall attain the age of twenty-one years, so as my real estate of inheritance in the county of Mayo, should come to be enjoyed by the said Richard Rutledge, my grandson, that my said real estate of inheritance in the county of Mayo, shall stand charged with and subject to the payment of £1000 to be for my third grand-daughter, Frances Rutledge, and the sum of £1000 to and for my fourth grand-daughter Mary Rutledge, daughter of my said son Thomas Rutledge, as and for their portions; but in case [358] my said third and fourth grand-daughters, or either of them, marry in my lifetime, my will is, that my said legacy, as to such of them as should so marry, shall cease; and in case my said grandson, Peter Rutledge, should happen to die without issue male as aforesaid, and that he should settle the interest aforesaid in part of my said real estate of inheritance, which was settled as aforesaid on his father's intermarriage, to the same uses of this my will, so as my acquisitions should go together, and my said grandson should leave one or more daughter or daughters lawfully begotten, who shall arrive at the age of twenty-one years, or be married, then I give my said grandson, Peter Rutledge a power of charging my said real estate in the county of Mayo with the sum of £3000 towards the portion or portions, or preferment of such daughter or daughters; and in case my said grandson, Richard Rutledge, should happen to die without issue male, so as my real estate of inheritance aforesaid, under the limitations of my will, should come to be enjoyed by the said William Rutledge or David Rutledge, or their or either of their issue, then I devise and bequeath, and my will is, that my said real estate of inheritance shall stand charged with the sum of £5000 payable and to be paid on that contingency to and amongst my grand-daughters Elizabeth Ormsby, otherwise Rutledge, eldest daughter of my said son Thomas Rutledge, and his third and fourth daughters Frances and Mary, and to my grand-daughters Jane and Elizabeth Rutledge, daughters of my said son William Rutledge, deceased, share [359] and share alike, that is to say, £1000 a-piece to each of my said grand-daughters, upon the contingency aforesaid; I further devise and bequeath, that my said real estate of inheritance in the county of Galway shall, immediately upon or after the decease of my said eldest son Thomas Rutledge, stand charged and be subject to the payment of £400 sterling, to and for my said grand-daughter Jane Rutledge, and the sum of £200 to and for my said grand-daughter Elizabeth Rutledge, towards their portions and preferment in marriage; and I do hereby authorize and empower my said son Thomas Rutledge, and his son, and my said grandson Peter Rutledge, after the death of my son Thomas Rutledge, provided he settles his said interest in part of the said real estate to the uses herein mentioned, to settle a jointure, chargeable and payable out of my said real estate of inheritance, limited to him as aforesaid, or to charge the said real estate of inheritance so limited to him, with any annuity or yearly sum not exceeding the yearly sum of £300 as a provision for any wife he the said Peter shall or may marry.'

The testator, by his said will, empowered his grandson, Richard Rutledge, to settle such jointure as therein mentioned; and also empowered such persons as should respectively become seised of the real estates of inheritance under the will, to make

such leases of the estates of inheritance as in the will mentioned; and also gave to Thomas Rutledge a power, "by any deed or writing, to be by him executed and attested by two or more credible witnesses, to charge or [360] encumber his said real estate of inheritance, in the county of Mayo, with any sum or sums of money not exceeding in the whole the sum of £5000 to go to such use and uses, and such purposes as the said Thomas shall think proper and fit to charge the same for; and he thereby further authorized and empowered his son Thomas Rutledge, by any deed or writing, to be by him executed and attested by two or more credible witnesses, to charge or encumber his said real estate of inheritance, in the county of Mayo, with any sum of money not exceeding the sum of £3000, with lawful interest for the same, to be vested in the purchase of lands or permanent interests, which he is to leave or settle on his son Peter, and his heirs, in strict settlement, provided he marries with his said father's consent, as before, or otherwise such purchase to go to the other uses herein limited, if said Thomas should not think fit to limit the same to his said son." And the testator, by his will, appointed his said son his sole executor.

The testator died in the year 1769. Thomas Rutledge proved the will, possessed himself of the personal property, and entered into and became seised of the several lands and estates limited to his use, and continued in the possession thereof, under the limitations in the will, until the time of his death.

By indentures of lease and release, bearing date the 7th and 8th of August, 1776, and made upon the marriage of Peter Rutledge with Catherine Bloomfield, between Thomas Rutledge and Peter Rutledge the younger, of the first part; John Bloomfield and Catherine Bloomfield his daughter, [361]ter, of the second part; Sir Charles Bingham and Robert Lord Viscount Jocelyn, of the third part; and Robert Waller and William Rutledge, of the fourth part; after reciting the indenture of the 3d of April, 1736, Thomas Rutledge and Peter Rutledge, in consideration of the marriage, and of the marriage portion of Catherine Bloomfield, conveyed to Sir Charles Bingham and Lord Viscount Jocelyn, the several lands comprised in the recited lease of 1736, to hold to them during the lives of the *cestui que vies*, in the recited indenture named, and of such other *cestui que vies* as should thereafter be added, by virtue of the covenant for perpetual renewal therein contained, in trust for securing an annuity of £100 sterling to Catherine Bloomfield, during the joint lives of her and Peter Rutledge, her intended husband, and subject thereto, to the use of Thomas Rutledge for life, remainder to the use of Peter Rutledge, for life; and from and after his decease, to the use of Sir Charles Bingham and Robert Lord Viscount Jocelyn, in trust, for securing the sum of £100 a year, by way of jointure, to Catherine Bloomfield, and subject thereto, to the use of the first son of Peter Rutledge, by Catherine Bloomfield, until such first son should attain his age of twenty-one years; and then upon trust, that Sir Charles Bingham and Robert Lord Viscount Jocelyn should convey the said lands and premises to such of the sons of Peter Rutledge, by Catherine Bloomfield, as should first attain his age of twenty-one years, his heirs and assigns; and in default of issue male of Peter Rutledge, by Catherine Bloomfield, or in case there should be one or more such sons, [362] or they should all die without issue male, under the age of twenty-one years, then to the use of Robert Waller and William Rutledge, their executors, administrators and assigns, for a term of five hundred years, in trust, for securing the sum of £5000, for the portions of the daughters of the intended marriage; and subject thereto in trust, that Sir Charles Bingham and Robert Lord Viscount Jocelyn should convey the said lands and premises to the said Thomas Rutledge, his heirs and assigns.

The marriage took place with the consent of Thomas Rutledge.

In the year 1787, a marriage took place between the Respondent, the natural son of Thomas Rutledge, and Elizabeth Knox, and upon that occasion Thomas Rutledge, by indenture, dated the 28th of August, 1787, conveyed several leasehold and other interests in lands, and also the ultimate reversion, or *quasi* reversion, in the lands comprised in the lease of 1736, to Henry King and William Knox, trustees in the said indenture named, to the use of Thomas Rutledge for life, with remainder to the Respondent for life; remainder to the said trustees, for securing a jointure to the said Elizabeth Knox; and subject thereto, to the use of the first and other sons of the Respondent in tail male; remainder to the use of Thomas Rutledge, his heirs and assigns.

In the year 1799, Peter Rutledge the younger died without issue.

By indentures of lease and release, bearing date the 12th and 13th May 1799, made between Thomas Rutledge, of the one part, and the Respondent, of the other part; after reciting the original lease [363] of the 3d of April, 1736, and that William Rutledge and Peter Rutledge, two of the *cestui que vies* in the said indenture named, were dead; and also reciting, that the interest under the said last-mentioned indenture was then vested in the Respondent, and that the Respondent had paid all rent and renewal fines under the said lease to the said Thomas Rutledge, and had required a renewal thereof, the said Thomas Rutledge demised and released all the said lands comprised in the said indenture of 1736, unto the Respondent and his heirs, for the lives of Thomas Rutledge, Francis Lambert, and the Respondent, and the survivors and survivor of them, at and under the yearly rent aforesaid, with a covenant for the perpetual renewal of the term of lives granted to the Respondent, on payment of the renewal fine of £1 3s. therein recited.

Thomas Rutledge at the same time executed a deed to the Respondent, dated the 10th of June, 1799, whereby he released to the Respondent, his heirs and assigns, the reversion in the lands comprised in the lease of 1736, expectant on the death of the Respondent without issue male.

By deed bearing date the 13th of May, 1799, Thomas Rutledge charged the several lands and estates whereof the testator, Peter Rutledge the elder, was seised as aforesaid, in the county of Mayo, with the sum of £5000 under the power to him given by the will in that behalf, and by the same deed assigned the sum of £5000 to the Respondent.

Thomas Rutledge by his will, dated the 11th of May, 1797, devised to the Respondent all his real property, and also bequeathed to him all his [364] personal property, and appointed him sole executor, and died in the month of March, 1805; whereupon Richard Rutledge, in the will of Peter Rutledge the elder, named, and to whom an estate for life was by that will devised by virtue of the limitations therein contained, became entitled, and entered into possession of the lands and estates by the will limited for the term of his life, with remainder to his first and other sons in tail male.

The Respondent, in the lifetime of Thomas Rutledge, got possession of all the lands comprised in the lease of 1736, and after the death of Thomas Rutledge he was allowed by Richard Rutledge to remain in the possession of the lands, on payment of the same rent as was originally reserved by the lease.

Richard Rutledge died in the month of August 1811, without issue; and thereupon the Appellant, David Rutledge, under the limitations in the will of Peter Rutledge (the testator's nephew William, to whom an estate for life was by the will devised, being then dead without male issue) became seised in possession of the lands so devised for the term of his natural life; and the Appellant, William Rutledge, became entitled to an estate in tail male in all the said lands expectant on the decease of the Appellant, David Rutledge, his father.

In the lifetime of Richard Rutledge, the Respondent filed his bill in the Court of Chancery, against Richard Rutledge, the Appellant David Rutledge, and the heir at law of the surviving trustee named in the will of the testator, Peter Rutledge, thereby praying, that the sum of [365] £5000 might be decreed a valid charge on the lands by the will limited, and that a competent part thereof might be sold for payment of said sum of £5000 and the interest thereon, since the decease of Thomas Rutledge, to which bill the several Defendants thereto put in their answers; and the Respondent, on the 17th of July, 1819, obtained a final decree of the Court of Chancery, whereby it was decreed, that there was then due to the Respondent the sum of £7436 19s. 8½d. for principal and interest, on the foot of the charge of £5000 and the said sum, with interest thereon from that day, was thereby decreed to be a charge on the lands and premises; and it was ordered, that the same sum should be paid off by the Defendants in the suit within six months, to be computed from the date of the decree, and in default thereof that the several lands whereof the testator was so seised in the county of Mayo, or a competent part thereof, should be sold; and that the Respondent, out of the money arising from such sale, should be paid the sum so decreed to him, with interest and costs.

The Appellants, on the 15th of November, 1819, exhibited their bill in the Court

of Chancery in Ireland, against the Respondent and others, thereby, among other things, praying, that the will of Peter Rutledge the elder, might be established and carried into execution, and that the Appellant, David Rutledge, might be decreed entitled to an estate for life, and the Appellant, William Rutledge, to a vested estate tail in all the lands whereof the testator was seised in fee: and that discharged from any grants, conveyances or incumbrances, created or procured by Thomas [366] Rutledge, except under the power and authority by the said will to him given: and that it might be decreed, that the said Thomas Rutledge was bound to elect between the said marriage articles of the 10th of November, 1743, and the said will; and that he had no right to take both under the said articles and will at the same time: and that it might be decreed, that the said Thomas Rutledge did, in his lifetime, elect to take and hold under the said will: and that he thereby relinquished all estate and interest in the said lands, created or provided by the said articles of 1743: and that the Respondent, Robert Rutledge, should be bound by such election, and might be decreed to account with the Appellant, David Rutledge, for the profits of the said lands comprised in the said indenture of 1736, since the death of the said Richard Rutledge, and that the same should be set off against the sum by the said decree of the 17th of July, 1819, decreed to the said Respondent, on foot of the said charge of £5000: and further, that in case the said Court should not be of opinion, that the said Thomas Rutledge did so elect the said Respondent, as being assignee, legatee, devisee, and personal representative of the said Thomas Rutledge, might be decreed to be bound to elect between the said will of the said Peter Rutledge the elder, and any estate or interest which he claimed in any part of the said lands, under any will or conveyance of or from the said Thomas Rutledge: and that it should be decreed, that the said Respondent did elect to claim under the will, and that it was by so electing, he was entitled to the said charge of £5000, under the power by the said will created.

[367] The Respondent filed his answer to the bill: but the Appellants did not prosecute their suit to a hearing.

In the mean time, the Respondent, on the 21th of December, 1819, filed his bill in the Court of Chancery against the Appellants, thereby setting forth the indenture of 1736, the marriage articles of the 10th of November, 1743, the will of Peter Rutledge the elder, and his death: and that Thomas Rutledge thereupon became seised of the demised lands for the term of his life, under the devise thereof to him contained in the will, and was also, under the articles of 1743, entitled to the equitable estate for the term of his life, in the lease of 1736: and that Peter Rutledge the younger was entitled to a *quasi* estate in tail male in remainder therein: and also setting forth the settlement on the marriage of Peter Rutledge the younger, bearing date the 8th of August, 1776, and his death without issue, the several conveyances hereinbefore mentioned, made by the said Thomas Rutledge to the Respondent, also the will of Thomas Rutledge, the seisin for life, and the decease of Richard Rutledge, in the year 1811: and charging that on the death of the said Richard Rutledge without issue, the Appellant, David Rutledge, under the will of Peter Rutledge the elder, became seised of an estate for life in the said lands, subject to the covenant for perpetual renewal: and also charging that the Respondent had applied for a renewal to the Appellant David Rutledge, of the lease of 1736, and that the Appellant had declined specifically to execute the covenant for perpetual renewal, contained in the indenture of 1736: and praying, among other [368] things, that the Respondent might be decreed entitled to have the said original lease renewed, pursuant to the covenant for perpetual renewal therein contained: and that the said covenant might be specifically executed by the Appellants, and for that purpose that it might be referred to by one of the Masters of the Court, to take an account of the sum due by the Respondent to the Appellant David Rutledge, on foot of the rents and renewal fines under the original lease, and the renewals thereof, and that the Appellants might be compelled to execute a renewal to the Respondent for the lives in the bill in that behalf mentioned, or such lives as the Master should insert.

To this bill the Appellants filed their joint and several answer, on the 31st of January, 1820, thereby insisting that Thomas Rutledge did not become seised of an equitable estate, under the lease of 1736, and that Peter Rutledge the younger, did not become entitled to an estate in *quasi* tail male, in remainder therein: and that

Thomas Rutledge and Peter Rutledge the younger, had no right to make such disposition as in the settlement of the 7th and 8th of August, 1776, is contained, respecting the lease of 1736; and that for the reasons therein mentioned, the Respondent was not entitled to the specific execution of the said covenant for perpetual renewal, in the lease of 1736 contained.

The cause was brought on for hearing, upon pleadings and proofs, before the Lord Chancellor of Ireland, on the 22nd day of February, 1821, who decreed that the Respondent was entitled to a specific execution of the covenant for perpe[369]-tual renewal in the lease of the 3d of April, 1736, in the pleadings mentioned, according to the true intent and meaning thereof; and accordingly, that on payment to the Appellant, David Rutledge, of the sum due in respect of rent and renewal fines, the Appellants should execute to the Respondent a renewal of the lease for the lives in the Respondent's bill named, or for such other lives as the Master should approve of; and that in case the parties should differ as to the amount due, in respect of such rent, or as to the form of such deed of renewal, that it should be referred to Roderick Connor, one of the Masters of the Court, to take an account of the sum due to the Appellant, David Rutledge, in respect of such rent and renewal fines, and also to approve of a proper deed of renewal, to be executed by the parties pursuant thereto, etc.

Against this decree the appeal was presented.

For the Appellants: Mr. Horne and Mr. Sugden.

By the acquisition of the fee-simple and inheritance of the lands by Peter Rutledge the elder, in the year 1743, his lease for lives thereof became merged, and the rent thereby reserved was extinguished, and the lease is not now subsisting for any purpose whatsoever. Peter Rutledge the elder, having so acquired the fee-simple and inheritance of the lands, he by his will devised the same and several other estates to the use of Thomas for life, and bequeathed all his leases for lives and years, and the residue of his personal estate, to Thomas, and thereby raised a necessity for Thomas to elect between the articles and the [370] will, and Thomas accepted all the benefits accruing under the will, and thereby concluded his election, and the Respondent is bound thereby.

The Respondent, by claiming the sum of £5000 and interest, which Peter the elder, by his will empowered Thomas to charge upon his estates of inheritance in the county of Mayo, and which Thomas accordingly charged in favour of the Respondent, has elected to take under the will, and is thereby precluded from claiming any interest in the lands, by a title which is opposed to or inconsistent with the will.

The lands in which the Respondent claims such title and interest, were part of the estates of inheritance, which the testator, Peter the elder, made chargeable, and Thomas charged with the sum of £5000 and interest, and the Respondent, while he seeks the benefit of such charge on the one hand, ought not at the same time to be permitted to claim under the party who executed the same in his favour, any of the lands themselves which were subject thereto.

The testator, Peter the elder, by his will expressly declared his intention to be, that all his acquisitions should go together, according to the uses thereby limited, and that Peter the younger should settle to those uses such interest as he was entitled to in the lands in question, under the articles of the 10th November, 1743, (that interest being a *quasi* estate tail, and the use limited to him by the will, being an estate for life), and the testator with that view, authorised Thomas to deprive Peter the younger, his son, of the use for life thereby limited to him in case he should refuse so to settle the interest, but the settlements [371] of 1776, and 1787, and the several subsequent conveyances executed by Thomas are in effect directly opposed to such intention and desire of the testator, inasmuch as thereby his acquisitions are separated, and made to descend in a different manner and to different persons, and such settlements and conveyances are a fraud upon the said will, and ought not to be supported by a Court of Equity.

If the lease for lives was not merged by the acquisition of the fee simple and inheritance by Peter the elder, yet the *quasi* reversion of the lands expectant on the failure of issue male of Thomas, was by the articles of 1736 reserved to Peter the elder, and such reversion passed by his will, whereby he limited his estates to such uses as aforesaid, in strict settlement, and Thomas being by that will a mere tenant

for life, could not make any valid disposition, either at law or in equity, of such reversion as he assumed to do by the settlement of 1787, under which the Respondent claims.

It was further argued at the bar, that the articles of 1743 might operate as a covenant to stand seised.* That a remainder limited to the heirs of the grantor is the old reversion, and the limitation ineffectual.† That when the limitations are complete, it makes no difference whether the [372] estates are legal or equitable (*Jervoise v. Duke of Northumberland*, 1 J. and W. 571). That the sons of Thomas, if they did not take an estate tail, took a fee, and if so, it vested, and the contingent remainders were gone (*Doc v. Perryu*, 3 T. R. 484). That the remainders were barred, and the estate complete, by the settlement of 1776, and by the renewals (*Blake v. Blake*, 3 P. W. 10, n. 1; *Wastenev v. Chapple*, cited in *Norton v. Frecker*, 1 Alk. 525).

For the Respondent: Mr. Pepys and Mr. Knight.

Peter Rutledge the elder, by the settlement of 1743, became a trustee of the lease of 1736, for the several persons entitled to equitable estates therein under that settlement, and these equitable estates could neither merge in the legal fee subsequently acquired by him, nor be in any respect prejudiced by such acquisition. The testator, Peter Rutledge, does not by his will make or affect to make any disposition of the lease of 1736, and clearly treats it as a subsisting interest, so that no implied duty of election arises upon the will. The power given by the will of the testator, Peter the elder, to Thomas, to deprive Peter the younger of the life estate, thereby limited to him, in the event of his marrying without his father's consent, or refusing, at the desire of his father, to settle the freehold lease of 1736 to the same uses to which the inheritance was limited, was plainly discretionary in Thomas, and to be exercised or not at his will and pleasure, and as this power never was exercised [373] by Thomas, the case in which Peter would have been expressly bound to elect, never arose.

On the 28th of July, the judgment was affirmed, on the motion of the Lord Chancellor, who said, that he had looked with attention through the papers, and thoroughly considered the case, but could not advise the House to disturb the judgment.

Judgment affirmed.

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ENGLAND.

(COURT OF CHANCERY.)

CHARLES BUTLER.—*Appellant*: THOMAS SNEYD KYNNEERSLEY, JOHN RICKMAN, RICHARD WILLIAMS, and JOHN ALLAN POWELL.—*Respondents*.

[Mews' Dig. i. 357; vii. 1871. See also *Ormond (Marquis) v. Kynnersley*, 5 Madd. 369, 2 Sim. and St. 15; 2 L.J. Ch. (O.S.) 178; 7 L.J. (O.S.) Ch. 150; 8 L.J. (O.S.) Ch. 67; and *Lushington v. Bolero* 1851, 15 Beav., note pp. 9, 10].

C. by his will, devised his lands in trust for G. his brother, for life, remainder to his sons in strict settlement in tail male, remainder to S. the testator's sister, for life, remainder in like manner to her sons, remainder to K. for life, without impeachment of waste, remainder in strict settlement to his sons in tail male, remainder to S. for life, with like remainder to his sons, remainder to the testator's right heirs. The lands were accordingly conveyed by the trustees named in the will to these uses.

G. died without issue, leaving S. his heir at law, and she married P. and with her

* *Roe v. Traumer*, Willes 682, 2 Wils. 75, S. C. — *Farr v. Wileart*, 2 Rolle's Abr. 783. See also 2 Rolle's Abr. 784. — *Doc v. Wittingham*, 1 Tan. 20, 22 Vin. Abr. 194. — *Crossing v. Scudamore*, 1 Vent. 137. — 1 Mod. 175, S. C. in Exch. Ch. — *Fade v. Baker*, 2 Vent. 149. — *Osman v. Sheafe*, 3 Lev. 370. — *Walker v. Hall*, 1 Lev. 213. — *Smith v. Risley*, Cro. Car. 529.

† *Real v. Kington*, Cro. Eliz. 324.

husband levied a fine of the reversion which had descended to her on the death of G. to such uses as S. should appoint, and she died, having appointed the reversion to P. during the joint lives of himself and A. until A. should attain twenty-one, or marriage, remainder as to one moiety to P. for life, and as to the other moiety to A. for life, remainder as to the whole estate to the sons, etc. of A. in tail, remainder (subject to a term) to P.

K. entered upon the death of S. and died, devising his real estates, charged with his debts, and bequeathing his personal estate to T. K. against whom a bill was filed, charging that K. during his possession of the lands, had committed equitable waste, by cutting trees planted, etc. for ornament, and praying that an account might be taken of the trees cut, and the value, and that T. K. as representative of K. might pay the amount out of his assets. A decree was made according to the prayer of the bill. But before the Master had proceeded under the decree, the question of value, and all matters in difference between the parties, were by an order of the [375] Court, by consent, referred to an arbitrator, appointed by the Master under the order, and arbitration bonds were executed by the parties. The arbitrator by his award found that a sum of £3871, which included the value of the timber cut, was the balance due to the plaintiff, and directed that sum to be paid. An application being made to enforce the payment of the money according to the award, the defendant presented a petition of re-hearing, which suspended the proceedings upon the award, and the case having been re-heard, the bill was dismissed, but no order was made respecting the award.

Upon appeal against this decree, held that the House could not proceed until there should be a judgment upon the whole of the proceedings before the Court below, and a special order was made, by which the Appellants had leave to withdraw their appeal, for the purpose of obtaining the judgment of the inferior Court upon the question as to the award.

Semb. That such a reference as above stated, submits the law as well as the fact to the arbitrator.

In 1816, Walter late Marquis of Ormonde, and Anna Maria Catherine Marchioness of Ormonde, his wife, filed their bill of complaint, in the High Court of Chancery, against the Respondent Thomas Sneyd Kynnersley; thereby stating, among other things, the will of Godfrey Bagnall Clarke, bearing date the 4th of December, 1774, whereby he devised all his real estates, after satisfaction of the debts and legacies therein mentioned, upon trust, to convey the said estates to the use of his brother Gilbert Clarke and his assigns, for life, without impeachment of waste; with remainder to trustees, to preserve contingent remainders; with remainder to his first and other sons, severally and successively in tail male; with remainder to his said testator's sister, Sarah Price Clarke, [376] for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to her first and other sons severally and successively in tail male; with remainder to Clement Kynnersley for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to his first and other sons severally and successively in tail male; with remainder to Wenman Samuel for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to his first and other sons severally and successively in tail male; with remainder to the testator's own right heirs for ever.

The bill further stated, that the testator died in December 1774, without having revoked or altered his will, leaving his brother, Gilbert Clarke, his heir at law, and that after the testator's decease, the trustees, in execution of the trusts of the will, paid the testator's debts and legacies, and afterwards conveyed the real estates to the several uses by the will declared, or such of them as were then subsisting or capable of taking effect; that the testator's brother, Gilbert Clarke, died without issue, and intestate as to the ultimate reversion in fee in the real estates, and that he left his sister Sarah Price Clarke his heir at law, and that she afterwards intermarried with Job Hart Price, who thereupon assumed the name of Clarke, and entered upon the testator's real estates, under the limitations in his will contained, and continued in

the possession thereof until the death of Sarah Price Clarke, which happened in the year 1801; and that Sarah Price [377] Clarke left issue male one son, namely, Godfrey Thomas Robert Price Clarke, and the Plaintiff Anna Maria Catherine Marchioness of Ormonde, then Anna Maria Catherine Clarke, and no other issue; and that upon the death of Sarah Price Clarke, her son Thomas Godfrey Robert Price Clarke, under the limitations of the said will, and the deeds of conveyance executed pursuant thereto, became entitled in possession to the estate; and that he was since dead, without issue, under the age of twenty-one years; and that upon the death of Thomas Godfrey Robert Price Clarke, Clement Kynmersley, as the next tenant for life of the estates under the limitations of the will, entered into possession of the estates, and so continued until his death.

The bill then stated that Clement Kynmersley died in April 1815, without issue: And that Job Hart Price Clarke, and Sarah his wife, duly levied a fine of the reversion in fee of the testator's estates, which were then vested in Sarah Price Clarke as heiress at law, to him, or to her other brother Gilbert Clarke; and that they, by proper assurances duly executed, limited the reversion in fee simple of such estates, expectant upon the determination of the prior uses to which the same were limited by the will of the testator, to such uses, intents and purposes as Sarah Price Clarke, whether covert or sole, by her will in writing should direct or appoint; and that Sarah Price Clarke, by her will, executed conformably to the terms of the power in that behalf vested in her, by the fine and declaration of the uses thereof, devised the reversion expectant on the failure of the estates then subsisting, to trustees, upon [378] trust to convey and settle the same to the uses and intent that her daughter the Plaintiff, the Marchioness of Ormonde, then Anna Maria Catherine Clarke, or her guardian or guardians during her minority, or until she should marry with consent in writing of such guardian or guardians, should receive an annuity of £1000 for maintenance, and subject thereto to the use of the said Job Hart Price Clarke and his assigns, without impeachment of waste, during the joint lives of Job Hart Price Clarke and the Plaintiff the Marchioness of Ormonde, then Anna Maria Catherine Clarke, until she should attain twenty-one years, or be married; then to the use and intent that one moiety of the estates, in case Job Hart Price Clarke should be living, but if dead, then that the whole should be limited to one or more trustees to be nominated by the Plaintiff, the Marchioness of Ormonde, then Anna Maria Catherine Clarke, during her life, to her sole and separate use, notwithstanding any coverture; and as to the other moiety to the use of the said Job Hart Price Clarke and his assigns, for life, without impeachment of waste, with remainder, after the death of the said Plaintiff the Marchioness of Ormonde, as to one moiety of all the said estates, in case the said Job Hart Price Clarke should be then living, but if dead, then as to the whole of the said estate, after the decease of the said Plaintiff the Marchioness of Ormonde, to her first and other sons successively in tail male, with remainder to her daughters in tail with cross remainders; with remainder, subject to a term of one thousand years, thereby directed to be vested in one or more trustee or trustees, for the purpose [379] of raising money for the payment of certain legacies, to the use of Job Hart Price Clarke, his heirs and assigns for ever.

The bill further stated, that the mansion-house and park at Sutton-cum-Duckmanton, was an ancient family seat; and that there were at the time when Clement Kynmersley entered into the possession thereof, many timber and other trees standing and growing in the park, and near the house, which served for ornament and shelter thereto, and were a great ornament and embellishment to the mansion-house and park, and were planted for that purpose; and that Clement Kynmersley, during the time he was so in possession of the mansion-house, lands and premises, felled and cut down many of the ornamental timber trees, or trees planted for ornament or shelter, which were standing in the park and about the house; and also divers saplings and young trees, not nearly come to maturity, and which were growing on other parts of the estate, and various spring woods, which grew on the estates, prematurely and before the same, according to the usage of the country, were arrived at the proper state for cutting; and he sold and disposed thereof for a very large sum of money in the whole, which he received and applied to his own use; and he committed other acts of waste, spoil and destruction upon the devised estates; and that Wenman Samuel, the tenant for life, in remainder, expectant on the decease of

Clement Kynnersley, without issue male, died in his life-time, and the Plaintiffs, and Job Hart Price Clarke, being interested in the estates in manner aforesaid, made frequent applications to Clement Kynnersley, [380] requesting him to desist from felling and cutting the trees and woods, and from committing any other waste, spoil and destruction on the estate; and also to account for the produce and value of the timber and wood so felled, cut, and sold, or disposed of by him; but Clement Kynnersley did not attend to or comply with such requests.

The bill then stated, that Job Hart Price Clarke died, having by indentures of lease and release, bearing date respectively the 15th and 16th days of June, 1809, conveyed all his estate and interest in the demised premises to the Plaintiff the late Marquis of Ormonde, and his heirs, and by means thereof, and of the several limitations aforesaid, the Plaintiff and his wife, who had not any issue upon the death of Clement Kynnersley, became entitled in possession to the before-mentioned estates: that Clement Kynnersley made and published his will, bearing date the 21st day of January, 1815, and thereby devised and bequeathed his freehold, copyhold and leasehold estates in the county of Stafford, to his nephew the Respondent Thomas Sneyd Kynnersley, his heirs, executors, administrators and assigns; and he thereby gave and bequeathed his real estates at Carshalton, and all other his real and personal estate to the Respondent Kynnersley, his heirs, executors, administrators and assigns, he or they paying all his debts, funeral and testamentary expences, for which purpose he declared it to be his desire, that his estate at Carshalton should be sold, in case his personal estate and effects should not be sufficient to pay the same, and appointed the Respondent Kynnersley, sole executor of his will: And that upon the death of Clement [381] Kynnersley, the Respondent Kynnersley, whom he left his heir at law, proved his will, and became his legal personal representative, and possessed his personal estate and effects to an amount more than sufficient to pay all his just debts, etc.; that upon the decease of Clement Kynnersley, the Plaintiffs the Marquis of Ormonde and Anna Maria Catherine his wife, entered into the possession of the estates devised by the will of Godfrey Bagnall Clarke, and being entitled as aforesaid, they frequently applied to the Respondent Kynnersley to come to account for the ornamental trees, or trees planted for ornament or shelter, which were standing and growing on the estates, and also of the other trees and woods improperly felled and sold by Clement Kynnersley, and to pay to the Plaintiffs, the value thereof with interest, which he refused to do.

The bill prayed an account of all timber and other trees growing in or near the mansion-house and park, and which were ornamental thereto, or which were planted for ornament or shelter thereto, and of other trees or woods growing on the estates unfit for felling, and which were felled and sold, or otherwise disposed of by Clement Kynnersley deceased, and of the monies received by him on the sale of such of them as were sold, and of the value of such of them, if any, as were not sold by him; and that his estate might be declared liable to make good the produce or value of the timber and other trees and woods which should appear to have been improperly felled; and that the Respondent Thomas Sneyd Kynnersley might be compelled to pay the same to the Plaintiffs accordingly, or into Court, for the benefit of the [382] person or persons ultimately to be entitled to the inheritance of the estates: and that the Respondent Thomas Sneyd Kynnersley might either admit assets, or that an account might be taken of the personal estate and effects of Clement Kynnersley, and of the rents and profits of the real estates devised in aid thereof by his will, and if necessary, that such will might be established, and the trusts thereof decreed to be carried into execution.

The Respondent Thomas Sneyd Kynnersley put in his answer to the bill on the 6th of December 1816, denying the alleged waste, and referring to an answer of Clement Kynnersley, put in to a bill filed in the year 1807, by John Hart Price Clarke, Walter Marquis of Ormonde then Earl of Ormonde, and Anna Maria Catherine his wife.

The answer of Clement Kynnersley referred to in the answer of the Respondent Thomas Sneyd Kynnersley, was put in in the month of June, 1808, and it was thereby admitted by Clement Kynnersley, that he had in the years 1805 and 1806 cut down timber and other trees in Sutton Park, to the value of £3223 19s. 8d. but insisted that he had a right so to do.

To this answer the Plaintiffs replied, and issue being joined, witnesses were examined, and their depositions taken and published.

Walter Marquis of Ormonde, in Michaelmas term 1818, exhibited his bill of revivor and supplement against the Respondents Thomas Sneyd Kynmersley, and John Rickman, Richard Williams and John Allan Powell, stating the death of his wife, and her will, by which, under a power, [383] she appointed, devised, and bequeathed all the residue of her real and personal estates to the Plaintiff, his heirs, etc. and appointed the Respondents, Rickman, Williams, and Powell, and P. Gell, executors of her will, and Gell having renounced the other executors, with consent of the Plaintiff obtained letters of administration with the will annexed. The bill prayed that the suit might be revived, and that Rickman, Williams, and Powell might state their claims on the monies sought to be recovered in the suit.

The Respondents, Rickman, Williams, and Powell, by their answer claimed an interest in the monies, but submitted to have the suit revived.

The Respondent, Thomas Sneyd Kynmersley, having also put in his answer, the suit was revived.

The cause came on to be heard before the Vice Chancellor, on the 6th of May, 1820, when his Honour decreed that the Plaintiff's bill, so far as it sought an account of dilapidations of the buildings on the estate in question in this cause, should be dismissed, without prejudice as to the question of costs: and it was ordered, that it should be referred to one of the Masters of the Court, to inquire whether Clement Kynmersley, in the year 1804, or at any time subsequent, cut or felled any timber or other trees which were planted or left standing for ornament or shelter of the mansion-house or park in the pleadings mentioned, or any other timber or trees growing on the estate in question, that were unfit for cutting and felling: and if the Master should find, that Clement Kynmersley did cut any such timber or other trees, then it was ordered that the Master should enquire whether the same or any part thereof were sold [384] by him, and at what price: and it was ordered, that the Respondent Thomas Sneyd Kynmersley should be charged with such price: and if the Master should find that any part of such timber or trees was not sold, he was to set a value thereon: and it was ordered, that the Respondent Thomas Sneyd Kynmersley should be charged with such value: and it was declared, that the Respondent Thomas Sneyd Kynmersley was liable to answer out of the assets of Clement Kynmersley, what should be found due for the amount of the price or value which should be so found due by the Master, who was to state any special circumstances at the request of either party, etc.

On the 7th of August, 1820, and while such proceedings were pending, the Plaintiff the Marquis of Ormonde died, having made and published his will, bearing date the 28th day of February, 1820, whereby he appointed George Marquis of Huntly, Sir James Graham, Baronet, and the Appellant, executors: Sir James Graham and the Appellant alone proved the will.

By an order, dated the 8th day of March, 1821, the suit was revived.

By an order made in the case, bearing date the 13th of March, 1822, it was ordered, with the consent of the Respondent Thomas Sneyd Kynmersley, and all others the parties to the cause, that it should be referred to the Master to approve of a proper person to be the arbitrator or arbitrators of the matters in difference in the cause, as also all other matters in difference between Sir James Graham and the Appellant, as personal representatives of the Marquis of Ormonde, and the Respondent Thomas Sneyd Kynmersley, as [385] executor of Clement Kynmersley: and it was ordered, that the Master should settle and approve of proper bonds, to be entered into by Sir James Graham and the Appellant, and the Respondent Thomas Sneyd Kynmersley, for that purpose.

In pursuance of this order, the Master made his report, bearing date the 30th of July, 1822, whereby he certified, that upon the nomination and by consent of the parties, he approved of Hugh Parker to be arbitrator, and of two arbitration bonds, each of which was made in the penal sum of £10,000 for the performance of the award, so that the arbitrator should make the same ready to be delivered to the parties on or before the 1st of February, 1823, which time was extended by two successive orders.

An award, bearing date the 25th of November, 1823, was made and executed by

High Parker, whereby he awarded and directed that Respondent Thomas Sneyd Kynnersley should pay to Sir James Graham and the Appellant, on the 12th of February, the sum of £3871 of lawful money of Great Britain, in full of all their claims as personal representatives of the Marquis of Ormonde, against the Respondent Thomas Sneyd Kynnersley as executor of Clement Kynnersley: And he further awarded and directed certain payments to be made in respect of costs and releases to be executed.

In February 1824, a motion was made before the Vice Chancellor that the award might be made an order of the Court in the cause and be performed. This motion stood over upon a suggestion that proceedings would be taken to set aside the award, upon the ground that the re-[386]-presentatives of Job Hart Price Clarke (if any one) was entitled to the proceeds of the timber cut down.

The Vice Chancellor intimated that this was a proper ground for a re-hearing.

Sir James Graham died on the 23d of March, 1825, leaving the Appellant the sole surviving personal representative of the Marquis of Ormonde.

In the month of April 1825, the Respondent Thomas Sneyd Kynnersley presented his petition to the Court of Chancery, stating among other things, that he conceived himself to be aggrieved by the decree, except so far as it directed the bill to be dismissed, so far as it sought an account of dilapidations, and that he was advised that the whole of the bill ought to have been dismissed with costs; and therefore praying, that the cause might be re-heard before the Vice Chancellor, which was ordered.

The cause was re-heard on the 23d of April, 1825, when the Vice Chancellor ordered that the decree should be reversed, and that the Plaintiff's bill should be dismissed.

Upon the subject of the award, the arbitration bonds, and the order directing the reference, nothing was done.

The appeal was against the decree of the 23d of April, 1825.

For the Appellant: Mr. Sugden.

The original hearing in the Court below, is reported in 5 Madd. p. 369. The point then discussed was simply on the question of equitable waste. According to my note, the Vice Chan-[387]-cellor said it was a creature of equity, and that there was a breach of trust. The note goes beyond the report in Maddocks, in stating more fully the ground of the decision to be breach of trust. There was evidence as to the fact of equitable waste. The decree only directs inquiry as to equitable waste. There was evidence that timber was cut contrary to the custom of the country, and in the park. There were trees planted, and growing for ornament, and an inner row of oak trees. Timber growing to exclude objects is entitled to protection (*Day v. Merry*, 16 Ves. 375.) The original decree directs only inquiry, and only as to equitable waste as a breach of trust. It was held that legal waste stood on a different ground. The original decree decided that the assets of the tenant for life were liable for the equitable waste.

Besides this, where a decree is taken by consent it cannot be reversed. A consent order must purport to be so on the face of the order. By an order of 13th of March, 1822, it is stated "that all matters in difference should be submitted to the arbitration of a person to be appointed by the Master, and the parties consenting, the Master of the Rolls by consent orders, etc." A court of equity will not enforce an agreement to refer, unless it is made under its own authority in a cause. An award has been regularly made; all this being done, and the decree which is the foundation being taken away, it might be sufficient to leave the case here.

The ground of the decree on the rehearing was that Clarke had the reversion in fee. The question was in whom the right to the money pro-[388]-duced by the timber so cut is vested. It was held that the right to the money vested in Clarke. The decree is wrong for two reasons:—1st. Because Lord Ormonde is the first person entitled to the estate of inheritance. 2ndly, Because if it belonged to Clarke, it passed by the conveyance to Lord Ormonde. Money arising from the cutting such timber is by the Court settled to go in the same course as the estate.

It is a settled rule, that a remainder man in tail takes money absolutely; but as money so produced is considered as real estate in such cases, it is held that it does not belong to the tenant in tail, till he acquires the dominion over the estate.

No doubt there was a right in him, but the question is, whether the right remained with him? The trees could never have been enjoyed as a separate article of property. The money goes as the trees would, until a party having an estate of inheritance comes into possession.

The Lord Chancellor: Was the objection arising from the award before the Court?

For the Appellant: No.

For the Respondent: The question arose upon the attempt to enforce the award: the subject therefore must have been distinctly before the Court.

The Lord Chancellor: But it does not appear that it was argued.

For the Appellant: The fact of its being by consent was not before the Court.

[389] The Lord Chancellor: What has been done under the award?

For the Appellant: It was stopped by the decree on the re-hearing. The decree was not altered on the ground of non-liability.

Lord Eldon: Suppose the House were to reverse the decree: the cause must go back for the purpose of proceeding upon the arbitration: and what could you do till the arbitration is complete? If reversed, must the House say that the arbitration shall be completed?

For the Appellant: We only want the decree of reversal removed.

Lord Eldon: I wish to know how this award is to be got rid of?

For the Respondent: We should have a good case to get rid of the award, if we support the decree. The only consent was to appoint an arbitrator.

Lord Eldon: Is not this an order of the Court? Have you a copy of the petition of re-hearing?

For the Appellant: The decree on re-hearing appears to be merely a decree dismissing the bill.

The Lord Chancellor: What then is to become of the award? There must be a distinct application to get rid of the award. The petition of re-hearing takes no notice of the award. If a cause is going on, and you agree to refer, do you not take the chances?

Lord Eldon: There is a difficulty on both sides. The petition of re-hearing takes no notice of the award, and you go before the Vice Chancellor taking no notice of the award. The question is [390] whether you should not have brought the matter as to the award before the Court.

The Lord Chancellor: They seem to have begun at the wrong end; they should first have impeached the award.

Lord Eldon: The Plaintiff says I am entitled to the money arising from the sale of trees cut down by an act of equitable waste; that is the question: if he is so entitled, then another question arises as to what is due to him. If you say that he did not refer the matter of title, that is another question.

For the Respondent: The representatives of Clarke are not before the Court, and his creditors might claim.

Lord Eldon: That might be the subject of objection on your part.

The Lord Chancellor: But as long as the award stands, there can be no proceedings. May not this arbitration by consent operate as a reference of the fact and the law together: and if so, how can we decide until the matter is brought before us? If they left the whole question to the arbitrators there may be an end of the cause. If the award cannot be set aside, is not that conclusive?

For the Respondent: We must establish the decree before we can make any application as to the award: there is no objection on their part against the order for re-hearing.

The Lord Chancellor: What was done upon the application to pay the money into court?

For the Appellant: The payment was stopped by this proceeding.

[391] Lord Eldon: Is the decree signed by the Chancellor? it should be so stated in the petition of appeal. It may be hard that you should have to pay the money over again: but have you not referred the question upon the title?

The Lord Chancellor: The question of the award should have been before the court at the same time with the question of re-hearing.

For the Respondent: The award we may not be able to set aside.

Lord Eldon: If you will admit that, we may go on. The matter as to the award is original matter, and not within the jurisdiction of the Court of Appeal.

The Lord Chancellor: Can you point out any way in which the validity of the award can be questioned in the Court below. Any question of law might have been raised upon that submission.

Lord Eldon: When you consent to the reference can it be said that you did not either refer the right or admit it? The submission would be nonsense without such a construction.

The Lord Chancellor: All matters in difference comprise every thing both of fact and law.

For the Respondent: The objection made is upon matters subsequent, contrary to all principle and practice.

The Lord Chancellor: The appeal must be withdrawn that the parties may go before the Chancellor, in order that the decree and the award may be considered together.

After this observation the argument upon the [392] case was stopped, and the following special order was made.

24th July, 1828. It appearing to this House, that upon the re-hearing before the Vice Chancellor, when the decree of reversal complained of by the said appeal was made, the effect of the award was not discussed before the Vice Chancellor, and which award appears still to remain in force; this House thinks it proper, and it is therefore ordered, that the Appellant, upon withdrawing his appeal, shall be at liberty to present a petition of appeal to the Lord Chancellor against the Vice Chancellor's decree of reversal: the Appellant and Respondent being also respectively at liberty to make such motions or other applications to the Lord Chancellor touching the said award, and for the confirmation or setting aside thereof, as they may be advised to make, such motions, or other applications, to be heard at the same time with the petition of *rehearing*, so to be presented as aforesaid, or at such time or times as the Lord Chancellor shall direct. And it is further ordered, that the cause be remitted back to the Court of Chancery, to proceed therein accordingly, reserving to each party the right of appealing from any order or decree to be made herein by the Court.

[393]

APPENDIX.

SCOTLAND.

(COMMISSARIES COURT AND COURT OF SESSION.)

MARY BLACK MACNEILL.—*Appellant*; MALCOLM MACGREGOR.—*Respondent*.

[Mews' Dig. vii. 652; S. C. 1 Dow and Cl. 208.]

In May 1816, a marriage ceremony between M. and G. (according to the evidence of one witness, who spoke positively to the performance of the ceremony, and the identity of the parties, confirmed by another witness, who spoke with less firmness as to the identity) was performed by a minister of the Church of Scotland, upon the production of an instrument, purporting and proved to be a certificate of a proclamation of banns, which proclamation, from the date of the certificate as compared with a registrate of the marriage and the evidence of the witnesses, could not possibly have been made. But it was proved to be the usual certificate, and that according to the practice in Scotland at the time, banns were in fact scarcely ever proclaimed, when such certificates were given. The minister who performed the ceremony had afterwards been banished for forgery, and collusion in effecting a marriage, and became incompetent to give evidence, but a book kept by him, in which the marriage in question appeared to be regularly entered, was produced, and proved by the wife and daughter of the minister, who also proved the performance of the ceremony.

M., who had afterwards married another husband, upon a suit to establish the first marriage, in her defences admitted that one evening in May 1816, by means of threats, and particularly of personal injury to a rival suitor, who afterwards became the [394] second husband, she was induced to go, and went with G. to the house of the minister before mentioned, but from the agitation of her mind, that she was incapable of paying attention to what then passed, and was convinced that she did not consent to the marriage. She also admitted that after the ceremony she returned with G. to her father's house, but denied the consummation.

It was in evidence that M. was in the habit of calling upon G. at his printing office, late in the evening and alone; and that after the ceremony of marriage, in speaking of it, she said "it was not binding; what would two or three words of an outlawed man do?" It was also in evidence, that on two occasions, in the presence of her father, she was addressed, and her health drank, by the name of Mrs. G., which salutation was in one instance returned, and in another received without observation by her or her father. It was also in evidence, that upon two occasions J., the second husband, after his marriage came to the house of M. when G. was there, and went secretly to an upper room, where he remained alone.

The marriage with G., as alleged, took place in May 1816. In June 1816, a marriage was regularly solemnized between M. and J. It was proved that G. before his alleged marriage with M. had admitted that J. was a more favoured suitor; that upon the marriage between M. and J. he had accepted a present of a pair of gloves; that he had been frequently present in social parties with J. and M., to whom he drank by the name of Mrs. J.; that he slept in the same room where M. and J. were in bed together as man and wife, and in all his intercourse with them, which was very frequent, recognised them as such.

Two years after the marriage of M. and J., and their colibitation, G. raised an action in the Commissaries Court against M. of declarator of marriage and adherence. There was issue of the marriage between M. and J., but neither the children nor J. were made parties.

Held (reversing the judgment below) that if a celebration of the ceremony of marriage took place between M. and G., it was to be presumed, under the circumstances before stated, that there was no real consent to marry. [2 Bl. N. S. 470: 488.]

Whether it is necessary that the second husband, and the children should be parties to the suit. *Quære.* [*Ib.* 416.]

Semb. That according to the practice of the Ecclesiastical [395] Court, it is only necessary to make the principal a party, but that the other parties interested may intervene if they think fit, at any stage of the suit. [*Ib.* 417.]

Supposing that the evidence had been deemed sufficient to warrant a declarator of marriage between M. and G., whether a sentence of adherence ought also to have been pronounced. *Quære.* [*Ib.* 460: 487.]

Upon a summons which alleges an irregular marriage, followed by consummation, and a regular marriage celebrated with a view to complete the irregular marriage, whether proof of the latter marriage, no proof being given of the former, would be a sufficient proof of marriage. *Quære.* [*Ib.* 489.]

Whether after judgment upon such a summons, and proof negativing the alleged regular marriage, a new action could be brought to establish the irregular marriage. *Quære.* [*Ib.* 484.]

Whether according to the law of Scotland, entries made in a book kept by a minister of the Church of Scotland, in the manner above described, are admissible in evidence to prove a marriage; and how marriages are to be proved, supposing the minister and witnesses to be dead, or incompetent. *Quære.* [*Ib.* 495.]

Whether the admissions of a woman who may be claimed as a wife by two persons, under such alleged ceremonies of marriage, and circumstances as above stated, is admissible in evidence as proof of the first marriage. *Quære.* [*Ib.* 496.]

Whether a marriage celebrated by a minister of the Church of Scotland, upon such

certificate as above mentioned, without actual publication of banns, is to be deemed, according to the practice, a regular marriage in Scotland. *Quære.* [*Ib.* 497-8.]

Assuming it to be an irregular marriage, previous and subsequent conduct of the parties is admissible evidence upon the question of consent. [*Ib.* 499.]

This was an appeal from certain judgments pronounced by the Commissary Court and the first division of the Court of Session, in an action of Declarator of Marriage, at the instance of the Respondent, against the Appellant.

[396] The summons was for a declarator of marriage and adherence, filed in the Commissaries Court on the 25th of March 1818: "It set forth, that an intimate acquaintance having for some time subsisted betwixt the Pursuer and Mary Macneill, sometimes called Mary Black Macneill, the reputed natural daughter of the late Dr. James Macneill of Stevenston, by Euphemia Black, they formed an attachment, and agreed to become husband and wife of each other; and accordingly, when they were together at Holytown, in the county of Lanark, in spring 1816, on a jaunt, in company with the said Dr. James Macneill, an irregular marriage between them was celebrated by the said Dr. James Macneill; and the marriage was consummated by their spending several nights together in the same bed, at Holytown aforesaid: That on the Pursuer and the said Mary Macneill, or Mary Black Macneill, returning to Edinburgh from the said jaunt, which they did in the month of May 1816, they considered it proper that no time should be lost in celebrating, *in facie ecclesiae*, that marriage which had been irregularly contracted between them at Holytown aforesaid; and accordingly they were, in the month of May 1816, regularly married by the Reverend Joseph Robertson, Minister of the Chapel in Leith Wynd, Edinburgh." Notwithstanding of all which, the said Mary Macneill, or Mary Black Macneill, casting off the fear of God, and forgetting her natural and Christian duty and promise made at her entering into said marriage with the Pursuer, now refuses to acknowledge her marriage, or to cohabit with [397] him as her husband: therefore the Pursuer, Malcolm Macgregor, ought to have our sentence and decree, finding and declaring, that he and the said Mary Macneill, sometimes called Mary Black Macneill, Defender, are lawful married persons, husband and wife of each other; and decreeing and ordaining the said Defender to adhere to, and cohabit with the Pursuer, and treat and entertain him in all respects as her husband; and further decreeing and ordaining the said Defender to make payment to the Pursuer, of the said sum of £100 sterling, as the expenses of this process, etc.

In the defences which were given in on the 1st of May 1818, the Appellant admitted the acquaintance, and the journey to Holytown, but denied "that a marriage was there celebrated by the Doctor, or that she either then or at any other period, consented to become the Pursuer's wife." On the other point she gave the following statement: "The Defender recollects perfectly well that the Pursuer, some time in the month of May 1816, made proposals of marriage to her, which she rejected, informing him, at same time, that she was pre-engaged with Mr. Jollie, her present Husband. Notwithstanding of this, some short time thereafter, the Pursuer called at Dr. Macneill's house, between ten and eleven o'clock at night, by which time the Doctor had retired to his bed room; and by means of threats, particularly of personal injury to Mr. Jollie, he prevailed upon her, or rather forced her, to accompany him to Edinburgh, and that he carried her to a house, which she afterwards understood was that of Joseph Robertson's; and, although from the agitation of her mind at [398] the time, she could pay no attention to what might then pass yet she is convinced that in no situation would she consent to marry the Pursuer, or break her engagement with Mr. Jollie, to whom she was sincerely attached, and had resolved to marry."

She then proceeds to state, "that having a short time thereafter been married to Mr. Jollie, the Pursuer on that occasion was presented with, and accepted a pair of gloves, as one of their friends, and frequently hereafter visited them in the Doctor's house, and only discontinued his visits from the month of December last."

In the answers to these Defences, the Respondent desired that the Appellant should be judicially examined, as to the facts stated in the summons, which was ordered by the Court, but the Respondent afterwards declined to avail himself of the right.

The Court then appointed a Condescendence, and the Respondent, on the 23d of April 1819, put in the following:

1. That having paid his addresses in the way of marriage to the Defender, who was living unmarried in the house of her reputed father, Dr. Macneill, with the approbation of the said Dr. Macneill, the Pursuer accompanied Dr. Macneill and the Defender in an excursion to Lanarkshire, in the month of May, 1816, for the purpose of visiting an estate belonging to Dr. Macneill, in the parish of Bothwell.

2. That in the course of this excursion, the parties slept several nights at the inn at Holytown, which is in the same parish with Dr. Macneill's [399] estate; and while in that inn, Dr. Macneill stood up and solemnly bestowed the hand of his daughter the Defender upon the pursuer as her husband, and gave the parties his blessing. That the Defender acquiesced in this by taking the Pursuer's hand; and while at the inn at Holytown, the Pursuer and the Defender slept in the same room for two nights, when the irregular marriage which had been previously solemnized by Dr. Macneill in the way here mentioned, was consummated.

3. That while upon this journey, the Pursuer was treated by the Defender and by her father in such a way as induced the tenants on Dr. Macneill's estate, and others in whose company they happened to be, to believe that the Pursuer and the Defender were either actually married, or were solemnly betrothed to each other as husband and wife. That the parties returned from this excursion to Edinburgh on the 20th May, 1816; and the Defender after her return to her father's house in Leith Walk, where she generally resided, admitted to various persons that an irregular marriage had been solemnized between the Pursuer and the Defender at Holytown, when she had accepted the Pursuer as her husband; and that this irregular marriage had been afterwards consummated.

4. That immediately upon their return to Edinburgh, the Pursuer and Defender thought it proper that their marriage should be regularly solemnized by a clergyman without any further delay; and with the view to this marriage, the Defender made the usual preparations in the way of dress which are customary on such occasions. In particular, she gave to Margaret Kinlay, who [400] is since married to a person of the name of Shewen, residing in Leith Walk, three gowns to be made for herself on the occasion of her marriage, also a marriage shift for herself and a marriage shirt for the Pursuer; all which articles she desired should be got ready by a particular day, with a view to the regular solemnization of her marriage with the Pursuer. And further, she requested the said Margaret Kinlay to officiate as her bride's-maid on that occasion.

5. That in pursuance of this resolution, the Pursuer obtained a certificate of proclamation of banns in the usual form; and thereafter the Pursuer and the Defendant proceeded, on the evening of Thursday, the 23d of May, 1816, from Dr. Macneill's house, near the bottom of Leith Walk, to the house of the Reverend Joseph Robertson, minister of the chapel of ease in Leith Wynd, Edinburgh, for the purpose of having their marriage regularly solemnized by that person. That upon arriving at Mr. Robertson's house, they made application to him to solemnize the marriage, producing to him at the same time the certificate of the proclamation of banns, and they were accordingly that evening regularly married by Mr. Robertson, according to the forms of the Church of Scotland, in the presence of Mr. Robertson's wife and his daughter; and the marriage was entered in a book kept by the said Reverend J. Robertson, as a record of the marriages which he solemnized.

6. That after the marriage was thus solemnized, the Pursuer accompanied the Defender from Mr. Robertson's house to the house of Dr. Macneill, in Leith Walk, and there the marriage was con-[401]-summated, by the Pursuer sleeping in the same bed with the Defender.

7. That the Defender has, upon a variety of occasions, admitted to sundry persons that she was married to the Pursuer by the Reverend Mr. Robertson as above mentioned, and that she thereafter slept with the Pursuer as her husband, in her father's house.

These facts the Pursuer undertakes to prove by the evidence of (Here follow the names of the witnesses).

On the 21st of May, 1819, the Appellant put in answers, by which, before making special answers to the articulate condescendence, she recalled the attention of the Court to the defence originally stated by her, and to the facts specially mentioned in the first part of her answers to a petition given in by the Pursuer. It was therein

stated, that so far from the Pursuer having then had any idea that the Appellant was his wife, that, on the contrary, he not only knew of the previous courtship between Mr. Jollie and her, and that they were to be married, but at the time of the marriage he was presented with gloves, which he accepted of; and being considered as one of their most intimate friends, he repeatedly visited them, drank to them as husband and wife, by the names of Mr. and Mrs. Jollie; and when he so repeated these visits, was in the practice of partaking of their family fare, always acknowledging them to be husband and wife. It therefore appears a most extraordinary circumstance, the Pursuer afterwards claiming the Appellant as his wife, a person who may have been said to have been married with his consent and approbation to Mr. [402] Jollie, her present husband; and so far from this having given him offence at the time, that, as already mentioned, he visited and acknowledged them as married persons, and as such was entertained by them. When, however, the Pursuer first pretended to say that the Appellant was his wife, it appeared that his object was merely selfish, as he offered to renounce the claim of a husband upon condition that she and Mr. Jollie would pay him a sum of money; so that if they had complied with his wish, no such action as the present would have appeared in Court.

The Appellant submitted that before the Pursuer should be allowed to enter upon his proof of the condescendence, the above special facts should be discussed, and a proof thereof allowed to the Appellant; or should the Court be inclined to allow the Pursuer to proceed with his proof in the mean time, the Appellant should also be allowed a proof of what she then stated, with what follows as the answers to the articulate condescendence.

The Appellant then proceeded to answer the condescendence.

Art. 1. The Defender denies this article, excepting in so far as regards the circumstance of the Pursuer's having accompanied Dr. Macneill and the Defender first to Holytown and afterwards to Glasgow. In May 1816, the Pursuer mentioned to Dr. Macneill that he had occasion to go to Glasgow, and would accompany him to Holytown if he inclined. Dr. Macneill acquiesced, and the Pursuer accompanied Dr. Macneill and the Defender to Holytown, and afterwards persuaded Dr. Macneill to go the length of Glasgow.

[403] Art. 2. This article is denied.

Art. 3. This is also denied.

Art. 4. This is denied, in so far as regards the Defender's having any view of a marriage with the Pursuer, making preparations on that account, or employing Margaret Kinlay to make a shirt for the Pursuer, and requesting her to officiate as bride's maid on occasion of the alleged marriage. Dr. Macneill, when in Glasgow, gave money to the Defender to purchase there three gowns, and she employed Margaret Kinlay to make them; but she denies her then having any view of a marriage with the Pursuer.

Art. 5. The Defender recollects that, some time in May 1816, the Pursuer made proposals of marriage to her, which she declined, informing him of her being pre-engaged with Mr. Jollie, now her husband. Notwithstanding of this, some short time hereafter, the Pursuer called at Dr. Macneill's house one evening about nine or ten o'clock, by which time he had retired to his bedroom, and by means of threats, particularly of personal injury to Mr. Jollie, the Pursuer prevailed on her to accompany him to Edinburgh, and he conducted her to a house, which she afterwards understood to be that of Joseph Robertson; and although, from the agitation of her mind at the time, she was incapable of paying attention to what then passed, she is convinced that neither then, nor at any time, did she consent to marry the Pursuer, or break the engagement she had come under with Mr. Jollie.

Art. 6. The Defender admits that the Pursuer accompanied her back from the house of Joseph Robertson to Dr. Macneill's House, where she [404] retired to her own room, and the Pursuer staid all night in a separate room below; but there is no truth in his allegation of there having been any marriage, or consummation of marriage, betwixt her and the Defender, either then or at any other period.

Art. 7. This article is denied.

The Commissaries allowed the Respondent a proof of the fourth, fifth, and sixth articles of the condescendence, being those relating to the solemnization of the marriage in Edinburgh, superseding consideration of the other articles, "until the

proof now allowed shall be led and concluded." By a subsequent interlocutor, on the 20th of August, the Commissaries allowed a proof of the remaining articles of the condescendence.

The evidence produced by the parties, as it finally appeared in the prints before the House on the appeal, was as follows:

On the part of the Respondent the proof was professedly confined to the allegation in the summons of a regular marriage at Edinburgh; the proof of the allegation of the irregular marriage at Holytown having been abandoned.

Charles Macpherson deponed, that the Appellant was in the constant habit of calling for the Respondent, and that the behaviour of the parties led to the general belief that a courtship was going on; that her visits to the Respondent at the printing house were frequent, sometimes twice or three times a week; that she was sometimes accompanied by her father, and sometimes alone. "Depones, that when the Pursuer came along to the office, she sometimes called as late as eight [405] or nine o'clock at night, at other times during the day. Depones, that when she called in company with her father, he does not recollect of her calling later than about two or three o'clock in the day. Depones, that on some of the occasions, the Pursuer left the office with the Defender when she came alone, and did not return again to the office that evening."

Margaret Kinlay deponed, "that she remembers that the Defender once mentioned to the Deponent, that her father, Dr. Macneill, wished to give her, the Defender's, hand to Malcolm Macgregor, the Pursuer, when they were together at Glasgow, but, as she said to the Deponent, she, the Defender, refused to marry him there, or till they came home, or something to that purpose; but she, the Deponent, cannot recollect her precise expressions." This witness afterwards mentions, that she was asked to be the bride's maid. Miss Macneill said, "when she asked me to be the bride's maid, that her marriage was to be private, and that it was to take place in Edinburgh; that the gentleman, and a friend of his, were to come in a coach to meet her at the minister's, but she neither mentioned the intended husband's name, or his friend's, or the minister's, or the name of the place where she was to be married; she just said that the gentleman was to come with his friend in a coach, to meet us at the minister's house in Edinburgh." The witness could not attend; and "it was some weeks after the time fixed for the marriage, that I asked Miss Macneill if her marriage with Mr. Macgregor was done; and she answered me, No; and added, [406] I am going to marry a man I like better, as I have before deponed to."

Mrs. Christian Macnaughton being interrogated "if she ever knew of Dr. Macneill, and the Defender and Pursuer going on a jaunt to Stevenston, in the west country, in the month of May 1816? depones, and answers, yes, I heard her speaking of it. Interrogated, what she said of the journey? deponed, the Appellant said, that when they were in an inn on the journey, with the Respondent, and Dr. Macneill had gone to bed, there was only another bed room with two beds in it, and the innkeeper's wife, or woman who kept the inn, asked her if she had no objections to sleep in the same room with Mr. Macgregor? that there were no curtains on the bed, and she objected to the want of them; and said, if she would hang sheets round the beds, she would have no objections; that she said that the woman hung sheets round the beds, and Mr. Macgregor and the Defendant slept in the same room in different beds that night."

Mr. Smyth, writer to the signet, made the following deposition: "I recollect him (the Respondent) speaking to me, some time after the execution of Dr. Macneill's second deed of settlement, in April 1816, about his marriage with the Defender, which was to be at the Black Bull Inn that evening, at nine o'clock, and wishing me to be present; but I was unwell at the time, and confined to the house; but I said, Mr. Court, my clerk, might go; and I think I called Mr. Court, and mentioned it to him, and he said he would go; and Mr. Macgregor said [407] he would call back at nine, but he did not call at the hour; and some little time thereafter, I said to Mr. Court, you had better go to the Black Bull, Mr. Macgregor may be expecting you there; and Mr. Court went to the Black Bull; and some little distance of time thereafter, he called back and told me he could hear nothing about him. Interrogated, when this took place? depones, and answers, this happened nearer the end of May

than the beginning of it. Mr. Smyth being interrogated, if the Pursuer called upon the deponent, and informed him that he had been married to the Defender in Edinburgh, and by whom? depones, and answers, yes, he did. Interrogated, if that was long after the evening that Mr. Court went to the Black Bull? depones, and answers, it was some distance of time after,—not so much as a month, but more than a week. I think he said they had been married by Mr. Robertson."

The Respondent referred, in evidence of the certificate of proclamation of banns having been obtained, to an extract from the books of the session clerk, of the following tenor:—"Registrar of marriage.—Edinburgh, twenty-first day of May, eighteen hundred and sixteen.—Malcolm Macgregor, printer, Old Church Parish, and Mary Macneill, St. Cuthbert's Parish, daughter of Dr. James Macneill, Edinburgh."

Mr. Andrew Masson, the son-in-law of Mr. Wilson, session clerk in the city of Edinburgh, deponed, "That he made the entry in the day-book kept at his father-in-law's, which is now [408] exhibited to the deponent, and which is in the following terms—

" 22d May, 1816.

" Malcolm Macgregor, printer, Old Church Parish, and Mary Macneill, St. Cuthbert's Parish, daughter of Dr. James Macneill, Edinburgh. That the parties are free, unmarried, of legal age, and not within the forbidden degrees, and he has resided upwards of six weeks in Edinburgh, is certified by James Macdonald, running stationer, Edinburgh, and Patrick Neill, printer, Edinburgh.

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(Signed) " Malcolm Macgregor.

" Js. Macdonald.

" Depones, that the entry of the above, transferred into the office day-book, in the following terms, also exhibited to the witness, is also in the deponent's hand writing:

" Edinburgh, 22d May, 1816.

" Malcolm Macgregor, printer, Old Church Parish, and Mary Macneill, St. Cuthbert's Parish, daughter of Dr. James Macneill, Edinburgh. Certyd. by James Macdonald, running stationer, and Patrick Neill, printer, Edinburgh.

(Signed) " Malcolm Macgregor.

" Jam. Macdonald."

Being specially interrogated, he depones, " that in no case was it the practice to transfer any of the entries in the house day-book, kept at his father-in-law's, to the office day-book, unless certificates had been given out to the parties." Then adding a qualification, which does not apply to the present case, he proceeds, " that he is [409] quite certain, that, with the exception now mentioned, certificates were issued in all cases where the entries appear to have been transferred. The deponent being now shown the copper-plate form of proclamation of banns in process, depones, that it is the form of certificate in use to be given out by the session clerk in the year 1816, and the same is marked by the Commissary Examiner, and deponent, as relative hereto."

The copper-plate form of certificate referred to, runs in the following terms:

" Marriage.

Edinburgh,

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" That the parties are free, unmarried, of legal age, and not within the forbidden degrees, and resided in Edinburgh upwards of six weeks preceding the proclamation of banns, is certified to me, for which I shall be answerable. And are orderly proclaimed in several churches in this city, in order to marriage, and no objections made why the same may not be solemnized, is certified by——"

He depones " that the entries in the office day-book were transferred into a folio book in the office, called the registrar of marriage;" and upon the interrogation of the Appellant, he repeats his conviction, that a certificate of proclamation of banns must have been granted, in the present case, and the grounds upon which that conviction rests.

Robert Bow, the present session clerk, being interrogated as to the extract from the register of marriages, being dated 21st of May, 1821, when it is entered in the day-book of date 22d May? depones and answers, it must be a mere mis-[410]-take of mine in transferring the entry from the day-book to the register, and the date

22nd being placed below instead of above. Interrogated, if he is satisfied from the evidence of the entries appearing in the different books above deponed to, that a certificate of proclamation of banns must have been given out at that time in the form above deponed to? depones and answers, I have no doubt of it. Interrogated, if the entry in the register, above deposed to, shews the date of the certificate of proclamation being issued by the session clerk, or if it shews the date of the celebration of the marriage? depones and answers, it shews the date of which the lines were got out, but not the date of the marriage."

The Reverend Dr. Macknight depones, "That he is one of the ministers of Edinburgh, and has been so for nineteen years past. Depones that he has officiated as clerk to the presbytery of Edinburgh for thirty years past. Depones, that the old regulations in regard to the proclamation of banns were not strictly attended to at and previous to the year 1816. Interrogated, whether at and previous to the year 1816, the deponent, as a clergyman of the city of Edinburgh, would have celebrated a marriage betwixt a gentleman residing within the city and a lady residing in the parish of St. Cuthbert's, on the production of the certificate of the proclamation of banns then in use by the session clerk of the city of Edinburgh, without his requiring also a certificate of a similar nature from the session clerk of the parish of St. Cuthbert's? depones and answers, I always [411] disapproved of the practice, but found it so common that I certainly did celebrate marriages on such certificates of proclamation from one of the parties only; and that, in consequence, I was anxious to obtain that alteration in the form of proclamation which has since been adopted by the presbytery, a copy of which is now shewn to me." And "The copper-plate engraving of the certificate of proclamation of banns in use to be issued by the session clerk of the city of Edinburgh, in the year 1816, and referred to in the depositions of Robert Bow and Andrew Masson, being shewn to the deponent, and also the entry of the attestation for a certificate of proclamation of banns, in order to marriage betwixt the parties, of date the 22nd May, 1816, contained in the house day-book kept by Adam Wilson, referred to in the deposition of Andrew Masson, being also now shewn to the deponent, and interrogated, whether, if the copper-plate form of this certificate had been regularly filled up in conformity to the entry contained in the day-book, and duly signed by the session clerk, the deponent would, on such certificate of proclamation of banns, have celebrated the marriage betwixt the parties? depones and answers, most undoubtedly I would; it was what was done every day, by which I mean very commonly."

Mr. Bow, the session clerk, depones, "That in 1816 it was the practice for clergy men to consider the parish of St. Cuthbert's, and the parishes in the city of Edinburgh, as the same, and to marry parties upon single lines from either parish."

Mrs. Margaret Robertson, the wife of the Re[412]verend Joseph Robertson, by whom the ceremony was performed, depones, that her husband "kept a book, in which, so far as I know, he generally recorded the marriages celebrated by him; and being shewn a book produced by the Pursuer, and now subscribed by the deponent, and Judge-Examiner, as relative hereto, which commences on the 1st of January, 1814, and appears to end upon the 26th of November, 1817; and the deponent being interrogated, whether that is the book so kept by her husband, and by whose hand it is written? depones, and answers, it is the book that was kept by my husband, and is wrote by him. And being particularly desired to look at the entry in that book, under the date of twenty-third May, eighteen hundred and sixteen, 'married Malcolm Macgregor, printer, Old Church Parish, and Mary Macneill, St. Cuthbert's Parish, daughter of Dr. James Macneill, Leith Walk. 'Town Lines;' and interrogated, if that entry is in the handwriting of her husband? depones, and answers, yes. Interrogated, were you present at this marriage? depones, and answers, yes. And again being interrogated, do you perfectly recollect that there was a marriage in your house, and celebrated in your presence by your husband, upon the 23d of May 1816, as specified in the book? depones, and answers, I recollect of it being, but I cannot recollect the precise date. Interrogated, about what hour did the marriage to which you allude take place? depones, and answers, between nine and ten o'clock in the evening I think; I cannot be certain. Interrogated, did you see [413] any marriage lines produced? depones, and answers, I know that they brought lines with them; I saw them in my husband's hands, either when he was celebrating the marriage, or

before or after the celebration. He generally held the lines in his hand while he was celebrating marriages. Interrogated, did you yourself read the paper that you call lines? depones, and answers, I really think I did, I believe I did." Her deposition closes as follows: "Re-interrogated for the Pursuer, did the parties in the marriage to which you allude conduct themselves in the ceremony, in the same manner as parties do on similar occasions, or did you observe anything particular? depones, and answers, they behaved just in the usual manner; I did not observe any thing particular.—Re-interrogated for the Defender, was it your husband's practice to put questions to the parties when he performed the ceremony? depones, and answers, It was his practice to ask parties if they were willing. Interrogated by the Court, have you any doubt he did so upon the occasion to which you allude? depones, and answers, none whatever."*

Mary Robertson, the daughter of the former witness, being interrogated, "do you know [414] the Defender? depones, and answers, I have known her by sight for several years, but I never spoke to her. And being shewn the book produced during the examination of the preceding witness, and interrogated, depones, that for more than fourteen years past her father recorded the marriages he celebrated; and the book produced, which she has now seen and examined, is of her father's handwriting. Interrogated, depones, that the entry under date the 23d of May, 1816, 'married Malcolm Macgregor, printer, Old Church Parish, and Mary Macneill, St. Cuthbert's Parish, daughter of Dr. James Macneill, Leith Walk.—Town lines,' is of her father's handwriting. Interrogated, depones, that the deponent was present at this marriage. Interrogated, do you know the Pursuer, Malcolm Macgregor, now in Court? depones and answers, yes; I recollect the face; he was one of the parties then married; I did not know him before the marriage, nor have I been acquainted with him since. Interrogated, what hour did the marriage take place? depones, and answers, late in the evening before supper. Interrogated, was there any candle lighted? depones and answers, No; I think there was not, I cannot recollect that there was any. Interrogated, did you see any marriage lines? depones, and answers, I did not see any lines, but I asked my father if there were lines; he answered me, that the Pursuer had town lines. I put this question before the ceremony was performed; I had not been present at any marriages for several years before, and had some delicacy about attending as a witness, which [415] led me to put the question." She also depones, "that the deponent had often before been present at the celebration of marriages, and the marriage in question was celebrated in the usual manner, and solemnly and deliberately."

The entry in the record of the marriages kept by Mr. Robertson, was in the following terms: "Twenty-third May, eighteen hundred and sixteen.—Married Malcolm Macgregor, printer, Old Church Parish, and Mary Macneill, St. Cuthbert's Parish, daughter of Dr. James Macneill, Leith Walk.—Town lines."

The Judge-Examinator certifies, "that he has examined the volume of the record of marriages produced: that it appears to contain upwards of one thousand different entries of marriages therein recorded, in regular order of date, with the exception of fifty-three, which are entered separately upon five leaves at the end of the book, in writing which, the pages are reversed, and which are marked as omitted in their place." He also certifies, "that the fifty-three marriages recorded as omitted in their proper places, are in other respects, regularly entered, and that the marriage now in question is not one of those, but appears to be regularly entered, at the time of celebration, in its proper place."

The certificate granted by the minister, is in the following terms: "Edinr. Car-rubber's Close, May 29, 1816.—These are to certify, that Mr. Malcolm Macgregor,

* This witness did not recognise the Appellant when pointed out to her upon the examination; and as to Macgregor, she admitted that she had never seen him before the ceremony; and being much pressed, as to how she could recollect so well his identity, answered, "Indeed, I know very little about it; I am so unwell to-day, I am unable to answer questions." "I recollect his face, I cannot be more particular." She also stated, that she believed there was a lighted candle in the room when the ceremony was performed.

printer, and Miss Mary Macneill, after producing regular marriage lines from the sessions clerks of the city, were married, before witnesses, by me,

“ Joseph Robertson, Minister.”

[416] Janet Nicholson depones, “ In spring, last year, I drank tea at the house of Archibald Macnaughton, type founder, in St. Patrick Square, in company with Mr. and Mrs. Macnaughton, and Mr. and Mrs. Jollie, that is, Mary Black, they call her Mrs. Jollie; there was no other person present but myself. I cannot recollect the precise time of the year. I was sent for by the Defender, and I went home from that company between eight and nine at night, and it was good day-light when I went home. Interrogated, was there any conversation about the Defender’s marriage in that company? depones and answers, the Defender, with whom I had been intimate, said to me, in presence of the company I have mentioned, that she had been married to Mr. Macgregor, but she could by no means think of living with him, and that she preferred Mr. Jollie, and that she would lay down her life for him. I do not recollect all she said, nor the precise words. Interrogated, depones, she asked me if I was married to Mr. Macgregor, and said I ought to have sent her livery, that is, wedding favours. I answered her that she was married to him, and that she should have sent livery first to me. I was urged to confess that I had been married to Mr. Macgregor. I never made any confession to Mary Black or Mr. Jollie that I had been married to him. Depones, Mary Black, in this company at tea, said that she had been married to Mr. Macgregor by the Reverend Joseph Robertson. I asked her if she had lines? she answered, What do I know? She Mary Black mentioned, that Mr. Robertson had said, when he married [417] them, how does such an old man get such a young wife? or something of that nature.”

“ Interrogated, if the Defender ever said any thing to the deponent respecting what she had done with the marriage lines? depones and answers, I don’t recollect exactly what she said about the marriage lines; I think she said something about giving them to Mr. Jollie, or something about Mr. Jollie having burned them. Mr. Jollie told me himself that he had gone to Mr. Macgregor about the marriage lines before he had married the Defender.” A question being put to this witness as to her having several natural children by the Respondent, she declined to answer.*

Mrs. Macnaughton depones, that (in spring 1818) “ she was sent for by the Defender. There was a deal of conversation betwixt Janet Nicholson and Mary Black, she having wished Janet Nicholson much joy, to which Janet Ni-[418]-cholson returned some answer, but I am not certain what it was. Mary Black began and told Janet Nicholson about her having been before Mr. Joseph Robertson; but how it began, I do not recollect exactly. That she described herself as being induced to leave her father’s house that evening, by the pretence that her presence was necessary to settle some business with a Mr. Bridges. She said she did not know where she was when she went into Mr. Joseph Robertson’s; and she said that Mr. Macgregor had used threats to induce her to go to Mr. Robertson’s, and said at the foot of the stair, that he would burn her deeds if she did not go, which deeds of her property. Mr. Macgregor, she said, had keeping at that time.† That she said Mr. Macgregor said he would employ one Macdonald, Esq. to stab Mr. Jollie, if she did not go to Mr. Robertson’s, and that Mr. Macgregor would go to London.”

* This witness also gave the same evidence as Mr. and Mrs. Macnaughton, as to the allegation of Mary Macneill respecting the pretence by which she was induced to leave home, and the threats by which Macgregor prevailed on her to go to Mr. Robertson’s for the purpose of being married. She deposed also to the expression of the Appellant, “ What will two or three words of an outlawed man do? ” She deposed further, that the next day after this conversation, she went to the Respondent’s printing office with Dr. Macneill, who told him that Jollie was a better marriage for Mary, and that he would not consent to the Respondent’s marriage with her; that the Appellant afterwards met the Respondent by his appointment, and in company with Jollie, when Jollie asked him if there was anything between him and the Appellant but the marriage lines of Joseph Robertson, to which he answered that there was not, and he desired the Appellant to take and burn them, and wished her and Jollie all happiness.

† This allegation refers to a matter which was in evidence upon the additional

Mr. Macnaughton depones, " that the Defender said that Mr. Macgregor took out his pocket-book, and gave him either a note or marriage lines, she could not say which, and he made no objections to perform the ceremony." Janet Nicholson deponed, that " she said that that marriage was not binding: what the devil signified two or three words of a minister?" Mrs. Macnaughton interrogated, " if she ever heard Mary Black, the Defender, say any thing about her [419] marriage not being binding with Mr. Macgregor? depones and answers, O yes, she said that night that it was not binding: she said, what will two or three words of an outlawed man do?" Mr. Macnaughton deponed, " when Janet Nicholson came in, Mary Black, the Defender, addressed her as having been married: to which Janet Nicholson said, that she was married herself to the person she mentioned, which was Mr. Macgregor. Interrogated, if he ever heard the Defender say any thing about the marriage not being binding? depones and answers, yes, I have heard her say it was not binding, on account of Mr. Robertson being afterwards under sentence of banishment by the Court of Justiciary for forging lines."

William Allan deponed, " that the Pursuer was in the habit of sleeping in Dr. Macneill's house all night, at different times during the period of the deponent being there;" though, upon being interrogated, " whether, upon that oath, he had ever seen the parties in bed together? depones and answers, I never did see them in bed together, nor does it consist with my knowledge that they ever were so."

Mr. White, lapidary, depones, that in June 1816, *i.e.* immediately after the marriage, " the Pursuer, with whom he has been long acquainted, came to the deponent's shop, and got three gold rings, and a brooch of Ayrshire jasper which he had bespoke, and for which he paid the deponent. Depones, that he was accompanied by the Defender and Dr. Macneill." He " also depones, that while the rings were making the Defender tried a ring upon her finger, to see [420] if it would suit: she came to my shop with the Pursuer when she tried it." And he concludes as follows: " Depones, about the month of June I made a gold brooch of a Brazil stone, by Mr. Macgregor's order, and, as he said, for the Defender. Interrogated, depones, I also furnished, by Mr. Macgregor's orders, a stone for the head of a cane, which he said he was to present to Dr. Macneill. Interrogated, depones, and answers, when the jasper brooch was delivered, Dr. Macneill being much fatigued, was in my room with Mr. Macgregor. He said to Mr. Macgregor, ' this will cost a deal of money, but it does not signify; it will be all yours.' Interrogated, depones, and answers, there was a glass of rum handed on this occasion. The Defender was also in the room. I drank to her, saying, ' Mrs. Macgregor, your health:' she said nothing, but she also drank to me."

Mr. Neill, printer in Edinburgh, depones, " that he is acquainted with the parties in this cause, and was also acquainted with the late Dr. Macneill of Stevenston. Depones, that he carries on the business of printing in Edinburgh, and that the Pursuer has wrought with him and his father as printer for upwards of twenty years. Depones that he has frequently seen Dr. Macneill and the Defender calling for the Pursuer at his printing office. Interrogated, depones, that he recollects, in the summer of 1816, calling at Dr. Macneill's house in company with the Pursuer, who had previously informed him of his marriage with the Defender. Depones, that upon his return from England, [421] in the beginning of the month of June that year, he was informed by the Pursuer of his marriage to Miss Macneill, and the Pursuer requested the deponent, that in consequence of his being so, he, the deponent, would call upon her at her father's in Leith Walk, in company with him: that the deponent begged that he would allow him to delay his call till after the rising of the session, in consequence of the great press of business at the time; and he accordingly delayed calling for a day or two after the rising of the session in July, when he called with the Pursuer, as deponed to. Depones, that they were cordially received by the Defender, and the deponent recollects of her shaking him, the deponent, by the hand, when she received them. Depones, that he recollects her going for her father, Dr. Macneill; and the deponent recollects, upon the doctor's coming into the room,

proof, that in April 1816 deeds were prepared under the direction of Macgregor, and executed by Dr. Macneill, by which he gave his property to the Appellant, and the deeds were left in the custody of the Respondent.

that he went up to the Pursuer and took one of the Pursuer's hands in both of his, shaking hands with him in a fondling manner, and upon the Pursuer mentioning the deponent's name to him, the doctor politely came up to the deponent and shook hands, and conversed kindly with him. Depones, that the conversation was very general, and that there was nothing said, as far as he recollects, about the marriage of the parties, but he recollects of inviting Dr. Macneill and the parties to come to his house, and that the invitation was accepted by them. Interrogated, depones, that he recollects of some spirits and water being brought into the room before his coming away. Interrogated, whether any healths were drank [422] upon the occasion? depones, and answers, I most distinctly recollect of drinking the defender's health by the name of Mrs. Macgregor, it was the only opportunity I had of shewing what was the object of my visit, which was to visit them as a new-married couple, and I therefore most distinctly recollect it; there was nothing particularly marked in my way of drinking her health, further than that I distinctly called her Mrs. Macgregor, and drank to her by that name. Depones, that she returned the salutation, and drank the deponent's health."

Janet Stove, after mentioning that she recollects the celebration of the marriage between the Appellant and Mr. Jollie, depones, " That she recollects being employed in assisting in the doctor's house on an afternoon some time after this period, and seeing Dr. Macneill and the Pursuer and Defender come into the house together, from Edinburgh, and go into the dining room, which is down stairs, and that she recollects of Mr. Jollie calling at the house while they were in the dining room. Depones, that she opened the door to him, and that he walked up stairs, but whether he previously took off his shoes or not she cannot positively say, but that she thinks he did. Depones, that she is certain he did not go into the room where Dr. Macneill and the parties were, but went up stairs, as deposed to; that she does not know how long he remained in the house, as she did not see him again. Interrogated, depones, that she recollects of going into the dining-room, soon after Dr. Macneill and the parties had gone into it, to inform them that the kettle [423] was ready for tea, and that she recollects of addressing the Defender by the name of Mrs. Jollie; that the Defender seemed very much offended at the deponent for doing so, and exclaimed, in an angry tone, ' Mrs. Devil! ' that nothing more passed at the moment, and the deponent left the room. Interrogated, depones, that a little after the Defender came into the kitchen, where the deponent was, for the tea kettle, and took it herself into the dining room. Depones, that she said nothing to the deponent, nor she to her, as to what passed in the dining room, either when she came into the kitchen or any time after. Depones, that she recollects the Pursuer coming out of the dining room, on the evening deposed to, some time after the deponent had left it; and that he went up stairs, and called up Margaret Craig, the housekeeper, and the deponent, and asked them, whether it was possible that the Defender was married to Mr. Jollie? Interrogated, what answer they made to him? depones, and answers, Margaret Craig told him that it was not only possible that they were married, but that it was provable, for that she herself had been present on the occasion. Depones, that the Pursuer seemed very sorry, after receiving this information, and she recollects his repeating the words, was it possible?"

It was alleged, but not proved, on the part of the Respondent, to account for the absence of Dr. Macneill from the second marriage at Edinburgh, that he was debilitated both in mind and body by a habit of drinking; and it was said that the fact of his incapacity had been found [424] by the verdict of a jury, upon issues directed in an action of reduction; but the proof was not brought forward in this cause.

For the Appellant, the following evidence was produced in the Appeal, and relied on:

Dr. Robertson, after stating that he knew Dr. Macneill by sight, proceeds: " Interrogated, if he was applied to in June 1816 to come to Dr. Macneill's house to marry Dr. Macneill's daughter to Mr. Jollie, and what answer he made? Depones and answers, I was applied to; and I answered that it was not convenient to go to Dr. Macneill's house; but if they would come to my house in the evening, I would see them there. Mr. Jollie was the person who applied to me at this time, and he shewed to me then a certificate of proclamation of banns, in the usual form, otherwise I would not have invited them to my house. Interrogated, if the parties came to the de-

ponent's house in a coach, at the time appointed? Depones and answers, yes; they came about half past seven that evening, which I think was the 13th of June, 1816. Interrogated, Who were the parties that came in the coach? Depones and answers, I was standing at my own window when the coach arrived, and Mr. Jollie was the first person who stepped out of it; he then handed out Dr. Macneill, and was followed by Miss Macneill, and some of the domestics; and the witness added, Dr. Macneill walked up the first flight of steps, amounting to ten, in my sight, with his arm in Mr. Jollie's, without any apparent difficulty; and when they were all assembled in the dining-[425]-room, Mrs. Robertson came and told me, and I went in to them. Interrogated, if Dr. Macneill made any observation previous to the marriage ceremony, and what it was? Depones and answers, I found them seated; he immediately rose slowly, and hoped I would excuse an old man, who, by reason of some infirmities, was unable to rise so readily, and make so polite a bow as he was accustomed to do in his younger days. Interrogated, What then took place? Depones and answers, I requested him to be again seated; he replied—No; I have come to give away my daughter to Mr. Jollie, and I must do so in the usual manner; on which he stepped forward, took her by the hand, and placed her near Mr. Jollie. Immediately thereafter I offered up a prayer, gave the parties a few exhortations, concluded with thanksgiving, in all which Dr. Macneill seemed to be much interested; for he requested them to remember the exhortation, and to act accordingly. When I found him so disposed, I said, I hoped he would be kind to the young people; to which he replied, Sir, I have been kind to them. I will be kind to them still; and nothing shall be wanting on my part to make them happy. I distinctly remember the expression. I then certified the marriage on the lines of proclamation, and my constant form of words are, 'the above designed parties were married before witnesses, by James Robertson, minister.' I then wished the parties much joy, and they left the room as they entered. Dr. Macneill in Mr. Jollie's arm, and the rest followed. Interrogated for the Pursuer, if he was acquainted with Mr. [426] Jollie previous to the marriage? depones and answers, I was not personally acquainted with him previous to his marriage; nor, to my knowledge, had I ever seen him, except in church, as he was a member of my congregation; and I knew there was such a person, though he did not visit my house, and I heard he was a suitor of Miss Macneill's. Interrogated, if he recollects from whom he heard that Mr. Jollie was to be married to Miss Macneill? depones and answers, no, I do not recollect it, but it was the general report of the parish at that time."

Afterwards, being "interrogated, who he gave the certificate of marriage to? depones and answers, I gave it to the bride, as I always do. Interrogated, in what form he asked the parties if they were willing to be married? depones and answers, I said to Mr. Jollie, do you take this woman, (they having joined hands) whom you have by the hand, to be your lawful married wife; and do you promise, before God and these witnesses, to be a faithful and a loving husband to her, till God shall separate you by death? Mr. Jollie replied, I do. I then said to the bride, do you take this man whom you have by the hand, to be your lawful married husband; and do you promise to be a faithful, a loving, and a dutiful wife to him, till God shall separate you by death? And the conclusion then is,—before these witnesses I declare you married persons; and whom God, in his good providence, has thus united, let no man put asunder."

Mrs. Robertson depones, "I recollect the marriage perfectly, but I cannot say exactly as to [427] the date; but I have no doubt but it was about that time (June 1816). Interrogated, if the parties came to their house in a coach? depones, and answers, yes they did. Interrogated, who accompanied them? depones and answers, Dr. Macneill was of the party, and a person who I understand was housekeeper to Dr. Macneill; and there was a bridegroom man, but I do not recollect his name. Interrogated, if, at the ceremony, Dr. Macneill gave away his daughter? depones and answers, yes, he did. Interrogated, if any conversation took place between Dr. Robertson and Dr. Macneill before or after the marriage ceremony? depones and answers, yes, a good deal. When Dr. Robertson came into the room, Dr. Macneill attempted to get up from the sofa, which he did with great difficulty, and said very politely, he hoped Dr. Robertson would forgive the infirmities of an old man; on which Dr. Robertson went forward and took him by the hand, and said he was glad he was giving his countenance to the young couple, as he knew it was in his

power to be of use to them : to which Dr. Macneill replied, he did so with all his heart, as he had already done something for them, and he intended still to do more. Dr. Robertson told Dr. Macneill that he might sit during the ceremony. Dr. Macneill replied, that he had come for the purpose of giving away his daughter, and he would do it. Interrogated, if Dr. Macneill wished Mr. and Mrs. Jollie much happiness after the ceremony was over? depones and answers, yes, he did so with great affection. Interrogated, if the parties then went away? [428] depones and answers, yes, after getting the marriage lines signed."

Christian Robertson (one of the Respondent's witnesses) says, "I nursed the Defender, (Appellant) and have been acquainted with her, and occasionally at her father's house ever since. Interrogated, depones, that she went to the west country with her father in spring 1816. After they came back, I am not sure but she said to me that Mr. Macgregor, the pursuer (Respondent) had been with her there. She said nothing to me about her marriage, or marrying. Mr. Macgregor told me he had been with them in the west country. I asked him if he was going to be married to the defender? (Appellant) He said, no; Dr. Macneill says he thinks I will be the man; but I think it will be Mr. Jollie, for I know her pre-engagement to him."

John Carr says, "that he has been intimately acquainted with the pursuer (Respondent) for thirty years and upwards. Depones, that he recollects some time about April 1816, of walking down Leith Walk towards Leith, in company with the pursuer, (Respondent,) and John Manderson, a witness cited for the defender, (Appellant); and upon returning back again, they met, towards the head of Leith Walk, Mr. Jollie and the defender. Depones, that the pursuer stopped and had some conversation with the defender and Mr. Jollie; and upon his joining the deponent and Manderson, the deponent asked him if Mr. Jollie and the defender were married, to which he replied, that they were not married, but that they would shortly be so."

[429] John Manderson depones, "That he has been acquainted with the pursuer, though not very intimately, for, as he thinks, about five years. Depones, that he recollects going down Leith Walk one afternoon, with the pursuer and John Carr, the preceding witness, some years ago, the deponent cannot exactly say how long, when, either in returning or going down the Walk, they met the defender and Mr. Jollie. Depones, that the pursuer stopt to speak to them, when John Carr and the deponent preceded. Depones, that the pursuer afterwards rejoined the deponent and John Carr, and the latter put a question to him respecting the defender and Mr. Jollie; to which question the pursuer made some answer respecting a marriage that was to take place, as he thinks, between the defender and Mr. Jollie. Depones, that this circumstance happened so long ago, that the deponent has a very indistinct recollection of what the pursuer said upon that occasion; but he rather thinks he mentioned the intended marriage above alluded to was to take place in a short time."

Margaret Robertson depones, "that she heard her mother ask the Respondent, whether the Appellant was to be married to him or Mr. Jollie? When he answered, that Dr. Macneill believed that he (the Respondent) was the person to whom his daughter was to be married; but that he (the Pursuer) knew Mr. Jollie was to be the man, as the defender had entered into a pre-engagement with him."

Mrs. Macnaughton, Margaret Robertson's sister swears to the same fact, namely, the Respond- [430] ent's statement, "that Mr. Jollie would be the man, as he (the pursuer) knew of his pre-engagement with the defender."

William Allan depones, "that he never heard any report that the pursuer and defender had been married till the month of March last, (1818) when he heard it from the pursuer himself."

John Carr, after mentioning what had occurred in April, 1816, when the Respondent declared that Mr. Jollie was to be the husband of the Appellant, goes on to depone, "That about six or seven weeks after this," (which could not be above a week or two after the marriage,) "the deponent happened to be in the shop of a Miss George, in the Kirkgate of Leith. Depones, that Miss George then mentioned to the deponent that Mr. Jollie and the defender had been married by Dr. Robertson, minister of South Leith. Depones, that the first time the deponent saw the pursuer, he put it to him whether this was the case or not; and the pursuer intimated to the deponent that it really was so. Interrogated, whether the defender had ever shewed the deponent the gloves which he said he had received on occasion of the marriage of

the defender and Mr. Jollie! depones, that he cannot charge his memory whether the pursuer did so or not; but he recollects seeing the pursuer have a pair of new gloves, which, according to the best of the deponent's recollection, he told him were the gloves he received on the occasion of the marriage. Interrogated, depones, that the deponent and Mr. Macgregor sat in the same pew in the chapel of ease, and [431] that subsequent to the period which has been alluded to, Mr. Jollie and the defender were in the practice of occasionally coming to sit in the same pew, as visitors of Mr. Macgregor. Depones, that he never knew Mr. Macgregor to come along with Mr. Jollie and the defender to the seat, but Mr. Macgregor was generally in it before they came. Depones, that after the service was over, the pursuer always walked away in company with the defender and Mr. Jollie. Depones, that upon one occasion, several months after Dr. Macneill's death, the deponent recollects of being in Mr. Jollie's house to tea, along with a number of other persons, and among the rest the pursuer. Depones, that upon this occasion the deponent recollects that wine and spirits were brought in, and the health of Mr. and Mrs. Jollie was drank by the company, the pursuer being present; but the deponent cannot exactly say that the pursuer personally drank their healths. Interrogated for the pursuer, whether he can say how often the defender and Mr. Jollie came to the chapel of ease, as above deposed to; and whether it was twice or thrice he saw them there? depones, that he cannot exactly say how often, but he is certain that he has seen them there at least a dozen of times."

Margaret Craig depones, "That she was in the service of the late Dr. Macneill, in the capacity of housekeeper, from Martinmas 1807, to Martinmas 1816. Depones, that she repeatedly saw the pursuer in the doctor's house, from July 1815, when the defender came to the house, till the deponent left the service; and [432] after the defender became Mrs. Jollie, which was on the 13th June, 1816, the deponent has seen him repeatedly there at dinner and tea, both in the drawing-room, and in the dining-room or parlour. Depones, that they dined several times in the drawing-room, to avoid disturbing the doctor. Depones, that upon these occasions she has heard the pursuer drink repeatedly to the defender and Mr. Jollie, by the names of Mr. and Mrs. Jollie; and the deponent recollects, on repeated occasions, of the pursuer asking the deponent, when he called at any time at the door, how Mr. and Mrs. Jollie did, after asking for Dr. Macneill. Depones, that she cannot recollect whether the deponent's husband was present on these occasions, when the pursuer drank to the defender by the name of Mrs. Jollie, but that nobody else was present. Depones, that Mr. Jollie always stayed in Dr. Macneill's house after the defender's marriage with Mr. Jollie."

William Allan, being interrogated, "Whether it consists with his knowledge that the pursuer acknowledged the defender and Mr. Jollie as married persons after their marriage? depones, that he has heard the pursuer, on various occasions, drink to them as married persons, betwixt the time of their marriage in June 1816 and the October following, when the deponent went to sea. Depones, that the pursuer has dined different times during that period in Dr. Macneill's house, and the deponent distinctly recollects of the pursuer drinking to them both as married persons." He then goes on to mention a party in which the Respondent [433] drank the Appellant's health as Mrs. Jollie. Afterwards, upon cross-interrogation, he depones, "That the defender's marriage with Mr. Jollie took place in the month of June 1816, and the deponent was present at the marriage. Depones, that he, the deponent, dined with the defender and Mr. Jollie in Dr. Macneill's parlour on these occasions, when he heard the pursuer drink to the defender and her husband by the name of Mr. and Mrs. Jollie; that he does not recollect whether Dr. Macneill was present on all these occasions that the deponent dined there, nor can he say whether he was present on any of the occasions when the pursuer drank to the defender by the name of Mrs. Jollie."

James Shank, tenant in Stevenston, after saying that he recollects the visit of October 18, 1816, when he paid Dr. Macneill a small sum of feu-duty, "Depones, that upon the above occasion, there were some spirits brought in, and the deponent recollects, that upon one occasion at least he heard the pursuer (Respondent) drink to the health of the defender (Appellant) under the appellation of Mrs. Jollie. Depones, that he, the deponent, repeatedly, at this time, addressed himself to the defender by

the name of Mrs. Jollie, in presence of the pursuer, and without his objecting to it."

William Adie, with reference to the same visit, and to a settlement which took place between him and Dr. Macneill, as to certain deductions to be made from the witness's rent, swears, "That the pursuer wrote the settlement which then took place. Interrogated, depones, that after [434] the above-mentioned settlement was agreed upon, there were some spirits brought in, and the deponent himself, in drinking to the health of the defender, addressed her by the name of Mrs. Jollie, without any objection being made to her receiving that title on the part of the pursuer, who was present. Depones further, that to the best of his recollection, the pursuer also, in drinking to the health of the defender, gave her the appellation of Mrs. Jollie."

Mary Hastie, daughter of the inn-keeper at Holytown, depones, "that in October, 1816, Dr. Macneill, the Respondent, and the Appellant, and Mr. Jollie, remained two nights at the inn. That she, the deponent, then served at table to the party, and she recollects of hearing the pursuer recognise the defender as Mrs. Jollie, and drink to her health as such, and this he did during all the time they remained in the house. That during the two days they were at Holytown, as above deposed to, Mr. Jollie, the defender, and the pursuer, all slept in the same bed room at night, as it was a doubled bedded room: in one of the beds of which Mr. Jollie and the defender slept together, and, in the other, Mr. Macgregor, the pursuer, there being no further accommodation in the house. Interrogated for the pursuer, depones, that she judged that Mr. Jollie and the defender slept in the same bed, as above deposed to, from the circumstance of Mr. Jollie asking of the witness a bed for himself and Mrs. Jollie. Depones, that they all went at the same time into the bed room; and the deponent was not in the room till next morning, after the gentle-[435]-men had left it; and she went in and saw Mrs. Jollie."

Mrs. Margaret Miller depones, that she was in Dr. Macneill's house on the day of the funeral, when there were various persons present: "That the whole company, including the pursuer (Respondent) considered Mr. Jollie and the defender (Appellant) as the master and mistress of the house, and their healths were drank to as such. That upon this occasion, she repeatedly heard the pursuer, Mr. Macgregor, drink to the health of the defender as Mrs. Jollie, and she is perfectly certain of this fact. That she was also present in Dr. Macneill's house the day before the funeral. That the pursuer was there at the same time, and he went out alone with the deponent. That on this occasion, the deponent put the question to the pursuer, who it was that married Mr. and Mrs. Jollie? to which the pursuer answered, that it was Dr. Robertson, minister of South Leith; and the pursuer at the same time mentioned that he was personally present at the ceremony. That she, the deponent, after the funeral of Dr. Macneill, frequently visited in the house of Mr. and Mrs. Jollie, in which, on two several occasions she met with the pursuer, on both of which he recognised the defender as Mrs. Jollie. Depones, that indeed, upon many other occasions, when the deponent happened to meet him, the pursuer recognised the defender to the deponent as the wife of Mr. Jollie."

Mrs. Littlejohn states, that she was present on the day of the funeral; that the Respondent was [436] there, and that he appeared "to conduct himself entirely as a guest of Mr. and Mrs. Jollie, in the same manner as the rest of the persons present did, only he did not appear so forward as some of them; and as to drinking the defender's health as Mrs. Jollie, the deponent thinks he just did as the rest." Afterwards, being interrogated, "If she recollects who it was that first congratulated the defender, as above deposed to, as the lady of Stevenston? Depones, that she recollects of Mr. Macgregor doing so when he first came into the room."

Christian Menzies swears, that she had seen and heard the Respondent over and over again recognise Mr. and Mrs. Jollie as man and wife. "That Mr. Macgregor was very much in the house at the time Dr. Macneill died, and seemed to take a charge in advising Mr. Jollie to make arrangements for the funeral. That, at this time, Mr. and Mrs. Jollie invariably appeared as master and mistress of the family; and the pursuer was considered in the light of a visitor there merely. That upon the first Sunday after Dr. Macneill's death, the defender and Mr. Jollie were kirked in the chapel of ease; upon which occasion the pursuer accompanied them, both going on foot, and upon their return in a hackney coach; and he also dined with them upon the same day."

Mrs. Margaret Cunningham, "depones, that she was present in Dr. Macneill's house two days previous to his funeral, and the pursuer, Mr. Macgregor, was also present. That Mr. Jollie and the defender were present on the same occasion. That, on this occasion, a glass [437] of wine was handed about to the company, and the deponent distinctly heard the pursuer then drink to the defender and Mr. Jollie, under the appellation of Mr. and Mrs. Jollie, and then afterwards he drank to the health of the rest of the company. That the evening before the funeral, the deponent was again present at the chesting of Dr. Macneill, at which time the pursuer was present, and wished to make himself serviceable to Mr. Jollie and the defender, whom he invariably recognised as Mr. and Mrs. Jollie, and made an apology to them for being obliged to go away sooner than he could have wished."

Thomas Littlejohn depones, "that he was at Dr. Macneill's funeral in May 1817, and that he afterwards went, along with several other persons, among whom was the pursuer and Mr. Jollie, to the house of Mr. James Smyth, W.S. when he heard Dr. Macneill's deeds of settlement read over. That, on the same evening, the deponent went down to Dr. Macneill's house, where he saw the pursuer in company with the defender; and Mrs. Littlejohn, the deponent's wife, and Mr. Jollie were also present."

Benjamin Brown, surgeon in Edinburgh, swears, "that he recollects sometime in the month of October 1817, three years ago, of he, the deponent, and his wife, Mrs. Brown, being at the house of Mr. Jollie, the defender, when the pursuer was present." He depones, "that upon this occasion there were several other persons present. That it was the first time, so far as he can remember, that he had [438] visited Mr. Jollie and the defender; and as was the common practice on such occasions, the deponent has no hesitation in saying, that the company, in general, drank to the health of Mr. Jollie and the defender, as married persons." Hector Gavin adds, "that he, the deponent, sat next to the pursuer on the occasion alluded to; and although he is not certain, yet he thinks that the pursuer must have, along with the rest of the company, drank to the health of Mr. Jollie and the defender, as married persons, otherwise he thinks his conduct must have been taken notice of."

On advising the proof and memorials, the Commissaries, in June 1821, found, "that the Pursuer had established by sufficient evidence that a marriage was celebrated betwixt the Defender and him, by Joseph Robertson, late, etc. in the month of May 1816; that the Defender has failed to establish by evidence any circumstance sufficient to elide the legal presumption thence arising, of matrimonial consent having been duly adhibited by her on that occasion; and therefore found facts, circumstances and qualifications proven relevant to infer marriage between the parties, and declared them married persons accordingly and decerned." Upon advising a reclaiming petition in 1821, the Commissaries adhered to their former judgment, and found that "no circumstances had been attempted to be proved on the part of the Defender, from which to infer intimidation, as avowed by her; that the Defender's matrimonial consent, arising from the marriage ceremony at Robertson's, is strengthened by the Defender's admission, that [439] the Pursuer accompanied her back from Robertson's to her father's house on the same evening, and that a presumption thence arises of sexual intercourse having followed betwixt the parties, which is farther confirmed by what passed at White's, the lapidary, some time thereafter; and that the inference of the Defender's matrimonial consent is not contradicted by any part of the Pursuer's conduct immediately following the marriage ceremony; and that although his conduct, at a subsequent period, might infer his willingness to relinquish his legal claim to the Defender as his wife, such conduct cannot destroy the legal effect of the evidence adduced to establish the validity of the previous union of the parties."

Against this judgment a bill of advocacy was presented, upon which the majority of the Court was of opinion that the case should be remitted for farther proof, which was accordingly taken as to the marriage of Jollie, and the circumstances of the conduct of Macgregor after the marriage, and his possession of the title deeds.

Upon advising this additional proof, the Commissaries were equally divided, and accordingly, by the practice of the Court, the judgment was affirmed. They found the marriage established, and decerned in the terms of the libel.

The Respondent thereupon brought the case again under the review of the Court of Session.

On the 23rd of December, 1825, the Court adhered to the former judgment.*

[440] Against these judgments the Appeal was presented.

The appeal was heard on the 11th of June, in the session of 1827, when an objection being suggested for want of parties, it was moved, that the hearing should be postponed, in order that inquiry might be made whether, according to the practice of the Consistorial Court in Scotland, Mr. Jollie and the children should not be parties.

Upon that occasion Lord Eldon said, that this objection for want of parties was not raised in the papers, or in the arguments in the Court below: that it was a new question raised for the first time before the House, which made the House a Court of original Jurisdiction; that it was on this ground, that he had been in the practice of remitting cases, where new questions, not argued below, had been raised before the House: that in later years, considering that this course led to great delay and expense, he had discontinued the practice of remitting causes, and decided questions raised originally before the House: but that this state of things should not be permitted to exist, but should be remedied by a standing order of the House.

Lord Redesdale said it was the business of Courts not to consider the convenience of parties, but of the general administration of justice; that public convenience should be considered, rather than that of the parties to the suit: so [441] that it might be known to every body what is the law, and in what manner it is to be administered in Courts of justice; that parties should be held strictly to the rules of the House, and expense to them should not be saved by the public sacrifice, which must be the consequence of irregularity and uncertainty. He then proceeded to say that it was important to know what were the points in dispute between the parties: that in Scotch cases it was the habit to display an argument; that the printed case should be a simple statement of facts, and application of the law arising out of the facts: but in this case it was a printed oration, instead of a plain statement of facts, and the House was left to find out the case.

Lord Eldon further observed, that it was true, other persons deeply interested in the decision, as the case now stood, had no opportunity of being heard: but if it had been the practice of the Consistorial Courts in Scotland to proceed without such parties, he should hesitate to advise the introduction of a new practice, which might affect the judgment of those Courts in former cases. He therefore advised that cases should be laid on the table, and counsel heard upon the question of practice.

On the 29th of February, 1828, the question as to parties and the practice was argued.—

It was contended on behalf of the Appellants, that in former cases, where a second husband or wife, or children, were not called, the fact might not have been known, but here it was notorious; that in questions of pecuniary interest, it was always deemed necessary that a person to be affected by the judgment should be a party to the [442] suit: How much more was it necessary where parties were to be deprived of such valuable rights, as the *status* of husband and children? As to the right to intervene, it proved the necessity; and a party intervening after the commencement of a suit, does so to a disadvantage. Is Mr. Jollie to adopt the admissions of Mrs. Jollie, and be bound by them? It was farther contended, that the second marriage should have been stated in the pleadings.

For the Respondent it was argued, that in cases of marriage it is the practice of the Courts to require only that the principal party should be called, unless collusion is suggested; that in the Dalrymple case (2 Hagg. Rep. 51), the suit proceeded to a certain length, and the original decision was given without the presence of Laura Manners, a party interested; she came in afterwards upon the appeal. Suppose the children of a second marriage were in a foreign country, must the *status* remain in suspense for ever, or till what time? that Jollie had attended the proceedings, and

* While this cause was pending, Macgregor presented a petition, praying for a sequestration of the heritable and moveable property of Mrs. Macneill, *alias* Jollie. In this and another proceeding Jollie appeared. But no application had been made in the principal action to have Mr. Jollie or the children heard for their interests. Nor had they in that action been sisted as parties.

could not complain of want of notice; that it would have been superfluous to state the second marriage in the pleadings, since a valid marriage could not be nullified but by a competent court.

On the question of parties, the following authorities were cited:

For the Appellant: Stair App. 792; 4 Ersk. 1. 66; Campbell, *Dict.* 10456; Pennycuik and Grinton, *Dict.* 12677; 4 Stair. 45. 20; 1. Ersk. 6. 49; Craig, 2. 18; Phill. Evid. 2. 239.

A great number of precedents were also produced from the Records of the Commissary Court, [443] in which persons affected by the judgment were not called as parties.

For the Respondent: *Greenhill v. Aitken*, 16th June, 1824; MSS. Cases in D. P.; Chapman and Lindsay, 23rd Feb. 1826, (4 Shaw and Dunlop, No. 320); Dalziel, *Dict.* 16780; Hargrave's Law Tracts; Case of Duchess of Queensberry; *Scaccia de Sententiis*; *Heraldus de Rebus Judicatis*; *Mauritius de jure interventionis*; Case of Dalrymple, Hagg. Rep. 2. 54.

Lord Eldon observed, that if according to practice Jollie might sist himself a party in the Court of Session at any time, he might do so perhaps in the House, as they were sitting as a Court of Session; and as to the question, whether he must adopt, and be bound by the proceedings as they stood, he must be heard on that point, before such a question could be decided. But that there was a difficulty as to the children, because the House could not appoint curators, and the cause must go back to the Court below for that purpose; and he doubted whether the House could permit Jollie, or the children, to intervene originally in that, the Court of Appeal: that the cause, if necessary, must be remitted for the purpose.

The case then, upon Lord Eldon's motion, was ordered to stand over for a week.

The case was again heard on the 7th of March, when the following observations were made by—

Lord Eldon: When this cause was heard at your Lordships' bar, in consequence of what passed in a previous session of Parliament, your Lordships were pleased to direct that counsel should be heard [444] on the question, whether the cause could be decided without bringing other parties before the house, who appeared to be interested in opposing the case of the Pursuer in this action. I am extremely glad that your Lordships were pleased to permit the matter to stand over, with a view that the question, whether there were sufficient parties before the House might be fully considered, before you ventured to say that you would not hear the cause upon its merits. First, because it is of very great consequence that the general doctrine in cases of this sort, with respect to who should be parties to a suit, should not be disturbed by what is done in this House. In the next place, because if it was necessary that those persons who have been mentioned, viz. Jollie one of the husbands, (if I may so describe him) and the children of Mrs. Jollie, probably by that Mr. Jollie, or who perhaps may have a claim now to say that they are the children of Macgregor, should be before the House, as parties, it is important that they should be made parties to the suit, before you enter upon the question of the merits.

This is not a mere action of declarator, unless the prayer with which the summons concludes, is the ordinary prayer in an action of declarator of marriage; and I mention that, because it does appear to me to be a matter of very great importance, that when the question is discussed upon its merits, some attention should be given to the prayer of this summons. It is not merely a prayer that it might be declared that Mary Macneill, sometimes called Mary Black Macneill, and Malcolm Macgregor, are lawful married persons, [445] husband and wife of each other; but it likewise prays, that the Court would decern and ordain the Defender, to adhere to and cohabit with the Pursuer, and treat and entertain him in all respects as her husband; and one question which may probably deserve consideration, (I speak this entirely without prejudice) is this: whether it is competent for a man, supposing him to have acted with respect to this second marriage in the manner in which these printed cases state Macgregor to have acted, to come into Court, not merely for the purpose of having the marriage declared with respect to the civil consequences of the marriage, but to call upon that individual woman, with reference to whom he had so conducted himself, to return to him, and cohabit with him as a wife.

What would be the case here, if it were a suit for the restitution of conjugal

rights, and the husband had so acted who instituted that suit, I do not pretend to say that I know; but it is a point that I should wish to hear something of at the bar of the House, before I can make up my mind. If the case is made out in point of fact, with respect to the conduct of this man, (admitting that if it were a suit for civil purposes, as for rents and profits, and so on, that the suit might be entertained to the extent of having it determined judicially, that he was the husband,) I do entertain very considerable doubt indeed, whether a man who makes a present of his wife, in the manner in which this gentleman is stated to have made a present of her to Mr. Jollie, has any right to come into any Court, for the express purpose of calling her back again to cohabit with [446] him, and to act towards him as a dutiful wife ought to act to an affectionate husband.

With respect to the question of parties, your Lordships have heard from the bar, and have heard it very properly as well as very learnedly stated, what is the general rule with respect to making parties to such a suit as this. If you are disposed to say that you agree with the doctrine that the husband Jollie and the children should be made parties, yet I am sure that your Lordships will feel that it is not in your power originally to determine a point of that nature, but that it would be necessary to direct the cause to be remitted, in order that the question with respect to the rights of those parties might be fully considered and properly adjudicated.

On looking through the papers, I find that it is insisted, and has, in fact, been pronounced upon by the Court below, that Jollie is not a necessary party: that might, perhaps, fall under your Lordships' consideration as a matter of appeal. With respect to the children, their right to intervene, or rather the necessity, I should say, of having them as parties before the House, does not appear to have been considered at all in the Court below, but that would not relieve you from the necessity of sending the cause back again, if a point on their behalf is to be made with reference to the question whether they should be made parties or not: and really there is a most curious circumstance in this case, with regard to that point: for whatever might be the case with respect to children in other circumstances, I apprehend that *prima facie* you have the right of those children now before the Court, because those children be-[447]-ing *prima facie* the children of her husband, if this person (Macgregor) is her husband, they are *prima facie* his children, and until he is divested of the *prima facie* character of the father, of those children he would be, in truth, their tutor, or the person to take care of their interests; and a singular distribution of parties it would be, if he had the *onus* of that duty laid upon him under such circumstances, for no one could suppose for a moment that it would be honestly discharged.

But whatever is the general doctrine with respect either to the necessity of having parties, or the rights of persons to intervene, it has been very properly admitted by the counsel that the general rule is, (as Dr. Lushington and another gentleman has remarked it to be,) that it is not necessary to have any parties but the parties principally interested; and there are many considerations of policy, with respect to marriage suits in particular, that may make it expedient not to depart from that rule, and it can hardly be denied that this rule is a rule familiar in many other cases besides matrimonial cases. In a Court in which I long sat, we all know that a suit may go on against an infant tenant in tail, and if that infant tenant in tail should happen to die, yet the proceedings had against him would be good against the remainder man when he came into existence, because the tenant in tail was the principal party interested when he was before the Court. It has not, on the other side, been denied that the husband may intervene if he pleases. It has not been denied that, in a special case, the Court may call on the parties to bring before it other parties than those admitted to be interested in [448] the suit, and if that doctrine is to be applied only to special cases, it is quite clear that before we can say a word as to whether that applies to this case, we must be able, after hearing this case on its merits, to determine whether this is that special case in which we shall call for such an intervention as I have now alluded to.

Upon that ground, as well as upon the other grounds, it appears to me that it may be right to go on with the hearing of the case on its merits, for this appeal is brought before your Lordships under the sanction of very eminent counsel, as an appeal fit for you to hear; and I am sure I may say, without offence to any body, that if the intent of desiring counsel to sign appeals and other proceedings in

Courts of Justice were fully attended to, I believe it would work as beneficial a change in the administration of the law as any whatever that can be mentioned. The suit being a proper suit to be heard upon appeal, it is quite clear that Mr. Macgregor, if your Lordships should happen to reverse the judgment, can have no reason to complain if you reverse it on the merits. It is a case, therefore, in which, in one view, and supposing the cause to come to one end, you may decide this matter, which it is agreed on all hands at the bar ought to be decided, without all the delay which must take place if you were to go through the operation of remitting it to the Court of Session, and then discuss it in the shape of a future appeal from the Court of Session, which may not take place for some years; and the final decision of this case might not be obtained till a great lapse of time shall have taken place, and these parties be kept [449] in the state of misery in which some of them must be at present.

There is another circumstance in this case, which it strikes me is a very material one, and I take the liberty of mentioning it, that the counsel may consider whether there is any thing in it, or rather I should say, in the papers before us, that may require much to be said upon it; and it is this—I observe that, in the Commissary Court, it is found that there are not proofs of circumstances sufficient to elide (I think is the expression) the intention of marriage. They apply that species of finding to a marriage which is said to be regular, and *in facie ecclesiae*.

I observe too, there are a great many cases cited on both sides, with a view to bringing under discussion the question, whether a marriage cannot be attacked upon the ground of want of consent, the want of consent being made out by proof of force or fear? There is a great deal likewise to be found in the papers with reference to the question, whether evidence of circumstances may not be adduced, to shew that, notwithstanding the marriage was regular *in facie ecclesiae*, and though you cannot attack it on the general ground either of force or fear, (the point is a very singular one—the point is a very important one in its decision one way or the other) whether it is not consistent with the law of Scotland, that even where there is no force or fear, there may yet be circumstances which shall give the parties a right to deny the intention of being married persons, though they went through the ceremony regularly? and I mention this, because I do not see how this House can either affirm or disaffirm [450] the judgment of the Court below, without taking notice of some parts of the contents of the interlocutors which have been pronounced, bearing reference to that most important point.

Under these circumstances, therefore, it appears to me proper, humbly to advise your Lordships to call upon the counsel at the bar, if they are now prepared so to do, to go through the case upon its merits; or if they are not now prepared so to do, to mention some day on which it will be convenient for them to undertake to go through the merits, and I propose to your Lordships that that course should be adopted. My Lords, I would just mention that this is not an action of declarator concluding for a divorce, but it is an action of declarator by a person stated to have conducted himself in the manner I mentioned, concluding for what we should call a restitution of conjugal rights. Nor is it an action of declarator of any other species, where upon the proof of the marriage civil rights of property are to be enforced.

Upon this motion, it was ordered that the appeal should stand over for a week.

On the 14th, 18th, 20th, and 25th of March, the case was argued upon the merits.

For the Appellant—It was argued, that the conduct of the parties, although it could not annul a regular marriage, was evidence that there was no serious consent in a solemnization which was not in all respects regular, and the following authorities were cited: *Campbell v. Cochrane*, D. P. 31st Jan. 1753; 1 Ersk. 6. 10; 1 Bank. 5. 23; *Cameron Dict.* 12680; *Allan*, 11th Aug. 1773; *McInnes*, [451] *Dict.* 12683; *Taylor, Dict.* 12687; *McLauchlan, Dict.* 12693; *Mcgregor, Dict.* 12697; *Napier*, (see the case of Dalrymple) *Sanctius de Matrimonio*; *Haggard's Rep.* 2. 280; *Hailes*; *Tait on Evidence*; *Forbes, Dict.* 16718; *Murray, Dict.* 16741.

For the Respondent: It was contended that the marriage being regular *in facie ecclesiae*, consent was necessarily implied in the act itself, and could not be controverted by circumstances of conduct as evidence of the want of consent. The authorities were: 1 Ersk. 6. 10; *McInnes quâ supra*; *Taylor q. s.*; *McLauchlan q. s.*;

McGregor *q. s.*; Napier, *q. s.*; McKenzie, F. C. 8th March, 1810; Niven, Fount. 1. 501; Tait on Evid.; Barber, *Diet.* 16712; Young, *Id.* 16713; Hailes' Canon; Hume on Crimes, 1. 462, 2. 329; Morge, Addam's Rep. 2; Fletcher, Coxe's Rep.; Hailes' Rep. 1. 561; Elchies No. 7. Voce Proof.

In the course of this argument, Lord Eldon enquired whether the words, "and decern," in the interlocutor of the Commissaries, were applicable to the whole of the conclusion of the summons; and observed, that if the interlocutor of the Court of Session was to be understood as not having yet determined the question of adherence, it could not be discussed in the House as an original question for its judgment. He also observed that the question, whether the fact of consent could be controverted, was very important to be argued; that in the Dalrymple case it was not necessary to determine that question; that certain expressions in the interlocutor of the Commissaries in this case, and the judicial arguments in the Court of Session, led to the inference that evidence might be admitted on the question of consent, [452] even if it were conceded that the marriage was regular. He also suggested an objection, that the judgment was for a good marriage at Edinburgh, while the summons alleged a good marriage at Holytown; that if the first was good, the second was only a form; that both could not be good, nor proof of a second valid marriage be properly given, upon a summons which alleged a prior valid marriage; that the question upon the first should have been disposed of by the judgment, that it might be consistent with the pleadings; that the evidence was inconsistent with the summons, for the certificate of banns was, that the parties were "free and unmarried;" that as there was no judgment on that part of the summons which alleged a marriage at Holytown, if the House should reserve the interlocutor, the Respondent might bring a new action, insisting upon the marriage at Holytown; that, in English pleading, if a declaration should allege a marriage in Scotland, and then, as in this case, that a marriage was celebrated in England, to make good the marriage in Scotland, proof of the marriage in Scotland would negative the allegation of the marriage in England.

At the conclusion of the argument, Lord Eldon said, that as to the objection raised by him, with respect to the proceeding upon a summons having two objects, he had been misled, by not having read the petition of appeal, which was regularly founded upon the provisions of the act of Parliament, which authorizes an appeal to the House after an interlocutor has been pronounced, which may have a material effect upon the ulterior pro[453]ceedings in the Court below; but that there was nothing in the act which prevented the House from remitting the case to the Court below, with a direction that they should give a judgment upon the question of adherence.

The case was then adjourned for further consideration.

On the 13th of May, 1828, the case was again brought on, when the following observations were made in moving the judgment.

Earl Lauderdale: My Lords, this is an action of declarator of marriage, brought by Malcolm Macgregor, a man of very low birth, and of distinguished immorality of character, against Mary Black Macneill, the natural daughter of the Reverend Doctor Macneill, a clergyman, in respect of immorality of conduct, certainly worthy of sustaining the relation of father-in-law to the Pursuer, who by this declarator aims at the honour of becoming his son-in-law.

On the first interlocutor of the Commissaries, I only wish to call your attention at present to the circumstance, that the finding is completely different from the allegation in the summons and condescendence; for they allege that a regular marriage was celebrated at Edinburgh, to give form and effect to the private marriage which was alleged to have taken place at Holytown.

Now, before calling your attention to the particular grounds upon which I shall humbly offer to your Lordships my reasons for thinking that those interlocutors ought not to be affirmed, I wish to call your Lordships' attention shortly to the outline of this case.

[454] It appears that this Mr. Macgregor was married to the step daughter of a woman of the name of Christian Robertson, to whom Miss Mary Black Macneill was given in charge to be nursed; from that time, though she returned again to her mother's house, with whom she lived to the age of twenty-three, Miss Mary Black Macneill seems to have frequented principally the society of Mrs. Christian Robertson; her

step-daughter, the wife of Mr. Macgregor; of another daughter, Margaret Robertson; a type-founder of the name of Macnaughton, and his wife, another daughter of Christian Robertson; and, lastly, of a cousin named Janet Nicholson, by whom it appears that Mr. Macgregor, after the death of his first wife, the daughter of Christian Robertson, had two natural children, if indeed there is not evidence in the case that he was married to her; because your Lordships will find that, in the course of the examination of this Janet Nicholson, though she asserts broadly that she never had confessed it, either to Mr. Jollie, or to Mary Black Macneill, and though she is asked by the examiner whether she ever confessed it to any body else? the examiner has carefully abstained from putting the question direct, whether she actually was married.

In such society, your Lordships cannot suppose that this unfortunate woman got any very distinguished education, or that she could contract habits other than those which were calculated to debase her mind; but, in the mean time, it appears that this man, Mr. Macgregor, who must have been a man of considerable art and cunning, though of low birth and station, had [455] got such an influence over the mind of Dr. Macneill, that in the end of the year 1815, when the mother of Miss Mary Black Macneill died, we find him boasting that he had used his influence to get Mary Black Macneill acknowledged by her father, and taken into his house. What his object was in so doing, I think I shall convince you, for I think I will make it impossible for your Lordships to doubt that he at this early period laid the project, through the influence he had gained over the mind of Dr. Macneill, of getting to himself Dr. Macneill's property, through the medium of the hand of this natural daughter.

In pursuance of this design, your Lordships will find that, by Dr. Macneill's direction, sometime about the middle of April, 1816, he managed to get a deed executed, which gave to Mary Black Macneill the house which Dr. Macneill inhabited, and £500 of money; and, on the 1st of May following, Mr. Macgregor got him to execute a deed, which conveyed to Mary Black Macneill, by disposition *mortis causa*, his whole landed property lying in Lanarkshire, in the neighbourhood of Holytown.

It was not long before Mr. Macgregor took steps to follow out the design which he had thus early formed, for, in the middle of May, it appears that he went with Dr. Macneill and his daughter, for the purpose of giving his advice concerning the management of the property near Holytown, and it is alleged, that there the irregular marriage, stated in the summons, took place. How it was irregular, when compared with the marriage subsequently contracted at [456] Edinburgh, it is very difficult to discover, because, in neither was there a proclamation of banns, and that marriage was celebrated before a clergyman of the church of Scotland, as well as the other, and I believe the most immoral clergyman, with the exception of Mr. Joseph Robertson, that possibly could have been picked out from the members of that church.

Mr. Macgregor states, that he returned to Edinburgh with the family, on the 20th of May, 1816, and that the parties there formed the design of celebrating regularly the marriage, which had been irregularly contracted at Holytown.

Now, whether the parties were or were not conscious that upon this occasion they had contracted marriage, I shall, in stating the facts of this case, submit to you my opinion subsequently, but, in the mean time, it is sufficient to say, that there is not in the whole mass of evidence any proof whatever that, from the moment that that alleged marriage was contracted, either of the parties acted as if they had actually thought they had been married persons. I know very well that the Commissaries have stated, that the inference of the Defender's matrimonial consent is not contradicted by any part of the pursuer's conduct immediately following the marriage ceremony. I think there is direct evidence that immediately following the marriage ceremony there was such contradictory conduct, because there is an admission in the action of the sequestration by this very Mr. Macgregor, that he saw Mr. Jollie and Mrs. Jollie together within a few days of the marriage. Within a few days of what [457] marriage? The marriage that he charges, is the marriage that he says took place at Holytown, and if you are to take it to have been to within a few days of that, it becomes a doubt with me, whether it was before or after the alleged celebration of this marriage at Edinburgh, that this meeting took place in

Pelrig Street, when Mr. Macgregor puts it beyond all controversy that he never behaved subsequently as if he had been a married man; because, he states that from that hour he abandoned her, and formed an idea that he would get a divorce. Thus, it is clear, that even at that early period, he did not conduct himself in such a manner as to shew that he was conscious in his own mind that he was married. On the other hand, it is certain that the lady from the very first conducted herself in a manner that shewed that she had not the most distant idea that she was married, as sufficiently appears from her having married within a very few days another man, with the consent of her father.

If you look at the general outline of this case, you will see that Mr. Macgregor, having placed himself, as he thought, in such a situation that he might assert his right, if it turned out that this woman really possessed her father's fortune, and that he might abandon her if it turned out otherwise, (for that seems to have been the object of his attempt) abstained from doing any thing to assert this right, till he saw her married to another man, till he saw children born of that marriage; and he then comes forward (thinking that she was then secured in the possession of the property, and overlooking the scandalous nature of the attempt) to deprive an innocent man of the [458] wife, to whom he thought he was really married; overlooking also the scandalous nature of the attempt to transfer to himself, as his legitimate children, the children of another; or perhaps rather with the view to found some future proceedings, with a view to illegitimize those very children, and deprive them of their birth-right. I think your Lordships will perceive, that a more scandalous case never was brought before any court of justice.

Your Lordships must recollect that last year there was a case discussed at your bar—I mean that of a Miss Turner and Mr. Wakefield; compare the circumstances of that case with this case. It is very true that Mr. Wakefield seemed to have formed a scandalous plan to possess himself of that young lady's property, though he did not know her; but is the disgrace even of that attempt, any thing like Macgregor's plan? which had for its object, to place himself in such a situation that he might, if he found it convenient, at a subsequent period, claim this woman as his wife, to the effect of annihilating the *status* of the children she bore by another husband, and deprive this man of his wife, who, it does not appear, had the smallest idea that she really was married to Mr. Macgregor.

If on that occasion your Lordships thought it necessary to interpose in your legislative capacity, I am sure that, acting consistently, it is impossible, before your Lordships could affirm this judgment, that you should not pause; and that, in your legislative capacity, you should not send down a bill to the other House of Parliament, to dissolve this marriage, and by that means do [459] away the chance of this immoral man getting the fruits of the fraud that he has attempted to commit. Fortunately, however, I think I can state to you grounds, which will shew you, that there is no occasion to resort to this extraordinary means of remedying the evil; because I think it is impossible, when the case is explained, not to see that you cannot affirm the decisions of the Court below.

That you may follow me the more easily throughout the reasoning I am about to submit to you, I will state to your Lordships the order in which it is my intention to proceed.

In the first place, I mean to submit to your Lordships, that under the summons, as it is drawn, it would be impossible for your Lordships to affirm the interlocutors now appealed against. In the second place, I mean to submit to your Lordships, that if the summons had been otherwise drawn, and if, instead of charging an irregular marriage at Holytown, of which there is not an atom of proof, if, instead of charging an intention at Edinburgh of celebrating a regular marriage, to give effect to that irregular marriage at Holytown, it had been otherwise worded, and there had been charged in the summons an irregular marriage at Edinburgh, that there is not any evidence that has been produced upon this occasion, I mean any legal evidence, such as can carry conviction to a judicial mind, that there was any marriage ceremony at all took place upon that occasion. Thirdly, I mean to submit, that supposing the summons had been otherwise formed, so as to charge an irregular marriage, and supposing there had been evidence, such as [460] was sufficient to convince you that a ceremony had taken place, still the species of ceremony proved,

does not exhibit the existence of that free, deliberate, real consent to form the connection of marriage, which the law of Scotland requires, to give validity to an irregular marriage. Lastly, I shall very shortly call your consideration to the cases that have already been decided in the Courts below, and in this House, with a view to shew your Lordships, that you must abandon every principle upon which you have heretofore decided, if you can possibly think of affirming the interlocutors in this case.

I will not detain your Lordships upon the conclusions of this summons. You will recollect, that when the counsel were arguing this case at your bar, I put to them whether they could state any case of this sort, any declarator of marriage brought in Scotland, that had a conclusion where there was a proof of a second marriage, desiring it to be ordained that the parties should adhere and cohabit. There is no such case existing. It is very true, that Doctor Lushington alleged, at first, the case of Mrs. Dalrymple : but that is not a case of a declarator of marriage. It was a case of an action for restitution of conjugal rights in this country, under rules of law perfectly different from those applicable to the present action. It is obvious what was the design of this man in so framing his summons, because if he had concluded for a divorce, her property, being mostly heritable property in Scotland, on which she was infert, he might have lost his right to that which it was his sole object to acquire : but waiving that consideration, the interlocutor finds, not that [461] there was a regular marriage, but that a marriage was celebrated between the Defender and him, by the Reverend Joseph Robertson. Is such a thing mentioned in the summons? It alleges that an irregular marriage was entered into at Holytown. There is no finding that such a marriage was proved. In fact, there was not an attempt to prove it. And the finding is not of an irregular marriage at Holytown, as alleged in the summons, but of an irregular marriage at Edinburgh, which under the words of that summons it was impossible for them regularly to pronounce ; and it is impossible, for that reason, for your Lordships to affirm, for before you can, under this summons, find these parties married, you must find, in the first place, evidence to convince you that there was an irregular marriage at Holytown, of which there is not an atom of proof ; and then you must have evidence that that marriage derived further efficacy, and further validity from the celebration of a regular marriage at Edinburgh, of which there is not, as I shall shew to you, any thing like a proof.

Having stated thus much upon the subject of this summons, on which I certainly could enlarge much, for a more extraordinary summons than that which has been exhibited to your Lordships in this case, and one more irregularly framed, for the purpose for which it is intended, never was drawn ; I will now proceed upon the supposition that this summons had been regularly formed, and assume that this summons had charged a marriage ceremony before Mr. Joseph Robertson, of Edinburgh. What evidence is there that can justify you in judicially finding that any ceremony what-[462]-ever took place? The evidence upon this subject is like the evidence in all cases where there is a consciousness of deficiency of proof, very various in its nature. The attempt seems to be, to patch up with one sort of evidence the deficiencies which they are conscious of in another sort of evidence ; for you have an attempt to establish it by documentary proof, you have an attempt by the evidence of witnesses to establish the fact, and lastly, you have an attempt to establish it by resting upon the admission of the party.

With regard to the documentary evidence, I must submit to your Lordships that there never were documents more deficient tendered to a Court, with a view to produce conviction, upon any subject. In the first place, you have produced to you a paper, intituled a registrate of marriage, and this paper is produced to you with a view to convince you, aided by the evidence of Mr. Bow and Mr. Masson, that there actually was that which it is impossible ever could have existed, and which there is no proof ever did exist, a certificate of proclamation of banns, granted upon this occasion ; when I say it is a fact that never did exist, it is confessed never to have existed, by the witnesses brought forward. But it is more material to shew your Lordships that it could not exist. You will recollect that those parties returned from Holytown on Monday, the 20th of May, and at that time, it is asserted, they first formed the design of celebrating this regular marriage *in facie ecclesiae*. On

Thursday, the 23rd, they were said to be married: now, although there could be no intervening Sunday between the Monday and the [463] Thursday, you are desired to believe, upon the strength of those documents, that a proclamation of banns actually took place, the parties telling you a story which makes it perfectly impossible.

This registrate of marriage is in the following words: "Registrare of Marriage, Edinburgh, 21st day of May, 1816. Malcolm Macgregor, printer, Old Church parish, and Mary Macneill, St. Cuthbert's parish, daughter of Doctor James Macneill, Edinburgh, 3rd December, 1817. Extracted from the Register of Marriages for the City of Edinburgh." Now it is very material that you should attend to the date of the registrate of marriage, which is the 21st of May. The date of the register of marriage is the 22nd, so that you have two documents to prove a fact that is admitted not to be true, and which it is shewn cannot be true; these two documents having dates that would destroy their effect, even were they resorted to, to prove a fact not otherwise impeached.

The next documentary evidence is on a par, at least, with that which I have already described: for you have produced to you, a book of private memorandums of Mr. Joseph Robertson's, a man before whom, it was proved in a case in the Court of Session, in the year 1811, (of *Dow v. Adie*) that a private marriage was celebrated, one of the parties being represented by a person hired for the purpose.

This is a book formed by a man who at that time was in prison, for having celebrated irregular marriages, contrary to the act of Charles the second, and for the forgery of marriage lines; and you are desired to give credit to this book, there [464] being upon the face of it, obvious marks that a great many of the entries must have been made at one and the same time, in one hand; and, after all, it being only an irregular private memorandum of this man, who was convicted of bad practices with respect to certificates. But, my Lords, you have another document, which, if this had been a regular register, kept by Mr. Joseph Robertson, a man of unimpeachable character, would have defeated the force of this entry; because you have a certificate, in the handwriting of this very same man, of the date of the 29th of May, certifying that those parties were married by Mr. Joseph Robertson on the 29th. Then what am I to believe, if I believe any thing, that is to be inferred from these documents? Did this marriage take place on the 29th? or did it take place upon the 23rd? It is impossible for you to discover upon which day it did take place; for though it has been attempted to confirm this by the evidence of witnesses, you will see that they do not recollect the date of the marriage. I hold, therefore, that it is impossible for you to allow your minds to be, in the smallest degree, influenced by a registrate of marriage, which is contradicted by the register of marriage; or by a book, kept in the irregular manner that I have described, which is contradicted by the certificate of the person who keeps it.

The parties were conscious that this documentary evidence was not worth much, and consequently they have relied upon the *pari voce* evidence of Mrs. Robertson, the wife of this man, and of Miss Robertson, his daughter; and it does so happen, (which is worthy of remark, because [465] it places those witnesses in a very suspicious situation,) that the very day on which they were examined, was the day on which this man was liberated from prison, and on which his further punishment of banishment was to commence. They were, therefore, persons who had an obvious interest to explain away his conduct, and to make it appear as regular as possible, looking undoubtedly for some mitigation of the punishment which the Court had inflicted upon him.

Mrs. Robertson, his wife, (and it is not alleged that there was any other person present but his wife and his daughter) is the first person examined, and to the first question, which was (Mary Black Macneill being pointed out to her) whether she knew this woman, she distinctly says, that she does not know her, and that she does not recollect ever having seen her before. The moment that answer was given, the witness should have been sent out of Court, as it was quite obvious that no benefit could be derived from her testimony. But that was not the mode that was pursued. Mrs. Robertson's recollection was refreshed, by producing the book to which I have alluded, and reading to her the entry of the marriage, in order that she might, in some degree, gain some recollection of the facts of the case; a proceeding which ought not to have

taken place, for this book not being itself evidence, never could have been regularly brought forward to prompt the recollection of a witness, they knew must be willing, from her situation, to say any thing upon that occasion. She is then asked, if she knew Mr. Macgregor. He is pointed out to her, and her answer is, that she [466] knows him perfectly, but she never saw him, either before or after the time on which, according to this entry, the marriage was celebrated. This seemed very extraordinary, when she professed to have that perfect knowledge of his person; it therefore naturally suggested this question: How did she recollect a man that she had never seen before or since? to which her answer is, "Indeed, I know very little about it." Now this is one of those witnesses, who are brought forward to identify the parties, and I wish to know whether it is possible for your Lordships to say, that Mrs. Robertson's evidence can be held, in the smallest degree to contribute to your conviction, that Mary Black Macneill and Mr. Macgregor were present on the day on which this ceremony is stated to have taken place, at Mr. Robertson's.

Miss Robertson certainly has a more perfect recollection; when I say a more perfect recollection, that is all I possibly can say; because, though she says she knew Mary Black Macneill as Dr. Macneill's daughter, still it comes out in a future part of her evidence, that she applied to her father, in the course of the ceremony going on, to know whether it really was Dr. Macneill's daughter. With regard to Mr. Macgregor, the evidence is pretty nearly the same with that which her mother gives. The one contradicts the other, both in the fact of there being a lighted candle, and in the fact of there being marriage lines; and the two agree in no one thing but a very important fact, on which I shall presently comment, that Mary Black Macneill did not utter a word from the time she [467] came into Mr. Robertson's house to the time she left it.

Taking then the *viva voce* evidence in its utmost extent, you have only the evidence of one suspicious witness, that can tend in the smallest degree to identify the parties who were alleged to be united by this marriage ceremony; and, according to the law of Scotland, one witness is not sufficient to establish a fact; you must concur with me, therefore, in thinking that there is no proof whatever upon which you can rest a judicial decision, that there was any ceremony took place on the 23d of May, 1826. The parties seem, in some degree, convinced of this, and, accordingly, the defect in the evidence is made up throughout the whole proceeding, by appealing to judicial admissions, and to extra judicial admissions, which it is proved Miss Mary Black Macneill made.

Now, my Lords, I am at present looking at this case, with a view to ascertain whether there is evidence that any ceremony took place; and, therefore, it is needless now to enter into the substance of those admissions, but I wish you to consider this question, whether it is possible that in a case such as this, where you have evidence of a legal marriage, subsequent to the irregular one, said to have been contracted, the admission of the party should be received as evidence, that the marriage actually did take place. If such admissions are received as sufficient evidence, there is no woman who has a fortune of her own, and who wishes to get rid of her husband, to whom she is married, and to betake herself to the arms of her paramour, that [468] might not, by connivance, get him to bring a declarator of marriage, and subsequently establish the fact of a previous marriage by her own admission. There is perhaps a feeling of delicacy in the other sex, that is not so prevalent in ours, which might prevent the frequency of such an occurrence; but, if the principle applies to one sex, it applies also to the other; and then any man who has married a lady, who, *bona fide*, believes him to be unmarried, any man who has contracted an alliance with a family of distinction, by whom he has many children born, if he takes a dislike to his wife, may get a similar proceeding instituted, on the ground of his having engaged in a previous marriage, alleging that there is evidence of that fact; and then the man has only himself to admit it, to the effect of destroying the *status* of his own children, born in lawful wedlock, and of ruining the reputation of a woman of high rank, and of great family connection, and who never dreamt of any such thing. Your Lordships must be convinced that this must be a precedent of the most dangerous nature. It has been stated, that the law of Scotland, with respect to divorce, gives too great a latitude, but, establish this principle, and then I will venture to say, this House will have very little cause in future to comment upon the law of divorce in Scotland; because, this new device for obtaining a divorce, would be so

much more easy, and so much more rapid, that I can not doubt it would totally supersede that law, upon which I have heard criticisms sometimes in this house, and do it away as effectually as if it were repealed by act of Parliament.

[469] I must, therefore, contend that, as there is no *vis à voce* evidence, establishing that this ceremony took place, and as the documentary evidence is of such a nature, that your Lordships cannot possibly rely upon it, and, as I trust you will not receive as evidence, the admissions of the party to prove such a fact, that, in point of fact, there is no legal evidence that any ceremony took place, such as you can say ought to bring home conviction to a judicial mind. But supposing that you could rest upon the admissions of this lady, how far could the admissions promote the object of the Respondent? The general tenor of her admissions, amounts only to this, (here the noble Lord read the admission).

Now, what does this admission amount to? If there was a marriage before Mr. Joseph Robertson, it was undoubtedly an irregular marriage, and, in law, must be considered as such. Without troubling your Lordships with reference to the reasoning on the law, as laid down by Mr. Erskine and Lord Bankton; without referring to the opinion of Mr. Hume, to the opinion of Mr. Craigie, to the opinion of Mr. Erskine, of Mr. Clerk, and all the great lawyers, given in the case of *Dalrymple v. Dalrymple*, I will venture to say, that I may state this without fear of contradiction, that, in the case of an irregular marriage in Scotland, it is the practice, and it is the law of the country, to take evidence of all the facts and circumstances antecedent to the alleged ceremony; of all the facts and circumstances pending the ceremony, and all the facts and circumstances of the conduct of the parties subsequently to the ceremony; and that, [470] from a complex view of all these circumstances, you are to infer, whether that real and deliberate consent was given, which constitutes marriage; and in doing this, you do not resort to the conduct of the parties subsequent to the ceremony, for the purpose of undoing a marriage contracted, but for the purpose of learning whether the parties did, or did not, by their conduct, exhibit a conscious feeling that no such ceremony had taken place between them, as was sufficient to lead them, in their own minds, to the conclusion that they were married persons. Looking, in this case, at the conduct of the parties before the ceremony; looking at the circumstances proved at the time of the ceremony; and looking at the conduct of the parties subsequently, there is not a case in all the books, where there is half the mass of evidence to shew that the parties did not think a marriage was to take place; to shew that the circumstances which attended the ceremony ought not to lead us to feel that a free consent had been given; and, undoubtedly, to shew by the conduct of the parties subsequently, that neither the one nor the other ever conducted themselves, in any one instance, in such a manner as to lead any reasonable mind to conclude that they felt that a consent had been given.

How does the evidence stand? I will not go through it in detail, it would take up too much of your time to read it, but, I have made some short extracts, to shew that Mr. Macgregor himself, antecedent to this alleged ceremony taking place, uniformly held that there was not the smallest chance that he should marry this woman; [471] that he knew she was pre-engaged to Mr. Jollie. Upon this subject, you have the evidence of a witness, who cannot be suspected, Mrs. Christian Robertson, the step-mother of Mr. Macgregor's first wife, who states this, "Mr. Macgregor told me he had been with them in the West Country;" a circumstance which shews the probable date of this communication: "I asked him if he was going to be married to the Defender! he said no, *Dr. Macneill says he thinks I will be the man*, but I think it will be Mr. Jollie, for I know her pre-engagement to him." Margaret Robertson, the daughter of this Mrs. Christian Robertson, states that she was present when her mother had this conversation, and she proves the same thing to have taken place.

John Carr says that he was walking towards Leith, in company with the Respondent Macgregor, and John Manderson, a witness cited for the Appellant, and, upon returning back again, they met, towards the head of Leith Walk, Mr. Jollie and Mary Macneill. That Macgregor stopped, and had some conversation with Mary Macneill and Mr. Jollie, and upon his joining the deponent and Manderson, the deponent asked him if Mr. Jollie and Mary Macneill were married, to which he replied, that they were not married, but that they would shortly be so. Not therefore contemplating

his marriage, but, in conformity to the testimony of the witness, already quoted, stating that such a marriage never would take place, because she was previously attached to Mr. Jollie, and that the marriage would soon take place between Mr. Jollie and her.

[472] Mrs. Macnaughton, another daughter of Mrs. Robertson, states, in confirmation of her mother and sister, that she heard Macgregor say that Mr. Jollie would be the man, that she knew of his pre-engagement with Mr. Jollie; and, afterwards, you have a witness beyond all suspicion, I might almost say, one who stands in the situation of being the only witness beyond suspicion, I mean Dr. Robertson, the clergyman who is supposed to have performed the ceremony of marriage, betwixt Mary Black Macneill and Mr. Jollie, who says that *a general report* had taken place *in the parish*, that Mary Black Macneill *was to be married* to Mr. Jollie.* How then does the evidence stand antecedent to the marriage? If it had been to be proved from circumstances antecedent to the marriage, that there was a design of marriage with Mr. Jollie, you would have had satisfactory proofs, but, with reference to Mr. Macgregor, there is not any one circumstance which does not go to shew that he himself actually believed that it never would take place.

Now, my Lords, what is the proof of what took place at the time of the marriage? you have this plain matter of fact, that both Mrs. Robertson and Miss Robertson say, that Mary Black Macneill *never gave any consent* whatever; that she never uttered a word during the progress of the ceremony. I admit that in the case of a regular marriage, when the parties come before a clergyman, after due proclamation of banns, where [473] they have given their consent to the marriage, as expressed in the marriage settlements, antecedent to the marriage, that a nod of the lady, or a bow in the church would be evidence of consent; but, where you know that parties have appeared who were not the parties to make that bow and that nod, as in the case of *Dow v. Adie*, where you know that every irregularity has taken place, and has been practised, something more is necessary than that nod, which might be sufficient in the case of a regular marriage; it is indispensable that consent should be really expressed, which is not the case, according to the evidence we have here received. Neither is there any proof of a consummation; Mr. Macgregor, indeed, alleges that he attended Mary Black Macneill home to her father's house on that day. Upon other occasions, where parties have gone to the father's house, and passed the night in that house, that might be a circumstance to produce some effect, but Mr. Macgregor had a bed in the house, he was in the regular habit of sleeping there; and the fact is, that there being no evidence of her being in the same bed with him that night, which might have been proved, is rendered much stronger from the circumstance of Mr. Macgregor having a bed in the house. The absence of that testimony is more remarkable, for there was not a servant of the house who might not have been questioned; first, as to whether Mr. Macgregor slept in his own bed? secondly, as to whether he passed the night with Mary Black Macneill? either of which circumstances, would have led to a definite conclusion on this important point. What is the conclusion? First, I say you have [474] proof that the parties in no respect contemplated a marriage antecedent to the alleged ceremony; secondly, there is absence of all proof of consummation, which, by the by, is not even alleged in the summons, for there is an allegation of the consummation of the marriage at Holytown, but not of the marriage at Edinburgh.

Thus far then, I maintain that you have no circumstances established, on which a presumption can be founded that, at the time of this irregular ceremony, any real consent was given by the parties.

I have already commented upon the interlocutor of the Commissary Court, wherein it is found that the inference of matrimonial consent is not contradicted by any part of the Pursuer's conduct immediately following the marriage ceremony. I have shewn your Lordships, that even from the time of the celebration of the marriage, the conduct of Mr. Macgregor, and the conduct of Mary Black Macneill

* See Tait on the Law of Evidence in Scotland, p. 431, where it is said that proof by notoriety, repute, or general belief, is privileged hearsay in the service of heirs, kenning of widow's terce, and other cases, as to the fact of relationship. So as to the shire jurisdiction, or parish, in which lands lie. But these are excepted cases.

was such as to satisfy any body that they were conscious of not being married persons. From the time of this marriage Mr. Macgregor was in the habit of regularly visiting Mr. and Mrs. Jollie, there are no less than eight witnesses who prove being present when they heard him drink their health as Mr. and Mrs. Jollie. There are witnesses who state distinctly that they recollect seeing Mr. Macgregor having a pair of new gloves; John Carr, says, according to the best of his recollection, Macgregor said he had received the gloves as a present at the marriage of Mr. Jollie. This man, who tells you he was married upon the 23rd of May; who tells you that a few days after he took such an aversion [475] to this woman, on account of her conduct in Pelrig Street with Mr. Jollie, that he formed the resolution of divorcing her, though, afterwards, he brings an action for adherence; this man, I say, is proved, on the 13th of June, within a few days of this, to have received a present of gloves upon the occasion of her marriage to another man. You have this Mr. Macgregor sitting in the same seat at church, listening to divine service, and afterwards walking home, to enjoy conviviality with Mr. and Mrs. Jollie for the rest of the evening. Is it possible to believe that there can exist such profligacy as that, this man knowing that he was married to her, sits in church with the adulterer and adulteress, and goes home with Mr. and Mrs. Jollie, to enjoy conviviality during the rest of the evening, drinking to their healths as such?

Must you not, under such circumstances, think that a man who could so conduct himself, must have believed and known that the marriage ceremony was not a ceremony that could be binding? That in fact the parties had never given consent; on that ground his conduct may be explicable, but, on any other ground, it is impossible to believe that he could conduct himself in a manner so profligate and disgraceful.

Mrs. Margaret Miller tells you "that the day before Dr. Macneill's funeral, she put the question to Mr. Macgregor, who it was married Mr. and Mrs. Jollie! to which the Pursuer answered that it was Dr. Robertson, minister of South Leith; and the Pursuer, at the same time, mentioned that he was personally present at the ceremony." If you believe this witness, surely there never did exist such a state of facts [476] in the world; but as none of the other witnesses seem to think he was present at the ceremony, the leaning of my mind is to the conclusion that he was not present at the ceremony, but that he very soon afterwards knew it. That he actually accepted gloves is beyond all doubt; that he frequented the society of the parties, heard them drinking to the health of Mrs. Jollie, and drank to her himself in that capacity; that he went, according to the evidence of Mr. Hughes, and Mr. Nicholson, the tailor, with Jollie on the occasion of the death of Dr. Macneill, accepting mourning, which Mr. Jollie presented him with, and which Hughes and Nicholson both state him to have received, is equally undoubted.

Though these facts are strong enough to carry conviction to any one's mind, that it is not in human nature that a woman should have conducted herself in the manner that this woman is supposed to have done, if she was conscious that a marriage ceremony had taken place; or that a man should have conducted himself in the way that Mr. Macgregor did if he had been conscious that the marriage ceremony took place; you have still stronger circumstances that lead to the same conclusion, for in the month of October following this marriage, Mr. Macgregor again attends Dr. Macneill, to advise with him in the management of his property at Stevenston, accompanied by his daughter and Mr. Jollie; and you have the evidence of Mary Hastie, the maid of the inn, who proves that, there being only a double-bedded room, Mr. and Mrs. Jollie slept in one bed, and Mr. Macgregor in the other. Can you believe that this man thought himself at [477] that time married to Mrs. Jollie on the 23rd of May? Is it possible that he would not have run from the place, and sought a bed any where, and even slept on straw, rather than have disgraced himself by sleeping in a bed, and seeing the adulterer and adulteress (which they must in his estimation have been, if he had thought he was a married man) enjoying those rights which he had exclusively the privilege to enjoy, in bed in the same room with him? I say, therefore, that when you look at the evidence which has been produced in this case, with reference to the conduct of the parties before marriage, the evidence which is adduced with reference to their conduct at the marriage, and the evidence that is produced of their subsequent conduct, it shews you that there is no reason to suspect

that there was any consciousness immediately before or after the supposed marriage, or, at the time at which it took place, that they had really contracted marriage. If it had been otherwise, it is impossible there should not have been some evidence to shew that the parties had consummated the marriage which has been charged in the summons; and lastly, it appears that there never were any two people, who conducted themselves in a manner tending more strongly to induce you to believe that they were not married people, and to create a positive belief, that they themselves never thought that the ceremony was binding: certain it is, that they never for one moment acted upon it as if it had been such.

It is impossible under this summons, drawn as it is, to affirm the decision of the Court of Session, which is declaratory of a fact that is not even alleged: or to find that there is any legal evidence, [478] such as ought to convince a judicial mind, that any ceremony took place at Edinburgh: or that the ceremony, such as it is, which the evidence attempts to persuade you did take place, is a ceremony from which you can infer that deliberate consent immediately to enter into marriage, which the law of Scotland requires.

I will call your attention to one or two of the cases which have been cited, to shew your Lordships the spirit of the decisions which have heretofore been made in this House, and before the Court of Session. We have in the books, cases similar to this in one respect, viz. cases of declarator of marriage where a second marriage avowedly took place, such as the case of *Malcolm v. Cameron*, and *Napier v. Napier*; and it is very important that you should advert to the evidence which Mr. Hume gives in the case of *Dalrymple v. Dalrymple*: you will there see, that in those two cases he states that the principal ground of deciding against the first marriage, was because the parties lived in the same town, and had allowed a second marriage to take place, and had allowed a length of time to pass, the second marriage being unchallenged. How much stronger is this case, which exhibits a person living in the same house, and accepting gloves on occasion of the second marriage ceremony, daily frequenting the society, and living in habits of intimacy with the parties contracting the second marriage, and actually sleeping in the same bed room with them? To be sure this is indisputably a much stronger case than that of *Napier v. Napier*, yet in that case the circumstances were found sufficient to induce the Court to decide against the validity of the first [479] marriage, though there were strong circumstances to prove consent in the case of the first marriage.

You have then the case of *Patrick Taylor v. Kello*, decided in this House. In that case, the parties exchanged mutual declarations, such as if it had not been for their conduct, either before or after the time of marriage, (which the Court always takes into consideration, pronouncing upon a complex view of the whole case) would in their judgment have constituted a marriage in the law of Scotland. The writings they interchanged were to the following effect. The lady signed this: "Skirling Mill, February the 16th, 1779. I hereby solemnly declare you, Patrick Taylor in Bricken-shaw, my just and lawful husband, and remain your affectionate wife." He on his part signed a similar paper, and signed himself her affectionate husband. An action of declarator having been brought in the Court below, the marriage was held to be valid: and it came to your Lordships' House, but it appearing to you, that at the time of the interchange of those letters, there was an understanding, which was inferred from the conduct of the parties, that those letters were to be given up on demand, this House reversed the interlocutor of the Court below, and found that there was no marriage. Now, my Lords, how feeble is this case in comparison to that which your Lordships now have before you? This is not a case where the parties agreed to withdraw the written documents on demand, but a case where the one party stands by, and sees the other party married, and the other absolutely contracts a marriage, and they conduct themselves to one another as if they had never [480] dreamt of the marriage ceremony having been performed.

In the case of *McInnes v. Moore*, in December 1781, the House of Lords reversed the interlocutor of the Commissary Court, and of the Court of Session, because it appeared that though the letters which were produced were sufficient to constitute marriage, they were written and delivered, not with the intent of contracting marriage, but with the intent of getting the lady the privilege of lying-in in the house of her own relations. Upon this ground, the House of Lords reversed the judgment,

shewing that in a case where the circumstances were infinitely slighter than that of Macgregor's, yet they were sufficient to destroy the effect of the consent to marriage.

The case of *Macgregor v. Campbell* is a very strong case. It appears that Captain Campbell, an officer in the army, formed a connection with a woman who was cohabiting with him, that he admitted his brother officers, and their wives, to visit her as his wife, and that she was by habit and repute received as such; but on the validity of this marriage being challenged, it appeared that this woman had actually received wages and livery meal, which is board wages according to the language of Scotland; that she displayed herself not as acting in the capacity of wife, but in that of his servant. Upon that evidence, the inference from other facts was rebutted, and it was declared that the marriage was invalid, because she continued to accept the wages which she had been in the habit of receiving antecedently. How much stronger in this case! where the party is proved to have connived at a marriage with ano-[481]-ther man, living in habits of intimacy with his alleged wife, and never stating any claim to her.

There is one branch of evidence which has escaped me, and I do not wish to omit any thing which can, either in one way or another, be deemed of importance. What I allude to, is the attempt to establish in evidence the intention of the parties to marry, as is inferred from the evidence of Mrs. Kinlay, alias Shewan. Mrs. Kinlay is first examined in the year 1819, and she tells a story that she had received from Mary Black Macneill three pieces of stuff, for the purpose of making a gown, and a piece of linen to make a shirt, in contemplation of her marriage, stating that, on that occasion, Mary Black Macneill asked Mrs. Kinlay to be a bride's maid; when pressed whether it was with a view to a marriage with Mr. Macgregor, or Mr. Jollie, she declared in the year 1819, that she could not say which. This woman is again examined in the year 1823, and some how or other, there is a great difference between the year 1819 and the year 1823: in the year 1823 it comes fresh to her mind, that it was with a view to marry Mr. Macgregor, for she then, in her evidence, states that she recollects perfectly when she heard of the marriage with Mr. Jollie, having said to Mrs. Craig, "Good God, is it possible she can be married to Mr. Jollie, when she asked me to be her bride's maid upon the occasion of her marriage to Mr. Macgregor." It is needless to comment upon the evidence of a witness who stands in such a suspicious point of view, that in point of fact she recollects distinctly in the year 1823, facts of which she knew nothing in the year 1819, reversing the order of human [482] nature with regard to recollection; but it so happens that the evidence of this woman, Mrs. Kinlay, is contradicted in other respects, because, unfortunately for her, she states that she gave that piece of linen to be made into a shirt to a woman of the name of Leslie, and Leslie states that she recollects dressing and carrying home that shirt on Saturday night; it must therefore have been with a view to the marriage of Mr. Jollie, and not with the view to the marriage of Mr. Macgregor, because you will recollect that Mr. Macgregor first formed the design of this marriage upon Monday, the 20th of May, and that the marriage, as alleged, did actually take place on the Thursday following, the 23d of May, and that there could therefore be no intervening Saturday for this shirt to be delivered.

There is another point which escaped my recollection, in going over the evidence, I mean, the details given by Mr. White, the lapidary, and Mr. Neill, the printer, brought by Mr. Macgregor with a view to shew that he, in two instances at least, subsequent to the marriage was acknowledged in the character of husband to Mary Black Macneill. Now, I confess to you, it is impossible for me to give credit to either of those witnesses; can I believe that Mr. Macgregor brought his friend Mr. Neill, in the beginning of July, to the house of Dr. Macneill, for the purpose of introducing him to his wife, and introducing him to a person as his wife, from whom he had accepted gloves on her marriage with another man? and that he introduced him to a person as his wife, of whom he had expressed his disgust, in consequence of the interview in Pelrig Street, and [483] declared a fixed and settled intention, as early as possible of divorcing her? The story is not credible, and it is totally inconsistent with the other facts proved, of his drinking her health as Mrs. Jollie, and associating with her and Mr. Jollie, they living as man and wife.

Neither can I believe the evidence of White, the lapidary: indeed the whole force of it depends on whether, at the time of uttering the words imputed to Dr. Macneill,

he was looking at Mr. Macgregor, or at his daughter; if Dr. Macneill, looking at Mary Black Macneill, who was in the room at the time, said, "you will get it all by and bye," the thing is quite clear; and that is much more probable, under the circumstances of the case, than that he was directing his eyes towards Mr. Macgregor. Consider the whole detail of Dr. Macneill's conduct, when present at the marriage of Mr. Jollie. Dr. Robertson, the minister of North Leith, distinctly proved, that Dr. Macneill told him that he would take his part in giving away his daughter; that he said to Dr. Robertson, in reply to some observations of his, that he had done a great deal for the parties, and he would do more. Can you believe that this man, within two days or three days of this having taken place, went to Mr. White, the lapidary, for the purpose of declaring that Macgregor, instead of Jollie, was married to his daughter, and uttering the sentence that he is said to have uttered, with a view to express that the whole of his fortune would belong to Mr. Macgregor? or is it not more reasonable to believe that, in point of fact, all he meant to say upon that occasion was, fixing his eyes on his daughter, "It will all be yours"?

[484] On all these considerations, I must submit to your Lordships, that it is impossible you should, under the circumstances of the mode in which this summons is framed, sanction and affirm the interlocutor of the Court below, in this case; that there is no evidence, on which you can legally rely, to prove that any ceremony whatever took place on the 23rd of May; and that, at all events, the ceremony which is proved is such, taking into consideration all the conduct of the parties before and after that, in conformity with your Lordships' former decisions, it is impossible you can say it proceeded on that free, that deliberate, that real, and that immediate consent to enter into a marriage, which is the species of consent required in an irregular marriage, under the law of Scotland. With regard to the nature of the judgment, I will read at present the sketch of the judgment I am inclined to propose; but I should think it much better to delay this, for the purpose of taking some time to consider how it should be worded. I confess that I should very much wish that, in this important case on the law of marriage in Scotland, your Lordships should introduce the allegations in the summons, as well as the conclusions thereof, so as to bring before the minds of the Judges in that country the precise grounds on which you determine; and I should think it very desirable, as the Court have obviously adopted the interlocutor they have pronounced, for the purpose of declaring that an irregular marriage had taken place at Edinburgh, that your Lordships should negative that conclusion, otherwise the effect of your judgment would be, that of dismissing this action, but leaving the parties in [485] such a state that they may bring a future action, charging an irregular marriage at Edinburgh; which I am sure you would not wish, after all the litigation which has taken place. The heads of the judgment I would suggest to your Lordships are, that on due consideration of all the facts and circumstances established by the evidence in the Court below, in an action of declarator of marriage, at the instance of Malcolm Macgregor against Mary Black Macneill, by summons on the 25th of March, 1818, wherein it is set forth "that an irregular marriage was celebrated between the said Mary Black Macneill, daughter of the late Dr. James Macneill, in the spring of 1816, which was consummated by their sleeping several nights together in the same bed; and, further, that they considered it proper on their return to Edinburgh, in the month of May 1816, that no time should be lost in celebrating, in *facie ecclesiae*, that marriage which had been irregularly celebrated between them; and, accordingly, that they were in the month of May, 1816, regularly married by the Reverend Joseph Robertson, minister of the chapel in Leith Wynd," it appears to this House, that there is no proof whatever of any marriage between those parties having at any time taken place, or any regular marriage, in *facie ecclesiae*, having been celebrated at Edinburgh, in the month of May, 1816; neither does it appear to this House, taking into consideration the facts established in evidence, in relation to the conduct of the parties, both before and after the 23rd of May, 1816, and all the other facts and circumstances proved, that there is evidence sufficient to justify the conclusion [486] that the said Mary Black Macneill, and the said Malcolm Macgregor, did at that, or at any other time, voluntarily, and deliberately express that mutual consent immediately to contract marriage, which, by the law of Scotland, is necessary to give validity to an irregular marriage. That, on these grounds, this House reverses all the interlocutors complained of, and remits the

cause to the Court of Session, with instructions to the Commissary Court to dismiss the action of declarator of marriage.

It would be sufficient merely to state that you assolzie the defendant, Mary Black Macneill, from all conclusions therein; but, in this case, I should prefer adopting the form to dismiss this declarator, raised at the instance of the pursuer Malcolm Macgregor, by summons, of the date of the 25th of March, 1818, absolving the Appellant, Mary Black Macneill, from the conclusions thereof, that she should be declared married to the said Malcolm Macgregor.

Lord Eldon: My Lords, if this was not one of the most important cases that has ever occurred, in the course of my experience, before any Court of judicature, I should be perfectly satisfied with what has been already stated to your Lordships, that there is sufficient ground to reverse the interlocutor of the Court of Session.

But I am anxious, for different reasons, at least to occupy a short portion of your Lordships' time; I am extremely desirous that it should appear that this judgment, at least as far as I am concerned in agreeing to it, does not proceed upon suppositions and notions, which, unless we protest against them, may be understood to be involved in the [487] effect of the judgment. When I first looked at these cases, and saw that the summons concluded with desiring that it should be found and declared not only that these parties were married, but that it should be decreed that the Appellant should return to her husband; that he should enjoy what is called, in this part of the country, a restitution of conjugal rights, I could not help feeling considerable doubt whether, supposing there ought to be a declarator of marriage, this was a case in which, at the instance of Mr. Macgregor, you would compel this woman to return to cohabitation with him. I have reason to believe that no such judgment would have been given in this part of the island; and I have further reason, from what I see of the conduct of the parties, to believe that Mr. Macgregor had no wish that any such judgment as that should be given. When I look at the process with respect to the property, I think that the principal reason for praying a declarator of marriage was, not to repossess himself of the person of the lady, but to get the enjoyment of that property, to which he would insist, as the husband of his wife, he might have some claim. I desire, therefore, that it may be understood, if we are to consider this, as I believe it to be, an appeal from an interlocutory judgment of the Court of Session, brought under the authority of an act of Parliament, in consequence of a difference of opinion amongst the judges, that your Lordships will be pleased to allow the individual, who has now the honour of addressing you, to say, that he does not admit; (he does not deny, because it would be improper that he should either admit or deny) that he [488] desires to be understood as standing quite neutral upon the question, whether this lady ever could be decreed to return to the embraces of Mr. Macgregor.

My Lords, there is another point upon which I am exceedingly anxious to be perfectly distinct, and that is this: that when you are once satisfied that, according to the law of Scotland, there has been actually a marriage between A. and B., no subsequent conduct is to be received in evidence, in order to entitle you to say that that marriage which has been actually had, and actually celebrated effectually, is to be undone. If it be a regular marriage, actually celebrated, and completely contracted, it is not to be undone upon probabilities arising out of subsequent acts and circumstances. On the other hand, notwithstanding what has been said about these Scotch marriages, that they are very easily formed, and very easily got rid of, I take it that there is nothing that the law of Scotland more clearly, more solemnly, or more consistently insists upon than this, that where a marriage is alleged to have been had, by a promise *per verba de presenti*, or by a promise *per verba futuro*, or by virtue of the implied promise, that arises out of cohabitation, habit, and repute, there is nothing it does so solemnly require, as that the consent to marry should have been full, deliberate, and free; that it should neither be the effect of force or fraud.

I desire also to give no opinion upon the question at present, for it is not before the House, though it is a question of very great consequence in my judgment, namely, whether you can, or cannot, there having been a regular [489] marriage in *facie ecclesiae*, give evidence whether the marriage intended to be had was effectually had. Upon that I desire to express no opinion whatever, upon which some cases are found in the prints upon the table.

I am therefore exceedingly anxious, in this very important case, to press upon your Lordships' attention, this, as what I take to be an indisputable proposition in law, namely, that if you find there was a marriage duly celebrated, actually had, that marriage cannot be got rid of by evidence of facts and circumstances done, or observed by persons afterwards, thinking it proper to disentangle themselves from the connection of marriage, actuated by caprice or dislike of each other, or a base motive of inducing other persons to think that they may form matrimonial connections with the parties. When once you have got clearly to the conclusion that a marriage has been had, that marriage must be sustained, let the consequences be what they may of sustaining it with respect to third persons. Therefore the question now before your Lordships is really this: was the ceremony that did take, or is alleged to have taken, place at Joseph Robertson's, upon the 23d of May, was it a mere ceremony gone through? or was it, on the other hand, an actual constitution of marriage? If it was an actual constitution of marriage, I am afraid we must consider it to be an actual constitution of marriage; you cannot undo it by reasoning upon circumstances, which may have great weight upon your minds, leading you, however, deeply to lament that any such thing had taken place.

I would beg to add here, that, in giving my [490] humble opinion upon this case, I feel myself fortified by what I have been desired to state, that, upon a very anxious attention to this case, a noble relative of mine, who long held the situation of Judge in the Ecclesiastical Court of this country, gives his full assent to its being stated to your Lordships, that he could not possibly sustain this marriage.

Having said thus much, I am led to revert now to the consideration of the substance of this summons. I hope I may be excused, taking into consideration that I had the honour of sitting in an important judicial seat, the most important judicial seat, in this House, for nearly twenty-five years, if I take the liberty to repeat, perhaps for the last time, that which I have often before stated, that I do most anxiously wish, whilst on the one hand no man has been more desirous than I have been, whatever may have been said to the contrary, that questions arising upon the law of Scotland, should be decided here upon the grounds and principles of that law, and that we should not govern ourselves by English principles, or the application of English law, where it cannot be applied consistently with the principles of the law of Scotland, I say I trust I may be excused, if I express my anxiety, for the sake of the judicature of that country, that their pleadings may be somewhat more accurately attended to, than they usually are. I have been very much struck with the extraordinary nature of the present summons from the first, and also upon the intermediate consideration of this case, and upon the present consideration of this case. Taking the summons to be what we call the [491] declaration of the party, the Pursuer, it is next to impossible for any man to reconcile what he is pleased to state in the summons, with what the real nature of the case is, as he has since made it out, by the proofs he has offered to you, in order to induce you to discern in his favour.

I shall not trouble your Lordships, by repeating what has been very accurately stated already upon the subject of the connection, (not the relationship, but the connection,) that subsisted between these different parties, before the occurrences, which form the subject of your Lordships' consideration, took place. I begin, therefore, by adverting to the journey to Holytown, in the spring of 1816, and let it be remarked that, unless I have deceived myself, upon looking at this evidence, or by looking at it too often, which is sometimes the case; let it be remarked that, before the journey to Holytown, it seems to have been pretty well known to Mr. Macgregor that Mr. Jollie was a suitor to this lady; and not only a suitor to this lady, but Mr. Macgregor seems to have felt that Mr. Jollie was preferred by the lady to himself. Mr. Macgregor, and Dr. James Macneill, who, let it be observed, was a clergyman, as well as a medical man, go, according to the summons, to Holytown in the spring of 1816 on a jaunt, in company with the Appellant, natural daughter of Dr. James Macneill, where an irregular marriage between them is alleged to have been celebrated by Dr. James Macneill; an irregular marriage is alleged to have been celebrated, and the marriage to have been consummated by their spending several nights together in the same bed, at Holytown aforesaid. If [492] you come to look at the condescendence, that important circumstance, of sleeping in the same bed, is softened down to something of this nature, to its being stated that they slept in the

same room; and the actual fact is disguised, both in the summons, and in the condescendence, that fact which has been spoken to by Mary Hastie, a servant in the house, and who represents thus—but before I state what her representation is, give me leave to say, that this matter of consummation, that is alleged to have happened at Holytown, was capable of proof, and might have made an end of the whole matter; but instead of there being any such proof, all the proof that there is, the great weight of evidence, as far as relates to it, is the testimony given by Mary Hastie, which goes directly the other way. If it had been true, that Dr. Macneill, a clergyman, married these parties; if there was mutual consent on both sides, and Dr. Macneill, the father of the lady, a clergyman, gave the benediction, and put their hands together, in the manner that is stated in the condescendence; if that had been true, what difficulty was it likely there should be, (unless Scotchmen differ from Englishmen) in their going into the same bed? There would have been consummation quite of consequence; it would have been the natural consequence, and nothing else could have happened.

Now what Mary Hastie says upon that is, (and if consummation, which, with respect to this marriage, you observe, is stated in the summons, had taken place, it was impossible that Mary Hastie's evidence can be true; but there is nothing to contradict it)—What she states is this: that it [493] happened unfortunately, in this Scotch inn, that there were not beds enough, or rather, not rooms enough for three persons to have separate rooms, there being two beds in one room, and one bed in another; and the Doctor having taken care of himself, by going to bed first, a difficulty arose what was to be done. It seems a difficulty existed in the actual circumstances, viz. that the bride and bridegroom, as the summons represents them, could only find out one room with two beds in it. I think they would, in all probability, have been satisfied with one bed, if they had been married at that time, as it has been alleged; at least I should suppose so. But an arrangement is made in a very curious way, and, as far as we have any evidence, instead of there being consummation, we must hold there was no consummation, because Mary Hastie says, that the lady was disturbed at sleeping in the same room with her newly acquired husband; that he slept in one bed, and she went to another bed; but she had just so much delicacy, which I am very glad to see among our neighbours in the north country, that she would not go to that bed, unless it was surrounded by sheets, so that even her husband could not set the eyes of his affection upon her. They accordingly slept in separate beds the whole night, and instead of any body being called to prove those circumstances which would have been undoubtedly proved to establish consummation, if it had taken place, the whole evidence tends directly the other way.

What is done next? The parties return to Edinburgh upon the 20th of May, in the same year, 1816, and this ceremony at Holytown hav[494]-ing been thought very irregular, (though Dr. Macneill was a clergyman,) and no consummation of the marriage having taken place, it was thought there should be some regular marriage, so the summons states it, or rather that the marriage at Holytown should be regularly celebrated at Edinburgh. This marriage at Holytown is in the summons considered as an irregular marriage, and in the proceedings no proof is made of it. If this was an irregular marriage, the defect of proof of which was to be supplied by another ceremony of marriage at Edinburgh; if that marriage at Holytown, as the summons states it, was to be regularly celebrated at Edinburgh; if this celebration was to be free from all objection, Macgregor proceeds in the most uncommon course that, in affairs of this kind, one has ever heard of. See how it is carried on: on the 20th they get to Edinburgh. Here I may as well state that a regular marriage in Scotland is, as I understand it, a marriage after publication of banns has taken place three times. In Erskine's Institutes, he gives a very good reason for that: he says, that the banns must be proclaimed three times in the church, because it gives people time to consider whether, by the third Sunday they will or not consent; but Mr. Macgregor thinks that the right way of getting rid of the difficulties that belong to that irregular marriage, and that private marriage, at Holytown, is—to do what?—that the right way is, upon the 23rd, to procure, or to endeavour to procure, a certificate of the publication of banns, as having taken place upon three Sundays, which could not possibly have taken place, because between the 20th and 23rd no [495] Sunday whatever could have intervened; and then he thinks it proper to apply him

self to Mr. Smith, stating that he means to be married that night; Mr. Smith mentions it to his clerk, and some persons connected with him, and they have a direction given them where to attend upon that night. Mr. Smith himself could not go; the clerk, I think, does go, according to the direction, to the Black Bull, and he finds nobody there. But this ceremony of marriage is had in the evening late: there is a difference about the time of night, Mrs. Robertson saying there was a candle, and Miss Robertson saying there was no candle; but for the purpose of having a public, indisputable, regular marriage celebrated before Joseph Robertson, there were Mrs. and Miss Robertson present at the ceremony, which, I suppose, could not have been made any better, by his being a clergyman of the Church of Scotland, than the marriage by Dr. Macneill himself, he being also a clergyman of the Church of Scotland. A ceremony passes at the time of night spoken to by Mrs. Robertson and Miss Robertson, and that is the only evidence, unless it is supposed to be evidenced by the book, the contents of which are inconsistent with some other parts of the evidence; a book, with reference to which I have wished to hear, but I have not heard yet, what made such a book as that producible in evidence; it may however be so. I know why a register in England is admitted in evidence—because it is kept as the law requires it to be kept. The law requires that there should be such a register kept, in a particular manner and form; but whether a private book, kept by a private clergyman, not in such manner [496] and form, not under and according to the authority of the law, would be evidence in England, is a question which could scarcely bear to be agitated.

Now I will not follow my noble and learned friend, if I may take the liberty to call him so, through all his statement of this case, because upon such a subject as this, he is much more competent to speak than I am: and I am happy to acknowledge, at this time of my life, the benefit I have received from his communications with me upon the Scotch law. I will not follow him in discussing the effect of the evidence of Mrs. and Miss Robertson, as to its being, or not being, defective in the respects in which he has contended that it is defective. After observing that I wish not to be understood to have conceded it to be clear, that a cause of this sort should go on without other parties to it, or that there is not great danger in admitting a marriage, certainly unobjectionable in form and circumstances, such as the marriage with Mr. Jollie, to be affected by the admission of the woman, who is represented to be a party in both marriages, I proceed here to say, that, notwithstanding all the difficulties that rest upon the testimony of Mrs. Robertson, and Miss Robertson, I must look at this case, as a case in which the woman's admission has been read and used as evidence; and whatever observation may be made upon the evidence of Mrs. Robertson, as not sufficient to prove the identity of the parties, or the particulars of the ceremony, in her admission this lady herself has made an acknowledgment that some ceremony of some sort took place at the house, where she and Macgregor were pre-[497]-sent. But then you must take the whole of her admission together, and taking the whole of her admission together, the question turns round again to be this—Can you, or can you not, admit evidence of facts antecedent to that period? Can you, or can you not, admit evidence of facts and circumstances subsequent to that period, with a view to aid and confirm her in her admission, taking it altogether, in which she represents that what then passed, was not a case in which she can be held to have given consent, much less that free, solemn, full, and deliberate consent, upon which Macgregor claims, as against her, the character of husband?

Now, my Lords, that you may, with respect to what are called irregular marriages in Scotland, look at prior facts and circumstances, and that you may look at the subsequent facts and circumstances, I take to be quite indisputable. The next question, therefore, is—Can you look at such facts and circumstances, with respect to an alleged marriage, such as is represented to have been had in this case? Can you look at them as evidence to enable you judicially to determine whether there has been effectually had, a marriage?

With respect to irregular marriages generally, there can be no doubt at all, looking at the text writers; there can be no doubt if you examine the opinions of the Scotch lawyers, which are to be found annexed to the case of *Dalrymple v. Dalrymple*, and I take it that the opinions of the Scotch lawyers would be evidence of what is Scotch law. We have the illustrious names which are there mentioned, to which I

may generally [498] refer your Lordships: we have the illustrious names of Erskine, Craigie, Hamilton, Hume, Dr. Hay, and a gentleman whom I shall call by the name of John Clerk, for fear you should think I am mentioning myself, and Cathcart, and Gillies, and Sir Islay Campbell.

Then the next question is—Is this alleged marriage such as is to be looked at by the application of the same rules of law that apply to the marriages mentioned in the books as irregular marriages? I find in these papers that doctrine of the same nature has been applied, in two or three cases even of regular marriages.

I have already desired to protect myself against its being understood that I give any opinion, whether it can or not be applied to what is strictly called a regular marriage in *facie ecclesiae*; but if there have been decisions that apply them to regular marriages in *facie ecclesiae*, surely there can be no difficulty in applying them to a marriage that is not a regular marriage; and then comes the question, is this a regular marriage?

Now the authority of the text writers, holds this not to be a regular marriage, because they say it must be a marriage with proclamation of banns; here there could be no proclamation of banns. My Lords, I cannot adopt that expression, without guarding against its being understood that I mean to intimate that, if there is an irregular marriage without proclamation of banns, but where there has been a full, actual, deliberate consent given, that any subsequent circumstances will authorise you to say, that that irregular marriage can be represented in any way as invalid. I do not mean to call in question at all the [499] validity of such marriages, God forbid I should, but if you have defective evidence with respect to the actual proof of a deliberate, clear, and solemn consent in the transaction of the ceremony, the question then is, whether you may not admit evidence with respect to the species of marriage, as an irregular marriage, such as you will admit with respect to other marriages that are acknowledged to be irregular marriages? and seeing that it is constantly admitted in irregular marriages, it does appear to me, I own, in this case, admissible evidence.

The next question will be, if it is admissible evidence, what is the effect of it? Now undoubtedly, with reference to that, I must say, with these eminent men whose names I have mentioned, that though there may be, with respect to a great many cases, doubts whether those decisions are just applications of the evidence, upon the effect of which the decisions have been made, that does not affect the principle at all of the admissibility of the evidence, and the duty of the court to attend to the full effect of the evidence, according to the best of its judgment, when that evidence is offered to its consideration.

With respect to cases of marriage, where the young man is fourteen and the young lady twelve, these are cases, in which perhaps more effect has been given to the supposed operation of deceit and fraud upon such persons than perhaps can be fully justified, recollecting that the law has said, that at those ages they are perfectly capable of giving full, and deliberate, and sufficient consent, though some allowance must be made for the difference of discretion between [500] twenty-one and fourteen, yet, with respect to this particular contract, the law, strictly speaking, has held them equally capable as older persons of giving their consent. With respect to all the cases, to which I am now alluding, both with respect to those very young persons, and with respect to other persons, in those cases that have fallen under the consideration of the Courts, it does appear to me one matter is worthy of great consideration, viz. what is the effect of all that passed with respect to the question, was free, deliberate, full, and solemn consent given at the time when the ceremony passed? or did the ceremony pass without that which constitutes a marriage, such a consent to the *consortium omnis vitæ* at the time of the ceremony?

Now, my Lords, if that be so, let us look and see what the case is with respect to the conduct of the parties. I think it is sufficiently proved in this case, that before the parties went to Holytown, Mr. Macgregor was fully acquainted with the circumstance that Mr. Jollie was a preferable candidate. There is, in my judgment, no proof of the truth of that assertion, which is to be found in this summons, that a marriage ceremony took place at Holytown, or that a marriage there was consummated; but I go further than that, because I think myself judicially authorized to say, that the allegation, with respect to that supposed marriage at Holytown, is utterly un-

founded, that there was no marriage there of any kind—that none was there consummated.

When the parties come back again to Edinburgh, what is done, for the purpose alleged in this summons, of having a regular marriage? for the purpose of having a public regular marriage, a public marriage in order to cure all the evils and inconveniences that might arise from a private irregular marriage, that is so alleged to have taken place at Holytown, they go to Mr. Joseph Robertson's. If such was the purpose, how does it happen that you can scarcely find any thing in this evidence, (I do not say there is absolutely nothing, but there is nothing that I think you can call material or substantial, when thoroughly examined with all the proofs) by which it appears, that Dr. Macneill, that any friends of the family, that any persons who visited, that any persons who had any intercourse with the family, had ever heard of such a thing as that this marriage was intended, and that it was to give regularity and publicity to the former marriage.

My Lords, we know very well what happens in England about such things. If parties have gone to Scotland and got married, and are to be married again in England, does not every man know, that under such circumstances, the purpose of having the marriage is to satisfy all the friends and connections, as well as the parties themselves, that the holy estate of matrimony has been effectually and properly contracted. That is one of the purposes, as well as the purpose of giving ease and happiness to the minds of the parties themselves; and I believe it would be thought a very extraordinary thing, if a marriage for that purpose was to be had here without any body in the world having previously heard of it. Joseph Robertson, the priest, and his wife and daughter, are the only persons who know of this ceremony of marriage, except the individual parties to it. [502] Can any man suppose, if Dr. Macneill had, according to the allegations of this summons, at Holytown given away his daughter in marriage, had put her hand into the hand of this gentleman as her husband, and given the priest's benediction upon that occasion, that Dr. Macneill, between the day on which that marriage happened at Holytown and the 23d of the month of May, should have become so weak and impotent in point of understanding, or so dreadfully addicted to drinking, that they would not let him know any thing at all of the matter? there is no proof that he knew any thing at all of this matter. Can any body believe that, if Dr. Macneill had conducted himself at Holytown in the way stated in this summons, can any man believe that Dr. Macneill would not have been present at this marriage, if such a marriage was to be had? but not only do you find that Dr. Macneill did not know of it, but, bating the evidence of the application to Smith, and Smith's communication to his clerk generally, and the reference of Smith and his clerk to the Black Bull inn, (your Lordships know what followed on that communication and reference) no human being seems to be acquainted with this intended marriage previously to the ceremony, but the very individual who ought to have known nothing of it, if it was intended to be a satisfactory celebration of marriage. I mean the man who appears to have been a disgrace to his profession. Of Mrs. and Miss Robertson I say nothing, but I am sure no person, meaning to celebrate a regular marriage, in order to support an irregular marriage, would think of being married at that time of night, in the house of such a [503] man as Joseph Robertson, with no witnesses but these ladies, and not only with no other witnesses, but without a single person out of the room where this ceremony of marriage was performed, being acquainted with the matter that was to take place, or with the purpose for which they were supposed to go there, and having it in their power to attend.

Then what says the summons in another respect? Those, who know any thing of the law of Scotland, know the immense importance of the allegation of, and proof of consummation. It is not even alleged in this summons that this marriage was consummated; but I can conceive a reason for not alleging it, for I am satisfied it was not consummated.

My Lords, I agree in this, that the story Mrs. Jollie states, is improbable; but, is it half so improbable as the story that Mr. Macgregor states? Can any body doubt that, if this was meant to be a regular marriage, in order to do away the objections against an irregular marriage, can any body doubt that there would have been proofs of consummation, when Mr. Macgregor must have known there

were,—at least I think there were proofs of the non-consummation at Holytown! Can any body doubt you would have had such proof by the servants in the house of Dr. Macneill? But there is not the least evidence that deserves the name of an attempt to prove consummation at Edinburgh; and, allow me to say, there is evidence to the contrary. When you come to consider the conduct of Mr. Macgregor with respect to Mr. Jollie, (and here let me notice that unless I misunderstand this evidence, it does not [504] appear that Mr. Jollie was ever acquainted with what passed before Joseph Robertson at this strange place; it does not appear that Mr. Jollie had ever been acquainted that Mr. Macgregor was the husband of this lady. I do not find any evidence of that, if there is any evidence of it, I have passed it by.)

Lord Chancellor: No, there is not any.

Lord Eldon: When you come to consider that after this, Mr. Jollie is united to this lady, upon the 13th of June, I think it is, in the subsequent month, and when it is proved that Dr. Macneill, who is said by this summons to have given his consent to the marriage, and performed the ceremony of marriage himself at Holytown, when you consider that he is present, goes to Dr. James Robertson's, that he goes there, and conducts himself in the deliberate, solemn, serious manner, in which Dr. Robertson states his conduct to have been regulated, whilst he gives away his daughter to Mr. Jollie; when you consider further, that there has been an attempt made to prove, (let those believe it who can, after having read the evidence of Dr. Robertson, and of his lady) that this Dr. Macneill was in a state of such imbecility, either from drunkenness, or a failure in his constitution, or some other cause, between the journey to Holytown, and this marriage, upon the 13th of June, I say, that the evidence in my judgment, which goes to impute to Dr. Macneill (in order to render inefficacious the evidence on the other side as to the state of Dr. Macneill) that imbecility, from whatever cause it arose, that evidence I say must have been brought for the purpose of destroying the effect, the dreaded [505] effect of the important inferences to be drawn from his attendance on the marriage of the 13th of June, and his non-attendance upon the other, on the 23rd of May. The attempt to prove that imbecility, in my judgment, wholly fails; I should have thought myself bound by judicial oath, if I had been trying this before a jury, to have told them they ought to give no credit to that testimony.

My Lords, it does not rest there; so far from Mr. Macgregor supposing he had a right to the person of this lady, I find in the evidence that it is usual to give the friends, upon a Scotch marriage, gloves, that is the present that is made to them, and Mr. Macgregor receives a present of gloves, as a friend and well wisher to the parties who had just been married: he does not attend, I believe at the wedding dinner, but he very frequently afterwards is to be found as a guest in the house of the parties; and when we come to the month of October, in the year 1816, these parties go to Holytown again, and the Doctor goes too. He was so far recovered from this imbecile state, in which it was attempted to be proved that he was at the time of the marriage, in June, 1816, he had so far recovered from his malady as to be able to go there again. Mr. Jollie and Mrs. Jollie, and Mr. Macgregor and the Doctor, form the party; and here let us see whether we can come exactly to the conclusion that parties are sleeping in the same bed, because they are sleeping in the same room, as in the antecedent spring. What is the conduct of Mr. Macgregor? Who is now to convince us that there was a real marriage, with full, free, and de [506] liberate consent given upon the 23rd of May, 1816? he is at Holytown along with the parties. What are the beds required? Doctor Macneill is there, and has a bed to himself; another is required for Mr. and Mrs. Jollie; and Mr. Macgregor contents himself with a bed for himself, as I understand the evidence. Let me fairly say that Mary Hastie does not say expressly that Mr. and Mrs. Jollie, slept together in the same bed, but, she says, she gave them a bed, because a bed was asked for, *for Mr. and Mrs. Jollie*. According to the first marriage at Holytown, Mr. Macgregor and his lady, as she must be supposed then to be, according to his case, lie in different beds, when there could be no reason in the world why they should not follow the good advice of Dr. Macneill, for he must be taken so to advise if he had married them, by getting into the same bed; and then, after it is supposed she had been deliberately married to Mr. Macgregor, having taken a fancy to be married to Mr. Jollie, when they meet in October, 1816, Mr. Macgregor then does

not sleep in one bed and she in another, but, according to all, that is the probable effect of this evidence. Mr. Macgregor sleeps in one bed, and Mr. and Mrs. Jollie in another; and that is to be taken in Scotland, which would not in England be taken to be proof of a deliberate consent, that Mr. Macgregor should be the husband of the lady and not Mr. Jollie.

My Lords, I will call your attention to another circumstance, Mr. Macgregor had been in some measure, or sort, employed as the man of business of Dr. Macneill. Dr. Macneill had made a provision for his daughter, this Mrs. Jollie, or [507] Mrs. Macgregor, according as your Lordships shall determine her to be, the one or the other, he had given her not the whole of his substance in the first instance; however, from a sense of duty to his natural child, he seems to have thought it was necessary to give her the whole of his substance, and he gives it her by deed. Those deeds were put into the possession of Mr. Macgregor, as I understand the case, and Mr. Macgregor might naturally enough think, that if he was to tell this story to Dr. Macneill, about this lady having first married him, with his consent at Holytown, and then married him again at Edinburgh, for the purpose of having no doubt left upon the effect of the Holytown marriage: and that she had then married Mr. Jollie afterwards, and in the Doctor's own presence, and given away by him, he might perhaps think that all the Doctor's good intentions, in favour of this lady, might be frustrated, if he told the Doctor of these most improper transactions on the part of his daughter, as they must be admitted to be, if Mr. Macgregor represents what were really the facts of the case. He is silent, as it is alleged, for some such reason until Dr. Macneill died. But, speaking the truth after a man is dead, will not enable him to act as if he was a living man. When, therefore, the Doctor was dead, does Macgregor claim his wife? No! he attends the funeral, where Mr. Jollie acts as chief mourner, and not Mr. Macgregor; after the funeral the deeds are called for, he delivers them himself; he is as a visitor of Mr. and Mrs. Jollie, as other friends visit Mr. and Mrs. Jollie, for some time; and he says nothing about this marriage, till about the [508] month of December, 1817. Then, in that December, 1817, my Lords, he makes a claim of marriage: it has escaped me if the proofs establish an earlier claim. Permit me, my Lords, to say that, when I first read this case, I thought it a case so disgusting, with respect to the moral conduct of the Respondent, that nothing upon earth would have induced me to give my opinion upon it, whilst I was under those impressions. I therefore made a covenant with myself that no detestation of the conduct of this gentleman should influence my judicial mind; I trust and hope that it has not. I have nothing to do with the case, except merely as to the law of the case, as it applies to the established facts. My Lords, what he then does, is to state that he has a claim of marriage; and your Lordships know the nature of his claim, and he then lodges his summons, for the purpose of having a declarator of marriage, according to the prayer of the summons, that this virtuous lady, as he must think her, might be restored to his arms, that she might live happily with Mr. Macgregor, as Mrs. Jollie, or Mrs. Macgregor. But this claim is not brought forward till after those circumstances had taken place. Notwithstanding all that, it is your Lordships' duty, if, under these circumstances, you can believe that there really was a marriage constituted effectually, constituted upon the 23d of May; it is your duty, notwithstanding all that, to say she must be restored to his arms; whether you ever will restore her to his arms I do not *know*, but I do not *think* your Lordships will readily make yourselves a party to that sort of business.

[509] My Lords, my judgment with respect to this declarator goes upon this, that, regard being had to the nature of the evidence which you have, it appears to me there is no reason to believe that there was a free, deliberate, full, voluntary, solemn consent given, to constitute immediately the relation in law of man and wife, at the house of the priest Robertson: that there is no reason, from the proof, to believe that there was consummation. The circumstances go to shew there was no such consent: they are evidence that the marriage was not understood by this gentleman himself to be a binding and valid marriage. This appears clear from his conduct subsequent to it, as well as from his conduct prior to it: the whole tends to show no such consent was given, and although her story is improbable, it is not half so improbable as his story.

Under all the circumstances, admitting as I do the extreme danger that attends

all questions about the dissolution of supposed marriages: looking, on the other hand, to it as a most important principle, that you should see that the most sacred relation of life is formed deliberately and fairly: upon the whole, I think the decision you ought to come to, (in all these cases you cannot, perhaps, be quite safe, all that you can do, is to be satisfied, when you pronounce judgment, that you are pronouncing the real effect of the proofs,) the best decision, in my opinion, is that which should lead you to reverse this interlocutor of declarator of marriage.

I will again repeat, that if this declarator of marriage should be supported, I still should entertain very considerable doubts indeed, whe[510]-ther, regard being had to all the circumstances of this case, the Court of Session ought to have been permitted to proceed one step further, for the purpose of the ulterior object of this summons, without considering the point, whether, under such circumstances, they would, or would not, decern a restitution of conjugal rights. As to the fact of the alleged marriage itself, my opinion goes along with that which has been expressed by the noble Lord who has addressed the House, subject nevertheless to some consideration of the terms in which the judgment should be expressed, because nothing can be of greater importance, than that you should take care that, by the terms of the judgment, you do not prejudice any future case. I would, therefore, with your Lordships' permission, submit to you, that you should take some time to consider in what terms the judgment should be expressed; but, with respect to the substance, that this declarator of marriage ought not to be supported, I perfectly agree with my noble friend who has preceded me.

Upon another subsequent day, Lord Eldon said—My Lords, it has occurred to me, since I before addressed your Lordships, that I omitted to notice the evidence of the lapidary, White, and that of a witness of the name of Neill. I shall only now say, that after repeatedly considering the effect of the testimony of both those witnesses, and the effect of the observations contained in the different printed memorials and cases, in support of, and against their testimony, that testimony might render inaccurate some few expressions, to be found in what I had before the honor of stating [511] to your Lordships upon this case, yet that testimony does not, in any degree, in my judgment, authorise any change of opinion—that this reversal should take place.

Upon due consideration of all the proceedings in this action of declarator of marriage, at the instance of Malcolm Macgregor against Mary Black Macneill, particularly of the summons, dated 25th March, 1818, wherein the allegations set forth are—"That an irregular marriage was celebrated between the said Malcolm Macgregor and the said Mary Black Macneill, by Dr. Macneill, at Holytown, in spring, 1816, which was consummated by their spending several nights together in the same bed; and that they considered it proper on their return to Edinburgh, in the month of May, 1816, that no time should be lost in celebrating, in *facie ecclesiæ*, that marriage which had been irregularly celebrated between them; and, accordingly they were, in the month of May, 1816, regularly married by the Rev. Joseph Robertson, minister of the chapel in Leith Wynd, Edinburgh;" and upon examination of what has been established by evidence in the Courts below, with reference to the facts alleged in the said summons, this House is of opinion that there is no proof whatever of any marriage between these parties having at any time taken place at Holytown, or of any regular marriage, in *facie ecclesiæ*, having been celebrated between them at Edinburgh, in the month of May, 1816. And further, this House, taking into consideration all the facts and circumstances proved in relation to [512] the conduct of the parties, both before and after the 23d of May, 1816, is of opinion that there is not evidence sufficient to justify the conclusion, that the said Mary Black Macneill, and the said Malcolm Macgregor, did on the 23d of May, 1816, or at any other time, voluntarily and deliberately express that real mutual consent immediately to contract marriage, which, by the law of Scotland, is necessary to give validity to such an irregular marriage, as is alleged to have taken place. It is therefore ordered and adjudged, by the Lords spiritual and temporal, in Parliament assembled, that the said several interlocutors, complained of in the said appeal, be, and the same are hereby reversed; and that the farther proceeding in this action be, and the same is hereby remitted to the Court of Session, with instructions to give directions to the Commissary Court to dismiss the declarator of marriage raised at the instance of

the said Malcolm Macgregor, by summons of date 25th of March, 1818, and to assolzie the defender, the said Mary Black Macneill, from all the conclusions thereof. And this House having so ordered and adjudged, doth not think it necessary to determine upon what has been submitted to its consideration, viz. Whether the several interlocutors, herein before mentioned, could have been deemed duly pronounced, in proceedings to which Robert Jollie, and the children of the defender, Mary Black Macneill were not parties?

[513] The principal topics of argument in support of the judgment in the Court below, are comprised in the following speeches of the Lord President, on advising the case in the Court of Session.

Lord President: This is a most distressing case. I shudder at the consequences of touching what may be considered a solemn marriage. Regular celebration is a matter of order, which, by removing doubts, gives certainty to consent. No woman of twenty-six years of age can doubt the purpose for which she goes before a minister, if she is not an idiot: and idiots are not capable of consent. I have great delicacy in touching a marriage so celebrated. It is said here, that the pursuer wishes the marriage declared, for the purpose of bringing a divorce; but if Mr. Macgregor makes her his wife, he can never get a divorce. Instantaneous repentance, after deliberate consent, will not dissolve a marriage. If such was the case, there would have been many instances in point. Look at the case of Mac Adam (D. P. May, 1813, MSS.). He was married at breakfast time. In the afternoon he blew out his brains. Here it was wished to dissolve the marriage, but the House of Lords would not hear of it. This might have been a rash marriage, but it was a regular one. I cannot believe there was concussion. If such existed, she would have shewn it. Macnaughton's evidence does not prove it. But from circumstances posterior to the marriage, Macgregor does not seem to believe he was married. It is a new case, and should be farther investigated, particularly as to Dr. Macneill's presence at Mr. Jollie's marriage. It is said, that the doctor not only consented to Macgregor's marriage, [514] but that he knew it had taken place. If so, he was the most criminal of all, to connive at Mr. Jollie's marriage. I should wish to be of the opinion of Lords Hermand and Balgray, for the sake of the children: but even if the first marriage should be adopted, the *bona fides* of Mr. Jollie, in contracting the second, would perhaps protect them, although it would not do so on the other side of the water. I recollect something similar happened in Mr. Riddell's case (reported by Bell), but the child died before a decision. I had, however, then spoken to the late Lord Meadowbank on the subject, who concurred with me, in thinking that the child must be held to be legitimate. I am for remitting to the Commissaries, to take further proof upon every circumstance which can bear upon the case.

(11 June, 1825.) Lord President (after the remit): I wish very much I could have taken the same view as my brother, considering that there are children of this marriage, and considering also, that Mr. Jollie seems to be the only person against whom there can be no reproach. As to both of the other parties their conduct is shameful.

There is no objection to Mr. Jollie's marriage: every thing was regularly and solemnly conducted, and there can be no doubt it would be a good marriage if it had not been vitiated by a previous marriage, but that is the question: And therefore, what does the Pursuer say as to Mr. Jollie's marriage, which did not take place till the 14th of June? that on the 23d May preceding he was married by the Reverend Joseph Robertson; Mr. Robertson was at that time an ordained minister of the gospel, and was entitled by the law of the church and state to marry. The Pur-[515]-suer produced marriage lines from the session clerk of Edinburgh, and the witnesses to the marriage were Mrs. Robertson, and her daughter. No doubt there might have been a deficiency in the evidence, for, although both the wife and the daughter recollect a marriage, they might have been mistaken about the lady: but unfortunately, that is supplied by the lady herself, for the Defender acknowledges it. It is true Mr. Joseph Robertson may have turned out not so respectable a character, but as to his capability of celebrating a marriage he was just as fit as the other. The parties were thus married *in facie ecclesie*, in both the marriages, but in both of them without actual proclamation of banns: neither of them were regular; the one was just as irregular as the other.

But the Defender says she was forced into the first marriage: that no consent was given by her; that no consummation followed, and that the Pursuer knew she was engaged to Mr. Jollie. All this may be true; but has she proved either deceit, threats, or force? Is there the slightest evidence of it? She says the Pursuer asked her in the evening to go to Mr. Bridges, that he had led her to Mr. Robertson's, and, under threats of burning the settlements, and murdering Mr. Jollie, he frightened her to go in. There is no evidence of all this; where did it happen? Was it on the height of Lammermuir, where she could get no assistance? No, this took place in a summer evening, in the end of the month of May. When there was good day light, she is led through the streets of Edinburgh under threats of burning her father's deeds, and murdering her sweetheart: [516] was there no person near to protect her and take her part? Surely, when she got into Mr. Robertson's house she was under protection: she could at least have told him of the threats that had been used against her, and desired him to send for a constable; but she says nothing: she does not even object to the ceremony; she is no child at the time; she was twenty-six years of age. There is no evidence of all this alleged force and threats, and, to me, it is quite incredible, that all this could have taken place in day light in a summer evening and in the streets of Edinburgh.

Then, what happens afterwards: they walked home together; they sleep at least in the same house together. It is true there is no evidence that consummation did take place, and you will presume it the more that this lady slept in the same room with him only a few days before. It would have been more suitable if, on that occasion, she had slept in the same room with her father; there might have been some indecency in this, but at least there would have been no impropriety, and where there was such a scarcity of rooms, it would have been more proper that she had slept in the room with her father, instead of that of a stranger; therefore, I cannot take it off her hands that there was no consummation, but at all events they walked home together arm in arm.

No doubt it is true that both parties seem afterwards to have repented of the marriage, but repentance however soon it follows consent will not do. In one case there was the most tremendous symptoms of repentance in the case of McAdam. In that case there was only an acknowledgment before servants, much less solemn than in the [517] presence of a clergyman, as to which no person in their senses could doubt of the object in view, no mortal can be mistaken; but in that case it was found both in this Court and the House of Lords, that the most instantaneous repentance could not undo the marriage. Therefore the repentance of the first marriage, and the consent to the second, will not do.

I will not say and I have no occasion to say that the consent before a clergyman is to be held as *propatio probata*. But this I will say, that there is no case where the consent before a clergyman was found not to constitute a marriage, except these two cases of the children, where they did not come before the clergyman for the purpose of being married, but where when the mother was out of the room the marriage was performed, and the girl was taken away by the mother before it was published, so that there was no consummation.

The only thing at all corroborative of the Defender's story, is the fact, that he was possessed of Doctor Macneill's settlements; but then his answer is just as good, that it was in consequence of the marriage that the Doctor gave him possession of them. And then there is another incomprehensible part of the story, that is, what took place at Mr. White's, the lapidary. Dr. Macneill was present on that occasion, and Mr. White drank to his daughter's health as Mrs. Macgregor, and no objections are stated. Then something took place about presents, upon which the Doctor said to Mr. Macgregor, "It will all be your's"; which corroborates the story, not only of their being married, but of his knowing of, and being entrusted with the settlements.

[518] The only thing that would have weighed, and weighed strongly, in my mind, if this first marriage had been constituted in any other way than in *facie ecclesiae*, for you will observe that all the clergymen say, that they never saw a case where the marriage lines were not delivered to the lady, but Joseph Robertson gave the marriage lines on this occasion to Macgregor himself. The object of giving the lines to the lady is, that she may have the proof of the marriage in her own possession, and in that case there can be no want of evidence of consent; but in this case it was

of less consequence, because the lady could have recourse to the evidence of Mr. and Mrs. Robertson, and their daughter. In this case, the evidence is completely supplied.

There can be no doubt that the Pursuer's conduct is most extraordinary, and most unjustifiable. He saw what was going on with Mr. Jollie; he delivered up the title deeds to him; he allowed Mr. Jollie to act as chief mourner at Dr. Macneill's funeral; he went to church with Mr. and Mrs. Jollie; he sat in the same pew with them. In short, he has been guilty of the most gross lenocinium that can well be imagined, and sure I am that, under such circumstances, he will never be able to get a divorce.

I wish I could separate this second marriage, which was every way regularly conducted, so as to give effect to it. But this I cannot do, and considering all the circumstances, I regret I can not do it. But the first marriage being constituted, by what appears to me to be a legal consent, nothing on earth can dissolve it, except a divorce, which this man, I think, will never be able to obtain.

[519]

SCOTLAND.

(COURT OF SESSION.)

JAMES PATTISON, and others.—*Appellants*; WILLIAM MILLS, and others.—*Respondents*.

[*Mews' Dig.* viii. 286; xiii. 1103, 1350. S. C. I Dow and Cl. 342. On point as to the law applicable to the contract, see *De laurier v. Wyllie*, 1889, 17 Ct. of Sess. 4th Ser. 191.]

A. and Co. carrying on business in England as an Insurance Company, had an office and an agent in Scotland, with whom C. D. etc. for themselves and others, as joint owners of a vessel, made an insurance, receiving from the agent a memorandum in general terms, importing, without exception of any sea risks, that the vessel was insured, and that a policy would be prepared and sent to be delivered to the assured, or their order, "on the third Monday in the ensuing month, or on any subsequent day." Notice of the effecting of the insurance was transmitted by the Scotch agent to the principals in London, who, two months after the date of the memorandum, transmitted to the agent a policy of insurance, containing a clause, by which the operation of the policy was to be suspended while the vessel should be at sea. This policy was not demanded by, nor delivered, nor shewn to the assured, who at the end of the year renewed their policy by the medium of the agent in Scotland, but by a memorandum of renewal, signed by the agent in England, and referring to a specific policy, which although it was lying at the agent's office, was not then demanded by, nor delivered or shewn to the assured. Soon after this renewal of the policy, the ship was lost at sea by fire. Under these circumstances, a judgment of the Court of Session, reversing a sentence of the Judge-Admiral, was affirmed on appeal, but on distinct grounds, the House of Lords being of opinion, that the memorandum was the contract between the parties, and therefore properly admitted in evidence, upon the trial of an issue directed before the Jury Court; that the stat. 6 Geo. I. c. 18, so far as relates to Insurance Companies, did not extend to Scotland; that a contract made under the circumstances above stated, was a Scotch contract; and that the principals and their agents were properly included in the same action.

[520] The Appellants in this case represented the Albion Fire and Life Insurance Company. The Appellant, Warner Phipps, being the Secretary to the Company in London, and the Appellant, Thomas Hamilton, being their Agent at Glasgow, but neither Mr. Phipps nor Mr. Hamilton were Proprietors. The other Appellants were Directors of the Company and Proprietors. They carried on their business in London.

where their policies were invariably executed, and all the Appellants were resident in London, excepting Thomas Hamilton.

The Respondents were the Proprietors of a Steam Boat called the *Robert Bruce*.

In the month of July, 1820, the Respondent William Mills, (being then the managing owner of the steam boat called the *Robert Bruce*, and of another steam boat called the *Superb*,) in the name of himself and others of the Respondents, but as the agent, and for the benefit of all the Respondents, applied to the Appellant Thomas Hamilton, as agent in Glasgow for the Albion Company, to effect an insurance to the extent of £3000 on each of the said steam boats, and to have certain policies cancelled which had been theretofore effected by individual owners on their respective shares.

Upon the occasion of effecting this insurance with Thomas Hamilton, a memorandum or certificate was delivered to the Respondent William Mills, by the Appellant Thomas Hamilton, of the tenor following:

"Albion Fire and Life Office, Glasgow, 4th July, 1820.—James Dennistoun, William Mills, [521] Colin Arrot, James Moffat, John T. Alston, Esquires, as a committee of management for themselves and others, having this day effected an insurance of £6000 with the undersigned, on behalf of the Albion Fire and Life Insurance Company of London, on the property specified in the check corresponding with this memorandum: a policy will be forthwith prepared at the office in London, for the said insurance, and such policy will be delivered to the assured, or to his, her, or their order, on the third Monday in the ensuing month, or on any subsequent day.

(Signed) P. THOMAS HAMILTON.

"Agent for the Company."

The proposed insurance being accepted by the directors, a policy of insurance was made and executed in London, on the 11th of September, 1820, containing a stipulation that the insurance was to be suspended, and remain out of force during the time the boat might be at sea.

The policy was never applied for by the Respondents until after the loss of the *Robert Bruce*, but it was transmitted from London soon after it was executed, and was lying in the office of Thomas Hamilton at Glasgow.

In June 1821, the Respondent William Mills, (in the name and on the behalf of himself, and the other Respondents,) renewed for another year the insurance effected on the *Robert Bruce* and the *Superb*. The premium was paid to the Appellant Thomas Hamilton, who delivered to the Respondent William Mills, a memorandum or certificate in the following terms, subscribed by the Appellant Warner Phipps, as secretary of the Company:

[522] "Albion Fire and Life Office, London, Midsummer, 1821. Renewal Certificate on Fire Policy, No. 56,978, insuring £6000 to James Dennistoun, William Mills, Colin Arrot, James Moffat, and John Thomas Alston, Esquires.

" One Year's Premium	£31 10
Duty	9 0
Total payment	£40 10
" £1000 insured with Eagle Company per Policy, No. 61,725,	
Premium and Duty	27 0
	£67 10

" 1821.— This is to declare that the above Policy has been renewed, and that the insurance granted thereby will continue in force from the 24th of June, 1821, to the 24th of June, 1822.

(Signed) WARNER PHIPPS, Secretary."

On the 28th of August, 1821, the *Robert Bruce* was destroyed by fire at sea, while on a voyage from Liverpool to Dublin.

Application was then made by the Respondents at the office of the Appellant Thomas Hamilton, for payment of the sum insured on the *Robert Bruce*, and upon that claim being resisted by the Appellants, the Respondents required a policy, framed in the terms in which they contended that it ought to have been executed, to be delivered to them. Upon this application, a policy excepting the risk of loss by fire at sea, was tendered to the Respondents, but they refused to accept it, insisting

they were entitled to have a policy without any exception of risk by fire while the boat might be at sea, and upon a policy of that unlimited nature being refused, they raised their [523] action against the Appellants in the High Court of Admiralty in Scotland, concluding that the Defenders ought, and should be decreed and ordained conjunctly, and severally by decree of the Judge of the said High Court of Admiralty, immediately to furnish and deliver to the Pursuers a valid and effectual policy of insurance upon the said steam boats or packets for the said sum of £6000 sterling, and that for the period of one year from the 24th day of June then last 1821, when the premium therefor was paid, and containing in the said policy, the usual clauses, and an obligation of insurance against the usual risks as before specified, and among others an insurance against the risk of damage occasioned, or which might be occasioned, to the said steam boats or packets by fire, at any time and any where during the period aforesaid of the insurance, and whether such policy should be furnished and delivered to the Pursuers or not, or in whatever terms they might express or had expressed the same, they the said Defenders should be decreed and ordained by decree foresaid, conjunctly and severally to make payment to the Pursuers of the foresaid sum of £3000 sterling, being the sum insured upon the said steam boat or packet, *Robert Bruce*, with lawful interest, etc.

The Appellants put in defences amounting in substance to a denial that they had ever undertaken the insurance upon the terms alleged, and further contending that such an undertaking even if made, would have been void in law by the operation of the statute* 6 Geo. I. c. 18: by the [524] 12th section of which act it was enacted, "That from and after the granting or making of the said respective charters or indentures for erecting the two Corporations before mentioned, and passing the same under the said Great Seal, for and during the continuance of the same Corporations respectively, or either of them, all other Corporations or Bodies Politic before this time erected or established, or hereafter to be erected or established, whether such Corporations or Bodies Politic, or any of them, be sole or aggregate, and all such societies and partnerships as now are, or hereafter shall or may be entered into by any person or persons for assuring ships or merchandizes at sea, or for lending money upon bottomry, shall by force and virtue of this act be restrained from granting, signing, or underwriting, any policy or policies of assurance, or making any contracts for assurance of or upon any ship or ships, goods or merchandizes at sea, or going to sea, and from lending any monies by way of bottomry as aforesaid, and if any Corporation or Body Politic, or persons acting in such society or partnership, (other than the two Corporations intended to be established by this act, or one of them,) shall presume to grant, sign, or underwrite, after the 24th of June, 1720, any such policy or policies, or make any such contract or contracts for assurance of or upon any ship or ships, goods or merchandizes at sea or going to sea, or take or agree to take any premium or other reward for such policy or policies, every such policy and policies of assurance of or upon any such ship or ships, [525] goods or merchandizes, shall be *ipso facto* void, and all and every sum and sums so signed or underwritten in such policy or policies shall be forfeited, and shall and may be recovered, to wit, one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety thereof to the use of such person or persons as will inform or sue for the same in any of His Majesty's Courts of Record at Westminster, in which action, suit or information, no essoin, protection, privilege, wager of law, or more than one imparlance shall be granted or allowed. And if any Corporation or Body Politic, or persons acting in such society or partnership as aforesaid, other than the two Corporations intended to be established by this act, or one of them shall presume to lend, or agree to lend, or advance by themselves, or any others on their behalf, after the said 24th of June, 1720, any money by way of bottomry as aforesaid, contrary to this act, the bond or other security for the same shall be *ipso facto* void, and such agreement shall be adjudged to be an usurious contract, and the offenders therein shall suffer as in cases of usury. Nevertheless it is intended and hereby declared, that any private or particular person or persons shall be at liberty to write

* The act giving a monopoly of insurance to the Royal Exchange and London Assurance Companies which is repealed, so far as relates to the monopoly, by 5 Geo. IV. c. 114.

or underwrite any policies, or engage himself or herself in any assurances of, for, or upon any ship or ships, goods or merchandizes at sea or going to sea, or may lend money by way of bottomry as aforesaid, as fully and beneficially as if this act had never been made, so as the same be not upon the account or risque of a Corporation or [526] Body Politic, or upon the account or risque of persons acting in a society or partnership for that purpose as aforesaid: any thing herein contained to the contrary notwithstanding."

The Judge Admiral by an interlocutor bearing date the 16th of May, 1822, repelled the defence founded on the statute 6 Geo. I. c. 18; but subsequently on advising a petition for the Appellants, the Judge Admiral superseded consideration of the defence on the statute. The Judge Admiral afterwards assized the Appellants from the action, on the ground that the insurance undertaken by the Appellants did not extend to loss at sea, but he found the Appellants entitled to no costs.

The case was thereupon removed into the Court of Session by mutual process of reduction of the decrees of the Judge of the High Court of Admiralty—the Appellants insisting they were entitled to costs—the Respondents that judgment ought to have been given for them (the Respondents,)—and the Respondents' summons of reduction, after praying that the Judge Admiral's interlocutors against them should be reduced, retracted, rescinded, cassed, annulled, decerned and declared null, etc. concluded (in the same terms as the process in the Admiralty Court,) that the Defenders (Appellants) ought to be decerned and ordained to deliver a policy for a year from the 24th of June, 1821, without any exception of risk by fire at sea, and whether such policy should be so delivered or not, that they ought to be decreed and ordered to pay the sum stated to be insured, viz. £3000, with costs, etc.

Memorials and condescendences and revised [527] condescendences were presented and put in on each side. In the memorial for the Appellants, they stated the act of 6 Geo. I. c. 18, as incapacitating them from undertaking an insurance against loss at sea, and relied also on circumstances before referred to, and other particulars, as shewing that in point of fact they had not undertaken an insurance against such a loss.

The memorial and condescendence presented and put in on the part of the Pursuers, (Respondents) set forth a variety of matters with a view of proving that when they effected their insurance on the *Robert Bruce*, they supposed they were effecting an absolute insurance without exception of sea risk.

On the 13th of May, 1826, the second division of the Court of Session pronounced a special interlocutor, by which "having resumed consideration of the conjoined actions and proceedings therein, with the condescendences, revised condescendences, and answers for Thomas Hamilton, they remitted the actions to the Jury Court, to be there proceeded with according to the statute."

The following issue was adjusted by the Jury Court for the trial of the cause, which was directed to be tried at Glasgow.

"It being admitted that on the 27th or 28th days of August, 1821, the steam vessel called the *Robert Bruce*, the property of the Pursuers, was destroyed by fire while at sea, on her voyage betwixt Liverpool and Dublin; whether the Defenders promised and agreed to insure the Pursuers to the extent of £3000, or about that sum, from loss and damage which might [528] be caused by fire to the said steam vessel while at sea as aforesaid; and whether the Defenders have failed to perform the said promise and agreement to the loss and damage of the Pursuers. Damages laid at £3000. (Signed) WILLIAM ADAM, Lord Chief Commissioner."

The issue was tried before the Lord Chief Commissioner, at Glasgow, on the 20th day of September, 1826, when a general verdict was found for the Pursuers, subject to a bill of exceptions, which after stating the issue, etc. proceeded thus: And, upon the trial of the said issue, the counsel learned in the law for the said Pursuers, to maintain and prove his case under the said issue, did offer to give in evidence, certain certificates or receipts, being eight in number, the same having been formerly given by the said Thomas Hamilton, as such agent as aforesaid, to the several individuals (whereof six only are parties to the present action) on occasion of those eight individuals effecting each one a several insurance with the said Company upon his several share and interest in the said ship, for the year from the 11th of August, 1819, to the 29th of September, 1820; of which said certificates or receipts, one was and is in the following or similar terms:—*Albion Fire and*

Life [Insurance] Office, Glasgow, 14th of August, 1819. William Mills, Esq. having this day effected an insurance of £200 with the undersigned, on behalf of the Albion Fire and Life Insurance Company of London, on the property specified in the check corresponding with this memorandum, a policy will be forthwith prepared at the office in London for the said insurance, and such policy will be [529] delivered to the assured, or to his, her, or their order, on the third Monday in the ensuing month, or on any subsequent day.

" (Signed) *Pr.* THOS. HAMILTON, Agent for the Company, ROBERT MITCHELL.

" Premium	.	.	.	.	.	.	.	.	.	£1	4	6
" Duty	.	.	.	.	.	.	.	.	.	0	7	0
											<hr/>		
											£1	11	6

" Insured up to the 29th of September, 1820."

And on the back of which said certificate or receipt there was and is the following indorsement:

" This receipt insures, viz. on the *Robert Bruce* steam-boat, at present plying between Glasgow and Liverpool, £200.

" (Signed) *P.* THOS. HAMILTON, R.M."

And the remainder of which said certificates or receipts, so offered in evidence as aforesaid, were and are in the same or similar terms. And the said Counsel for the said Pursuers, in further maintenance of the said issue on the part of the said pursuers, did further tender and offer in evidence a letter, dated the 31st of August, 1819, from the said Thomas Hamilton, the said Defender, and agent for the said Company at Glasgow, to Warner Phipps, Esq. London, secretary to the said Albion Fire and Life Insurance Company of London, Defenders aforesaid, and a letter in answer thereto, from the said Warner Phipps, dated the 3d of September, 1819, to the said Thomas Hamilton, respectively written and sent on occasion of effecting the said insurance referred to in the said certificate: From which said letters the Counsel for the Pursuers proposed to offer in [530] evidence as aforesaid excerpts in the terms following; that is to say: " I have this day sent, per mail-coach, a parcel containing commission account and account-current; and inclosed you will receive bills for the balance at the credit of the Company, amount £1215 6s. 5d.

" The parcel contains also twenty fire orders, fire renewal sheet for August, Midsummer, and life renewal sheet for August, amount to the credit of the Company, as noted below; also order on Eagle Company for £8 10s.

" I am not disposed to think that the insurers of the *Robert Bruce* steam-boat, as per fire orders No. 14 to 22, inclusive, excepting No. 21, will be satisfied with the introduction of the clause, 'but not while the same shall be at sea.' I think that, in addition to the rivers, the channel ought to be admitted, as this vessel is expressly to ply between Clyde and Liverpool, and will be a great part of her time in the channel."

And which said answer of the said Warner Phipps, was offered in evidence as aforesaid, and is in the terms following, that is to say:

" In answer to your remarks respecting the clause which exempts the Company from loss on steam-boats while at sea, I have to state that it is a point in which we have no choice. The Royal Exchange and the London Assurance are the only Companies which have a right, as Companies, to undertake insurances on vessels while at sea, and no other Company can lawfully undertake such risk. If, therefore, the Proprietors of the *Robert Bruce* are not content to hold our policies with the exception [531] complained of, I will thank you to advise me, and we shall then, of course, consider the insurance not to be renewed after the present."

To the admissibility of all which certificates and letters, or excerpts therefrom, being given in evidence, the Counsel learned in the law for the said Defenders did object, as not legal or competent matter to be given in evidence in maintenance of the issue on the part of the said Pursuers. But the said Lord Chief Commissioner did then and there deliver it as his opinion, that the certificates and letters were legal and competent evidence in maintenance of said issue; and did allow the same to be produced, and given in evidence on the part of the said Pursuers. And the said Counsel for the said Pursuers, in maintenance of the said issue, did propose to give in

evidence a certificate and receipt dated the 1th of July, 1820, granted by the said Thomas Hamilton, agent as aforesaid, at the time of receiving the order to obtain a policy of insurance from the said Company on the said steam vessel; which said certificate was and is in the terms following, that is to say:

"Albion Fire and Life Office.—Glasgow, 1th of July, 1820.—James Dennistoun, William Mills, Colin Arrott, James Moffat, and John T. Alston, Esqrs. as a committee of management, for themselves and others; having this day effected an insurance of £6000 with the undersigned, on behalf of the Albion Fire and Life Insurance Company of London, on the property specified in the check corresponding with this memorandum, a policy will be forthwith prepared at the office in London for the said [532] insurance, and such policy will be delivered to the assured, or to his, her, or their order, on the third Monday in the ensuing month, or on any subsequent day.

"(Signed) P. THOMAS HAMILTON, Agent for the Company, ROBERT MITCHELL.

"Premium	£31 10 0
"Duty	9 0 0

	£40 10 0"

And the Counsel for the said Pursuers, in further maintenance of the said issue, on the part of the said Pursuers, proposed to give in evidence a policy of insurance, of date the 11th of September, 1820, numbered 56,978, made by the said office in pursuance of the said last mentioned certificate or receipt; and which policy of insurance was and is in the following terms:

"Whereas James Dennistoun, William Mills, Colin Arrott, James Moffat, and John T. Alston, Esqrs. of Glasgow, as a committee of management, for themselves and others, have paid to the Albion Fire and Life Insurance Company of London, the sums above stated to have been received on the grant of this policy, for premium and duty, and have agreed and conditioned to pay, or cause to be paid to the said Company, from time to time, at its house in New Bridge Street, London, or to some one of its accredited agents, the sums above stated to be in future due, for the renewal or continuance of this policy, at the period or periods also above stated. Now, be it hereby known, that from the 30th day of June, 1820, and so long as such future payments so conditioned to be made [533] shall be made, and the directors of the said Company, for the time being, shall agree to accept such payments; the capital stock, and the funds of the said Company, shall be subject and liable to pay, and make good to the person or persons above-mentioned, and by whom such payment is so acknowledged to have been made, or to his, her, or their heirs, executors, or administrators, all such loss or damage, as the said person or persons so assured shall suffer by fire on the property herein after described, not exceeding in the whole the sum of £6000 sterling, and not exceeding in any case, the sum which shall be specifically stated against the property herein after described: that is to say, £3000 on the steam boat *Robert Bruce*, including machinery and apparatus belonging thereto, now plying as a passage boat between the Clyde and Liverpool, and £3000 on the steam boat *Superb*, including machinery and apparatus belonging thereto, and now plying as a passage boat between the Clyde and Liverpool. N.B. It is agreed that the said boats shall have liberty to lie or ply in any port, harbour, river, dock, or navigable canal in the United Kingdom of Great Britain and Ireland, but that the insurance by this policy shall be suspended, and remain out of force, as regards either of the said boats, during the time she may be at sea. £1600 are insured on each of the above mentioned steam boats, with the Eagle Insurance Company."

"Memorandum. It being the intention of this Company, that only one of its policies shall be in force at any one time, in favour of the same [534] person or persons on the same property, it is declared, in the case of any former insurance having been granted by the Company to the person or persons herein named, on the property above described, that this policy shall not take effect, until such former insurance shall have ceased, or shall be given up. The unexpired value of former policies may be at all times received in aid of new insurance. It is farther expressly declared, that this policy shall be valid only on the condition of the former policies

of the said Company. No. 54,600, 54,601, 54,602, 54,603, 54,604, 54,605, 54,606, 54,608, 54,611, and 55,107, being held to be cancelled and made void."

And it was further proposed by the Counsel for the said Pursuers, to prove, in support of the said issue, that the said policy of insurance was not transmitted by the said Defenders, the Albion Company, to the said Defender Thomas Hamilton, their agent, until the month of December, 1820; and that the said policy, regularly executed, was then transmitted to Glasgow, to the said Thomas Hamilton, in pursuance of the said order of insurance, and was, at the date aforesaid, in said office at Glasgow, ready for delivery, and that the same was not sent for by the said Pursuers; nor did the said Thomas Hamilton send the said policy to the Pursuers, but that it remained in the office of the said Thomas Hamilton, and was not delivered prior to the loss of the said vessel, but offered, when demanded, under protest, on 3d September, 1821.

And the said Counsel for the Pursuers did further, in order to maintain the said issue, give in [535] evidence a certificate or receipt, dated London, Midsummer, 1821, given by the said Thomas Hamilton to the said William Mills; which said certificate or receipt was and is in the following terms: that is to say: "Albion Fire and Life Office, London, Midsummer, 1821.—Renewal certificate on fire policy No. 56,978, insuring £6000 to James Dennistoun, William Mills, Colin Arrott, James Moffat, and John T. Alston, Esquires."

" One year's premium, £31 10s. duty £9, total payment	£40 10
" £4000 insured with the Eagle Company, per policy No. 61,725, premium and duty	27 0
	<hr/> £67 10

" This is to declare, that the above policy has been renewed, and that the insurance granted thereby, will continue in force from the 24th June, 1821, to the 24th June, 1822."

" (Signed) WARNER PHIPPS, Secretary."

And the said counsel for the said pursuers, in further maintenance of the said issue on their part, did propose and offer to give in evidence, by Peter Gillies, clerk of the said pursuer William Mills, that in the month of June or July 1820, and in July 1821, conversations took place in his, the witness's, presence, between the said William Mills, acting for himself, and as the agent and manager for the other pursuers, and Robert Mitchell, clerk of the said Thomas Hamilton, defender, he the said Robert Mitchell acting for the said Robert Hamilton in the insurance in question, that the said conversations related to [536] the terms or conditions of the aforesaid proposal to insure, and to renew the insurance on the said *Robert Bruce* steam-boat, for the year from the 24th day of June, 1820, to the 24th day of June, 1821, and from June 1821 for another year; and that in the said conversations no allusion was made by the said Robert Mitchell as to the risk being limited in any way on the said *Robert Bruce* steam-boat.

And in further maintenance of the issue aforesaid, and for the purpose also aforesaid, the said counsel for the said pursuers did further offer to give in evidence, by the testimony of the said Peter Gillies, that a certain other conversation was had, in his presence, in July 1821, between the said William Mills and the said Robert Mitchell, acting as aforesaid, viz. that at the time when the said certificate of renewal was so given as aforesaid, and that in such last-mentioned conversation nothing was said about a limitation of the insurance as to sea risk. To the admissibility of which said evidence respecting the said conversations, the counsel of the said defenders did then and there object, as not legal or competent evidence in maintenance of the said issue on the part of the said pursuers. But the said Lord Chief Commissioner did then and there deliver it as his opinion that the same was legal and competent evidence to maintain the said issue; and the same evidence was accordingly then and there admitted and received on the part of the said pursuers. And the said counsel for the said pursuers, in further maintenance of the said issue, did further propose and offer to give in evidence, that the premium paid to the Albion [537] Fire and Life Insurance Company, for insuring steam-vessels against risk of fire at sea, was 10s. 6d. per cent. which was equal to the rate of premium proved to have been paid in certain other cases for such insurance at the time of

ordering the insurance in question. To the admissibility of which said evidence, the said counsel for the said defenders did then and there object. And the said counsel for the said pursuers did further propose to give in evidence, that the practice of agents in Glasgow for English and Scottish insurance companies, including the agents for the defenders, the Albion Company, is, to send the policies effected at those offices to the assured, as evidence to shew, that it was in like manner the duty of the said defenders, the said Albion Company, or of the said Thomas Hamilton, as their agent, to have sent the said policies so effected with them as aforesaid to the said assured. To the admissibility of which said evidence the said counsel for the said defenders did then and there in like manner object, as not being legal or competent evidence on the part of the said pursuers in maintenance of the said issue. But the said Lord Chief Commissioner did then and there deliver it as his opinion, that the said several matters so proposed and tendered in evidence for the purposes aforesaid, and so objected to as aforesaid, were fit and competent to be given in evidence under the said issue; and then and there allowed the same to be, and the same were accordingly given in evidence in that behalf. And the said counsel for the said defenders did then and there insist, before the said Lord Chief Commissioner, that all the said parole evidence [538] so allowed to be given, and the certificates and letters, or excerpts thereof, so allowed, to be produced and read on the part of the said pursuers, and so objected to by the said counsel for the said defenders, should not have been left to the Jury, or referred to their consideration, because the aforesaid parole and written evidence admitted to be given as aforesaid, was not evidence admissible in law to maintain the case under the said issue.

And the said counsel for the said defenders did then and there request the said Lord Chief Commissioner so to direct the said Jury; but his Lordship did then and there deliver it as his opinion to the said Jury, that they might and ought to consider the same as legal evidence to be weighed by them in considering the agreement and promise, and failure of performance of the same, in the said issue contained.

And it was then and there admitted, by and on the part as well of the said pursuers as of the said defenders, that the said Albion Fire and Life Insurance Company, during all the time herein mentioned, was a certain company carrying on the business of insurers against loss by fire at London, and that the said several defenders, (excepting the said Thomas Hamilton, the agent at Glasgow of the said company,) were respectively resident in London; that the said company, by means of agents in Scotland and elsewhere, was and is in the habit of insuring property in those places respectively; but that all the instruments of policies of insurance heretofore insisted upon, made and entered into by the said company, were executed by or on the part of the said company in London, and not elsewhere.

[539] And the said counsel for the said defenders did then and there also insist, before the said Lord Chief Commissioner, that even if legal and competent evidence had been given before the said Jury, whereby to prove that the said defenders (the said Albion Company) did promise and agree, as in the said issue mentioned, still that, by a certain act of Parliament made and passed in the sixth year of the reign of King George the First, entitled "An act for better securing," etc. such promise and agreement would be illegal and void, and that the said pursuers could not maintain any action thereon, and that the said Jury should be directed to find a verdict for the defenders. But the said Lord Chief Commissioner did nevertheless direct the said jury, if they were satisfied that the evidence admitted to be given on the part of the pursuers was sufficient to support the said promise and agreement in the said issue mentioned, that they should find a verdict for the said pursuers; whereupon the counsel for the defenders did tender their exceptions to the said direction, and did insist, that, under the provision of the said statute, the pursuers could not maintain the said action, and, therefore, the said Jury should have been directed to find a verdict for the defenders.

The said counsel for the defenders did also then and there submit, and humbly insist before the said Lord Chief Commissioner, that if the said evidence were sufficient to warrant the Jury in finding a verdict for the said pursuers, still that the said Jury should not be directed to find a general verdict against all the defenders, but only against the said Albion Company, the prin- [540] cipals, or else against the said Thomas Hamilton, the agent; and then and there requested the said Lord Chief

Commissioner so to direct the said Jury. But he, the said Lord Chief Commissioner, did, then and there, deliver it as his opinion, to the said Jury, that, if their verdict should be in favour of the pursuers, to find against all the defenders generally; to which the counsel for the defenders excepted, insisting that the Jury should have been directed to find either against the Albion Insurance Company, or against Thomas Hamilton, as aforesaid.

And the said Jury then and there delivered their verdict in favour of the pursuers, and against all the defenders; but the counsel for the defenders insisted that the verdict should have been in favour of the defenders, inasmuch as the said several matters admitted to be given in evidence under the said issue were not in law admissible, and ought not to have been referred to the consideration of the said Jury; and that the several other matters herein before set forth, as admitted and given in evidence respecting the residence of the said Albion Insurance Company, the defenders, in respect to the execution of all the said instruments and policies of insurance, were a bar to the said action, by virtue of the statute of the 6th Geo. I. herein before-mentioned; and farther, that the said Jury should not have been directed to find a verdict against all the defenders. And the said counsel for the said defenders, did then and there propose the aforesaid exceptions to the directions aforesaid of the said Lord Chief Commissioner, and did request [541] him to sign the said Bill of Exceptions according to the form of the statute in such case made and provided; and thereupon the said Lord Chief Commissioner did sign the said Bill of Exceptions, on the 21st day of June, 1827, in the eighth year of the reign of his present Majesty.

The Jury found the issue in the affirmative, and returned a general verdict for the Pursuers (Respondents) against all the Defenders (Appellants).

The exceptions taken by the Appellants' counsel were put in the form of a Bill, as hereinbefore set forth, which was afterwards duly signed by the Lord Chief Commissioner according to the statute.

The Bill of exceptions, having been allowed and remitted to the Second Division of the Court of Session, came on to be argued before the Court on the 11th July, 1827, when the exceptions were disallowed by the Court, who then pronounced the following Interlocutor: "The Lords having heard counsel for the parties in terms of their former deliverance, disallow the exceptions, and declare the verdict final and conclusive in terms of the statute: find the pursuers entitled to the expence of this discussion: allow an account thereof to be put in, and remit the same when lodged to the Auditor of Court to tax and to report, reserving all other questions of expences."

This is one of the Interlocutors against which the present appeal was instituted.

On the 22d of December, 1827, the Court by Interlocutor approved of the Auditor's account [542] of expences, by which the Pursuers (Respondents) costs were taxed at £67 18s. 7d.

This Interlocutor is also included in the appeal.

The Appellants then moved the Court of Session to pronounce judgment upon the defence raised by them under the Statute 6 Geo. I. cap. 18, which on the discussion of the Bill of Exceptions they had considered to be a question not properly raised at the trial, but reserved for the consideration of the Court of Session after the remit to the Jury Court was exhausted by the trial of the question. After hearing the counsel for both parties, the Court, on the 20th of December, 1827, appointed the parties to give in mutual cases. On the 22d of January, 1828, the Court pronounced the following Interlocutor, repelling the defence raised under the Statute of 6th Geo. I. and finding the Appellants liable to the payment, not only of the sum insured, but also of interest thereon from the time of the loss.

"Having resumed consideration of these conjoined actions of reduction, and advised the same with the verdict of the jury award of Mr. Thomas Robertson, referred to and produced; and having also advised the mutual cases for the parties on the defence in law, founded on the act 6th Geo. I. cap. 18, which was reserved by the Judge Admiral; and having now heard counsel thereon:—in respect the insurance in question is an insurance against the risk of fire on a Steam Vessel, which is not a marine insurance contemplated by the said Act: the Lords, in the action of reduction, and for payment at the instance of William Mills [543] and others, find that the

statute founded on does not apply to this case, repel the defence founded on the said statute, as well as the other defences to the said action, and reduce, decern, and declare in terms of the reductive conclusions of the libel, and in respect of the said verdict and award find the defenders, conjunctly and severally, liable to the Pursuers in damages, modify the same to the sum of £3000 and decern for payment thereof with interest thereon in terms of the libel; and in the action of reduction at the instance of the Albion Fire and Life Insurance Company, sustain the defences, assoilzie the defenders and decern: find the Albion Fire and Life Insurance Company and the defender, Thomas Hamilton, conjunctly and severally, liable in the expences of the conjoined processes incurred in this and in the Admiralty Courts, allow an account thereof to be put in, and remit the same when lodged to the Auditor of Court to tax and to report."

Against this Interlocutor also the Appeal was instituted.

The cause being then again transmitted to the Jury Court upon the question of costs, the judges of that court, on the 25th January, 1828, ordered the Appellants to pay to the Respondents the costs incurred in that court.

This order is also included in the Appeal.

The damages, with interest and costs, amounting together to £1675 16s. 8d. were afterwards paid by the Appellants, in pursuance of an order of the Court of Session made for that purpose, security being found for the same being refunded [544] in case the judgment of the Court below should be reversed.

The Appeal was against the Interlocutors of the Court of Session, bearing date the 11th day of July, 1827, the 22d day of December, 1827, and the 22d day of January, 1828, and the order of the Jury Court, bearing date the 25th day of January, 1828.

For the Appellants: The original Policy renewed by the Memorandum of Midsummer 1821, expressly excludes risk of fire at sea, and this was the only contract made by the Appellants. It was not competent for the Respondents on the trial of the issue to adduce any parole or collateral evidence in order to control and vary the clear import of the written evidence. It was more especially incompetent for the Respondents to adduce on the trial of the issue, parole evidence of the matters set forth in the Bill of Exceptions, the same being (in great part) matters which had taken place *inter alios*, and in which the Appellants were not concerned. It is inconsistent and repugnant to the whole body of evidence adduced in the cause, to make all the Appellants, some of them being principals and some agents, joint contractors, and jointly liable to indemnify the Respondents.

The Contract of Insurance founded upon by the Respondents was a Contract made and signed in England, by a Society established there, and from the date of that Contract, until and at the time of the loss of the *Robert Bruce*, the Statute 6, Geo. 4, c. 18, was in force, and by the operation [545] of that Act, it was incompetent for the Appellants to make themselves legally responsible for any risk which might befall the *Robert Bruce* "while at sea."

For the Respondents: The whole evidence tendered by the Respondents at the trial, and admitted by the Judge, was competent and proper evidence for proving the matters in issue, and fully warranted the verdict returned by the jury.

It is argued that the loss occurred under the renewal receipt of 21th June, 1821, which bears expressly to be a renewal for another year of the policy, numbered 56,978, subscribed by the Appellants, in September 1820, and containing a clause expressly "excluding all the time the vessel might be at sea." The terms of that policy thus form the only admissible evidence of what was truly the contract of parties; and, therefore, no extrinsic or other evidence should have been admitted, in support of an allegation that their contract was different.

But this objection proceeds upon a misconception of the nature of the action, and of the issue that was tried. This was not an action on a policy, but for a policy, or for damages in consequence of not obtaining one. The foundation of the Respondents' claim was, that after contracting and paying for a policy to cover a special risk, no such policy was delivered; and the first conclusion of their summons, is, that the Appellants should be ordained to deliver such a policy, on which action might be brought.

The evidence produced by the Respondents, [546] proved, that the price or premium advanced by the Respondents, was the highest premium then taken in Glasgow, for

insuring steam vessels against fire, whether at sea, or in ports and rivers; that several of the Respondents had recently, at the same or a less premium, obtained such insurances upon other vessels of this description; and that they had taken no measures for covering by any other insurance, the principal risk which they ran, viz. that of fire, while at sea. The premium paid for insurance of vessels against fire, while in port or harbour, was proved to be 2s. 6d. or 3s. per cent. whereas the premium paid to the present Appellants, was 10s. 6d. per cent.: that the vessel was originally insured as a vessel "then actually plying between the Clyde and Liverpool," and when her employment was afterwards changed to plying between the Clyde and Ireland, notice of that, as a material change of circumstances, was given and received by the Appellants: that immediately after taking the Respondent's money for the first insurance, (of which all the others were confessedly mere renewals or continuations,) and in transmitting the consequent order for a policy, the public and accredited agent of the Appellants, distinctly intimated to them, that the Respondents expected to be insured against fire risk while at sea, and that he, himself, was of opinion, that the policies then ordered, should be worded accordingly: and that though the Appellants are said to have rejected this suggestion, in a private letter to their agent, no communication of that rejection, nor any intimation whatever, of the limitation proposed to be inserted in the policy, was ever, at any time, [547] made to the Respondents, till after the loss had occurred: that though it was the universal practice of insurance agents in Glasgow, to send round and deliver the policies which they had engaged to furnish, the policies stipulated for by the Respondents, were retained and withheld by the Appellants, or their agents, and never tendered or exhibited till after the loss had occurred; and, that although there were repeated conversations on the subject of their insurance, between the Respondents, or some of them, and the agent of the Appellants, subsequent to the correspondence above referred to, no intimation was ever given of the restrictions, which are said to have been in their contemplation, nor any hint of the limited protection they proposed to afford.

Even if the policy, with the limitation referred to, had been tendered or delivered to the Respondents, they would not have been bound by that limitation, if they could show by clear evidence, that it had been inserted, either through fraud on the part of the Appellants, or through gross mistake on their own;* and the evidence admitted at the trial would have been competent and receivable evidence to prove such fraud or mistake. The general doctrine relied on by the Respondents is given, under those limitations and exceptions, by all the authorities. As there is no question here of the sufficiency of the evidence produced for the Respondents, it is not necessary to say more of it, than, that being calculated to prove [548] fraud or gross mistake, it was, at all events, competent to be received in the trial of such an issue; and that there is no room for an exception against the act of the Court in sending it to the Jury. At the same time, it is conceived to be quite clear, that it was sufficient and conclusive as to both points. That the limitation in the policy, could only have been inserted from the grossest mistake of the meaning, object, and understanding of the Respondents, was made out, beyond all possibility of question; and that it was inserted fraudulently and *mala fide* by the Appellants and their agent, is equally demonstrated by the facts, of their knowledge of the premium being equal to that required for an unlimited policy, their consciousness, as evidenced by the letter of their agent, that the Respondents relied on it as unlimited; and by their retention of that premium, and their concealment, and non-delivery of the instrument itself, till after the loss had occurred.

The statute of the 6th Geo. I, c. 18. had no bearing upon the question of fact set forth in the issue which was sent to trial; and could not competently be brought under the view of the Court or Jury, in the course of that trial, although it might have been (as it afterwards was) founded on as a bar to the Respondents recovering any judgment in the cause, or applying the verdict as the ground of such judgment. The Appellants indeed, did not insist on this ground of exception in the Court below;

* Phil. Evid. i. pp. 550, 558, etc. Fell on Guarantees, p. 58, etc. and cases there cited. Marshall i. pp. 349, 351, and cases cited.

and acknowledged by their subsequent proceedings, that they were aware it could not be sustained in that form of pleading.

The verdict of the Jury was properly returned for the Respondents generally, and without distinguishing between the case of the Appellant Hamilton, the agent in Glasgow, and that of the other Appellants, the office-bearers and partners of the Albion Insurance Company of London; and the Judge did, justly and legally refuse to direct the said Jury, to find alternatively, against one or other only of these Appellants.

It is objected that if the agent acted within his powers, then he bound only his constituents, and not himself individually, and the verdict ought to have been against the former only. If on the other hand, he acted beyond his powers, then he did not bind his constituents, and the verdict should have been against him only as an individual. But the resident agent or mandatory of a foreign party is, by the law of Scotland, liable, along with his principal, to any judgment or decree obtained in the Courts of that country, in the issue of suits maintained for behalf of such party, by such agent or mandatory, although confining himself strictly to the terms of his mandate or instructions. And an accredited agent in the general business of a party, whether in the same or in a foreign country, will bind that party to individuals who, *bona fide* contract with him in the name of such party, as to all matters falling apparently within the line or course of that general business, although it may happen, that by his private instructions, he was debarred from entering into such transactions.

No evidence being produced by the Appellants, to show whether the actings of the agent, in his dealings with the Respondents, were or were not within his powers or instructions, the justice of the case required that the verdict [550] should be against both, conjunctly—their ultimate claims of relief, as against each other, being left entire, on the application of such verdict.

The act of 6 Geo. I. c. 18. plainly did not extend to Scotland, and was intended only to give the two favoured companies a monopoly of Marine Insurances in the English market; while the property insured, in the present instance, was Scottish property, and the contract for insurance entered into in Scotland, in a public office or place of business in Glasgow, and by parties who were not bound to know, and could not be affected by the provisions of any foreign law. It is said not to be clear that the statute did not extend to Scotland; and if it applied only to England, the contract here was between the Respondents and an English Company, known and held out to the Respondents as such; and, though locally concluded at Glasgow, by means of an agent, was no more a Scottish contract than if it had been arranged altogether in London, either by some of the Respondents repairing to that place in person, or by their corresponding with the Appellants in that city by post. But the act is manifestly applicable to England alone; as the necessary actions for giving effect to it are directed to be brought in the Courts at Westminster only; whereas, in another branch of the same statute which was meant to extend to Great Britain and Ireland, the relative actions are allowed to be brought in the Courts, either of Westminster, Edinburgh, or Dublin; and when it was afterwards thought expedient, that its provisions should be made operative in the American colonies, it was found necessary to pass an additional [551]—tional or supplementary statute (the 11 Geo. II. c. 37.) expressly extending them to these colonies.

Monopolies are unfavourable in law; and are therefore to be strictly construed, especially when the sanction under which they are protected is that of nullity in *bona fide* contracts, entered into by persons not bound to be cognisant of their existence. The Appellants came into Scotland, and there set up an establishment, exactly similar to those which Scotchmen might lawfully set up; and for the express purpose of dividing with such native establishments, the employment of Scottish customers. *Quoad hoc* therefore, their's was truly a Scottish establishment; and there is no reason to think that even the Appellants transgressed any law which was binding on them, when they undertook this business in Scotland, (the monopoly of the companies favoured by the statute being manifestly the monopoly of the English Market only)—and it being free to them as British subjects, to carry on any branch of trade in Scotland, with the same privileges as natives. Nor could their connection with a head office in England take away those privileges, as to a true Scottish transaction. But, at all events, it will not make this an English contract, that one of the parties

to it was settled in England. That party may, perhaps, be liable in penalties; but the foreign party who actually contracted in his own country, and was neither bound nor presumed to know the English statute, ought not to be exposed to loss, by the annulment of his contract. The law of England may justly punish its proper subjects who violate its injuncti-^[552]ons; but ought not to forfeit the rights of those who are not subject to it, and do not contract within its territory, or subject them to losses of which they had no warning.

The monopoly of the favoured Companies did not extend to the insurance of steam-vessels, which had no existence at the date of the statute, and are exposed to hazards of a particular description, and substantially different from any that could then be contemplated as the objects of marine insurance. Monopolies and restraints on the employment of capital and industry, are always to be construed as narrowly as possible, and never to be extended, by mere implication and analogy, to cases which they did not originally comprehend. The statute of apprenticeships, accordingly, has not been held applicable to trades that were not in existence at the time it was passed; and the same rule has been applied to many other cases far less clear and favourable than the present.

Even if the Appellants were themselves disabled by the statute from granting the Respondents a policy extending to the whole voyage, they were bound by their onerous contract, to have procured such a policy from one or other of the Companies favoured by that act, and are bound to repair to the Respondents the loss arising from their failure or omission so to procure it. By taking the Respondents' money (a sum of money proved to have been fully equal to the value of an unlimited policy,) they obviously became bound to procure and deliver such a policy. The Respondents, who did not know, and were not bound to know any disabili-^[553]ties which might attach to them by the law of England, might, indeed, understand that the Appellants were themselves to fulfil this engagement, by executing and delivering such a policy in their own names. But they who pretend that they knew the law of England, and were bound to know it, cannot be permitted to say that they had any such understanding. They are barred from so construing the contract, by every principle of consistency and common honesty; and, considering that it is now finally established by the verdict of the Jury, that they did covenant and agree to deliver to the Respondents, a policy covering them from risk of fire while the vessel should be at sea, as well as while in port or in rivers; and as it is plain that such a policy might, at all events, have been procured from one or other of the privileged Companies, it seems undeniably to follow that it was their duty so to procure it; and that they have been justly subjected in reparation of the damages arising from their omission. They might have met the first and leading conclusion of the Respondents' summons, by delivering such a policy; but as they have not chosen to do so, they cannot be relieved from the other alternative, of paying the damage that has ensued.

The Lord Chancellor: (26th June): There is a case which stands for judgment, of the Albion Company against Mills. It was a case of this description, upon which at present, for a particular reason, I will say only a few words, as I wish to have an opportunity of further considering the course which ought to be adopted:—the Plaintiffs, the ^[554]Pursuers in the action below, were the Proprietors of a steam vessel called the *Robert Bruce*. There is an Insurance Company in London for Fire and Life Insurance, called the Albion Insurance Company: they have an establishment at Glasgow, a regular establishment and office there, conducted by a person of the name of Hamilton. A considerable quantity of insurance business on account of the London Insurance Company was transacted at that office. The owners of the *Robert Bruce* applied at the office at Glasgow to have their vessel insured—a steam vessel called the *Robert Bruce*. An agreement was entered into for the purpose by Mr. Hamilton the agent, and a policy was afterwards effected. Various questions have arisen, which were agitated in the Court below, and which have been much considered and discussed. One objection on the part of the Albion Insurance Company to pay this loss, was an objection arising out of the statute of 6 Geo. I. c. 18: it was said, that any policy of insurance, or any agreement for insurance entered into, under the circumstances under which this particular insurance was effected, was by means of that act of Parliament altogether

void, and much argument was made use of both in the Court below, and at the bar here, for the purpose of determining this material and important question, whether that act extends to Scotland, to contracts entered into, and executed in that part of the United Kingdom. The Court below were of opinion that the statute did not apply to Scotland, and I am very much disposed to concur in that opinion.

[555] But another most material and important question arose, one much more complicated, which was of this description, namely, whether the contract was a contract entered into in Scotland or in England, in other words, if the statute does not extend to Scotland, whether it was a contract so entered into in Scotland as to render it valid and binding. The Court below appear to have differed on that point, and they came to no conclusion with respect to it; but they decided the question on another point, quite wide of the decision of that question: they said this was a case of loss that did not come within the act, and I wish for the purpose of directing the attention of your Lordships and the parties to this point of the case, to read the very terms of their judgment—the final judgment: “Having resumed consideration of those conjoined actions of reduction, and advised the same with the verdict of the jury award of Mr. Thomas Robertson, referred to and produced, and having also advised the mutual cases for the parties, on the defence in law founded on the act 6 Geo. I. c. 18, which was reserved by the Judge Admiral, and having now heard counsel thereon, in respect the insurance in question is an insurance against the risk of fire on a steam vessel, which is not a marine insurance, contemplated by the said act, the Lords in the action of reduction and for payment, at the instance of William Mills and others, find that the statute founded on does not apply to this case, repel the defence founded on the said statute, as well as the other defences to the said action.”

[556] Now I confess I am not disposed at all to concur in that judgment. I think it is impossible that that judgment, according to my apprehension and understanding, can be sustained. In the first place, if you look to the words of the act of Parliament, they are most general and comprehensive; the words are:—“that if any of the persons described, shall presume to grant, sign, or underwrite, after the 24th of June, 1720, any such policy or policies, or make any such contract or contracts for assurance of or upon any ship or ships, goods or merchandizes at sea or going to sea, or take or agree to take any premium or other reward for such policy or policies, every such policy and policies of assurance of or upon any such ship or ships, goods or merchandizes, shall be *ipso facto* void.” It is in my opinion impossible to say, that an insurance on a steam vessel against fire was not distinctly and precisely within the language of this act of Parliament; and there is another circumstance to which I wish particularly to advert, which is this,—that fire is one of the risks expressly mentioned in all policies of insurance, according to the form that now exists, and as far as relates to that part of the case, existed at the time when this act of Parliament was passed. It not only comes expressly within the words of the act of Parliament, but within the terms of policies in use at the time. It appears to me therefore impossible, merely because some alteration has taken place with respect to the mode of propelling vessels of this description at sea, to say that cases of that kind do not come within the meaning and language of this act of Parliament. [557] It appears to me, with all respect and deference, (and I entertain the greatest respect and deference for the learned Judges by whom this is decided,) to be a proposition which cannot be supported. But at the same time that I state that decision to be in my opinion erroneous, I do not undertake at this moment to say whether on other grounds the judgment may not be sustained: and if your Lordships should be of opinion that on other grounds the judgment may be sustained, whether the House ought to decide at once upon the case as it at present stands, or whether it should be remitted to the Court in Scotland, for the purpose of calling upon the Tribunal there to come to a decision upon the point, which they seem to have avoided deciding, and to have cut the matter short by deciding the case, upon the ground open to the objection, as it appears to me, to which I have referred, that is a question on which I have not yet made up my mind. I have had some consultation with a noble and learned Lord, at present in the neighbourhood of this House: he thinks it is a question which deserves consideration, and I will endeavour to-morrow to give my opinion upon it, if I am in a condition, with propriety, to

propose to your Lordships a judgment on the materials at present before you, without remitting the case to the Court below, in order that the Court below may come to a determination and decision on the question,—whether this is to be considered as an English or a Scotch contract. If I am, on the materials before me, authorized to propose to your Lordships a judgment, and it will be proper for this House to give a judgment on those materials, without calling on the Court [558] below to pronounce their judgment upon the question I am ready to state my opinion: what that opinion will be, I will not at present anticipate, but I am prepared to give that opinion on the point of form. I feel desirous that this case should stand over, for the purpose of giving me an opportunity of considering that question, till to-morrow.

(27th June.) After looking at the papers, and attending to them throughout, I should recommend to your Lordships to decide, that on the ground upon which the Court below pronounced their judgment, it cannot in point of law be sustained; but upon the whole, looking at all the papers, and the proceedings which have taken place in the Court below, and the transaction itself, there is, I conceive, sufficient to justify your Lordships in affirming the judgment, though on a different ground.

The circumstances of the case are these:—There is a Company in London called the Albion Fire and Life Insurance Company; that Company is so constituted, that, according to the law as it existed by virtue of the act of 6 Geo. 1. c. 18. it is incompetent to effect insurances upon ships and merchandizes at sea; that is a point which is admitted in the case, and with respect to that it is not necessary I should make any further observation. This Company has an establishment at Glasgow, and a regular office at Glasgow, called the Albion Fire and Life Insurance Office, and they have a person attending there as their agent, a person of the name of Thomas Hamilton. They had been in the habit of entering into contracts and engagements to a considerable extent in Glasgow. When I say they had been in the [559] habit of entering into contracts and engagements to a considerable extent, I mean contracts and engagements similar to those which are the subject of the present inquiry. There were certain persons, who are the Respondents in this appeal, residing in Scotland, who were the owners of a steam vessel called the *Robert Bruce*. The owners of this vessel were desirous of insuring her, and they applied for that purpose to Mr. Hamilton, at the office at Glasgow, and upon their application at the office in Glasgow, the contract to which I will call your Lordships' attention, was entered into in these terms—"Albion Fire and Life Office,—Glasgow, 4th of July, 1820.—James Dennistoun, William Mills, Colin Arrot, James Moffat, John T. Alston, Esquires, as a committee of management, for themselves and others; having this day effected an insurance of £6000 with the undersigned, on behalf of the Albion Fire and Life Insurance Company, London, on the property specified in the check corresponding with this memorandum, a policy will be forthwith prepared at the office in London for the said insurance, and such policy will be delivered to the assured, or to his, her, or their order, on the third Monday in the ensuing month, or on any subsequent day. (Signed) P. THOMAS HAMILTON, Agent for the Company, ROBERT MITCHELL. Premium £31 10s.—Duty £9."

This contract was drawn up at Glasgow, dated at Glasgow, and signed at Glasgow, by Hamilton, who was the agent for the Company. According to the ordinary course of business, Hamilton communicated this transaction to his principal [560] in London, and a policy of insurance was sent down to the office at Glasgow. It was not sent within the period limited by the contract, for it was not sent till the month of September, the contract having been entered into in the month of July. Any person looking at that contract must see, that it is in its form a general contract of insurance; that is, a contract for a policy, which shall be a general policy of insurance. There is no limit whatever, as to the places to which the contract is to extend; there is no exception in the contract; there is nothing expressing that when the policy comes down, it shall contain a clause, that the insurance is to be suspended while the vessel is at sea. It is a general contract of insurance; or rather they undertake that a general policy of insurance shall be executed. The policy of insurance that was sent down to the agent at Glasgow, (an insurance on the steam vessel against fire,) contained this clause, "this policy of insurance to be suspended and remain out of force, during the time the steam boat may be at sea." This policy of insurance,

however, remained in the office of Hamilton. There is no evidence that it was ever shewn to the parties insured, nor any evidence to shew that the fact of this clause of exception, was ever communicated to them. Thus the transaction went on for a year.

At the expiration of the year, or shortly before that time, the Respondents applied to Hamilton, the second time, to extend the insurance another year; they paid Hamilton the premium of insurance for another year. There is no evidence to shew that the policy was then communicated to [561] them; there is no evidence whatever of that fact. On the contrary, there is evidence of a different description. There is no evidence to shew that the exception in the policy, was at that time, or any previous time, communicated to the assured. The money was received by Hamilton, and a memorandum given that the policy had been renewed.

A short time after the renewal of the policy, the vessel was destroyed by fire, on her passage from Liverpool to Dublin, and the persons who thus considered themselves assured by this contract, applied to Hamilton, for the payment of the loss. The answer they received was this: You are not entitled to recover: for if you advert to the policy, you will find there is an exception in the policy: the policy is not to have operation during the time the vessel is at sea. The assured upon this commenced proceedings, for the purpose of recovering the amount of the loss. Their proceedings were in the first instance instituted before the Judge Admiral, and the judgment was against the insured. It is unnecessary for me to enter into the terms of that judgment, for afterwards the proceedings came before the Court of Session.

On this question coming before the Court of Session, it was considered that there were two points:—One point was the question of fact, as to what the nature of the insurance was:—the other was the question of law, to which I yesterday alluded, and to which I shall again call your Lordships' attention. It was conceived that the question should be remitted to the Jury Court: it was so remitted, and the issue I am about to [562] read, was that which was drawn up for the purpose of the trial. It is in these terms, "whether the Defenders promised and agreed to insure the Pursuers to the extent of £3000, or about that sum, from all loss and damage which might be caused by fire to the said steam vessel while at sea, as aforesaid: and whether the Defenders have failed to perform the said promise and agreement, to the loss and damage of the Pursuers." The question turned entirely upon this part of the issue, namely, whether the agreement to insure extended to the period while the vessel was at sea. The cause came on for trial: the evidence was heard, and a verdict was found for the Pursuers. Exceptions were taken to the evidence, in the process of the trial. These were afterwards embodied into a bill of exceptions, which was signed by the learned Judge, who presided in the Court: and has been printed in the papers, which have come before your Lordships for your consideration.

It appears to me, on looking at the exceptions, that there is only one material point to which it is necessary to call your Lordships' attention. It was said, and justly said, that where there is a written agreement to insure, a preparatory agreement, and afterwards a policy of insurance is effected in pursuance of that agreement, it is the policy which is the contract between the parties. The ordinary course of proceeding in the City of London is, that a slip is in the first instance signed, and after that slip is signed a policy is effected, and it is the policy which is the contract, and the slip cannot be adverted to for the purpose of explaining the meaning of the [563] parties. It was argued that no contract had been entered into at Glasgow, that it was an agreement for a policy, that the policy had been afterwards executed, and that must be considered, having been sent down to Scotland, to be the agreement between the parties. But there was this fallacy in that argument, the Pursuers brought their action upon the agreement as entered into by Hamilton, as signed by Hamilton. What was that agreement? That was an agreement for a general insurance. It was an agreement that a policy should be executed. That policy to be executed was to conform to the agreement. The policy had, it is true, been sent down, and if the parties had agreed to it, that would have bound them. But that policy did not conform to the original agreement: it was never communicated to the parties that there was an alteration, and if the agent agreed to a general insurance that being within his duty as agent, it was imperatively his duty under those circumstances to communicate to the assured, that the policy having come down, the parties in London did not conceive themselves authorized in execut-

ing a general policy, but only a policy with the exception to which I have referred. No such communication was made by Hamilton, and therefore the owners of the vessel never adopted that, for they never knew it.—What then did they feel themselves justified in saying? It was this—We have entered into an agreement with your agent at Glasgow, for a policy of a particular description: you have never fulfilled that agreement:—you have received our money by which you bound yourselves to send down a [564] general policy: instead of that you have sent down another policy, and we call upon you to fulfil that agreement.—That was the nature of the action.

But this agreement was only for the year, and at the expiration of the year, as I have stated to your Lordships, an application was made to the Company to renew the policy: and if the policy had been shewn at the time of the renewal, the policy would have been the contract. But when it was renewed nothing was said by Hamilton about the terms of it, nor was it shewn to the assured. When, therefore, the money was paid for the renewal, according to every principle of equity—(and this Court had jurisdiction both legally and equitably) according to every principle of law and equity and justice this renewal had reference to the original agreement, and they ought, therefore, to have executed it conformably to the stipulations of the original agreement. When, therefore, it was contended as it was strenuously in the Jury Court, that the Court had no authority to look into any thing but the policy, that was rightly over-ruled: and when it was repeated at your Lordships' bar, it was impossible not at once to feel the fallacy of it, for it was clear that a policy was sent of a different description from that stipulated, and that it was not communicated to the parties that the agreement had not been fulfilled. The Jury, therefore, were in my opinion, justified in the verdict they found, and when we dispose of this general question on the bill of exceptions, it appears to me unnecessary to refer your Lordships to the other grounds of objection, stated in the bill of excep-[565]-tions, because I think your Lordships will be of opinion, that if the way in which I am putting the question is the correct mode of deciding it, they are of little consequence in the decision of this case.

The question of fact being disposed of, the next in consideration was the question of law—it was said that they could not recover on this policy. Why? Because by the 6 Geo. I. c. 18, the monopoly of insurance by Companies on ships and merchandize at sea, is given to two particular Companies; namely, to the London Insurance Company, and to the Royal Exchange Assurance Company, and that, therefore, that contract was altogether void, whether it was an agreement for a policy, or a policy executed:—that the act of Parliament was a bar, the act of Parliament declaring that all policies executed by six persons other than those companies, shall be absolutely null and void.

The first question which arose in the discussion was this, and a very important general question it was: Does that act extend to Scotland? that is, does that part of the act to which I have referred extend to Scotland? The act was passed with two views; it is the act generally called the Bubble Act: it was an act for the purpose of preventing those wild speculations which had currency at the period to which I have referred, and that part of the act specifically extends to Scotland: for it is stated in the body of the act, that the penalties which shall be imposed for the violation of that part of the act, shall be recovered in the Courts of Edinburgh, Dublin, or London. It is clear, therefore, that that part of the act was intended [566] to extend to Scotland. But with respect to the other part, it is quite different. In the first place it is a little too strong to suppose that only these two English Companies could be intended to have a right to insure, not confined to England only, but extending to other parts of the kingdom: there is, in respect to that question, this important distinction, that the penalties are recoverable only in the Courts of Westminster, and it is impossible not to see that that part of the act of Parliament was intended to apply only to England. That point being decided, I conceive your Lordships will think yourselves justified in concurring in the judgment of the Court below.

Another question, very important in its nature, a question of law, was raised. There is an English Company it is said effecting an insurance, an English contract, and although this act of Parliament may not extend to Scotland, this is an insurance by an English Company, and therefore it is argued that it would be mere evasion to

say that the parties in this case could recover on this in Scotland. This turns entirely on the question whether or not this was an English contract, or a Scotch contract. The way in which it was argued at the bar, and in the Court below, appears to me very fallacious. It was analogous to the argument, to which I have already referred, which was raised in the Jury Court, that the Policy is to be considered as the contract, and that the Policy was executed here by the Company, and if the Policy were the ground of action, the proceeding on a Policy so executed in London, might admit of doubt and question. But that is [567] not the case here. What is the nature of the action? Here is a contract entered into, not in London, but in Glasgow: written in Glasgow, dated in Glasgow, and subscribed in Glasgow, the consideration paid in Glasgow, at the office established, and for a long time established in Glasgow. Why is it then to be said, that that contract, I mean the original contract, was not a contract in Glasgow? If I send an agent to reside in Scotland, and he in my name enters into a contract in Scotland, the contract is to be considered as mine, where it is actually made. It is not an English contract, because I actually reside in England; if my agent executes it in Scotland, it is the same as if I were myself on the spot, and executed it in Scotland. The original contract, therefore, must be considered as a contract entered into in Scotland, and it was that original contract, and not the Policy, which was the ground of action: the action was brought for the infringement of that contract. You agreed to give me a general Policy, you did not give me a general Policy, I call upon you therefore for damages. It is said that the Insurance Company could not comply with that agreement, for that they could not have a general Policy. But if that is so, what had the assured to do with that? The agent stipulated to do it, if the directors in London could not do it. It is my opinion, that the agent in Glasgow might have made a valid Policy; but that if he could not have made a valid Policy, they are bound to make compensation for the breach of that contract so entered into in Glasgow. They were bound, in my humble judgment, by that contract by which they engaged [568] to effect a Policy of a particular description, which they have not done; and not having done that, they are bound to make compensation to the party, in respect of all the loss he had sustained by their not having done so: the party being entitled to consider the case precisely as if the agreement had been executed.

Then with respect to the renewal of the Policy. What sort of a renewal was that to be? Here is an agreement to execute a valid Policy: the party insuring was entitled to consider that as a Policy, an undertaking to do that which was to be done. The rule operates upon that which the party agreed to do, and which a Court of Equity considers as already done, and therefore it is a renewal of a Policy having effect in Scotland. I am happy to say, that although the Court of Session were not unanimous upon this point, three of the judges were of opinion that this was to be considered as a contract in Scotland, and the Pursuers declared upon it as a contract so framed, a contract to be executed in Scotland. The other learned judge seemed to entertain a contrary opinion, and it was in consequence of the judges of the Court below differing in opinion upon this point, that they were led to do that which I think they were not justified in doing, namely, to decide the question on another point, which I consider as utterly untenable, the judges below having declared, that according to their opinion, this act of Parliament which prohibits all Companies from making insurances on ships and merchandizes at sea, does not apply to the case of a steam vessel. I stated to your Lordships yesterday my reasons for differing in opinion [569] from those learned judges, with respect to that point; and I do that with the utmost deference and the utmost respect. From all I have seen as to the judgments of those learned judges, I am led to entertain the highest respect for their knowledge and their attainments, but I am bound here in advising your Lordships in reference to the judgment here to be pronounced, after paying every attention to the subject, to act according to the result of my own opinion. I think that the grounds on which the learned judges decided this case in the Court below, cannot be sustained, but that upon the proceedings and the evidence, it is clear that the Pursuers are entitled to recover: they are entitled to recover upon the principle of this being an agreement for an insurance entered into in Scotland—a contract made in Scotland. The act of the 6th Geo. I. c. 18, not extending to Scotland, the contract is a valid contract, and the Plaintiffs are entitled to recover damages, for the purpose of affording them compensation for the loss they have sustained by the breach of that agreement.

On these grounds, I should suggest that the judgment be affirmed, not in the terms in which it has been pronounced; but that, in your Lordships' opinion, the Pursuers have made good their claim. The form of the judgment shall be prepared, and I will on a future day submit it for the opinion of your Lordships.

[570] (27 June, 1828). It is declared, that although this House is of opinion that the insurance upon which the Respondents sought to recover damages, is a species of insurance to which the statute 6th Geo. I. c. 18. does apply; yet inasmuch as this House is of opinion that the said statute, as to that part of it to which the interlocutor of the Court of Session of the 22d of January refers, does not extend to Scotland, the said appeal upon the facts of this case ought to be dismissed, and the interlocutors affirmed. It is therefore ordered and adjudged that the appeal be dismissed, and with the above declaration, that the several interlocutors complained of be affirmed.

REPORTS of CASES heard in the House of Lords, upon Appeals and Writs of Error, and decided during the Session 1829. By RICHARD BLIGH, Barrister-at-Law. Vol. III. New Series.

IRELAND.

(EXCHEQUER CHAMBER.)

RICHARD BALL, a Minor, by HENRY WEMYSS, his Uncle and next Friend, -
Plaintiff in Error; PATRICK MANNIX, Lessee of Laurelot Shinton Ball,
Defendant in Error.

[Mews' Dig. iv, 81; S.C. 1 Dow and Cl. 380. The modern test of contractual capacity in the case of insane persons and of persons of weak capacity is given in *Imperial Loan Co. v. Stone* (1892) 1 Q.B. 599. See also *Balby v. Smith* (1900) 1 Ch. 588, as to lunatic; and notes to *Huguenin v. Bassey* (1 Wh. and T. L. C. 7th Ed. 247) as to undue influence.]

By a deed in 1762, lands were conveyed to the use of the grantor for life, and after his death in trust for D. S. his daughter, the wife of R. S.; and after her death, to the first and other sons successively of D. S. by R. S., with remainders over, and subject to a power of revocation. In 1763 the grantor, by a will made in execution of the power, directed and desired that if there should be no issue male of the existing marriage, the lands should stand limited (subject to the dispositions of the deed of 1762) to the first and other sons of his daughter, by any other husband.

R. S. died in 1778, leaving D. S. his widow, and four sons surviving. Soon after his death, D. S. married R. B., by whom she had a son A. B.

J. S. the eldest son of the first marriage, having been from his infancy a person of weak capacity, in the year 1785, as soon as he came of age, joined with his mother and father-in-law, [2] as party to a deed, by which reciting his title as tenant in tail in remainder, subject to his mother's life interest in the lands, and an agreement which had been made for providing thereout, a present maintenance for him; and that the younger children of his mother had been left without provision by the deed of 1762; and further reciting certain expenditure made on the premises by R. B. the husband of his mother, for the benefit of the inheritance, the lands were assigned to trustees for a term of five hundred years, in trust to secure to J. S. an annuity of £ , and subject thereto to the use of the mother for life; remainder to R. B. for his life, remainder to trustees for a term, to raise portions for the younger children of D. M. his mother, and subject thereto to the use of J. S. and the heirs male of his body, and in default of male issue to such other of the children of D. M. as she should appoint, and in default of appointment, to R. S., E. S., and A. B., three of her children; remainder to her right heirs.

A fine and recovery were levied to give effect to this deed, which was registered in 1789.

J. S. died in 1794. In 1800, L. S., the second son of the first marriage, filed a bill in Chancery against R. B. and D. his wife, to establish the deed of 1762, and to set aside the deed 1785 on the ground of fraud. This bill was dismissed by the plaintiff in 1805.

By deed in 1803, D. the mother, appointed the lands to A. B. her youngest son, subject to the payment of annuities. In 1809 the lands were, by deed executed on the marriage of A. B., settled on the husband and wife, and the issue of the marriage, notwithstanding notice given to the parties by L. S. of his claim.

R. B. died in 1813. A. B. died in 1814, leaving a son. D. the mother died in 1818. Upon this event, L. S. brought an ejectment against the parties in possession under the deed of 1785. This ejectment was not prosecuted, but in 1821 L. S. being dead, an ejectment was brought against the same parties by his son. Upon the trial it was agreed between the parties, that the sole question should be, whether the deed of 1785 was void at law as the deed of J. S. It was sworn upon the trial by some witnesses, that J. S. was not competent at the time of executing the deed, and they spoke to acts and conduct evidencing mental incapacity. On the other hand, it was by others sworn, that he was competent to execute. It was admitted that the incapacity did not arise from lunacy,—no evidence having been given of lunacy.

[3] The Judge, in his charge to the jury, told them that the question for them to try was, whether J. S. was a person of sound mind or not, and that to constitute such unsoundness of mind as should avoid a deed at law, the person executing such a deed, must be incapable of understanding and acting in the ordinary affairs of life, that it was not necessary that he should be without any glimmering of reason, and that as one test of such incapacity, the jury were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him. To this direction a bill of exceptions was taken, upon the ground that the Judge refused to tell the jury that in order to avoid the deed at law, the unsoundness of mind must amount to that which constitutes idiocy according to the strict legal definition of an idiot.

Held that this direction was right, and that the case could not be argued or decided upon an objection that the direction was too general and vague, because such objection was not taken at the trial, and did not form part of the bill of exceptions.

In the year 1762, John Ball was seised in fee of the town and lands of Bannagh-nough, otherwise Three Castles, Neaglesland, Boards, and Pricksheath and Monabricka, lying in the parish of Bannagh-nough, otherwise Three Castles, in the barony of Cranagh and county of Kilkenny.

Dorothea Margaret Ball, his only child, intermarried privately with Richard Shinton.

For the purpose of making a provision for Dorothea Margaret and her issue, independently of her husband, John Ball executed an indenture of release upon the 10th of July, 1762, by which he granted, released, and confirmed the said town and lands to certain trustees, in trust to the use of himself for life, remainder to his daughter Dorothea Margaret for life, remainder to her heirs in [4] tail male, with divers remainders over, reserving a power to alter these limitations by deed or will.

On the 6th of March, 1763, John Ball, by his will, after charging the town and lands with an annuity of £100 per annum to his wife during her life, devised and directed as follows: "And I hereby devise, and direct and declare, that the said trustees mentioned in the said deed of the 10th of July, 1762, shall as far as the law can permit, be deemed and taken to stand seised of my estate vested in them or granted to them, in the first place, to the uses of this my will: and that they do every act in their power to establish and fulfil the same; and my further will is, that as there are now seven years of a lease of the house and gardens and seventy acres of land to come, commencing from the 25th of March, 1763, to Folliot Warren, Esq. that at the expiration of the said lease my daughter Dorothea Margaret Shinton may live in said house, and may have said number of acres during her life, but not her husband or any one of their family after her decease: but to be set by my said trustees after her decease, to the best improved rent for the benefit of her children, nor shall the said Shinton have any power during said Dorothea Margaret's life to turn, plough, or cut down any oak, ash, elm, hazle, or apple trees or hedges whatsoever, or on any account, and to keep up the improvements for the benefit of her children." By this will the testator also made a large provision for the younger children of his daughter.

John Ball died soon after executing this will.

In the year 1778, Richard Shinton, the husband [5] of Dorothea Margaret, died, leaving issue, John, their eldest son, who was from his infancy weak in mind; Lancelot, their second son, the father of the Defendant in error; Richard, their third son; George, their fourth son, and an only daughter, Dorothea. All these children took the name of Ball.

Soon after the death of Richard Shinton, Dorothea Margaret intermarried with Richard Ball, for many years a practising attorney, by whom she had an only son Abraham, who was the father of the Plaintiff in error.

By deed, dated October 17, 1785, and executed by and between Richard Ball and Dorothea Margaret, his wife, of the first part, John Shinton Ball of the second part, the Reverend Wardlow Ball, clerk, and Serjeant John Ball of the third part, John Humphrey of the fourth part, and Samuel Foley of the fifth and last part, reciting the title of Dorothea Margaret and John Shinton Ball to the said estate, and an agreement entered into for providing a present maintenance for him thereout, and that the younger children of Dorothea Margaret had been left wholly without any provision by the former deed; and further reciting the expenditure made by Richard Ball on the house and demesne, for the benefit of the inheritance, Richard Ball and Dorothea Margaret, his wife, and John Shinton Ball, joined in assigning the said lands and estate to Wardlow and John Ball, to the use of John Humphrey, for a term of three hundred years, in trust to secure the maintenance and present provision for John Shinton Ball, payable quarterly, and subject thereto to the use of Dorothea Margaret, without impeachment of waste, for her life, with remainder to Richard Ball for [6] his life, in like manner with remainder to Samuel Foley for a term of five hundred years, in trust to raise the portions so agreed to be provided for the younger children of Dorothea Margaret, and subject thereto to the use of John Shinton Ball, and the heirs male of his body; and in default of such issue, to the use of such other of her children, and for such estates therein, as Dorothea Margaret should by deed or writing, under her hand and seal, and attested by two or more credible witnesses, or by her last will, direct and appoint; and in default of such direction and appointment, to the use of Richard Shinton, George Shinton, and Abraham Ball, three of her children, share and share alike as tenants in common in tail general; and for default of such issue, with remainder to the right heirs of Dorothea Margaret for ever. And the deed, after reciting that a fine with proclamation had been levied in the preceding Trinity term, of the lands, by Richard and Dorothea Margaret Ball, and John Shinton Ball, to Wardlow Ball, directed that the fine should enure to make him a perfect tenant to the precipe of the lands, that a common recovery might be suffered thereof by the said parties, in order to bar all estates tail and remainders therein, and to enure to the uses declared by the said deed, and reserved a joint power of revocation of the said uses and trusts, and of new appointment of others in their stead, to Richard and Dorothea and John Shinton Ball, during the lives of Richard and Dorothea; and to John Shinton Ball, and the survivor of Richard and Dorothea Margaret, during the life of such survivor. This deed was registered on the 21st day of October, 1789.

[7] The recovery was suffered by John Shinton Ball as of Michaelmas term, 1785, by virtue of a warrant of attorney duly executed by him for the purpose, in which recovery Thomas Ball was defendant, and Wardlow Ball was tenant to the precipe, who appeared and vouched John Shinton Ball, who appeared by his attorney and vouched the common vouchees.

John Shinton Ball died in the year 1794, and his brother Lancelot Shinton Ball exhibited his bill in the Court of Chancery in Ireland upon the 24th of December, 1800, against Richard Ball and Dorothea his wife, stating the settlement and will of John Ball, the imbecility of John Shinton Ball, and that fraud was practised upon him, and praying that Richard and Dorothea might bring into Court the deed of 10th July, 1762, and that the trusts thereof might be performed, and that the fraudulent deed might be set aside, and that the fine and recovery might enure to the uses of the deed of 1762.

This bill was afterwards dismissed at the instance of the Plaintiff.

By deed dated May 14, 1803, Dorothea Margaret Ball, in pursuance and execution

of the power reserved to her by the deed of the 17th of October, 1785, limited and appointed the lands, after her own and her husband's death, and subject to the trust terms thereby created, to the use of her youngest son Abraham Ball and his heirs, subject however to and charged with an annuity of £40 yearly to Richard Shinton, her third son by her first husband, for his life; and a further annuity of £30 yearly to her daughter, Dorothea Shinton, for her life, payable thereout.

[8] Abraham Ball afterwards intermarried with Jane Wemyss, in consideration of which marriage, a settlement, dated April 4, 1809, was executed by and between Richard Ball and Dorothea Margaret, his wife, of the first part, Abraham Ball of the second part, James Wemyss, and Jane his daughter, of the third part, and the said James Wemyss, Sir John Blunden, Bart. and the Rev. Sterne Ball, clerk, of the fourth and last part, whereby the said lands and premises were settled and limited to the uses of the said marriage, viz. to provide a present maintenance for Abraham Ball, and a jointure for his intended wife, and subject thereto after the decease of the said Dorothea Margaret and Richard Ball, to Abraham Ball for his life, and after his death, to the use of the issue of the said marriage, subject to his appointment by deed or will as therein mentioned.

The marriage afterwards took effect, and there was issue born thereof, Richard Ball, the Plaintiff in error, and two daughters, Martha and Dorothea.

Richard Ball died in 1813, leaving his wife, Dorothea Margaret, surviving him.

Abraham Ball died in 1814, leaving his three children surviving him, and without having exercised the power of appointment given him by the deed of the 4th of April, 1809.

Dorothea Margaret Ball died in 1818; upon her death, Richard Ball, the Plaintiff in error, and his sisters, took possession of the estate.

Immediately after the death of Dorothea Margaret, Lancelot Shinton, her second son, the father of the Defendant in error, as of Michaelmas term 1818, brought an ejectment in the Court of Exchequer to recover the possession of the lands [9] and laid demises therein in his own name, and in the names of several other persons, in whom the legal estate in the premises might be considered to be outstanding; defence was taken to this ejectment for all the premises therein in the names of the Plaintiff in error and his sisters, and the cause being at issue, a consent was entered into between the parties therein, limiting the issue to be tried between them to the sole question of the competence of John Shinton Ball to execute the deed of the 17th October, 1785.

The issue in the cause came on to be tried before a special jury of the County of Kilkenny, at the summer assizes 1819, when after the Plaintiff had gone through his case, and three witnesses having been examined for the Defendant, a compromise was proposed and agreed to on both sides, and made a rule of the Court, and the jury was discharged by consent without giving any verdict.

Launcelot Shinton having subsequently refused to abide by the compromise, and to fulfil its terms, and having proceeded to bring another ejectment to recover possession of the lands in the Court of King's Bench, and obtained judgment by default therein, a conditional order was obtained from the Court of Exchequer for an attachment against him for his contempt of the Court in so proceeding under the circumstances, unless he should forthwith vacate the judgment.

Launcelot Shinton having subsequently refused to abide by the compromise, and to the order could not be served upon him in person, and in February 1821 he died without having been served therewith, leaving the Defendant in error his eldest son and heir at law, who immediately thereupon as of [10] Hilary term 1821, brought an ejectment for recovery of the lands in the Court of King's Bench in Ireland, on his own and other demises, to which ejectment defence was taken in the name of the Plaintiff in error.

In the following year the father of the lessor of the Defendant in error died, and in the next year an ejectment was brought by the Defendant in error against the Plaintiff, which came on to be tried at the assizes for the county of Kilkenny, on the 4th day of August, 1823, when (as the record bears) it was admitted and agreed by the counsel concerned for the parties on each side, that the sole question to be tried should be, "Whether a certain deed executed by the said John Shinton Ball in his lifetime, bearing date the 17th day of October, 1785, was or was not valid at law, as the deed of him the said John Shinton Ball, which deed had been executed by the said John Shinton Ball and the other parties thereto, for the purpose

of leading the uses of a certain fine and common recovery levied and suffered by the said John Shinton Ball in his lifetime, of the lands in the said ejectment mentioned, as remainder-man in tail thereof, in conjunction with his mother Dorothea Ball, the preceding tenant for life of the said lands, and that if the said deed should be found to be not valid, as the deed of the said John Shinton Ball, that then a verdict should pass for the lessor of the Plaintiff in this case as heir male of the body of Laurelot Shinton his father, deceased, who in his lifetime was next remainder-man in tail of the said lands, and in such right entitled to the said lands on the death of his mother the said Dorothea, the te[11]-nant for life, (the said John Shinton Ball his elder brother being then dead, without lawful issue of his body,) and on the other hand, if the said deed should be found to be valid as the deed of the said John Shinton Ball, then that a verdict should pass for the Defendant; and it was further admitted and agreed by the counsel on each side for the said parties, that the said John Shinton Ball had died in the month of December 1791, and had not left any lawful issue of his body, and that Richard Ball, the second husband of the said Dorothea Ball, had died in the year 1813, and that the said Dorothea had died in the year 1818, leaving the said Laurelot Shinton, the father of the lessor of the Plaintiff, her then oldest surviving son by her first husband, and Abraham Ball, father of the Defendant, her son by the said Richard Ball, her second husband, her surviving; and the counsel for the lessor of the Plaintiff having thereupon opened the case in his behalf in order to maintain the said issue, on his part produced several witnesses, who being duly sworn deposed, that the said John Shinton Ball at the time of his executing the said deed, was not, in their opinion, competent to execute the same, and further deposed to acts and conduct of the said John Shinton Ball, as evidencing his mental incapacity, and having given such evidence, and the said deed of the 17th October, 1785, having been read in evidence, the said counsel thereupon closed the Plaintiff's case; and the counsel for the Defendant thereupon, after stating the case on his behalf, called several witnesses to maintain the issue on his part, who being [12] sworn and examined deposed, that in their opinion the said John Shinton Ball at the said time was competent to execute the said deed, and further deposed to acts and conduct of the said John Shinton Ball as evidencing his mental capacity, and deposed that the said John Shinton Ball was certainly not an idiot; and thereupon the case and evidence having been closed on both sides, and it having been admitted and agreed by the counsel for each of the parties, that the alleged incapacity of mind of the said John Shinton Ball did not arise from lunacy, no evidence having been given of lunacy in him, the learned Judge in his charge commented and observed upon the evidence given on each side, and told the jury, that the question for them to try was, whether the said John Shinton Ball was a person of sound mind or not; and that to constitute such unsoundness of mind, as should avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life; that it was not necessary that he should be without any glimmering of reason, but that it was sufficient if he was incapable of understanding his own ordinary concerns, and that as one test of such incapacity, the jury were at liberty to consider, whether he was capable of understanding what he did by executing the deed in question when its general purport was fully explained to him; whereupon the counsel for the Defendant in the action called on the learned Judge, and required him to tell and direct the jury, that in order to avoid said deed at law, the unsoundness of mind of the said John Shinton [13] Ball must amount to that degree of unsoundness which constituted idiocy according to the strict legal definition of an idiot. But the learned Judge refused so to tell or direct the said jury on the said trial, but, on the contrary, directed them as before stated; wherefore the counsel for the said Defendant on his behalf excepted to the said opinion and direction of the learned Judge on the said trial; and, at the request of the counsel for the Plaintiff in error, the learned Judge who presided at the trial put his seal to a bill of exceptions to the above effect, tendered by them.

The matter having been argued upon the exceptions before the Court of King's Bench in Ireland, that Court, on the 8th February, 1825, overruled the exceptions, and judgment was thereupon entered for the Defendant in error.

The Plaintiff in error being dissatisfied with this judgment of the Court of

King's Bench, brought his writ of error returnable in the Exchequer Chamber in Ireland, insisting "that in the record and proceedings aforesaid, and also in the matter recited and contained in the bill of exceptions, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the Honourable Mr. Justice Jebb, the learned judge before whom, and so forth, at and upon the trial of the issue so joined between the parties aforesaid, did direct and tell the jury so impanelled to try the issue, that the question for them to try was, Whether the said John Shinton Ball was a person of sound mind or not, and that, to constitute such unsoundness of mind as should avoid a deed at law, the person executing such deed must [14] be incapable of understanding and acting in the ordinary affairs of life. That it was not necessary that he should be without any glimmering of reason, but that it was sufficient if he was incapable of understanding his own ordinary concerns; and that as one test of such incapacity, the said jury were at liberty to consider whether he was capable of understanding what he did by making the deed in question, when its general purport was generally explained to him: And there is also error in this, to wit, that the learned Judge, upon the trial of the issue, did refuse to tell and direct the said jury, though called upon so to do by counsel for the said Richard Ball, that in order to avoid the deed so executed by the said John Shinton Ball at law, the unsoundness of mind of the said John Shinton Ball must amount to that degree of unsoundness of mind which constituted idiocy, according to the strict legal definition of an idiot. And there is also error in this, to wit, that by the record aforesaid it appears that the verdict aforesaid was given upon the issue for the said Patrick Mannin, whereas the verdict, by the law of the land as to the issue, ought to have been given for the said Richard Ball," etc.

The case was argued before the Court of Exchequer Chamber in Ireland, upon the 15th day of June, 1826, when the Judges gave their opinions *seriatim*, six of them being of opinion that the judgment should, and the remaining six that it should not be reversed: whereupon, according to the practice of the Court, the judgment remained undisturbed and was affirmed. Richard [15] Ball then brought his writ of error returnable in Parliament, and assigned for errors the several matters on which he insisted before the Court of Exchequer Chamber in Ireland, to which the said Patrick Mannin rejoined that there was no error.

For the Plaintiff in Error: Mr. Sugden and Mr. Swan.

There are only four kinds of insanity known to the law, lunacy, idiocy, accidental loss and wilful deprivation of understanding (Co. Litt. 248, a. *Beverley's Case*, 4 Co. 124). This case does not fall within the two last divisions, and lunacy being excluded by agreement, the question is confined to idiocy. In the cases of drunkenness and blindness, and where the question is as to the degree of understanding, the courts proceed on the ground of fraud, which is a good objection at law as well as in equity. There are cases peculiar to equity, which proceed on equitable grounds (*Osmond v. Fitzroy*. Citing *Johnson v. Medlicot*, 3, P. W., 130). The judgment in this case seems to have proceeded on the principles applied in commissions of lunacy and in courts of equity, which is a different species of jurisdiction; and even in those cases the jury must find that the person is of unsound mind,—it is not sufficient to find that he is of weak judgment and understanding, and incapable to manage his affairs, and formerly commissions were not granted upon this ground (*Exp. Barnsley*, 3 Atk. 168. Lord Donegal's case, 2 Ves. 407. See *Ridgway v. Darwin*, 8 Ves. 65).

[16] Where courts of equity make deeds void on the ground of weakness of understanding, it is in cases where there is inadequacy of price, or undue influence, by parental authority or otherwise; and even in such cases effect is given to such deeds, so far as they are providently executed (*Bennet v. Vade*, 2 Atk. 324).

If insanity were the only ground, the case would be sent to a court of law. If weakness of understanding is the ground of proceeding, it is only one among other ingredients which in equity constitute fraud. To direct a jury to consider whether a man is capable of understanding a deed is a dangerous practice, and contrary to the practice on commissions of lunacy.

In *exp. Holmes* * the jury found that the party was "not competent," and the

* Before L. C. Lyndhurst, 23d Nov. 1827: a new commission issued on the 26th November, under which the party was found of unsound mind.

proceeding was quashed because the return was deemed insufficient. In *exp. Cranmer* (12 Ves. q. 415) the return was, that "he was so far debilitated in his mind as to be incapable of the general management of his affairs." This return was quashed for insufficiency: so a return in the words of the Judge's direction to the jury in this case would have been quashed. If the finding is not in the words of the commission, it must be in words of known legal import, that the party is of unsound mind. In *Ridgway v. Durin* (8 Ves. 65. See *Sherrwood v. Sanderson*, 19 Ves. 280), Lord Eldon ordered physicians to visit a lady whom a jury had found not to be a lunatic, for the purpose of determining whether her state of mind was competent to the [17] management of her affairs, with a view to personal control without a commission, and he said that, although it was not a case of insanity, he thought himself bound to do this, if it was only made out that it was not fit that she should have the management of her pecuniary affairs. But this is language unfit to be addressed to a jury, and the doctrine cannot be applied at law. The cases of supposed partial insanity* are in fact total:—the proof only is partial. At law the only question is, whether the party is of unsound mind. Before the Lord Chancellor the question may be, where insanity is not proved, whether the protection of the Court is not necessary for the individual. There is a case now before the Lord Chancellor, where the party has lost his faculties by age (*Exp. Clement*, still pending). The case of *Faulder* (3 Camp. 126, more full 1 Coll. Lun. 390) v. *Silk* is no authority for the Defendant, it is an authority for the Plaintiff. There the fact of lunacy was established prior to the execution of the bond, and the only question was, whether it was executed during a lucid interval. In this case the question of lunacy is excluded. The direction of the Judge was wrong, because it was not confined to idiocy, and because it induced the jury to look to the whole life of the party who executed the deed, not precisely to the particular time of execution.

In the case of wills, the question turns upon general capacity, and wills have been found void [18] where the testator would not have been found insane if living. The question as to deeds stands on different principles. That is a question between parties dealing for consideration, whereas in wills it is between representatives and voluntary donees.

The charge of the Judge is vague, uncertain, and calculated to mislead the jury. If the jury were satisfied that the party was capable at the time of executing the deed, they were not at liberty to enter into the question whether he was capable of acting in the ordinary affairs of life. The jury should have been directed to inquire, whether he understood the act, and to go no further. They were directed to try a question not before them. His general conduct was not a question at issue. He might have been prodigal, and apparently incapable of acting in ordinary affairs, yet not insane, and incapable of understanding and executing the deed in question. The great objection to the Judge's direction is, that the capacity to do the act is not put as the real criterion and distinct matter in issue, but only as one test to shew the soundness of his mind as to all the acts of his life. So that upon a question of purchase, no man could act safely without inquiring as to the whole conduct in a vendor's life. The question upon a direction to a jury, and the influence which it may have, is very different from the opinion of a judge, on a point of law. The direction is wrong both in what is directed and what is omitted.

For the Defendants in error: The Solicitor General and Mr. Jervis.

This case has been argued as if it were an application to the Court for a new trial, upon the ground of a general misdirection, whereas the [19] question is upon specific exceptions. The statute (W. 2, 13 Ed. 1) provides, "that the judgment shall be given according to the exceptions as allowed or disallowed." It was the object of the statute that the trial of the Judge should be limited to the precise exception. If new exceptions are to be argued, the Judge is treated unfairly. It has been decided, that a party is not at liberty to go into the general question (*Warre v. Miller*, 4 B. and C. 538). If the matter is on the record as a bad declaration, the whole record

* *Dow v. Clarke*. *Addams' Exc. Rep.* 3, 79. *Haggard's Judgment of Sir J. Nichol* before the Delegates, 1828. Before the L. C. on application for a commission of review, 1829, not repd. *Exp. Mitchell* heard before the Lord Chancellor in private.

being before the Court, it might be questioned. The question here was limited to the objection, that the Judge refused to direct the jury that in order to avoid the deed, the unsoundness of mind must amount to that degree which constituted idiocy. This raised the question, whether any incapacity short of idiocy could avoid a deed at law. But with this is now mixed up another part of the Judge's address to the jury, which should have been made the subject of exception, if the parties intended to avail themselves of any objection to it. The point was hardly raised in the argument of the case below, and, in fact, was not open for discussion even as to this point. The question put by the Judge is in substance whether the party was capable of understanding the deed which he executed, not merely as to the general propriety of his conduct.

The letter of the writ, in a commission of lunacy, requires the jury to inquire whether the party is lunatic or idiot, but now that form is disregarded, and it is held sufficient to find the party of unsound mind. Why should not a similar change be admitted in the practice at law.

[20] Other rules of law have undergone equal alteration. The rule as to access on a question of legitimacy. The rule that a man cannot stultify himself.* So drunkenness is a good evidence on a plea of *non est factum* and delivery, as an escrow may be given in evidence on the same plea. The real question is, whether the party is capable of understanding the deed he executes. The distinction between deeds and wills is not admitted. The question upon a will is, whether the testator has a mind capable of disposing of his property. The question upon a deed is substantially the same, and juries are always so directed in the case of deeds. The question in *Faulder v. [Silk]* was the same as this. The direction was there given with a greater latitude, and the inquisition was held to be evidence [3 Camp. 126].

Lord Tenterden: In forming an opinion upon this case, the House can only look to the bill of exceptions to ascertain the facts and questions for decision. Facts not there to be found must be wholly disregarded. Before I enter upon the substance of the question, it is right to advert to a topic so strenuously urged by the counsel for the Plaintiff in error, that six of the Judges were of opinion that the direction was calculated to mislead the jury. That is an argument which cannot prevail in this House. If all the Judges of Ireland were of one opinion upon this subject, and the House had entertained a different opinion, it would have been their bounden duty to act upon their own opinion. A court of error ought [21] not to be influenced by the judgment of those from whose decision the appeal is brought. (Here the noble Lord stated the substance of the record.)

The question arising out of this record is, whether the Judge's direction to the jury was correct.

It was argued by the counsel that the party was not a lunatic,—that is, that he was not at one time of sound mind and at another time unsound; but whatever the state of mind might be, that it was not temporary but permanent. The Judge told the jury that the question was, whether the party was of sound mind or not,—and that mode of stating the question was quite correct. He then proceeded to give a definition, "That to constitute such unsoundness as should avoid a deed at law, the party executing such deed must be incapable of understanding and acting in the ordinary affairs of life." In that, perhaps, he went too far. The Judge then directed the jury that "It was not necessary he should be without any glimmering of reason; and as one test of such incapacity, they were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him."

The counsel for the defendant then required the Judge to tell the jury, that in order to avoid the deed at law, the unsoundness of mind must amount to idiocy, according to the strict legal definition of an idiot; and this being refused, the bill of exceptions was tendered and sealed.

It is impossible to read this record without seeing that the point of the objection is this, and this only,—that it was erroneous to direct the jury [22] to make any

* 2 *Str.* citing *Thompson v. Smart*, 2 *Ventr.* See *Bridgman v. Holt*, *Shower's P. C.* *Thomson v. Leach*, 12 *Mod.* 173. *Salk.* 427, 675. See Lord Raymond, 313. *Comb.* 45.

other enquiry than this, whether the party was an idiot. If the Judge ought so to have directed, the direction given was erroneous: but it is impossible so to contend. The jury were in substance directed to enquire whether the party was of unsound mind: and I find that the Lord Chancellor, according to the authorities, has held that a finding in these terms is sufficient.

As to the strict legal definition, I find in an old book on this subject, that if a person is capable of learning the alphabet he is not within the legal definition of idiocy; yet it is impossible to hold that persons no further qualified are capable of executing a deed. The question at law is, whether, in substance, there is such capacity of execution: and, in effect, the Judge in this case so put the question to the jury, when he told them that the question was, whether the party was of sound mind or not, and directed them to consider whether he was capable of understanding the deed when explained.

The observation as to the glimmering, will not make the whole direction erroneous, nor was it irregular or improper when considered in connexion with the other parts of the direction to the jury. In my opinion it was right.

The objection that the direction was too vague, indefinite, or general, cannot be taken upon this record. Counsel intending to raise such objection, should call upon the Judge to give more specific direction, that he may have the opportunity of correcting his error.

Lord Plunket: I concur in the proposed judgment: it is unnecessary to assign the reasons. But as to the ambiguity of the direction, if that [23] is to be made a ground of objection, it should be distinctly stated to the Judge at the time, and put on the record. The ambiguity of the direction would then be a question for the consideration of the Court of error.

Judgment affirmed.

[24]

IRELAND.

COURT OF EXCHEQUER.

JOHN O'NEILL, Esq.—*Appellant*: The Right Honourable JAMES FITZGERALD, JAMES BURKE, and the GOVERNOR and COMPANY of the BANK of IRELAND,—*Respondents*.

[Mews' Dig. xi. 713.]

By the stat. 23 and 24th Geo. III. of the Parliament of Ireland, for securing the monies of suitors of the Courts of Chancery and Exchequer, by depositing the same in the National Bank, which provides for the appointment of an Accountant-General for the Court of Exchequer, it is enacted that "So long as he observes the rules thereby, or by the Court to be prescribed, he shall not be answerable for any monies which he shall not actually receive, but that the Bank shall be answerable for all monies deposited with them;" and regulations for the transfer of stock are specified in the act.

Under this act A. was appointed Accountant-General of the Court of Exchequer, in the year 1796.

In the year 1810, A. executed a power of attorney, authorising S. B. his chief clerk, to make transfers in the Bank books of any stock, of which A. should first have executed a transfer draft under his hand, on cheque paper, pursuant to the orders of the Court. This power was deposited at the transfer office at the Bank.

Under this power S. B. producing a certificate or transfer draft, purporting to be signed by A., but in fact forged, and in several respects not conformable to the particulars required by the power and the statutory regulations, obtained a transfer of stock from one cause to another, for the purpose of supplying deficiencies in the stock in the latter cause, which had been caused by transfers under certificates formerly forged by [25] S. B. Upon the discovery of this transfer from the first to the second cause, two creditors in the first cause, who

had proved their debts, made a motion in the cause, calling upon A. to refund the stock transferred: which, after hearing affidavits of the Appellant and the Bank of Ireland, was ordered by the Court. Upon appeal against this order, it was questioned whether the Court of Exchequer had jurisdiction to make such order by a summary proceeding, not in a cause, and whether the House of Lords had jurisdiction to entertain such appeal. But eventually the order was reversed.

The Appellant was Accountant-General of the Court of Exchequer in Ireland.

In the year 1810 he executed a power of attorney, by which he appointed Sampson Browne the chief clerk in his office, his attorney, for him and in his name to transfer, in the books of the Bank of Ireland, all government and other stock of every kind, which should be in the Bank on his account, as Accountant-General of the Court, and which the Appellant should, by draft under his hand, written on cheque paper, (as usual in his drafts as Accountant-General on the Bank) transfer, pursuant to the order of the Court: And the Appellant, by the power of attorney, authorised and empowered Sampson Browne, in the Appellant's name, to do all acts required by the forms of proceeding in the Bank, which should be necessary for completing the transfer of such stock in the books of the Bank, as the Appellant should, by such draft under his hand, transfer: and thereby ratifying all such lawful acts as Sampson Browne should do, for the purpose of carrying such transfer, as the Appellant should so execute, into full and complete effect.

[26] The cheque paper, mentioned in the power of attorney, was paper having on it an impression in copper-plate, with blanks for names, dates, and sums, to be filled according to each occasion, so as to make a certificate that the writer had transferred certain stock as therein stated.

This power of attorney, thus restricted, was deposited in the Bank.

Sampson Browne, on the 16th December, 1818, produced at the Bank a certificate, bearing date the 14th of that month, entitled, in two causes then depending in the Court of Exchequer, viz. Blakeney and others against Annesley and others, and Hickey against Fitzmaurice and others. The certificate was in the words and figures following:

December 14th, 1818.

Blakeney and others *a.* Annesley and others.

Hickey *a.* Fitzmaurice and others.

Pursuant to order, dated 7th December, 1818, I do hereby transfer from the credit of the first cause to the credit of the second cause, Government stock at five per cent. to the amount or one thousand nine hundred and twenty pounds, two shillings, and one penny, which place to my account in said second cause.

£1920 2 1 5 per cent. Gov. stock.

JOHN O'NEILL,

JOSEPH MACARTNEY.

To the Governor and Company of the Bank of Ireland.

This certificate was written on plain paper, and [27] the whole of the writing on it, except the name Joseph Macartney, was that of Sampson Browne.

After the certificate had been examined and passed by the proper officers of the Bank of Ireland, the transfer was immediately completed.

At the time when the certificate was brought to the Bank, the balance of 5 per cent. stock to the credit of the cause of *Hickey v. Fitzmaurice*, was £1549 2s. 3d., and the sum of £1920 2s. 1d. having been added to the sum of £1549 2s. 3d. 5 per cent. stock, by means of the transfer, the balance of 5 per cent. stock to the credit of the cause then amounted to £3469 4s. 4d.

Afterwards, on the same day, Sampson Browne produced at the Bank another certificate, which was in the words and figures following:

Hickie
a. { To the Govt. and C^o. of the Bank of Ireland.
Fitzmaurice { Accountant-General's Office.
and others. }

IN THE COURT OF EXCHEQUER.
1 per cent. Gov. stock.

No. 1241.

£3082 10 10

COURT OF EXCHEQUER.

Pursuant to an order, dated the 9th December, 1818, I do hereby transfer to Harman Fitzmaurice, or James Fitzmaurice, his attorney, government stock at 5 per cent. to the amount of three thousand and eighty-two pounds, ten shillings, and ten pence, which place to my account in the above cause.

[28] Provided that, if this draft be not paid within one month after date, the same shall be void.

JOSEPH MACARTNEY.

Dec. 16th,
1818 eighteen.

JOHN O'NEILL.

*Accountant-General of the
Court of Exchequer.*

This certificate was on the cheque paper, and the whole of the writing at foot thereof was of the hand-writing of the Appellant.

On the production of this certificate, the transfer mentioned in it was immediately completed, the fund being then sufficient for that purpose, by reason of the preceding transfer to that cause.

On the 10th of February, 1826, a notice, entitled, in the cause of Blakeney and others against Annesley and others, was served on the Respondents, the Governor and Company of the Bank of Ireland, on behalf of the Right Honourable James Fitzgerald and Jane Bourke, creditors under a decree made in the cause, of an application intended to be made to the Court of Exchequer to oblige the Appellant to replace the sum of £1920 2s. 1d. government stock; and that the directors of the Bank should permit an inspection of their books and other documents relating to the account in the cause, or furnish a copy of the account to the attorney of the said creditors. In support of this application, affidavits were filed by the solicitor of the applicants, and by the Accountant General of the Bank.

On the 15th of February, 1826, the Court of Exchequer made an order that the Bank should allow the parties to inspect the books and documents relating to the account, or furnish a copy of it; and that the Accountant General should [29] replace the said stock and the interest thereon, unless cause should be shown in four days after service of the order.

The Appellant made an affidavit, stating that the document of transfer was a forgery, and the transfer made without authority, and contrary to the form in which he was accustomed to make transfer drafts.

On the 22d. of February, 1826, the Appellant's affidavit having raised a question in which the Bank might be concerned, the Court, to give them an opportunity of laying the facts, on their part, before the Court, by affidavit, ordered that the motion should stand over till the Saturday following (February 26th).

On the 25th of February, 1826, an affidavit was made by Mr. Brabazon Stafford, the transfer officer of the Bank of Ireland, stating the power of attorney, the course of business, the transfers of the £1920 2s. 1d., and of the £3082 10s. 10d., the state of the account in the cause of Hickie against Fitzmaurice, and a transfer by the Appellant in December, 1819, some former transfers of the same kind which had been acted on by the Appellant, and the transfer then in question, insisting, that from the whole it was manifest, that the course of business, in such cases, was authorised by the Appellant, and that the particular transfer in question was known to him; and that, by so acting on it, he had deprived the Bank of the power of transferring back the stock in question; had affirmed the act of his clerk, if defective before, and had discharged the Bank from all responsibility thereon.

On the 26th of February, 1826, the Court, on the application of Appellant, ordered that the [30] motion should stand over till the 1st of March, with liberty for him

to answer these affidavits, and for the Bank to file any further affidavits as they should be advised.

On the 1st of March, 1820, being the day to which the motion stood adjourned, a further affidavit was made by the Appellant, in which he objected to the certificate in question, as not being on cheque paper, and that, on examining the accounts it appeared that the transfer in question was made to replace the amount of three transfers previously made in the cause of Hickie against Fitzmaurice, to private persons, one of a sum of £110 14s. 7d. in money, one of £627 5s. 10d. of five per cent. stock, and one of £909 2s. 1d. of the like stock: and that the certificates for these transfers were never signed by the Appellant.

On the 1st of March, 1820, the Court ordered that the motion should stand over till the first day of the next term, with liberty to the Bank to file answers to the affidavit last mentioned.

On the 17th of April, 1820, several affidavits were filed on the part of the Bank of Ireland, and among others, Mr. Brabazon Stafford made a further affidavit, setting out some instances of transfers of stock to other causes, made by Browne under certificates on plain paper, and afterwards acted on by Appellant by certificates on cheque paper, signed by himself, for transferring over such stock, or part thereof, respectively to private persons, which transfers were made by Browne accordingly; and stating, that there were many more instances of the same nature.

On the 29th of April, 1820, on consideration of the several affidavits, and the several documents contained in them, the Court "Ordered [31] that the cause shown by the Appellant should be disallowed, that the order of February the 15th should be made absolute: and that the Appellant should, by the first day of the next term, replace to the credit of the said cause the sum of £1920 2s. 1d., five per cent. stock, with interest, from the said 16th day of December, 1818, until lodged, and that the cause shown by the Bank should be allowed, without prejudice to the rights of the creditors in the said cause, in making any further application against the said Bank, if it should thereafter be found necessary; and the said Court did declare that no costs were given on the said motion, and ordered the said Bank to furnish forthwith a correct copy when applied to, of the account in said cause, as standing in the books of the said Bank, with liberty to the creditors, or Connell O'Connell, their attorney, to compare the same, if found necessary."

From this order the appeal was presented.

The case was first argued in 1824, when the counsel for the Appellant entered upon the argument of the case on the merits, but were stopped by the Lord Chancellor (Eldon) and Lord Redesdale, who, in the course of the argument, made the following observations:—

The Lord Chancellor * (1821, Mar. 4): In matter of form, how is it that you make the Bank of Ireland a party? The application was in the cause of *Annesley v. Blakeney*, in which the order was made upon the Accountant-General. The Bank of Ireland was [32] not a party in the cause. There was no motion that the Bank should replace the stock, nor in the alternative that the Bank or the Accountant-General should replace it. They were ordered to produce their books, and having complied with that order, how could they be made parties? It being admitted that the Appellant in this proceeding does not seek to make them liable, how is it that they are brought here?

With respect to the injury to the parties in one way, the Court might have redressed it. If a sum of money, by means of a forged instrument, is transferred from one cause to another, the Court might order it to be re-transferred.

If the Accountant-General is an officer of the Court, they may have jurisdiction; if not, they have none. The order is a nullity, and how can it be the subject of appeal?

If at all the subject of appeal, it must be so as between the Accountant-General and the persons who applied for the order. If they are made parties, how can the Bank of Ireland be brought in?

If a short order cannot be made, but the proceeding must be by suit, for what purpose should we send it to a re-hearing in the Court of Exchequer, where they

* These observations were made at intervals, but are thrown together for convenience.

can make no order! How are the Bank parties! On notice from you they appear, being mere affidavit-men. You cannot summon witnesses to appear as parties. The order is upon the Accountant-General to replace the stock, and then, upon the supposition that he might be unable to do so, a power is reserved to the creditors to make such application as they may be advised. How do the counsel for the Appellant shew that the Bank of Ireland are par-[33] ties! It is said to have been treated in the Court below as an interpleading suit. It was an application of creditors in a suit to have money replaced. An order was made for that purpose on the Accountant-General. If he is an officer of the Court, there might be jurisdiction; if not, then the question is, by what right the jurisdiction was exercised! If this was a case in which there was no jurisdiction, and the House entertains an appeal, the consequence may be, that all orders in the Courts of Chancery and Exchequer may be brought here by appeal. If there is no redress here, there may be elsewhere, but it is not our duty to tell the parties what other Courts have jurisdiction.

The question as to the jurisdiction of this House must first be argued. The petition of appeal asks that the Bank of Ireland may answer. Suppose the Accountant-General to be civilly responsible, and an action brought against him, if the Plaintiff in the action had failed to obtain a verdict, could the Court of Exchequer have then made an order upon him in this summary way, without suit! It is clearly made upon him now as an officer of the Court. The Appellants may consider whether they will proceed to argue the question of jurisdiction. In the mean time the order is not to be drawn up. If they proceed no farther, the Bank of Ireland must have their costs.

Lord Redesdale: The Act of Parliament makes the Bank liable in case the Accountant-General observes the directions of the Act. But this is a summary proceeding; I doubt whether it is a subject of appeal.

If this had been the fraud of an attorney of the [34] Court, and they had ordered him to replace the stock, is there a jurisdiction in this House to entertain an appeal! It is a very important question, and might open the door to a flood of appeals. Suppose this had happened in a Court of Law, could any application have been made! The jurisdiction, I believe, was formerly much more extensive than it has been exercised now for many centuries. There is no precedent of appeal upon any summary order of this kind. It was much debated formerly, whether orders in the matter of appointing guardians could be the subject of appeal. There is a general notion that the jurisdiction now exercised by the House of Lords, belonged to and *was derived* from the ancient Parliament. They certainly exercised a much larger jurisdiction. I find in the rolls of Parliament, that the Commons contended that the appeal ought to be to the whole Parliament, but this happens to be in contradiction to the disclaimer of the Commons in the reign of Henry the Fourth.

In the case of Gibson, an attorney, who forged a certificate, the indictment was laid with intent to defraud the Bank of England. There was no application to the Court of Chancery in that case. According to the case made by Mr. O'Neill, there is no forgery as to him; for he says he is not answerable. It is, therefore, a fraud or forgery with intent to defraud the Bank of Ireland, or parties, it does not appear which. There was a power to Browne which might affect the question of forgery. There is a difference between the Irish and the English acts upon this subject. Here the order itself is required to be produced at the Bank. Supposing the Bank of Ireland not to be parties responsible in this proceeding, the difficult [35] question is, to know how to dispose of the matter as between the Appellant and the other parties. If there is no jurisdiction in this House to give redress upon appeal, and the Court of Exchequer in Ireland should proceed by attachment against Mr. O'Neill, for disobedience of the order which is now the subject of appeal, then, upon a writ of habeas corpus, or an action for false imprisonment, the question as to the jurisdiction of that Court would be raised.

As far as the House is concerned there are two questions: first, whether we have jurisdiction as to the Bank of Ireland; secondly, as to the other parties. As to the latter, it is material to consider on what ground the Court of Exchequer could make the order. Probably only upon the ground that the Accountant-General is an officer of the Court, subject to its summary jurisdiction. If so, this would be a precedent applicable to every case where an Attorney or other officer of the Court was censured. Every such case would be the subject of appeal to the House of Lords.

The case was again brought before the House in 1825.

For the Appellant: Mr. Hart and Mr. Shadwell.

Mr. Hart: The first question arising is this, was the order in itself an extra judicial order, such as it was not within the competence of that Court to have pronounced against such an officer: and, in the next place, if it was not an extra judicial order, such as it was not competent to the Court to pronounce, then whether it was not erroneous.

By the principles of the law of this country, [36] no subject of property can be finally decided without ultimate recourse to the protection of the superior judgment of the House of Lords, in reviewing those decisions which are fit subjects of appeal, and the present appeal was therefore presented to your Lordships. As I understand the case, the consequence of that appeal was to bring to your Lordships' view two points: first, whether the Court below exceeded the limits of its jurisdiction—if it did, then whether the House of Lords is not a proper tribunal to bring that Court to a sense of its duty, in keeping within the limits of its jurisdiction: or if not, whether the subjects of this country are in this dilemma—that although in causes depending between suitors upon subjects of property, where a Court acts, and acts judicially in the decision of rights, there is, in every case, an appeal to your Lordships to review the judgment: yet, if the Court thinks fit to travel beyond its jurisdiction—to exceed the proper bounds which the constitution and law of the country have prescribed—that neither your Lordships have a right to rescind orders so pronounced, nor any other tribunal that we are aware of, or of which we have been able to acquire any information from the learning of those who have looked into the subject.

It has been urged, that this House does not originate causes—that your Lordships only exercise jurisdiction upon the ground of appeal from some inferior tribunal—that in cases where there is no suit depending, your Lordships can take no notice of any injuries inflicted upon rights of persons or property, however grievous they may be—in other words, that your Lordships will not permit your House to be occupied by original com-[37]-plaints, but only to review those grave and solemn decisions, which it shall be considered as fit for the wisdom of a superior tribunal to set right when complained of. I admit that to be the case, and that in no instance where rights of property are infringed, can the party whose rights are thus affected, come originally before your Lordships. The case must go through the ordinary tribunals in the first instance, and those who have ground of complaint against the decisions of those tribunals, must come by appeal to the House: the rights of property between suitors cannot in any case, by any process or course of proceedings, which the Courts in this country admit, be so finally concluded as not to come under revision of your Lordships' judgment: but then a question arises whether your Lordships, who exercise a control over the judgments of the Courts below in rectifying erroneous judgments, are precluded from looking into the grounds of those judgments, to see whether those Courts have travelled beyond the authority which the King, who constituted them, intended to vest in them for the distribution of justice among his subjects.

If complaints on this subject were of frequent occurrence, we should probably have some precedent on subjects of the kind, enabling us to see how, when Courts of Justice in this country, I mean the Superior Courts of Justice, travel beyond the line of duty prescribed to them by the law of the country, that transgression is to be corrected. That there must be some mode of doing it no one can doubt: one would not attribute such an anomaly to the law of England, as to suppose that a regular judgment between parties is always [38] subject to review by your Lordships, as a tribunal of appeal, and yet that the misconduct, the mistakes, and the errors of judgment, in Courts below, in deciding that which they had no authority to decide, is of a description not to come either within the limits of your Lordships' authority, or the cognizance of any other known authority in this country. That would be an anomaly, an absurdity which no man could impute to the system of English law. There is that species of regular gradation of authority in this country, that every inferior Court has a superior tribunal to correct its errors, of whatever description those errors may be, in a regular gradation, until they travel up to your Lordships' House, and here, as there must be in every established Government, they find an ultimate judicature. The King, who is the fountain of justice to all his subjects, acts, in distributing that justice ultimately through the judgment of the House of Lords, in all decisions upon

rights of property, and your Lordships have the jurisdiction to control the Superior Courts within the limits of their authority, as those Courts have to control the inferior Courts of Justice, who have peculiar jurisdictions.

The Ecclesiastical and the Maritime Courts of this country are as much a component part of the judicial establishment of the Kingdom, are as much vital institutions, original in themselves, as the Court of Chancery or the Court of King's Bench: but they are, by the policy of the law, placed in a degree of subordination to other Courts, and as their jurisdictions are peculiar and limited, confined to the cognizance of a certain species of causes, whenever they travel beyond [39] those limits which the law has prescribed to them as the extent of their jurisdiction, the Court of King's Bench, or the Court of Chancery, as occasion may be, issues a prohibition, and stops them, by telling them that they have erred in taking cognizance of such subjects. Now as when the Spiritual and Maritime Courts exceed their authority, the constitution has provided a superintending control to read them within the limits of their jurisdiction, is it not a necessary consequence in principle, that where those Courts, which are Courts liable to be appealed from in the decision of rights, by mistake or from any other motive, go beyond the limits of their authority, in taking cognizance of subjects which are not within their cognizance, there must be inherent in the law of this country some tribunal to which the subject may resort, to have them brought within the limits of their duty. If there be no such tribunal the dilemma must arise, that a subject of this realm, however aggrieved and oppressed by extra judicial acts, may have no remedy: unless it be said that the law places a remedy in his own hands, that is, that whenever a Court of Justice acting in a matter not within its jurisdiction, thinks fit to affect the person or the property of the subject, inasmuch as such acts may be considered as acts *coram non jure*, the subject is entitled to resist *manu forti*. Unless it be argued that such is the remedy which the law prescribes, I have not been able to find any other mode by which such an error can be controlled and corrected, except by recourse to this House.

We know that within almost the memory of man, the jurisdiction of your Lordships, as an appellate jurisdiction, has been the subject of [40] question and of dispute. When appeals from the Court of Chancery were first brought here, complaints were made to the House of Commons, and the House of Commons pretended to exclude the interposition of your Lordships in reviewing orders of the Court of Chancery, upon the ground that it was affecting the property of the subject, and they assumed the right, not to control your Lordships directly in taking such cognizance, but they assumed the right of imprisoning those who should presume to execute your Lordships' orders. They went further, and assumed the right of imprisoning those members who should think fit to resort to your Lordships to review judgments between commoners of the realm decided in the Court of Chancery. The Commons, at that period when their own authority was not very great, might be willing to arrogate a little more, and the other party be willing to concede a little less as to the authority of this House. I have not been able to find, supposing the Commons of England had carried their point in excluding your Lordships' jurisdiction in cases of appeals from the Court of Chancery, how they would act where one of the suitors happened to be a commoner and the other happened to be a peer of the realm. But the subject was at last settled in a way, the benefit of which has resulted to all the owners of property in the realm.

You are here for the purpose of hearing appeals, as well as for the purpose of assisting the King in his great council of the nation, and there must be in your Lordships the right to control the King's Courts, because you sit here under the direct authority of his Majesty, [41] to review those judgments which in his personal capacity he was incapable of reviewing, but which in his political capacity it was his duty to have reviewed. That being settled, it seemed to me to follow as a necessary consequence, where your Lordships have jurisdiction in appeals from decisions between A. and B. contesting rights of property in a cause, that if that Court whose decision was subject to review and appeal before your Lordships, thought fit to step aside from the parties and to make an order upon a subject affecting his property, that must fall to be considered also as subject to appeal, being an excess of authority. It would be very desirable to ascertain what other tribunal could take

cognizance of such an excess of jurisdiction. Although I have understood that the limits were not very accurately defined in former days, that the King, sometimes in Parliament, sometimes by his Privy Council, sometimes by portions of that Privy Council, authorized by commissions to act concurrently, and at other times by your Lordships alone, determined on matters of appeal; yet, looking at those views of the case which are now presented to us, the present alternative only is this, that either your Lordships or the Privy Council must have jurisdiction upon the subject, or that it is the fact that suitors and individual subjects of his Majesty throughout the kingdom, may be aggrieved to any conceivable extent, and yet not have any remedy against that grievance.

No man will presume in the existing state of our constitution, to say that a petition to the King alone could be attended to, for the purpose of looking into subjects of that description: no man [42] will suppose that his Majesty could act in any other way than through one or other of the great councils, namely, your Lordships, as the first and the most important of those great councils, or the Privy Council, who is to advise him as to the general affairs of the kingdom. As to the limits of distinction between these two great and supreme tribunals, whose judgments are not subject to be reviewed, but constitute the law of the country as conclusively as if a statute had been passed upon the subject, (I do not say makes the law, but is declaratory of what the law is,) your Lordships are the King's council for regulating and controlling those legal decisions respecting rights of property that occur between the King's subjects within the limits of the kingdom of England; and the office of the Privy Council, as far as it goes, is to regulate the rights of property that are referable to those foreign dependencies, and those other questions of judicature that do not come within the ordinary control of the King's Courts of Justice, and which must be ultimately decided where judgments are erroneous, or where Courts travel beyond their jurisdiction.

It would be a singular state of absurdity in the law of England, that if the Court of Chancery, between two individual suitors, were to make a decision which is subject to appeal, they may come to your Lordships to rectify it, because an order is made between A. and B., the suitors in the Court; but if the Court pronouncing an order in that cause, think fit to direct that a third person, not a party to the cause, shall pay the whole amount of the demand from the one to the [43] other, or to make an order which will subject that individual to imprisonment, your Lordships' hands are tied from setting that right, merely because the individual whose rights of property, and the freedom of whose person, is affected by such an order is not a party named in the suit; that your Lordships must say, here we are in a state of imbecility, we can give no relief; true it is that order is made in a court of competent judicature; it has all the colour of being a judicial order, and if it were a judicial order deciding the rights of property of individuals in the cause, we could correct that which is erroneous; but as the Court has thought fit not to decide between the individual parties as to the rights of a party, but has made an order that a third person shall pay the whole subject in demand, that being the case, the subject must either submit to pay the sum so awarded against him, or find out, God knows where, some other tribunal to do him right upon that subject.

Let the Courts act as erroneously as they please; and for the purpose of this argument, I may suppose the Court of Justice below to act from the most corrupt motives that can be attributed to persons acting in a judicial character. I will suppose the judge to be intending to benefit himself, and to make an order against an innocent third person to pay a sum of money, which, in circuitry must otherwise have come out of his own pocket, I may be told that with respect to such nefarious conduct the law is open to impeach a Judge who so acts, that he may be proceeded against criminally; but, my Lords, what answer is that to the innocent subject, who wants not to vindicate the justice of the country at large at his [44] own expense, and at the loss of all that he possesses in the world, but who simply desires to be restored to that state of quiet possession of his rights, which, without the unjust intervention of a Court of Justice he would not have been deprived of. We know that the law is open wherever violated, and however high the subject who dares to violate it, to the vindication of right by criminal proceeding; but that is not concurrently with the title of the individual whose rights of property are infringed,

by resisting that infringement by the ordinary legal modes. If this order was extra judicial on the part of the Court below, I shall hardly be told that such a case is not subject to a revision by your Lordship, but was a void and null act, which a subject may resist *mann forti*; I shall hardly be told that the law of England, in this state of civilized society, puts any subject, of any condition, under the obligation of raising commotion in the country and resisting by force. If it appears to be a regular order of a Court of Justice, I shall hardly be told, if I understand it rightly, that the law of the country looks not to so important a condition as that of preserving the peace of the community, and omits to provide that in no case shall the subject be under the necessity of protecting himself against the violation of his person or his property by his own hand, or by the assistance of his friends, but that in all cases where they are violated he shall have redress by legal means, pointed out to him by the law.

If that be the case, I apprehend that these legal means must be by application to this tribunal in the nature of appeal, to be entitled undoubtedly in a cause in which the order aggrieving the [45] subject has been pronounced, and which your Lordships will take cognizance of as an existing cause, to see whether any order has been made in that cause which the law of the country does not sanction.

Looking upon this case therefore as if it were new, as if your Lordships were for the first time to assume, or to repudiate a jurisdiction upon the subject, I submit to your consideration, whether you would not necessarily make a precedent. All cases that depend upon precedent, must at some time have existed in a condition in which the precedent was to originate, and in the absence of all precedents in Courts of Justice, you only look at the reason, at the fitness and the principle of the jurisdiction proposed to be exercised, and doing so you make the precedent, because no record of any anterior proceeding exists; but in making a precedent, the Court does not make the law upon the subject, but declares by the precedent, that that which they are doing is inherent in the constitutional law of the country, and if the occasion has never before arisen, which required the Court to make such an order, it then becomes fit that an order should be made, not only to prevail in the instance of the existing case, but to guide the judgment of all future Courts in similar subjects. If this appeal were totally destitute of precedent, I should with great confidence submit to your Lordships such would be the principle on which the House would act. It being admitted that in an order regularly made between suitors in a cause, it is universally subject to review by appeal to this House, I should contend that *a fortiori* whenever the Court goes [46] beyond its jurisdiction and affects third persons, they have a right to seek refuge at your Lordships' bar, to see whether such an order was or was not a just order. There may be two grounds on which you may decide a case so represented, the first is, that the order is irregular—is extra judicial, that it seeks to attach and affect the person and the property of a subject who is not a party to the suit, that the Court therefore had no right to make such an order, and upon that ground you would rescind it, leaving those who obtain the order to pursue the regular course, whatever that might be, to attain the same end which such extra judicial order was intended to produce. If it be supposed that the order was not extra judicial, would you not hold as an appellate jurisdiction, that as the making of that order was within the competency of the Court, that it must be equally within your competency as a Court of Appeal, to review that order. It cannot be an order legitimately made by the Court below, but by an irresistible inference it must be subject to the judgment of your Lordships.

I have been contented to take this, as a case in which the Court below had jurisdiction to pronounce the order, if in justice it was fit to be pronounced; but taking it to be so, it is competent to me to shew, that according to the facts of the case, this was not an order fit to be made, that the Court which made the order erred in its judgment, mistook the law, did not properly view the facts upon which it ought to proceed. I am only desirous to go into that case, if you think fit, to satisfy you that there never was pronounced in any Court, an order so deeply or [47] vicious as this is, when you look at all the facts of the case.

The Lord Chancellor: In the discussion of this case you have a right to assume that the order was as wrong as it possibly can be. The first question for the House to decide, is, whether it has jurisdiction, supposing it should be so? We had some thing of the same nature this morning.

Mr. Hart: I am apprised of that case,* and I apprehend there is no case more dissimilar in principle than that which we take leave to present to your Lordships. It is unbecoming in counsel, to solicit any Court of Justice to intimate what source of relief a party may resort to for justice. At the same time, looking at the great and valuable protection which you give to all suitors, for you are the last and only refuge, if a party is injured and aggrieved by proceedings in the Courts below, I know not what relief for such injuries can be had, if your Lordships say your jurisdiction is not co-extensive with that which is exercised in the Courts where such orders are pronounced. Some course must be pointed out, for that a failure of justice cannot take place by the laws of this country, I take upon myself to assume, without qualification and without doubt. At present I am bound to consider it as yet doubtful whether your Lordships have or have not jurisdiction, whether you will [48] or will not consider yourselves as having jurisdiction, for if you think fit to say you have jurisdiction, you have it as a matter of course.

Before I advert to the cases of recent date, supposed to affect the present question, I will call your attention to a case that seems to me, to be precisely in unison with the present. I know it has been stated that it is but a single case, that however it may be a precedent, it was a precedent doubted at the time: but the same objection may be made to every precedent where one anterior judgment only exists. Where a claimant of justice comes to demand his rights at the hands of a Court of Justice, it is not usual to repel a precedent, by saying it has been decided once, and but once: true it is, that we can find but one instance in which the House has exercised the jurisdiction, but that arises not from any doubt of the validity of the precedent, but from the happy dispensation under which the subjects of this country exist, that they seldom have to complain that the King's ordinary Courts of Justice travel beyond their duty, either from intention or mistake. Lord Hale, that great and constitutional lawyer, upon the subject of appeals from the Court of Chancery, lays down a doctrine which I quote as not applying specifically to the case itself, with respect to the present application, but to the principle which governs universally the law of the country, applicable to the subjects' rights. He was of opinion, that it was highly unreasonable that the decree of a Chancellor, who may err as well as another man, should be conclusive, should be unexaminable by any other Court, but be as binding as the law of [49] the Medes and Persians, or as an act of Parliament.

He says (Hale's Jurisd. of the H. of L. c. 22), "the Court of Parliament, as sitting in the House of Lords, for the Lords Spiritual and Temporal assembled in Parliament, are the highest Court of Justice in the realm. Here the judgments at law, of the greatest ordinary Court of Justice, namely the King's Bench, are examinable and reversible for error, and what reason can there be, that a decree in a Court of Equity should have a greater sacredness than a judgment at law?" Now I would ask of those who mean to oppose this reasoning, what greater sacredness can an error of judgment, if the Chancellor or any other Judge sitting in Law or Equity, who travels beyond the legal limits of his jurisdiction in making an order not warranted by his jurisdiction—what greater sacredness can such an order as that have over an order pronounced by a judicial authority, acting within its proper limits, but mistakenly exercised? I apprehend, the principle which I am now stating applies emphatically to this case, and I do not know how to reason this case in a stronger point of view, than to say that it must be argued by those who resist the jurisdiction of the House of Lords, that in all cases in which a Judge confines himself within the limits prescribed by law, but acts either unwisely, erroneously, or corruptly, the House of Lords can correct his errors in judgment; but where he travels beyond his jurisdiction, and inflicts injuries a hundred-fold more grievous upon a subject [50] of the country, than he could have inflicted by any decision or decree he could judicially have made upon the matter in contention, that those injuries must remain unre-

* *O'Sullivan v. Hutchins*, D. P. 1825, MS. The appeal was against an order of the Court of Chancery in Ireland, respecting an award made upon a submission to reference, under the provisions of the Irish statute, 10 W. 3. c.—and not in a cause. The case was argued on the 15th of February, 1825, and stood over till the 30th of June, 1825, when the appeal was dismissed, upon the ground that the House had no jurisdiction.

dressed, or at least it is not within the competency of the House of Lords to redress them. When he travels within the limits prescribed by the constitution you may control his decision, but when a Judge travels beyond the limits of his jurisdiction, and does an infinitely greater mischief, you cannot control him.

But there is a precedent which is precisely in point. The case * of an appeal from the Court of Exchequer by a person not a party in any [51] suit, and against an order not pronounced in any cause. A cause was depending in the Court of [52] Chancery between Lord Wharton, Plaintiff, and Sir W. Robinson and others, Defendants. An order had been obtained by Lord Wharton [53] upon a motion made in the Court of Exchequer, there being no cause depending between those parties, that a certain parchment, alleged to be a record of the Court, in the hands of one Thompson, an officer of the Court, might not be filed by him among the records of the Court, it being the object, as he apprehended, of the Defendants to the suit in Chancery, to make use of this parchment as evidence in that suit. This order was afterwards rescinded, by an order made upon the motion of Sir W. Robinson and others, and it was directed that the parchment, being a commission, articles and survey should be filed as a record of the Court.

From this latter order there was an appeal by Lord Wharton. It was objected that the order was not made in a cause, and that other persons, parties in the suit as defendants, were not before the House. The answer to this objection, so far as relates to the defect of parties, was that Squire was the only defendant who supported the order in the Exchequer, and employed Thompson to file it. Upon this state of things, the House of Lords directed that a trial should be had in the next term in the Court

* The case was in substance as follows: An order had been made in the Exchequer containing the following recital—"Whereas, upon the 26th of February last, upon motion on the part of Thomas Lord Wharton, it was ordered by the Court, that a commission issued out of this Court in the 15th year of the reign of King James the first, together with six several articles of instruction, and eight several schedules thereunto annexed, purporting to be a boundary and survey of the Honor of Richmond and the Lordship of Middleham, in the County of York, taken by virtue of the commission by Sir Timothy Hutton and Sir Talbot Bowes, Knights, and other Commissioners, and dated at Richmond, the 19th of October, 1618, should be left in the hands of Mr. Thompson, one of the attornies, but should not be received as a record, or filed, nor any use made thereof, or of the enrolment thereof, until further order:" The order then proceeds to recite, that a motion was made "on behalf of Sir William Robinson, Baronet, and others, praying that the said order might be set aside, and that the said commission articles and survey might be allowed of as a record, and filed accordingly:" The order then recites the evidence produced for the purpose of satisfying the Court of Exchequer that it was an authentic document, viz. that it had been taken from the files, and therefore ought to be restored to the records of the Court. The effect of the evidence, as stated, is to trace this parchment from the hands of one professional man to another, till recently found in the hands of a person who had got the papers of a Mr. Grainge. It was also shewn, that at a prior trial, within the limits of the commission, this document was used as evidence. The order then recited an affidavit on the part of Lord Wharton, opposing the filing of the survey. Upon these recitals, and upon view of the document and perusal of the commission and articles, and survey, the Court ordered the former order, which directed that the record, paper or parchment, should not be filed as a record, should be rescinded, and they ordered that the said commission articles and schedules, purporting to be the survey, be filed accordingly on the proper file, amongst the inquisitions and extents of King James the first.

From this order an appeal was entered by Lord Wharton. In the petition of appeal it was stated, "That the Appellant had purchased certain mines in question before this pretended record was brought into the office, and that if such writing should be suffered to be filed as a record, after such length of time, the searching the record office, which was the common security of every subject, would signify nothing; settlements and purchases would be easily defeated, and no man could be safe on his estate or inheritance. The Appellant shewed that the other Defendants in Chancery were not made parties to this appeal, because the Respondent Squire was the only defend-

of Common Pleas, in which the question should be—whether the parchment in dispute was such record of the Court as pretended?

The House did, therefore, in that case, hold jurisdiction in the case of an order which was not made in cause, and although this objection was expressly taken and pressed. There was, indeed, a protest against this order of the House, but the protest rather adds to the authority of the order. In a new case, unanimity was not [54] to be expected. The protest shews at least that the matter did not pass without discussion, and the decision is that of the great majority of the House, including the Chancellor, a great parliamentary as well as constitutional lawyer. It therefore, establishes a precedent deliberately argued which ought not now to be shaken. The opinion of the small dissenting minority was bound by the superior reasons and judgment of the great majority of the House, who thought it right and advantageous to the community that such a jurisdiction should be exercised. The reasons given in support of the protest, appear to me to be inconclusive. The first objection is, that by the order they assume jurisdiction in an original cause, because there was no suit between the parties in the Exchequer, and that the petition could not be called an appeal from that Court. But how is it an assumption of jurisdiction in an original cause, to make an order in a matter which had been adjudicated in an inferior Court? It cannot surely be necessary, that in a matter adjudicated, however important, A. should be personally a plaintiff, and B. personally a defendant, to make it a fit subject of appeal. There are in fact, many cases subject to appeal, where neither appellant nor respondent were parties in the suit; as where a third person has become the purchaser of an estate sold under a decree in a suit, it has been

ant who made affidavits for the supporting the survey, and the principal person who solicited therein, and employed Thompson to file and enrol it." The Defendants petitioned the House of Lords, and "setting forth their case at large, prayed to dismiss Lord Wharton's petition, and discharge the order for their answering thereto. But the Lords, on the 22d of January, 1702, ordered that Squire and Thompson should answer Lord Wharton's petition, and Lord Wharton, on the 25th of January, 1702, obtained an order that Thompson should not be obliged to answer." Squire, in his answer, proceeded to state the grounds on which he objected to the order, and in the result, the House ordered, that the officers of the Exchequer should bring into the House the bundle or roll in which the survey of the Honor of Richmond was, which was taken in the 15th year of King James the first, the original affidavits upon which the survey was filed; the office book, in which there was an entry of a survey taken of the Honor of Richmond in the 7th of King Charles the first; and the survey also itself." On the 7th of January, an objection was taken to the House taking cognizance of the order. "Upon the 12th of February, 1702, after hearing Counsel upon the petition and appeal by Lord Wharton, touching the order of the 15th July, 1701, it was ordered by the Lords, that a trial should be had next term, at the bar of the Court of Common Pleas, by a jury of the County of Middlesex, in an action wherein this should be the feigned issue, viz. Whether the skins of parchment directed by the order of the Court of Exchequer of the 15th of July, 1701, to be filed, are the perfect, unaltered, exact, and entire commission and return first filed in the Court of Exchequer in the 15th year of King James the first." Against this order there was a protest; eleven of the Peers, including Lord Nottingham, dissented from the decision of the House. The reasons of the protest are—first, "Because we conceive that by this we assume a jurisdiction in an original cause; for these reasons: first, because there has been no suit between the parties in the Court of Exchequer, and consequently this petition cannot be called an appeal from that Court. Secondly, although there was a suit in the Court of Chancery, yet one of the persons required to answer was not a party in that suit, and therefore, as to him at least, it must be an original cause. Thirdly, though all had been parties in Chancery, yet it never was heard that an appeal lay from one Court that had no suit depending in it because there was a suit depending in another Court. Fourthly, because no Court can take any cognizance of a cause in which that Court cannot make an order, because very many are concerned in this record who are not before the House, therefore this House cannot take any cognizance of it." (Signed) Nottingham, etc. See the Lords' Journals, vol. 17.

considered* that he might be dealt with as a party in the suit. Although he is not actually before the Court as a formal [55] party, yet being affected in his rights by an order discharging his contract, it has been held competent for him to appeal against such order to the House of Lords, if he thought such order erroneous. Why was it assumed that such a purchaser being no party in the suit might appeal, plainly upon this ground, that the order affected his right of property acquired by the contract. This was a subject incidentally brought into the cause: but the purchaser was neither plaintiff nor defendant. It was argued that he would be put to file an original bill, but it was considered by the Court, that if the order was erroneous it would be the subject of appeal.

The Lord Chancellor: I have from Lord Redesdale a copy of a case, in which an appeal to the House of Lords was presented against an order of a Court of Equity rescinding a purchase.†

Mr. Hart: Then there is another authority for holding that the House of Lords has jurisdiction by way of appeal against orders of Courts of Equity, affecting the property of a subject not a party in a suit; and in truth, it is a refined and metaphysical distinction to entertain jurisdiction between party and party in a cause, and to refuse relief to a third person more deeply affected in his rights by an order in the same cause.

In the case of Lord Wharton it was not an order in a cause, it was an order *ex parte*, and yet an appeal was entertained. In the case now before the House, the order was made in a cause most injuriously affecting a third person, and why it should be less an order in a cause, and [56] by what magical operation it should be less subject to appeal than if it injured the plaintiffs or defendants in the suit for whose benefit it was intended, I cannot conceive. In general a court abstains from making orders in a suit which affect third parties, but here the Court has made an order in a cause, and if it be erroneous, either because the Court had no jurisdiction to make such an order, or because having jurisdiction it is unjust, it is equally an order made in a cause affecting the rights and property of a third person, and must be a proper subject of relief by way of appeal to this House. The third reason for the protest I really do not understand, the reasoning seems to proceed in a circle: first, to assume a proposition and draw an inference from it, and then to endeavour to establish the original proposition by means of the inference.

There is a difficulty in supposing how the House should be precluded from making an order in which it directed that a document should not be filed as a record, because some parties were absent or should be present: the House deciding merely between these parties, the one contending that it should be considered as a record, and the other contending that it should not, how can it be said that the House, when it came to a decision, that it ought not to be considered as a record, concluded the rights of absent persons by doing it? Sir William Robinson failed in making out his title to have this document filed; and made an authentic document, his evidence slipped from under him. By this order the House only exercised a jurisdiction to affirm the order [57] of the Court of Exchequer, in case the evidence should bear it out, but to disaffirm it in case the evidence should not bear it out; the House looking at the conflicting testimony, and thinking that the trial by jury was the proper mode of deciding the facts upon which the rights of property might turn, rather than upon affidavits, the House said the order may or may not be right, but certainly it is not right to confirm it without some preparatory steps to ascertain the facts, and therefore the House ordered that that Court which had stepped a little too forward in deciding facts as conclusive upon affidavits, should suspend the operation of the order it had pronounced, until a jury had decided whether it was an authentic record or not.

There may be cases in which the House of Lords may have no jurisdiction, and would not spontaneously exercise a jurisdiction. In the case of the *Attorney General*

* See *Watkins v. Maule* in Chancery, an order 23d February, 1825, rescinding a purchase. There was an appeal by the purchaser to the House of Lords, upon which the order was affirmed. *Bailey v. Maule*, MS. 3d May, 1825.

† Probably the case acted in the note, p. 54, in which Lord Gifford and Lord Redesdale spoke on the motion for judgment.

v. *Wall** the decision proceeded upon a different principle. Whenever the united legislature have thought fit by statutory enactment to give particular forms of proceedings for the remedy of injuries, and make no farther provision, then it is a principle of the law, that the statutory regulation being a jurisdiction collateral to the common law jurisdiction of the [58] country, is not subject to the same mode of appeal as in other cases; for if the legislature had intended that an appeal should have laid from the inferior jurisdiction, it would have directed that there should have been such appeal. That is an old and inherent principle in the construction of statutes, and looking at a recent statute (52 Geo. III. c. 101) giving the new jurisdiction in cases of charity, by which the legislature enabled the Lord Chancellor or the Master of the Rolls to make certain regulations in charity matters, which it was not competent for them to make unless it was in an existing cause, the legislature foreseeing that by force of the natural construction of the Act of Parliament it would have prevented a review of the decision in the Court below, they provided that an appeal should lie to this House, if presented within two years: so far, therefore, from this Act of Parliament being an argument that you have not jurisdiction in those cases, it is affirmative, for it shews that in all cases arising out of the old established judicatures of this Kingdom, there shall be an appeal; but where there is new statutory jurisdiction, if it does not expressly permit a suitor to appeal, it must be taken to imply that the case shall go no farther.

The case of the *Attorney General v. Wall* was of that description: it was a case of an extent, a purely common law process, and a statute was passed giving a new remedy to those who were entitled to equitable incumbrances upon the estates seized by the Crown. Such incumbrancer before the passing of the statute was obliged to go into a Court of Equity: [59] instead of which it gives him a short mode of proceeding, by which he has his equitable rights ascertained without the delay and expense of a suit in equity; but when it gave him that mode of proceeding, it was provided that if he chose to adopt it, he must do it subject to the hazard of the judgment to be pronounced finally in the Court below. That is analogous to a new jurisdiction, and where a party chooses to submit to it, he cannot go farther in litigation. So again in the cases of bankruptcy a new Court is created: the Lord Chancellor sitting in the Court of Chancery, exercises an authority over the bankrupt's estate, and the claims of all parties, but it is the statute that gives to the Lord Chancellor authority to make orders that shall bind the parties, the statute creating a new jurisdiction; and it has been always considered as the true construction of that Act that it gave a jurisdiction not inherent in the law of this country, and therefore, this House cannot review decisions in matters of bankruptcy, as you may in the case of common law proceedings. With such nicety have the limitations of jurisdiction been settled, that in cases where serious questions have arisen, the Lord Chancellor (Eldon) with a forbearance not often necessary, is in the habit of saying that he does not wish parties to be bound by his individual judgment, and rather than bind them by an order in bankruptcy, he gives them leave to file a bill, so that if he same judge happens to preside in Chancery, and the party thinks he errs in judgment, he may go to the House of Lords, which is the refuge to all [60] those who conceive themselves aggrieved. I can conceive a variety of cases in which the greatest injury might be inflicted by the King's Courts below, by their orders most intolerable injuries might be inflicted on the King's subjects, which would be irremediable unless this House would take cognizance, with a view of annihilating those orders.

Suppose that in the Court of King's Bench criminal proceedings took place against a person, not an officer of the Court, nor in any way a party to a suit then pending, and that the Court should think fit upon an *ex parte* proceeding to call upon him to answer the matters contained in the affidavits, and that he should be

* D. P. 1822, 1824, MS. The case was thus:—Lands subject to mortgages had been seized under an extent, a Commission of Bankrupt afterwards issued against the mortgagor, and an Act of Parliament was passed enabling the Court of Exchequer to make reference to the Master to ascertain priorities, etc. and make orders respecting the funds in Court under the extent upon motion or petition as in causes in Equity. The appeal was against an order made under this Act, and the House of Lords held that they had no jurisdiction.

examined upon interrogatories. The effect of such an order upon the individual to be bound by it would be of the most intolerable description, and shall it be said that the Court shall be permitted to make such an order, and yet if the individual were to apply to your Lordships to review that order, he is to be told he must submit to it. If he had had the good fortune to have been the defendant, however delinquent he might have been—if he had happened to have been an attorney of the Court, however great his delinquency, being a party, this House would review the order;* but because he is quite independent of the Court, although the Court has thought fit to violate the limits of its jurisdiction by making an order upon him, which it ought not to have made; there is no tribunal which can correct it, and the party aggrieved must go out of this House, subject to all the consequences of having the im-[61]position of an order upon him which is extra judicial. He must submit to it, unless he can repel it by force, which in all other cases the law of the country takes care shall not be necessary, by providing that every man shall have redress for all that which is erroneously done by individuals or Courts of law.

Mr. Shadwell: It may be admitted that the House has no jurisdiction to hear an appeal against an order made by the Lord Chancellor, or the person having authority under the sign manual in a case of lunacy (*Rochford v. B. of Ely*, 6 B. P. c. 329), nor upon a decree from any Ecclesiastical Court (1 Vern. 118), but the judgments of the Ecclesiastical Courts in Scotland are subject to revision in the Courts of Great Session in Scotland, and thereby this House acquires a jurisdiction over the decrees of the Ecclesiastical Courts in that country; so again with respect to the decrees of the Court of Admiralty, with the same distinction as it relates to Scotland. There is no appeal from a Colonial decree; in those cases, and in lunacy it is considered that the King is the supreme authority, and that no other Court can interfere. Neither is there any appeal in an order made by the Lord Chancellor or Lord Keeper, or whoever holds the Great Seal in Bankruptcy, that is decided upon the construction of the statute, because those who entertain jurisdiction in bankruptcy, interfere not as judges in the Court of Chancery, but as persons named in the Act. The question in this case will be, whether where an order has been made in a cause actually existing between persons who are not parties to the cause, the House of Lords has jurisdiction to review the order.

[62] In the general assertion of jurisdiction, which was made by the House of Lords in that question which arose upon Sir John Fagg's case, the House of Lords by their notice to the Commons, represent the House as "the place where the King is highest in his royal estate, and where the last resort of judging upon writs of error and appeal in equity in all causes, and over all persons, is undoubtedly fixed and permanently lodged" (see Hargraves's Preface to Hale's Jurisd. of the House of Lords). I point your attention to the expression "all causes," because the order complained of in this case, is an order in a cause essentially differing from the case of the *Attorney General v. Wall*. There extents having issued at the suit of the Crown, the mortgagee, a special incumbrancer upon the estate of Paul Bentfield, came in under the extent and the provisions of an Act of Parliament, without filing a bill for that species of relief which is ordinarily administered in the Court of Exchequer. It was argued in that case, that inasmuch as the proceedings which took place under the extent and the statute were denominated causes, and the orders made from time to time were styled decrees, that the particular order complained of, which was pronounced by the Court upon exceptions to a Master's report made in pursuance of what appeared upon the face of it to be a decree, it ought to be considered as made in the cause; but your Lordships were satisfied that it was not strictly speaking a proceeding in a cause in equity, however proceedings of that sort might have been by common practice and habit, entitled and styled decrees in causes. [63] That was the point decided in the *Attorney General v. Wall*.

Now this case differs essentially from that, for here is a cause subsisting between parties. It appears there was an application made in the cause, as the respondent has stated himself, by persons who were not creditors in the cause as plaintiffs upon the record, but persons admitted as creditors in the decree made in the cause; they were the persons who applied against the Accountant General of the Court in the cause, for the purpose of having the stock in question re-transferred.

* Not so as orders of a Court of Common Law

The Lord Chancellor: The application here is to replace a certain quantity of stock. I think one of the questions may be whether the stock, by virtue of this instrument having got out of one cause to another, should not be re-transferred, or in other words, whether the party who caused the stock to be transferred should retain the benefit of a transfer which had been made by forgery.

Mr. Shadwell: It could not have been done, for there was not stock enough to allow of a re-transfer into the cause of *Blakeney v. Annesley*.

Although this were to be considered as an order upon parties who were no parties in the cause, still there are a variety of cases in which a Court of Equity deals largely with the property and personal liberty of parties who are not parties in the cause. One of the most familiar instances is this:—I will suppose that a bill is filed by a residuary legatee against an executor to take an account; the decree directs an account to be taken of debts and credits: the creditors come in under that decree, though by [64] no means parties to be bound in all respects by the decree, as they would have been in the case of a bill filed by one creditor on behalf of himself and others: but they come in as creditors, and the question is discussed in the Master's office, whether the debts claimed by them are or are not due. Now suppose a Court of Equity should think it right upon the claims made by the creditors in the Master's office not to give the creditors an opportunity to except to the Master's report; or suppose that leave were given to except, and the exception heard, and the Court decided against the creditors, and no leave given to file a bill, in what situation would they be placed? If a creditor under such circumstances were to file a bill, he would be met by a plea that the party was not bound to answer. What, under these circumstances, is the situation of a creditor, if the Court making such a decree is not to make it subject to revision?

Let me put the case of an administrator of a testator's estate, in which a legacy is carried to the account of a particular legatee, with leave to apply to the Court, and he does so, and the Court refuses to make an order:—I am putting, it is true, a strong case, but I am doing so in order to illustrate my argument:—in that case what must a legatee do, if not allowed to proceed by appeal upon his petition, for the legacy actually severed from the testator's estate and carried to his account, which would be a complete discharge to the executor? He would actually be without redress, unless the House of Lords were to control the decision of the Court below.

If the resolution of the House of Lords in the case of Sir John Fagg is of any avail, it must [65] be acted upon in such cases as I have put, and I can put cases in which the personal liberty of the subject might be affected by proceedings of the Court of Equity, which if the narrow doctrine now contended for were to prevail, no redress could be obtained; suppose for instance, an injunction was granted to restrain a Defendant and his servants and agents, from doing a certain act in the common form of injunction, suppose that the Court should be satisfied that some person, bearing the character of servant or agent of the Defendant, had committed a breach of the injunction, and the Court being so satisfied, an order is made out in the proper form for the party to be committed to the Fleet: what redress has the individual in that case? If the Court chooses to stand by the order it has made, and this House does not give relief, he can have no relief whatever. In that case he can have no relief by Habeas Corpus, for if the Court has competent jurisdiction, which it has as matter of course, and the order is made out in the proper form, if the individual applies for a Habeas Corpus he would be remanded, and he might be compelled to linger out his existence in prison until the Court should relent and rescind its order, or this House would interfere. Suppose the case where an infant ward has been married, and upon a motion made against the parties, the Court of Chancery should order some clergyman to be committed to the Fleet upon the ground of having committed an offence against the jurisdiction of the Court, by having married a ward, and yet he may have been no party to the business; is there to be [66] no appeal in that case? I put these cases as those, which if they did happen, and could not be reviewed by the House of Lords, would entail the greatest misery upon the subjects of the country: and I have always understood, that the House of Lords assume a general jurisdiction in causes, for the purpose of rectifying orders which are erroneous, and all the cases I have put would be errors in orders, though the victims were not parties to the cause. Upon what principle is the House not

to interfere! you will interfere, though no one of the cases which I have stated has been adjudged, or although there are no received cases prescribing rules to the House. The last application in all the cases which I have put, would be to your jurisdiction for relief, and if you did not interfere, there would be a defect in the administration of justice.

With respect to the cases which I first put, as to want of jurisdiction, they are grounded upon this reason, that there is no cause in Equity depending between the parties, but that reason totally fails in the cases which I have just supposed, and in the cases now at the bar: upon what ground therefore, can it be said that the House of Lords is not to interfere! In the case of the *Attorney General v. Wall*, there was no defect in the proceeding, as against the parties who claimed, for this reason, they themselves elected to go and claim their equity upon the common law side of the Court; that was a new common law proceeding given by the statute, but they might have filed a bill; and there is a case in Coke's Reports, where it appeared that [67] it was originally the practice for parties to file a bill, in order to have that equitable relief, which the statute entitles them to have in cases of extents; but if parties voluntarily intervene, and choose to take the course prescribed by the statute, that subjects them to the order of the Court, which must be final when once made. If the parties complain of that order, it was their own option to adopt that course. But in the case at the bar, orders are made in which the party has not voluntarily submitted to the jurisdiction, but attempted to repudiate or wished to avoid it; so that the reasoning applied to the case of the *Attorney General v. Wall*, is reasoning that cannot be applicable to the present case, for here the Accountant-General did not intervene, he asked nothing. I consider this, though it may be a case of the first impression with regard to particular features of it, as a case not governed by any one of the cases decided upon the point, and if so, then the only question will be, whether you will hold that a Court of Equity has any right to exercise unlimited jurisdiction over parties who are not parties in the cause? Would it not be a singular anomaly, that if there be a decree against a party in a cause which is erroneous, he shall have redress by an appeal to this House; but that where a person is a total stranger to the cause, an order may be made ruinous to his property, and injurious to his liberty, and such an order is not to be reviewed? You will long hesitate before you lay down a general rule in such cases, that this House will not interfere; for it is quite contrary to the principles of the constitution, that [68] a person not a party in a cause shall be liable to have an order made against him which is not subject to review; it cannot be conceived that a Court of Equity has a larger power over persons who are not parties in a cause, than it has over those who are parties in a cause.

I conceive this to be a question of great importance, and a case in which you may soon have to apply the very same doctrine, whatever it be which you may lay down in this particular case, for there is now pending an appeal before the Lord Chancellor in the Court of Chancery, from an order made by the Master of the Rolls, in which he has refused to interfere with respect to a person not a party in the cause, it being an application praying that that person should do a certain act. It was asserted that a certain portion of stock was obtained in an improper manner, and a petition was presented praying that the individual in question should be ordered to replace the stock; the present Master of the Rolls dismissed that petition, and an appeal is now pending in the Lord Chancellor's paper; it is not, therefore, a mere speculative opinion, arising from the dictates of fancy, which we are calling upon your Lordships to pronounce, but you will have immediately to reconsider this point in another case.

I should conceive that in a case like the present, where there seems to be pregnant reason why the House should interfere in the case of an order made in the cause, that the House of Lords would be mainly aided by considering what it has actually done, where an order has been made without a cause being in Court.

[69] The Lord Chancellor: If no injury can be done without a remedy, how is it in the Courts of Common Law, where, although there may have been fifty erroneous orders in the course of the proceedings, this House cannot touch them? In the case of the Court of Chancery, the interlocutory orders may be appealed against, but there are many orders which may be made in certain cases, in which there is no appeal

Mr. Shadwell: The House of Lords assumes a general jurisdiction in orders made by Courts of Equity, in consequence of the magnitude of property, and the necessity, therefore, of interfering.

The Lord Chancellor: I have asked many people why there should be that difference, and if they would give the real answer, they would say they cannot tell, though a person who practised in the Court of Equity, would be able to tell them without any difficulty.

Mr. Shadwell: A Court of Law confines itself to one single point; a Court of Equity, particularly in the administration of an estate, undertakes to solve all manner of questions between all manner of persons, not only between the parties who have their names on the record, but persons whose interests may be affected, and which must be finally disposed of before it is possible for the Court to make a decree between the Plaintiff and the Defendant. So in the case of a residuary legatee, the Court must take care that a due portion of the fund should be paid to individuals who are properly entitled to it, and the mere severance of a fund from the bulk of the estate, is not sufficient of itself; so that [70] there is the widest difference possible between an interlocutory order of a Court of Law, and an interlocutory order of a Court of Equity.

If in the case of *Wharton v. Squire* the House has actually entertained jurisdiction where an order was made not in a cause: what weight of precedent is there, or what precedent can be alleged in which the House of Lords has refused to interfere where an order has been made between parties? The cases cited are all beside the present: they are authority for the right proceeding of the House as far as they go, but do not furnish the least ground of argument for your not exercising jurisdiction in the present case. I should say *prima facie*, that the House of Lords will act up to the spirit of the resolution in Sir John Fagg's case, and it is not enough to be asked, where there is a precedent, whether the House will act or not: We have, even if there was no precedent, all the authority of principle in our favour, and no one case can be produced where the House of Lords has refused to interfere, where an order has been made on parties not in the cause: great inconveniences will be sustained, if this House does not interfere in cases of this description.

For the Respondents, the Bank of Ireland.* Mr. Horne and Mr. Phillimore.

It is not true that there is a remedy by appeal to this House in all cases where there is no remedy elsewhere against erroneous judgments, or excess of jurisdiction; there are many cases wholly with-[71]-out relief by way of appeal. As for the case of purchasers and creditors who not being original parties, come in under the decree in a suit, they become by adoption for all technical as well as substantial purposes parties in the cause. The doctrine of Lord Hale that all decrees in Courts of Equity are subject to appeal to this House, is indisputable, but not applicable to the case before us. In the case of a bill by a creditor, a decree obtained by one is a decree for all, when they come in under it, and being in Court by their own act, they would be subject to the general jurisdiction in the same manner as original parties. This is not an exception to the rule, but an instance of it. There are two objections to this appeal, as it regards the other parties, first, that the order was made by the Court below upon its own officer, and secondly, that the Court had no jurisdiction to make such order.

In the case of *Wharton v. Squire* there was a case pending in Chancery between the parties, and a question arose whether a certain parchment in the hands of a private individual was a record of the Court of Exchequer, to be used as evidence in the suit in Chancery; the parties in the suit were applicants to the Court of Exchequer, and submitted to the jurisdiction, and by the order of the House an issue in the cause in Chancery was directed to try this question of fact. There was in that case, therefore, no question whether the Court below had jurisdiction to make the order, for the parties had submitted themselves to the jurisdiction. In this case one of our objections to the appeal is that the Court below had no jurisdiction to make [72] this summary order. If this could be described as an order

* The Respondents Fitzgerald, etc. had been served with process, but declined to appear, and the Appeal was set down as *ex parte* against them.

in a cause, the Bank of Ireland are not parties in the cause nor to this order. The motion was made by Mr. Fitzgerald against Mr. O'Neill; no order was prayed against the Bank, they merely made affidavits for the information of the Court, and are brought here improperly by the process of the House, no order has been or can be prayed against the Bank of Ireland.

In the course of the argument, the Lord Chancellor made the following observations:

The Lord Chancellor: The case as it stands upon the appeal, states only a conditional order made, that the Defendants should pay the money, and the Bank should permit inspection of their books, and that that order should be made absolute, unless cause was shewn to the contrary. Cause was shewn to the contrary, and the order stated upon this appeal is only that Mr. O'Neill should pay the money. The order was absolute against the Bank to make them produce their books; the Bank appeared, they made no objection to the order, and with respect to Mr. O'Neill paying the money they have nothing to do; that is a mere question between him and Burke and Fitzgerald. If Fitzgerald and Burke did not put in their answer within a given time, then according to the practice of the House a petition should have been presented to the House, upon which an order would issue, calling upon them to put in their answer within the time limited, or the House would act upon it.

The journals are not evidence of the order made upon such a petition, and the service of the order upon the proper persons.

[73] If you are both agreed to argue it as a question of merits whether the Court of Exchequer had or had not jurisdiction, that is another thing, but consent alone will not give this House jurisdiction.

Whether the Court of Exchequer or whether this House has jurisdiction or not, the question now before the House is whether this jurisdiction existed at the time of making the order; I apprehend the House must determine that question, which it cannot do until the evidence is before it; I do not mean to prejudice the question at all.

With respect to the service of the appeal, the person who speaks of the service is Mr. Burke, the Attorney for John O'Neill, and he certifies that he had given notice to Connell O'Connell the Attorney for all the Respondents.

Under the standing order of January 1819, having presented your appeal, and no answer having been put in in proper time, you are empowered to set it down *ex parte* without any further notice; the result is, that the order so far as the Bank is concerned is right, because every thing is done by this order, that it was prayed the Bank should do; they therefore, have nothing to oppose. With respect to the rest it may be an argument between the counsel for Mr. O'Neill and the reasoning of the House upon what appears to be right to be done; the judgment of the House must be given upon that view, and the House must take care to be right upon it. The first question is as to the jurisdiction; the House itself must be satisfied that it has jurisdiction, if the House is satisfied that it [74] has jurisdiction, you will go on upon the case as between O'Neill and the other parties who do not now appear; the Bank of Ireland are out of the field, they are entitled to their costs, and need not appear any more.

There will be no reply, if the cause is to be heard *ex parte* as against those persons who are not here; when you have stated your case against them, and they do not appear to state their case against you, your statement of the case leaves it to the House to decide. At the same time it is a matter upon which we shall be very glad to receive information, and if you have anything further to state we shall be happy to hear it.

If the House should inform you that it has jurisdiction, you will have to state your case upon the merits; but you will not have to state your case upon the merits as against the Bank. With respect to the new practice in the Court of Chancery, of an injunction restraining a creditor proceeding at law, though he is no party to a suit, that would be very grievous, if that person were not permitted to appeal against that injunction. Lord Thurlow never would adopt that practice, though Lord Rosslyn afterwards established it upon very mature consideration; he said, if a creditor by a motion in a suit in which he is no party, is stopped from going on at law, it is a very material thing to consider what his remedy is by way of appeal.

On the 7th of March, 1825, the case came again before the House for argument upon the [75] merits, when the Lord Chancellor (Eldon) made the following observations:*

The Lord Chancellor: The first question which the Accountant-General of the Court of Chancery in Ireland makes here, is whether that Court had any right to proceed against him by order. That will depend upon the construction of the Irish Act of Parliament.

According to the statements in the appeal before this House, supposing the Court of Exchequer to have had jurisdiction by order, to have directed the Accountant-General to do this, they do not appear to have had any jurisdiction by the nature of the application to them to award any thing respecting the Bank, because the application to them was neither more nor less than that the Bank should produce their books. Nor was there any application of any body in the Court of Exchequer as far [as] I can see to make the Bank answerable at all.

It is quite clear that the Bank in meeting the motion, that they should produce their books, appears to have entered into a sort of controversy as to who was liable; with reference to which the Court had no more jurisdiction upon that motion, to say whether they were liable or not, than the Court of Exchequer in Westminster Hall.

If the Court of Exchequer in Ireland had any jurisdiction to make the Accountant-General answerable by order, instead of making him answerable by bill—I think if they had proceeded as in all such cases as this, the Court of Chan-[76]-cery here would have done to bring all the parties before the Court, in order to give them all a hearing, the Bank among others might have been brought before the Court. It appears to me, that the proceeding is exceedingly defective, supposing the Court of Exchequer had jurisdiction to proceed against the Accountant-General. Whether this House has any jurisdiction at all in the matter is a different question.

I have said nothing conclusive on the subject of jurisdiction, because I know the matter is one of very grave consideration, whether the House has jurisdiction in this case; and that is under the consideration of a noble and learned Lord who knows more upon the subject than I can pretend to do. I have no difficulty in telling you that if the House has jurisdiction, the inclination of my mind will be to direct the Court of Exchequer to order a bill to be filed.

The first question whether we have jurisdiction must depend upon this: supposing the Court of Exchequer had no jurisdiction in the case, can we set them right. That is the first question, which in truth involves the question whether we have any jurisdiction in any such case as this or not; nobody I think can hear the case stated without having, (if there be such a thing,) a judicial appetite to exercise the jurisdiction.

I have communicated to the noble and learned Lord to whom I have been alluding what has passed by way of argument here; some delay will occur before we can learn his opinion. I do not wish to intimate my own until I have his opinion.

Does it appear to have been considered in the [77] Court below, whether the Court of Exchequer had any authority to proceed by a motion against the Accountant-General?

If the Court had jurisdiction to proceed by motion against the Accountant-General of that Court, either they must have proceeded against the Accountant-General of that Court, dismissing from their minds all question of what other persons were to do, or they must have assumed jurisdiction to make other persons answerable upon application by motion, as they must have gone to this length at least, to hold that they would not determine that the Accountant-General of the Court was liable unless the matter were put into such a shape—a bill for instance, which would have brought before them all persons as against whom the Accountant-General might have a right to say that they were first liable; upon this question, it is a material circumstance that this money was paid without all those checks which the Act of Parliament required. The question then would be in what way the parties were to be brought before the Court and in what way, in point of fact, their liability was in issue before the Court of Exchequer.

If this case had been brought before the Court of Chancery in England, if an ap-

* Mr. Hart and Mr. Shadwell for the Appellant. The observations occurred at different periods in the course of the argument, which was *ex parte*.

plication had been made against the Accountant-General there, I have had no experience how the Court would proceed—I mean no experience in the article of charge against the Accountant-General; but I apprehend that the Court of Chancery would have said, file a bill, bringing all parties before the Court.

[78] The Bank appears to have agitated here the question not only of the Accountant-General's liability, but their own liability, and the affidavits go to that point; the application to the Court at the time had nothing to do with their liability.

The question in some way would be raised necessarily, whether the Bank was liable; there is no doubt if these facts are as they have been stated, that an action might be brought, and probably maintained too as well as brought.

If this House has jurisdiction, I do not think it will take much time to deliberate what it ought to do: whether it has jurisdiction or not, is a question of so much importance, that without the assistance to which I have before alluded, I do not think it right to offer to the House my advice. We will therefore, let you know when we shall be prepared to give judgment upon it.

The Lord Chancellor (4th July, 1825): There was a cause heard before your Lordships in which Mr. John O'Neill was the Appellant, and the Right Honourable James Fitzgerald and others were the Respondents: this was certainly a very important case, with respect to the value of the property which was in dispute between the parties. I mean the amount of the stock, for which the Accountant-General of the Court of Exchequer in Ireland was sought by a motion made in a summary way to be held answerable. That Court was of opinion, that they had jurisdiction to hear the matter in that summary way, and they were also of opinion that the Accountant-General of the [79] Court of Exchequer in Ireland, was answerable for that sum. He appealed to this House upon a motion made not in a cause, but upon a motion made in the Court of Exchequer in Ireland, to charge the Accountant-General of that Court, (regard being had to the special manner in which he was appointed by act of Parliament,) with a sum that had been transferred, (taking it to have been improperly transferred,) out of one cause into another cause.

A question arose, whether supposing that the Court of Exchequer had jurisdiction to charge him by that species of summary process, there lay any appeal to this House. With the assistance of my noble and learned friend (Lord Redesdale) who sits near me, a great deal of consideration has been given to this case; there can be no doubt, I apprehend, that if a cause had existed on the Equity side of the Court of Exchequer, the Court of Exchequer had jurisdiction to decide that case, and that an appeal would lie to your Lordships; but on the other hand, if the Court of Exchequer in Ireland had a summary jurisdiction to charge the Accountant-General, as one of its officers, for misconduct in the nature of negligence, it becomes then a serious question indeed, whether this House has jurisdiction in such a case. At present I may say there is no precedent: I may venture in the presence of my noble friend to say we both doubt, whether the Court of Exchequer in Ireland had jurisdiction to proceed in this summary way; and it has, therefore, appeared to us most advisable to submit to your Lordships this proposition, that the [80] cause should stand over, with liberty in the mean time, (notwithstanding the appeal,) to Mr. O'Neill the Appellant, to apply to the Court of Exchequer for a revision of the order on the question of jurisdiction, leaving it open, whether, if they have jurisdiction, they have duly exercised it. If they should be of opinion that they have jurisdiction, it will be for your Lordships to dispose of this appeal, after it has so stood over; in which case you must determine, whether you have jurisdiction or not. If on the other hand, they should be of opinion on reviewing that case that they have no jurisdiction, the consequence of that will be, that in the form of a cause which may be originally decided in the Court of Exchequer in Ireland, it may be brought here by regular appeal. I therefore, propose that the cause should stand over till the next Session of Parliament, and that in the mean time Mr. O'Neill should be at liberty to apply to the Court of Exchequer for a reversal of the order appealed from, for the purpose of discussing the question of the jurisdiction of the Court to make an order in the nature of this order in a summary way. After that application shall have been made, and the judgment of the Court of Exchequer shall have been pronounced upon that application, then that this matter should further come on in this House, any of the parties then being at liberty to apply as they shall be advised.

Lord Redesdale: It appears to me impossible, considering the subject, that your

Lordships can entertain jurisdiction of this case in the manner in which you have already entertained jurisdiction on appeals, for there is in truth no record [81] before you. It is a question whether an officer of the Court of Exchequer has executed his duty so negligently, that he has made himself responsible to suitors in the Court to answer to them in damages for the injury they have sustained, and whether by his being so made responsible, he is to relieve the Bank of Ireland from being responsible. It appears to me that that is properly the subject matter of a distinct suit, and that there ought to be before your Lordships, some record upon which you can proceed. The proceeding which has been had is not a matter of record, it is not incidental to the record, but it is, in my humble judgment, a complete distinct new cause of action. If such action can be sustained, a distinct new cause of action, which ought to be made the subject of a distinct and separate suit, it might then probably come before your Lordships in the way of appeal; but in the manner in which it is framed I apprehend your Lordships can no more take notice of it by way of appeal, than if the Court of Exchequer had proceeded against any officer for misconduct in his office, either by removing him from that office, if they had a right so to do, or by proceeding against him in the way of contempt by process of contempt, for having so conducted himself.

These are proceedings, from which I apprehend no appeal can be allowed to your Lordships' House; because they are matters incidental to the Court, for the sake of keeping the officers in proper order in the execution of their duties in the Court; but this is a distinct question of property, which ought, therefore, to have been made the subject of a distinct suit, and not the sub-[82]-ject of such an order. It does not appear that the Court of Exchequer entered into any consideration of that subject; it does not appear to have been a case properly before them. The Court of Exchequer, therefore, not having considered that question, the proper way appears to be to refer the matter again to the Court: if they conceive that they have jurisdiction they will state the grounds on which they conceive they have that jurisdiction, and then your Lordships will know how to deal with it, but it is a matter which cannot properly be on record in the Court of Exchequer. In the manner in which it is brought forward, I do not apprehend it can be the subject of appeal. In a distinct suit, the question will properly arise, whether this gentleman was responsible for the misconduct of an under clerk of his office, and whether the Bank of Ireland are to be relieved in the manner in which this order relieves them, it being at least extremely questionable, whether there was not as much of misconduct in the Bank of Ireland as in this gentleman.

Die Lunae, 4th July, 1825.—On hearing the said petition of appeal, a question having been made, whether the Court of Exchequer in Ireland had jurisdiction in a summary proceeding, to make the order appealed from: and it not appearing that that question had been fully considered in the said Court, let this matter stand over, with liberty for the Appellant, notwithstanding the appeal before this House, to apply to the said Court to discharge the order complained of, to the intent that the question whether the said Court had jurisdiction to proceed in a summary way to make such order, may be further considered by the said Court.

[83] In consequence of the above order, the Appellant in 1827 moved the Court of Exchequer in Ireland that the order of 1820 might be reconsidered and discharged. The motion was many times before the Court: but in December 1827, the Court of Exchequer refused to make any further order. Upon this motion, the creditors, the original applicants, were served with notice, but did not appear: the Bank of Ireland were not served but did appear, and opposed the motion.

In 1829, the case came again before the House of Lords for further consideration, when Counsel again appeared for the Bank of Ireland: but Fitzgerald, at whose instance the order complained of was originally made, purposely abstained from appearing.

On the 6th of April, 1829, the order was reversed without observation, the Counsel of the Bank of Ireland consenting to take £100 for costs.

Order Reversed.

For the Appellant, Mr. Sugden and Mr. Bligh; for the Respondent, the Bank of Ireland, Mr. Horne and Mr. Phillimore.

[84]

ENGLAND.

(COURT OF EXCHEQUER.)

THOMAS SPONG,—*Appellant*; JOHN SPONG, and others,—*Respondents*

[*Mews' Dig.* xv. 1259, 1659, 1660. S.C. 1 Dow and Cl. 365; and, in Ex., 1 Y. and J. 300. Approved of in *Conron v. Conron*, 1858, 7 H.L.C. 168. Distinguished in *Cornwall v. Saurin*, 1886, 17 L. R. Ir. 595; and see *Robertson v. Broadbent*, 1883, 8 A.C. 812; *Bank of Ireland v. McCarthy* [1898], A.C. 181.]

J. S., by a will properly executed, gave a sum of £1000 to be laid out in Government or real securities, in trust for L. the wife of S., for her separate use for her life; remainder to J. for his life; remainder to the children of L. by S. He then devised certain lands and tenements specified to various persons named in the will, and after bequeathing several pecuniary legacies, he concluded thus: "And I do hereby expressly charge and make liable my real and personal estate to and with the payments of the aforesaid several legacies." Held, reversing the decree of the Court below, that the lands specifically devised, were not liable to the payment of the legacies on a deficiency of the personal estate.

John Spong, by his will, dated the 20th of August, 1811, bequeathed and devised as follows:

I give and bequeath unto my dear wife, Rosamond Spong, the sum of £200 of lawful money of Great Britain, and direct the same to be paid into her hands immediately after my decease; also, I give and devise unto my said wife the possession of the dwelling house in which I now reside, and also the cottage adjoining, now in the occupation of Andrew Kemsley, with the outbuildings, garden, and appurtenances thereunto belonging, free from all rent, except [85] government and parochial taxes, so long as she continues my widow, sole and unmarried; also, I give and bequeath unto my said wife, all my furniture and wines, and moveables of every description, not consisting of money or securities for money, in and about my said dwelling house and cottage, outbuildings, garden and premises, for and during her natural life, she continuing my widow, sole and unmarried. And after the decease of my said wife, or her marrying again, which shall first happen, I give, devise and bequeath my said dwelling house, cottage, outbuildings, garden and premises, and my said furniture, and all wines which shall not be previously used by my said wife, together with my moveables of every description, not consisting of money or securities for money, in and about the said premises, unto and to the use of my son Thomas Spong, his heirs, executors, administrators and assigns, for ever.

Also, I give and bequeath unto my said wife and her assigns, for and during the term of her natural life, one annuity or yearly rent-charge or sum of £100 of lawful money of Great Britain, free and clear of and from all taxes and deductions, whether parliamentary or otherwise (except property tax), the said annuity to be chargeable and charged on, and issuing and payable out of the lands hereinafter mentioned, (that is to say) the yearly sum of £300 part thereof, to be chargeable and charged on and issuing and payable out of the lands by this my will hereinafter given and devised unto my said son Thomas Spong, now living at Mill-hall; and the yearly sum of £100, [86] the remaining part of the said yearly rent-charge of £400, to be chargeable and charged on and issuing and payable out of my mill and premises at Snodland, hereinafter by this my will given and devised unto my son William Spong, etc. And I order and direct that the several provisions made for my wife by this my will, shall be by her accepted and taken in lieu and stead and in full satisfaction of all dower and thirds, free bench and customary right, which she as my said wife could claim to be entitled of, in, to or out of all or any part of my estates, etc.

Also, I give and bequeath to my executor hereinafter named, the legacy or sum of £1000 of like lawful money current in Great Britain and Ireland, to be by him laid out and invested in his name, in the public stocks or funds, or upon government or real securities; and the stocks, funds and securities in or upon which the said sum

of £4000 shall be laid out and invested, I direct shall and may be from time to time altered, varied and disposed of, and the monies arising therefrom again laid out and invested in or upon new or other stocks, funds and securities, and so often as to him my said executor shall seem meet; upon trust, that he my said executor do and shall pay the dividends and interest thereof from time to time when and as the same shall accrue due and payable for and during the natural life of Letitia the wife of John Spong, late of the Borough of Southwark, hop factor, during such time only as she remains a widow and unmarried, in such manner as she the said Letitia the wife of the said John Spong, notwithstanding her coverture, [87] shall by any note or writing direct or appoint, or into her own proper hands for her own separate and peculiar use and benefit, so as not to be subject to the debts or control of her husband the said John Spong; and in like manner in all respects as the said annuity or yearly rent-charge of £100 is hereinafter made payable to my daughter Rosamond, and only upon the receipt or receipts of the said Letitia Spong, or her appointee or appointees, which alone shall be a good and sufficient release and discharge, releases and discharges, to my said executor for so much of the dividends, interest and produce of the stocks, funds and securities in or upon which the said sum of £4000 shall be invested and laid out, as shall be therein expressed to be received.

And from and immediately after the decease of the said Letitia Spong, I give and bequeath the interest and dividends of the said sum of £4000 unto my executor hereinafter named, upon trust that he do and shall from time to time well and truly pay or cause to be paid the said interest and dividends into the proper hands of the said John Spong, for and during the term of his natural life; and it is my express will and meaning, that the same shall continue and be paid and payable to the said John Spong during so many years only of his life, as he the said John Spong shall not alien, sell, or assign the same, or attempt to alien, sell or assign the same, to any person or persons whatsoever; but if the said John Spong shall sell or assign the same, then and in such case the said bequest and the trusts hereby created and declared of and con-[88]-cerning the same shall cease, determine, and be utterly void, and the same shall go to and be paid and payable to the said John Spong's children by the said Letitia his wife as hereinafter mentioned; and it is my express mind, will and meaning, that the receipt of the said John Spong shall alone be a sufficient discharge to my said executor. And from and immediately after the decease of the said Letitia Spong and the said John Spong her husband, then I give and bequeath the said principal sum of £4000 upon trust that he my said executor do and shall pay and apply the said principal sum of £4000 for the benefit of all and every the child or children of the said Letitia Spong by the said John Spong her husband, to be equally divided, etc. Provided always, that in case all the said children shall happen to die before any of them attain the age of twenty-one years, and without leaving lawful issue as aforesaid, then upon trust that the principal sum of £4000 shall sink into and be deemed and taken as part of the residuum of my personal estate.

Also I give and devise unto my son Thomas Spong, his heirs and assigns, all and every my freehold and leasehold estates, situate at Mill-hall, East Malling, Aylesford, Burham, Ditton, and Sandgate, in the said County of Kent, and Acton in the County of Middlesex, comprising the estate called the Dunkin Estate, together with the mansion-house, thereunto belonging; and also those three dwelling houses in the occupation of John Smitherman, John French, and John Jarratt, together with the barn, called Ashbarn, lodges and yard; and also all those [89] four other dwelling houses in the occupation of E Oakley, etc.; and also all those two acres and a half of land planted with apples and cherries, leading from Mill-hall to the London turnpike road; and also a field, called Old Hithe Field, containing about one acre and a half; and also certain lands at New Hythe, called Simmons, together with the dwelling houses, etc.; and also all those two houses next adjoining, late in the occupation of, etc. with the lodges, gardens, and appurtenances thereunto belonging; and also all that estate which I lately purchased of Mr. Richard Round, containing by estimation about eighteen acres, together with the willow plot adjoining and next Baldock's wharf; and also all that estate which I lately purchased of Sir John Honeywood, Baronet, likewise adjoining, containing about ten acres (be the same more or less); and also all those two plots of land near the Brook-gate, allotted by the com-

missioners for dividing the waste lands of East Malling, together with the appurtenances, to hold the said estate and premises by this my will devised to my said son Thomas Spong, unto and to the use of my said son Thomas Spong, his heirs and assigns for ever, subject to the annual payment of £300 to my said wife, during her life, part of the said yearly sum of £400 by this my will given to her; and the annuity or yearly sum of £100 hereinafter given in trust for my daughter Rosamond Spong.

Also I give and bequeath to my said son Thomas Spong, all the farming stock, goods and chattels, books, debts and things contained in an inventory lately made out by me, and signed with my [90] name, which my said son Thomas Spong is in possession of.

Also I give and devise unto my said executor hereinafter named, all that my messuage or dwelling-house, barn and outbuildings, and also twenty acres of land, (be the same more or less) situate lying and being at Cow Lease, in the parishes of Aylesford and Burham aforesaid, late in the occupation of Rebecca Underhill, her under tenants or assigns, but now in my own occupation, with the appurtenances thereunto belonging, upon the trust and to and for the several uses intents and purposes hereinafter mentioned; that is to say, upon trust, that he my said executor shall and do from and immediately after my decease, permit and suffer my son Daniel Spong, and his assigns, to have, hold and enjoy all that my said freehold estate to my said executor given in trust as aforesaid, and to receive and take to his and their own use and benefit the rents, issues and profits thereof, for and during the term of his natural life, he my said son Daniel keeping the said freehold premises in good and tenantable repair.

And from and immediately after his decease, I give and bequeath the said freehold messuage or dwelling-house, barns and outbuildings, with the lands and appurtenances thereunto belonging, unto my said executors, until the youngest child of my said son Daniel shall attain his or her age of twenty-one years; and in the meantime to receive the rents, issues and profits of the same, for and towards the maintenance, education, and bringing up of all and every the child and children of my said son Daniel Spong, upon the [91] trust hereinafter mentioned; and when and so soon as such child shall have attained the said age of twenty-one years, then I do hereby direct my said executor to sell and absolutely dispose of the same by public auction or private contract, as to him shall seem expedient, for the best price or prices in money that can be reasonably had or obtained for the same, and to convey the same accordingly, etc. And from and immediately after the decease of my said son Daniel upon trust, that he my said executor, do and shall pay or transfer all such principal monies, stocks, funds and securities, so to arise by sale of my said estate, until all and every the child or children of the said Daniel Spong, lawfully to be begotten, equally to be divided between or among them, share and share alike, if there shall be more than one; and if there shall be but one such child, the whole to be paid or transferred to such one child, etc.

But in case all the said children shall happen to die without leaving lawful issue of his, her or their body or bodies as aforesaid, then I give and devise the said last mentioned messuage or tenement, lands, hereditaments and premises, unto and to the use of my said son Thomas Spong, his heirs and assigns for ever, etc.

Also I give and devise Snodland Mill, and the several cottages attached thereto, and also the drying houses, sheds, and wharf, and about nine acres of land thereunto belonging, unto and to the use of my son William Spong, of Snodland, his heirs and assigns, for ever, subject and charged with the annual payment of £400 to my said wife for her life, part of the [92] said yearly sum of £400 by this my Will given to her.

And I give, devise and bequeath unto my executor hereinafter named and his heirs, during the natural life of my daughter Rosamond Spong, spinster, one annuity, yearly rent charge, or annual sum of £100 of lawful money of Great Britain, to be issuing and payable out of the estates and premises devised to my said son Thomas Spong as aforesaid.

Also I give and bequeath to my executor hereinafter named, the sum of £1000 of lawful money of Great Britain, to be by him laid out and invested in his name in the public stocks or funds, or upon government or real securities; and the stocks, funds, and securities in or upon which the said sum of £1000 shall be laid out and invested, I direct shall and may be from time to time altered, varied, sold and disposed of, and the monies arising thereupon again laid out and invested in or upon

new or other stocks, funds and securities, and so often as to him my said executor shall seem meet, upon trust, that he my said executor do and shall pay the interest and dividends thereof, from time to time, as the same shall accrue due and payable, for and during the natural life of my said daughter Rosamond Spong, in such manner as she shall by note or writing direct or appoint, or into her own proper hands, for her own separate and peculiar use and benefit, so as not to be subject to the debts or control of any husband she may have; and in like manner, in all respects, as the said annuity or yearly rent-charge of £100 is hereinbefore directed to be [93] paid to her my said daughter Rosamond Spong, and only upon the receipt or receipts of my said daughter, or her appointee or appointees.

And from and immediately after the decease of my said daughter, upon trust, that he my said executor do and shall transfer and assign the stocks, funds and securities, in or upon which the said sum of £1000 shall be laid out and invested, unto between and among all and every the child and children of my said daughter, by any husband she may happen to have, etc.; and in case my said daughter Rosamond Spong should not happen to have any son who shall live to attain the age of twenty-one years, nor any daughter who shall live to attain that age, or be married, then upon trust that he my said executor do and shall transfer and assign the stocks, funds and securities in or upon which the said sum of £1000 shall be laid out and invested unto, between and among all and every, or any one exclusively of the others or other of my sons and other daughters, as my said daughter, (whether covert or sole) shall by her last will and testament in writing or writings, purporting to be or in the nature of her last will and testament, or a codicil or codicils thereto, to be by her respectively signed and published in the presence of and attested by two or more credible witnesses, direct or appoint; and in case my said daughter Rosamond Spong should happen to depart this life intestate, as to the whole or any part of the said stocks, funds and securities, then the said sum of £1000 shall sink into and be deemed and taken as part and parcel of the residue of my personal estate.

[94] Also I give and bequeath to my daughter Mary, the wife of Charles Brenchley, Esq. the legacy or sum of £2000 of lawful money of Great Britain, which will make up her fortune to the amount of £3000, I having on the marriage of my said daughter Mary with the said Charles Brenchley given her the sum of £1000.

Also I give and bequeath to my executor hereinafter named, the legacy or sum of £2000, etc. upon trust, that he my said executor do and shall pay the dividends and interests thereof from time to time, when and as the same shall accrue due and payable, for and during the natural life of my daughter Martha, the wife of Major William Rowan, in such manner as she shall appoint, etc.; and from and immediately after the decease of my said daughter Martha, then upon trust, that my said executor do and shall stand possessed of the said last mentioned stocks, funds and securities, upon such and the same trusts, and subject to the same provisos and directions in all respects, for the benefit of all and every the children, or the only child, as the case may be, of my said daughter by her present husband, or by any other husband she may hereafter happen to have, as herein before expressed, of and concerning the stocks, funds and securities in or upon which the said sum of £2000 shall be laid out and invested for the benefit of all and every the children or the only child of my said daughter Martha, etc. Also I give and bequeath unto my said daughter Martha Rowan, the further sum of £1000 of lawful money current in Great Britain and Ireland, to be paid and payable to her executors [95] administrators and assigns, within twelve months next after my decease.

Also I give and bequeath to the two children of my deceased daughter Elizabeth, the wife of William Bowles, Esq. the legacy or sum of £1000 each, of like lawful money, when they shall respectively attain the age of twenty-one years; also I give and bequeath unto John Spong, the son of the said John Spong by Letitia his wife, the sum of £500 of like lawful money current in Great Britain and Ireland, to be paid him when he shall attain his age of twenty-one years.

And I order and direct the several legacies and sums by this my will given and bequeathed, or which I may hereafter give or bequeath by any codicil or codicils to this my will, and which shall not be otherwise directed to be paid, to be raised and paid, or put out and invested, as the case may require, within twelve months next after my decease; and I do hereby expressly charge and make liable my real and per-

sonal estate, to and with the payments of the aforesaid several legacies, etc. The Appellant was appointed executor of this will.

The will was executed and attested so as to pass real estates. The Testator died in the month of January, 1815, without having revoked or altered his will, leaving the Respondent Daniel Spong, his eldest son and heir at law, and Daniel Spong and the Appellant Thomas Spong, and the Respondent William Spong his co-heirs in gavelkind.

After the death of the Testator the Appellant proved his will, and possessed himself of the per-[96]sonal estate and effects of the Testator, and he paid the principal part of the debts and some of the legacies of the Testator; but he did not pay the whole of a mortgage debt which was charged upon the estate devised to the Respondent William Spong, nor the legacy of £1000 to the Respondents John Spong and Letitia his wife and their children, nor invest any sum for the benefit of the several persons entitled to such legacy, and the legacy of £2000 by the Will given to the Respondent Martha Rowan and her children, remained unpaid. Upon the death of the Testator, the Appellant and the other devisees named in his Will, respectively entered into the possession of the several estates thereby devised to them respectively.

The Respondents John Spong and Letitia his wife and their children, together with the Respondent Charles Penderanda da Frauchimont, who married one of the daughters of John Spong, on the 13th of December, 1821, filed their bill in the Court of Exchequer against the Appellant, and the bill was afterwards amended by making the Respondents Daniel Spong, William Spong, Rosamond Spong, William Rowan and Martha his wife, and William Bowles and Mary Bowles Defendants to the suit. The case stated upon the amended bill, was to the effect before mentioned. The bill prayed that an account might be taken of what was due and owing to the above mentioned Respondents for principal, in respect of the aforesaid legacy of £4000, and also of the interest which had accrued due upon such legacy, and that such interest might be paid by the Appellant to the Respondent Letitia [97] Spong, for her sole and separate use, and that the Appellant might be directed forthwith to pay into the Bank of England, in the name and with the privy of the Accountant-General of the said Court, in trust in the said cause, the sum of £1000, and that the same when paid in, might be invested by the said Accountant-General, in the purchase of three per cent. Bank Annuities, for the benefit of the above named Respondents, according to their respective interests therein, under the said Testator's said will, and that the trusts thereof might be declared accordingly; and that the Appellant might also be decreed to make good to the above named Respondents such loss as they had sustained, by the non-investment by him of the said sum of £4000 at the time when he ought to have invested the same; and that an account might be taken also of what was due to the Respondent John Spong the younger, for principal and interest in respect of the legacy therein mentioned; and in case the Appellant would not admit assets of the said Testator come to his hands, sufficient for the purposes aforesaid, then that an account might be taken of the personal estate and effects of the said Testator, which had been received by the Appellant, or by his order, or for his use; and that the same might be applied in a due course of administration; and in case the personal estate of the Testator should not be sufficient for the purposes aforesaid, then that such deficiency might be made good by the sale of a competent part of the real estates of the Testator, and that all necessary parties might join in such sale; and that in the mean time a Receiver might be ap-[98]pointed of the rents, issues and profits of the real estates of the Testator; and that such Receiver might be directed out of such rents and profits to keep down the interest then due, and thereafter to accrue due upon the legacy; and that the Appellant, and the other Defendants therein named, might be restrained by injunction from interfering, or in any manner intermeddling with such real estates.

The Appellant, upon being served with process, put in his answer to the original bill, and also his answer to the amended bill, and thereby admitted the will of the Testator as stated in the bill, and his death; and that he the Appellant had duly proved the will, and had taken upon himself the execution thereof, and that he had possessed himself of the personal estates and effects of the Testator, to the amount thereafter stated, but he thereby denied, that the estate of the Testator was nearly

sufficient to pay all the debts and legacies of the Testator: and the Appellant, by his answer, admitted that he had entered into and then was in possession of the real estates of the Testator, devised to him by the will.

The other Defendants also put in their respective answers to the bill, and the Respondents Daniel Spong and William Spong, by their answers respectively admitted the will and death of the Testator: and the Respondent William Spong, by his answer further stated, that the premises devised to him by the Testator, were mortgaged by the Testator in his life time to John Simson, Senior, of Hertford, in the County of Hertford, latter, for the purpose of securing the payment to John [99] Simson, of the sum of £2200 or thereabouts, with interest: and that the Defendant had, since the death of the Testator, paid or accounted for the sum of £1100 or thereabouts, on account of such mortgage, out of the Defendant's own proper monies: and he submitted, that the sum secured by such mortgage being a debt of the Testator, the sum of £1100 so paid by the Defendant on account of such mortgage, ought to be repaid to him, with interest, out of the estate of the Testator.

The several answers of the Appellant, and of the other Defendants to the suit, were replied to: and a witness having been examined on the part of the Respondents, the Plaintiffs in the suit, and cross examined on the part of the Appellant, the cause came on to be heard (reported 1 Young and Jervis, 300) before the Lord Chief Baron, and was argued on the 19th and 20th of December, 1826, and on the 29th of January, 1827, when it was decreed that the will should be established, and the trusts thereof carried into execution: and it was referred to one of the Masters of the Court, to take an account of the respective values of the several real estates of which the Testator was seised at the time of making his will and of his death: and to take an account of the debts, legacies, and funeral and testamentary expenses, and of the personal estate of the Testator come to the hands of the Appellant, etc. and how the same had been disposed of: and upon taking such accounts, if it should appear that the personal estate of the Testator was not sufficient for the payment of the legacy, then the Court declared, [100] that the Testator had, by his will, charged so much as should remain unsatisfied upon the whole of the real estates, whether specifically devised or otherwise, and also upon his personal estate specifically bequeathed: And it was further ordered, that Rosamond Spong, the widow of the Testator, should be at liberty to elect, whether she would claim her dower out of the real estates of the Testator, or whether she would take under the will of the Testator John Spong: and that the Master should enquire and report to the Court accordingly: and whether the Respondent William Spong had paid off any mortgage made by the Testator on any of his real estates, etc.

From this decree, except so far as it directs, that Rosamond Spong, the widow, should be at liberty to elect whether she would claim her dower out of the real estate of the Testator, or whether she would take under his will, the appeal was presented.

For the Appellants: Mr. Fonblanque and Mr. Swann.

For the Respondents: Mr. Sugden and Mr. Stuart.

On the part of the Appellant it was argued that by the general rule of equity, a specific devise was exempt from contribution to a general pecuniary legacy, and that it was for the Respondents to shew from the words or provisions of the will, a clear intention on the part of the Testator to charge the land specifically devised, with the payment of the legacy: that if the land was so charged, *a fortiori*, the specific legacies to the brother and the widow must be equally [101] charged, which seemed inconsistent with the apparent intent of the Testator, particularly as to the widow, whose legacy was given as a substitute for the right of dower: that the judgment below was founded on the propositions that every devise of land was specific, therefore the devise of a residue of real property was specific, and that there was no distinction as to exemption from charge, between a devise of a particular estate and of such residue: which propositions were contrary to law and the authority of decided cases.

For the Respondents, it was put upon the ground of an implied intention to be collected from the will: And that the words of the will charge all the lands without exception, and are not confined to the residue.

The authorities cited were *Sayer v. Sayer*, 2 Vern. 688. *Prec. in Chanc.* 392. *Lewin v. Lewin*, 2 Ves. 417. *Webb v. Webb*, 2 Vern. 111. *Brown v. Allen*, 1 Vern.

31. *Long v. Short*, 1 P. W. 403. *Hamby v. Roberts*, Ambler, 128. S. C. 1 Dickens, 101, under the name of *Hamley v. Fisher*. *Birmingham v. Kirwan*, 2 Scho. and Lef. 414. *Howe v. L. Darlington*, 7 Ves. 147: for the Dict. of Eldon, C. that every devise of land is specific. *Hill v. Cock*, 1 Ves. and Bea. 175, for the same dictum. *Clifton v. Burt*, 1 P. W. 679. *Harris v. Ingledew*, 3 P. W. 91. *Kightly v. Kightly*, 2 Ves. J. 328. *Keeling v. Brown*, 5 Ves. 359. *Joy v. Campbell*, 1 S. and L. 328 (see a corrected and enlarged report of this case, *post*, p. 110). *Powell v. Robins*, 7 Ves. 209. *Ellison v. Airey*, 2 Ves. 568. *Huslewood v. Pope*, 3 P. W. 322. *Aldrich v. Cooper*, 8 Ves. 396. *Austen v. Halsey*, 6 Ves. 475.

[102] Lord Manners: This is an appeal from a decree of the Court of Exchequer in England, on a bill by the Respondents, who are pecuniary legatees of a sum of £4,000 under the will of John Spong, for the payment of this legacy and for the usual accounts. The bill prayed that if the personal estate of the Testator should be insufficient, the deficiency should be raised out of his real estates, and the question between the parties is, whether if the personal estate should be insufficient to satisfy this legacy, the legatees interested in this sum have a right to resort to the property specifically devised and bequeathed to supply the deficiency. The Lord Chief Baron was of opinion, that according to the true construction and effect of the Testator's will the pecuniary legatees had such right, and decreed accordingly. The Appellant Thomas Spong, who is a specific devisee and legatee, and is also residuary devisee and executor, has appealed from that part of the decree.

The Testator by his will, upon which the question arises, gave a legacy of £200 to his wife, and he also gave to her the possession of a dwelling house, in which he resided, so long as she continued his widow, sole and unmarried. He gave to her also all his furniture and wines, and moveables of every description, not consisting of money, or securities for money, in and about his dwelling house, during her natural life, she continuing unmarried; and after her decease, or her marrying again, he gave his dwelling house, cottage, furniture, and wines which should not have been used, together with moveables of every description, and not consisting of money, or securities for money, [103] to the use of his son Thomas Spong. He then gave to his wife an annuity of £100, £300 of it being payable out of the lands given and devised to his son Thomas Spong, and the remaining £100 out of a Mill and premises devised to another son, William Spong. He then directed that the several provisions made by his will should be in lieu of dower; and he released his son John Spong from a bond debt of £1000. He then gave to his executor a sum of £1000, which is the sum now in question, to be invested in his name in government securities, upon trust, to pay the dividends and interest to Letitia Spong, the wife of John Spong, for her separate use during her widowhood, with remainder to her son as provided by the will. He then gave his estates, freehold and leasehold, at Mill Hall and other places in the County of Kent, and also a property in the County of Middlesex, to Thomas Spong the Appellant, his heirs and assigns for ever, subject to the annual payment of £300 to his wife during her life, part of the said yearly sum of £400 by his will given to her; and the annuity or yearly sum of £100 thereafter given in trust for his daughter Rosamond Spong. He then gave to his son Thomas Spong all the farming stock, etc., upon his farm. He then gave certain lands in the parishes of Aylesford and Burham, to his Executor in trust for his son Daniel Spong, for his life, and after his decease to his children. He then gave certain lands, cottages, and appurtenances to his son William Spong, subject to an annuity of £100, the remainder of the sum of £400 given to his widow.

He gave several other pecuniary legacies, and [104] then comes this clause upon which the question arises: "I do hereby expressly charge and make liable my real and personal estate to and with the payment of the aforesaid several legacies." He then gave some direction with respect to his pews in Aylesford Church; and as to all the rest, residue and remainder of his real and personal estate, of what nature or kind soever the said might consist, not theretofore given and bequeathed, he gave and devised it to his son Thomas Spong, his heirs, executors, administrators, and assigns absolutely, and he appointed Thomas Spong his executor.

Upon the hearing of this cause the Lord Chief Baron pronounced a decree to this effect: "That the Will should be established, and the trusts thereof performed and carried into execution;" and it was further ordered and decreed "that it should be

referred to the Master to take an account of the respective values of the several real estates of which the said testator was seised at the time of making his will, and the time of his death;" and it was further ordered and decreed "that it should be referred to the Master to take an account of the debts, legacies and funeral and testamentary expenses, and of the personal estate of the testator John Spong, come to the hands of the appellant, his executor, or of any other person or persons by his order or for his use, and how the same and every part thereof had been applied and disposed of: and upon taking such accounts if it should appear that the personal estate of the testator was not sufficient for the payment of the said legacy, then the Court declared that the testator John Spong had by his will charged so [105] much as should remain unsatisfied upon the whole of his real estates, whether specifically devised or otherwise, and also upon his personal estate specifically bequeathed."

It appears that there was some real property of the testator which passed under the residuary devise, and in this case, Thomas Spong the specific devisee under the will has appealed from that part of the decree which makes liable to the satisfaction of the pecuniary legacy the property devised by the will.

Upon the report of the case it seems that the Lord Chief Baron has laid down a proposition which appears to have pervaded the whole of his argument, and to have governed his decision, and which is to this effect, namely, that there is no difference between a specific devise of a particular estate, and a residuary devise of a real estate, and that a general charge of pecuniary legacies upon real estate as it would affect a residuary devise so it would affect a property specifically devised: for as to real estates they are in their nature specific devises, and if a legatee has a right to resort to the one he has equally a right to resort to the other. Upon this proposition the whole case rests. Now, I confess, I cannot concur in this proposition. There is not much authority in the books upon the subject, but, I think there is a marked and obvious distinction between property specifically devised and real estate which passes under a residuary clause.

In the first case a testator by specifically devising or specifically bequeathing any part of his property, intends as between the objects of his bounty to separate that part of his property from the rest, and that it should not be subject to the [106] provisions and operation of his will. Whereas in a residuary devise as in the present case, it is quite the reverse. The devisee must take it subject to all the provisions and incumbrances charged upon the land. In the one case the devisee takes the specific thing devised—in the other case the residuary devisee takes such part of the real property as shall remain after satisfying the charges and incumbrances affecting the real estate. The cases therefore appear to me most materially different. By the general rule a specific devisee or specific legatee shall not contribute to make good a pecuniary legacy, but there can be no such rule applicable to a residue. A residue of a real estate is so far specific that it must be in the possession or in the power of the testator to devise it at the time of making his will, and upon the lapse of any specific devise it will not fall into the residue, but in other respects it is merely residue, and this is its character. Lord Hardwicke in the case of *Hamby v. Roberts*, which is reported in Ambler, and better reported in the first volume of Dickens's Reports, recognizes that distinction in the marshalling of assets: and it is a distinction, as it appears to me, which is very obvious and very decisive of this case. The Lord Chief Baron has not drawn that distinction, and this appears to me to be the objection to this part of the decree against which the appeal was directed.

Mr. Sugden in his argument contended that if the testator had at the outset of his will charged his debts and legacies upon his real estate, and had then given specific devises, and specific bequests, and also pecuniary legacies, the pecuniary legatees would, in case other funds were deficient, [107] have a right to resort to the property specifically disposed of. I do not concur in that opinion. It certainly was not the opinion of Lord Alvanley, who in three different instances stated his opinion as to the distinction between creditors and legatees under such circumstances. In the first case of *Kightley v. Kightley* (2 Ves. J. 328) in 1794, Lord Alvanley makes that distinction. Afterwards in the case of *Shallcross v. Finden* (3 Ves. 739) in 1795, he persists in that distinction, and in the case of *Keeble v. Brown* (5 Ves. 359), in the year 1800, he continues to distinguish between creditors and legatees in respect of such a charge.

Now this opinion of Lord Alvanley's, though it does not amount to the authority of a decision upon the subject, is by no means without weight. He laid down this rule in the first case I have adverted to, and having afterwards understood that the Lord Chancellor differed from him in opinion, that brought his mind more forcibly to reflect upon it, and he persisted in that opinion, and afterwards proceeded in three different cases to lay down the doctrine accordingly. I think there is much more weight to be given to it than to a mere *obiter dictum*, for though it does not amount to a decision, it was a deliberate and well considered opinion.

When this case came on for argument, I stated that I would not in the absence of any law Lord take upon myself to reverse the decision of an eminent Judge, whose decisions are entitled to so much respect. I have now an opportunity of expressing my opinion in the presence of my noble and learned Friend on the woolsack; and I have the satisfaction of saying that I have com-[108]-municated that opinion to Lord Eldon, and Lord Redesdale, both of whom concur with me in it.

With respect to the case of *Campbell v. Joy*, which was supposed to be a decision upon the point; in that case there does not appear to be an express charge so as to amount completely and entirely to an authority upon the point; but I have enquired of Lord Redesdale what we are to understand by his stating in that case "that it would be understood by counsel that it would be contrary to principle to charge a specific part of an estate called Throne, with the payment of legacies." His answer was, that what he meant by its being against principle was, that it was an established rule of the Court that a specific devisee or a specific legatee was not to contribute to make up a pecuniary legacy; and that that was what he meant to lay down in that case.

Now if the testator had intended to prefer the pecuniary legatee to the specific devisee or specific legatee, and had by his will expressed that intention, or if that intention must be necessarily implied from the context of the will, there is no doubt the Court would have given effect to that intention and have decided accordingly. But the rule of construction when this intention is not expressed, is that the pecuniary legatee cannot resort to property that is specifically disposed of. That was the opinion of Lord Eldon in this case, and it was the opinion also of Lord Redesdale, in which I perfectly concur, having had the advantage of hearing all the arguments upon the subject.

There was another observation which was very well made by one of the Counsel at the Bar, that [109] in this case the testator seems to have himself understood the distinction between a specific legatee and a residuary legatee, for he gives to Thomas Spong a specific bequest of land and personal property, and he also makes him residuary devisee, and legatee, and from that it was inferred that he was aware of the difference between a specific and a residuary devise of real estate. That was an observation made by one of the Learned Counsel, and very properly as applying to this case; so far, therefore, from there being any intention in this case on the part of the Testator to prefer the pecuniary legatee, he has himself drawn the distinction, and he has stated nothing that would justify the Court in excepting this case out of the general rule, namely, that a specific legatee or a specific devisee shall not make good a pecuniary legacy. If this distinction of the Lord Chief Baron's were to stand, it would very much disturb and shake that rule, which I think there is no ground for doing.

With respect to the case put by Mr. Sugden, although I may say, that I do not agree with him, and that I think Lord Alvanley was not of that opinion, perhaps the best and most satisfactory answer that I can give to Mr. Sugden is, that the Testator in this case has not so done as he represents. He says, that if in the outset of the will there was a charge of legacies, upon real and personal estate, it would entitle the residuary legatee to go against the property so devised. But in this case the Testator has not so done.

Upon the whole, I submit to your Lordships, that the part of the decree of the Lord Chief Baron, in which he directs that "if it shall ap[110]pear that the personal estate of the Testator was not sufficient for the payment of the said legacy, then the Court declared that the Testator John Spong had by his will charged so much as should remain unsatisfied, upon the whole of his real estates, whether specifically devised or otherwise, and also upon his personal estate specifically."

devised," should be reversed, and that in all other respects the decree should be affirmed.

Die Lunae, 13th of April, 1829.—It is ordered and adjudged, etc. that so much of the decree complained of in the said appeal as declares that "if upon taking the accounts, it should appear that the personal estate of the Testator was not sufficient for the payment of the legacy in the decree mentioned, then that the said Testator J. Spong had by his will charged so much as should remain unsatisfied, upon the whole of his real estates, whether specifically devised or otherwise, and upon his personal estate specifically bequeathed," be and the same is hereby reversed. And it is further ordered and adjudged that the said decree complained of, in all other respects be and the same is hereby affirmed.

JOY v. CAMPBELL.

[News' Dig. ii. 446: vi. 1358. 1477. Followed on the point as to the shares in the partnership (1 Sch. and Lef. 335: 3 Bli. N. S. 117) in *Hamilton v. Bell*, 1854. 10 Ex. 545, 548, and *Reynolds v. Bowley*, 1866, L. R. 2 Q. B. 41, 474; and see *Colonial Bank v. Whinney*, 1886, 11 A. C. 442, and the Bankruptcy Act 1883 (46 and 47 Vict. c. 52), s. 44 (iii.). On point as to liability of executor (1 Sch. and L. 340: 3 Bli. N.S. 117, 118), see *Speight v. Gaunt*, 1883, 22 Ch. D. 744.]

In the report of the case of *Joy v. Campbell*, 1 Scho. and Lefroy, p. 339, is a marginal note or abstract, which is thus expressed:—"A specific legacy cannot in a subsequent part of the will be charged with payment of debts or legacies." The Lord Chief Baron, in his observations (1 Young and Jervis, 314) in giving judgment upon this case of *Spong v. Spong*, having expressed a doubt of the accuracy of this marginal note, a corrected report of the case of *Joy v. Campbell*, drawn up by Mr. Beatty, is inserted below. This report contains many essential additions to the statements, some of which are noticed by italics, and others by indexes. A report is also added of the further proceedings in the case before Lord Manners.

[111] William Brown deceased, was in and before the year 1787 a dormant partner in the mercantile house at Belfast called the "Sugar House Company," in which he possessed one half of six shares part of twenty shares of which the capital stock consisted, the other half of which six shares belonged to John Brown his brother; William Brown was also a dormant partner, and had one third of a share of the capital stock in another mercantile establishment called the "Rope Walk Company," in which John and another brother Thomas Brown were concerned in the same manner, and to the same extent, each having one third of a share.

In 1787, John Brown being about to commence business as a banker, assigned his interest in the said two mercantile concerns to his brother William in trust for himself, and William executed a declaration of trust accordingly; and shortly after William intending to enter into another banking house, prevailed on Thomas (who was apprized of the former trust), to become a trustee both for him and for John, for their respective shares in the said houses, the other partners having agreed to accept Thomas as a partner. An assignment was executed to him, for merely nominal consideration, the object being to evade the provision of the bankers' act; and soon after the execution of the assignment, Thomas cancelled the deed by cutting off the name and seal of William, and delivered back the deed so cancelled to William in whose possession it remained till his death. Thomas regularly received the dividends accruing from the said companies, and duly paid over to William his shares during his life, and gave credit to John in his account with him for the amount of his shares. During the period of these transactions Thomas carried on a distinct trade in partnership with John Oakman, under the firm of Brown and Oakman.

William Brown was, previous to the making of his will after mentioned, and at the time of his death seized and possessed of a farm and land called the Throne near Belfast, in the county of Antrim, for the lives of the King and the Dukes of York and Clarence, and from the death of the survivor for the term of forty-one years, to be computed from the 1st November, 1790, and also seized and possessed of other real and personal estates to a very considerable amount, and being thus seized and

possessed, he, on the 11th November, 1794, made his *will* duly executed, by which he bequeathed several pecuniary legacies and an annuity, and devised and bequeathed to his brother Thomas Brown, his dwelling-house in Belfast, held for lives and years, with his household furniture, plate, houses, etc. and [112] after bequeathing several further pecuniary legacies, and among others one thousand pounds to William Brown Joy, the son of his niece Mary Ann Joy, and two thousand pounds to the other issue of said Mary Ann Joy; he left devised and bequeathed his farm and premises at the Throne, in the Barony of Belfast, with his buildings, etc. thereon unto his nephew William Brown, son of his brother Thomas Brown, to hold to him his heirs, executors, administrators and assigns, from the time he attained his age of twenty-one years; but in case his said nephew William Brown should die under the age of twenty-one years, he left and devised the said farm and premises to the next eldest son which his said brother Thomas Brown might happen to have, when such next eldest son should attain the age of twenty-one years, and to the heirs, executors, administrators, or assigns of such next eldest son; and in case no son of his said brother Thomas should attain the age of twenty-one years, then he left and devised the farm at the Throne amongst the daughters of his said brother Thomas (if more than one) share and share alike, with this special limitation however respecting the said devise of the farm at the Throne, to wit that none of the said devisees should or could take effect, until the decease of his said brother Thomas, for it was his will, and he did thereby order and direct, that his brother Thomas Brown should have and enjoy the free use and benefit, profits, and advantages of the said farm, from testator's decease for the term of his natural life without impeachment of waste. The testator then bequeathed three thousand pounds among the children of his said brother Thomas Brown to be paid with interest on their coming of age or sooner at the option of his executors, and *subject to the payment of the legacies, annuities, devises and bequests aforesaid, and to his debts and funeral expenses*; he devised and bequeathed all the rest residue and remainder of his lands, tenements, freehold estates, effects, money, and securities for money, goods, chattels, and worldly property of every denomination and description whatsoever and wheresoever at the time of his death, unto his said brother Thomas Brown his heirs, executors, administrators, and assigns, and nominated John Campbell, (to whom he gave a legacy of one hundred pounds), James Joy, and his brother Thomas Brown executors and trustees of his will, and the testator thereby ordered and directed that whatever part of the several legacies thereinbefore mentioned should remain unpaid, at the end of twelve months next after his decease, together with the life annuity thereinbefore mentioned, should be then *well and sufficiently secured upon his freehold and personal estates and assets, and bear a legal interest from that time until paid and discharged* in manner aforesaid. And in case any of the legacies thereinbefore [113] mentioned and bequeathed should lapse, by means of the death or failure of one or more of the legatees aforesaid previous to testator's death, he thereby bequeathed such lapse the legacy or legacies to his said brother Thomas Brown his executors, administrators, or assigns, and upon the death or failure of one or more of the legatees aforesaid or annuitant before mentioned, whose legacies were payable under said will upon contingencies of life, at attaining full age, or being otherwise, circumstantially or eventually, capable of taking or inheriting under the said will, he did thereby order and direct that all such contingent legacies should go and belong to his said brother Thomas Brown his executors, administrators, and assigns.

William Brown the testator died in December, 1795, whereupon all the executors proved his will in the prerogative court of Ireland, and took probate, but as James Joy did not live at Belfast where the property principally lay, it was managed by the others; Thomas Brown continuing until his bankruptcy in October 1798, to receive the dividends of the Sugar House and Rope Walk companies as trustee, collecting debts due to the deceased and paying some of his debts and legacies, and Campbell (who had been the partner of William in the bank) retaining in his hands a sum of five thousand two hundred and eighty-five pounds one shilling and fivepence, belonging to his testator, which was lying in the bank at the time of his death, and paying himself his legacy of one hundred pounds.

With respect to this sum of five thousand two hundred and eighty-five pounds one shilling and fivepence the following transactions took place. Campbell had in the life time of William Brown lent a sum of four thousand two hundred pounds to

Brown and Oakman on the joint note of William and John Brown, and Brown and Oakman for two thousand seven hundred pounds, of this, part was paid in William Brown's life time, and the remainder due at his death the sum of three thousand two hundred and thirty-two pounds, which Campbell received from the bank, and lodged the notes in the bank to the credit of William Brown's account; soon after the bank settled accounts with Thomas Brown as executor of William Brown, on which occasion, after deducting the said sum of three thousand two hundred and thirty-two pounds, and also a sum of one thousand five hundred and forty pounds which had been previously paid to Thomas Brown, a balance of five hundred and thirteen pounds one shilling and fivepence appeared due to the estate of William Brown which was then paid to him, and a receipt for the whole sum of five thousand two hundred and eighty-five pounds one shilling and fivepence was given to the bank by Campbell and Thomas Brown as executors; at [114] the same time, the notes not only of William Brown but of John Brown and of Brown and Oakman were given up to Thomas Brown, and no steps were ever taken to compel payment against either John Brown or Brown and Oakman.

After the bankruptcy of Brown and Oakman, (which did not take place until October 1798) the assignees insisted on their right to have not only Thomas's original share in the Rope Walk company, but also that which he held in trust for William, which trust he had admitted on his examination before the commissioners, and this claim having been disputed by the executors of William, was submitted to arbitrators, who by their award decided in favour of the assignees, in consequence of which, the value of that share was paid over to them by the company.

On the bankruptcy of Thomas Brown, John Graham and John Scott were chosen his assignees, who as such, sold the interest of the bankrupt in the freehold tenement in Waring Street, Belfast, which had been specifically devised by William Brown to him for the sum of one thousand two hundred pounds, and they also sold the life interest of Thomas Brown in the farm at the Throne, which had been specifically devised to him for life.

Thomas Brown died on the 2nd of July, 1801, leaving Sarah, Isabella, William, Frances, Mary, and Campbell Brown, his only children, but before his son William, or any of his children, had attained the age of twenty-one years.

The bill in this cause was filed on the 14th of January, 1803, by the children of Mary Ann Joy against Campbell and Joy, the surviving executors of William Brown, and the assignees and children of Thomas Brown, and against John Brown the eldest brother and heir at law of William Brown the testator, stating the foregoing circumstances, and charging that owing to the misapplication of the assets by Thomas Brown and Campbell, there was not a sufficiency left for payment of the legacies bequeathed to them by the will of William Brown, and praying, "That the said award may be set aside, and that the executors might be decreed to come to a just and fair account with your supplicants for the estate of the said William Brown, and that the said executors might set forth a particular account of the real and personal estate of the testator, specifying the nature, quantities, qualities, and value thereof respectively, and how much thereof they had applied in discharge of the testator's proper debts and legacies and funeral expences, and how much thereof had been applied in discharge of the debts of the said Thomas Brown, and of said Brown and Oakman, and to whom, and for what paid, [115] and what was become thereof particularly; and that the said John Campbell might answer for such parts of testator's estate as he misapplied in payment of said notes, or as through his neglect or wilful default had been wasted and lost, or as by his means or assistance had come to the hands of said Thomas Brown, or that said Thomas Brown might contribute to the payment of said notes: And that the said executors might set forth a particular account of the debts due and owing by the testator at the time of his death, and on what securities, and to whom due, and how contracted, and which of them remained unsatisfied, and which of them had been paid, and by whom; and that *the whole real and personal estate* whereof the said William Brown died seized or possessed, or such part thereof as to the Court should seem fit, might be decreed to be subject to the said William Brown's debts and legacies; and that the same or a competent part thereof, might be sold for payment of said debts and legacies, or that plaintiffs might be permitted to claim as creditors on the estate of said Thomas Brown for the amount thereof, or for said William Brown's proportion of the pur-

chase money thereof specified in said deed of assignment to said Thomas Brown; and that plaintiffs, or said executors in trust for them, might be permitted to claim as creditors on said bankrupt's estate, for all sums of money received by him before his bankruptcy out of said two companies, on the foot of said William Brown's shares therein; and that the said John Graham and John Scott might be restrained by injunction from making a dividend of said bankrupt's estate, until the hearing of the cause. And that plaintiff's legacies might be raised, and might be placed out at interest on good security for their benefit, until such legacies should respectively be payable; and that in the meantime the interest thereof might be applied towards their maintenance and education, and that all necessary accounts might be taken.

All the defendants answered the bill: and witnesses having been examined, the cause came on for hearing on pleadings and proofs, and was argued on the 1st, 2nd, 4th, 5th, and 12th days of May, 1801, before Lord Redesdale, the then Lord Chancellor of Ireland.

The Attorney-General (O'Grady), now Chief Baron, Mr. Saurin, Mr. Mayne, and Mr. Joy for the plaintiffs: the Solicitor-General (Plunkett), now Chief Justice Common Pleas, Mr. Burston, and Mr. Scriven, for the defendants, John Campbell and William Brown, and the other children (all minors) of Thomas Brown: Mr. Dunt, and Mr. Bushe (now Chief Justice King's Bench), for defendant Joy: and Mr. Ball and Mr. Bell for the assignees of Mr. Brown.

[116] Much of the argument of Counsel was directed, to the consideration of the validity of the award, made regarding the shares held by Thomas Brown in the two companies, in trust for William the testator, and also as to the liability of Campbell to refund to the estate the sum he had received in payment of the notes in which the testator was security to him with Thomas Brown, and Brown and Oakman. It was also argued by the plaintiffs' Counsel, that the assignees of Thomas Brown were bound to bring into Court the proceeds of the sales of the tenement in Waring Street, and the life interest of Thomas in the farm at the Throne, both of which he took under the specific devises of the will. With regard to the farm at the Throne, on the part of the plaintiffs it was contended, that the devise of the Throne to William Brown was a contingent remainder, and that by the death of Thomas Brown before his son William came of age the remainder to William, and the other limitations expectant thereon were defeated, and the same therefore descended to testator's heir at law, or to his residuary legatees, and were in either case subject to the debts and legacies of the testator. *However, it was argued that even taking it for granted that the property passed to William the minor under the specific devise in the testator's will, it was equally liable with the other real property to the payment of his debts and legacies.*

On the part of the minor, William Brown, it was argued that the devise of the interest of William Brown which was a *per auter vie* estate, and a term of years in case the lives should fall within a certain period to William Brown the minor at 21, though given by a written clause to Thomas the father for life, could not be considered as a contingent remainder, which must take effect, or not at all, on the death of Thomas, as in the case of a particular estate supporting a remainder of an estate of inheritance for the *per auter vie* estate remains and continues whilst the life lasts, and if there be no special occupant, it goes to, and vests in the first occupant, and that the devise therefore was no more than an appointment of the person to take a special occupant, and though he may not, and it was admitted, was not entitled to take as such until he was 21, it was contended that his use then would be good, and no rule of law to prevent him, and that the devise was clearly a good existing devise, and that the doctrine of contingent remainders was quite inapplicable. This point being established, *it was admitted that the possession or profits of the lands from the death of Thomas Brown to whom it was specifically devised only for life until William Brown should attain the age of twenty one years, passed under the residuary devise to the assignees of Thomas Brown, subject with the rest of testator's property not specifically devised to the payment of his debts and legacies; but that only till William, the specific devisee, should attain his full age, and that after that period they would belong to him, not subject to the charge made by the will for the payment of the debts and legacies, notwithstanding the testator's other properties should be inadequate to pay his debts and legacies, as it was submitted that the said charge did not affect the interest to which William was entitled under the said specific devise.*

With respect to this property his Lordship had the question fully discussed at the bar, "whether William Brown, the son of Thomas, took the estate devised to him by way of contingent remainder or of executory devise," but it afterwards appeared unnecessary to decide the question at that stage of the cause.

Lord Redesdale: I shall consider further the point with respect to Campbell and the Throne property, the only other question is with respect to the shares in the partnership concerns.

His Lordship then went into the consideration of the arguments which had been urged on the part of the assignees of Thomas Brown as to the validity of the award made with respect to these shares, and stated the reasons at great length which induced him to come to the conclusion, that "with respect to this property the right was with the creditors and legatees, and that there was no difficulty in saying that this money should be accounted for." His Lordship then went on to say,—

"On the other part of the case,* the funds for paying these demands, are only the property passing under the *residuary* bequest after the *specific* bequest to Thomas Brown," (that is, the specific bequest of the tenement in Waring Street, and of a life interest in the Throne.) "It is attempted in the subsequent part of the will to charge this, but that is against principle: it is a legacy as much as any other, and it cannot be considered that the testator meant to give that specifically, and yet to subject it in some manner as if it formed part of the residue; that property therefore, must be taken by the assignees of Brown, not subject to the legacies so far as the other fund shall not be able to discharge them."

The Lord Chancellor was disposed to reserve his judgment as to [118] the liability of John Campbell to refund to the testator's estate the sum he had received from the testator's assets in payment of the notes of the testator and Thomas Brown, and Brown and Oakman; and also the absolute disposition of the fee in the Throne property until the report should come in; but it having been intimated as the wish of the parties to have his Lordship's opinion as to the liability of Campbell delivered in the first instance, the cause was called on again on the 12th of May, 1804, and his Lordship after alluding to the arguments of Counsel on both sides, and referring to several decisions on similar points, declared that Campbell was bound to refund the sum he had so received from the assets of the testator.

Pursuant to that part of the decree by which it was ordered, that the estate and property of William Brown not specifically devised then remaining unsold should be forthwith sold, the testator's interest in several premises were sold by the executors, and amongst the rest, the rents of the farm of the Throne to accrue until a son of Thomas Brown should attain the age of twenty-one years, were sold for the sum of fifty pounds, the Chancellor considering that the *intermediate* rents between the death of Thomas Brown, and the majority of William Brown, his son, passed under the *residuary* devise and were subject to the testator's debts and legacies.

John Campbell having died, a bill of revivor was filed against his executors, and the cause was revived.

Graham and Scott, the assignees of Thomas Brown, both died, the former having survived.

William Brown, the eldest son of Thomas Brown, attained his age of twenty-one years on the 30th of April, 1810.

The Master made his report in 1811. On the 22nd February, 1812, the cause was heard on the Master's Report and on the merits.

The Attorney-General for the plaintiffs, after stating the pleadings, decree, and Master's Report, proceeded: "A question arises on the freehold premises called the Throne, belonging to the testator, who after bequeathing several legacies, devised the farm of the Throne to his nephew William Brown, to hold to him, his heirs, executors, administrators, and assigns, from the time he attained the age of twenty-one years; but in case he should die under that age, he devised the farm to the next eldest son which his brother might happen to have, when such next eldest son should attain the

* The assignees' liability to refund the produce of the sales of the tenement in Waring Street, and the life interest of Thomas in the Throne, both specifically devised to him, his Lordship having reserved the consideration of the devise to William the minor of the Throne property for further consideration.

age of twenty-one years, and to the heirs, etc. of such next eldest son, and in case of no son attaining twenty-one years, to the daughters. This question is reserved by Lord Redesdale in the decree, and it now becomes necessary to consider who is entitled under the will to this farm. We contend that it is a devise to testator's brother for life, with a contingent remainder to his first son attaining twenty-one, and not an executory devise; that Thomas having died before any son attained twenty-one, the contingent remainder is gone, and the estate descends to the heirs. There was another question, whether this farm was liable to the payment of the pecuniary legacies, but Lord Redesdale decided that those lands being specifically devised to Thomas Brown for life, and to his first son attaining twenty-one, were not liable to the payment of the legacies.

Mr. Dunn for the defendant, William Brown, the devisee.

The object of the testator was to put forward in life the family of his brother Thomas. His brother John was his heir at law, but the testator does not notice him in the will. The testator had fixed his residence at the Throne, and his anxious wish appears to have been to establish Thomas's family there. He intended that Thomas should enjoy the farm during his life, and on his death the devise over to take effect. The intent is clear and manifest, but it is contended that this being a contingent remainder, has been destroyed. We contend that this limitation to William, the son of Thomas, is a vested interest. I argue this as if it were an estate of inheritance, but it is an estate *per autre vie*, in which there cannot be strictly a legal remainder. The first case where a devise to a person at twenty-one was held to be a vested remainder, was Boraston's case, 3 Rep. 19. *Edwards v. Hammond*; or *Stocker v. Edwards*. There was a devise for life, remainder to another when he should attain twenty-one. The tenant for life died and the remainder man was only seventeen, and the question was whether the remainder vested: the Court held it to be a condition subsequent, and that the estate vested immediately, subject to be divested on not attaining twenty-one. See *Mansfield v. Dugard*, 2 Eq. Ca. 195; *Stocker v. Edwards*, 2 Shower, 398; 3 Lev. 132.

Lord Manners: If the words in the will were to Thomas for life, remainder to his eldest son on attaining twenty-one, I should go with you; but the devise is to William Brown from the time he should attain twenty-one years.

Mr. Dunn: The word "If" is the strongest that can be used to create a contingency; and yet even that has been overruled. *Bromfield v. Crowder*, 1 N. R. 313. There the testator devised to A. for life, and after her death to B. for life, and at the decease of A. and B. or the survivor, gave all his real estate to C. if he should attain twenty-one. It was held C. took a vested remainder. In the pre-[120]-sent case the word "from" is used in the first devise; and in the second devise the word "when" is used, which shews the intention. The last limitation is to the daughters. The testator must be presumed to have intended an equal benefit to all the children. Now the devise to the daughters is without any condition, and if their father died without leaving sons, they would take absolutely. This proves the intention of the testator was that all should take alike. In *Bromfield v. Crowder*, it was contended the remainder was gone, yet the Court was unanimous in the opinion that the estate had vested; and there is no distinction between the present case and that, where the devise was held to be an immediate devise, but to go over in case of death before twenty-one.

Lord Manners: When I find that Sir William Grant, who had so much experience, sent that case to a Court of Law, I ought not to decide the present question, which is purely legal; however, I shall hear the argument.

The Solicitor General on the same side.

We contend that this is an executory devise, although I may argue differently from the course pursued by Mr. Dunn, yet we have the same interest. If the father had no estate for life, it would be clearly an executory devise to the eldest son, and would vest. This estate was intended to vest in possession when any of the nephews attained twenty-one, till then the father of the devisees was to enjoy as a rent charger, then does any inconsistency arise by giving the father an estate for life? It is only a condition subsequent, that if the first nephew should die before twenty-one, his father living, the second nephew should take; but if he died after twenty-one, then the estate would go to his representatives. The attaining twenty-one is the period looked at by the testator, and when one of the nephews should attain it, the estate would

then vest. The father was an incumbrancer for the rents and profits. Suppose the testator had devised an annual sum to the father, or that the sons should pay the rents and profits to him, would that make any difference? 2ndly, Here the words of the will are transposed in order to make out a contingent remainder,—it is not the rule of construction thus to defeat the will.

Mr. Plunkett for the legatees.

Lord Redesdale has decided that this is not a vested interest, and then the question is, whether it be a contingent remainder or an executory devise.

Mr. Burston for the legatees.

From the decision of *Dou v. Morgan*, 3 T. R. 763, it is manifest that this is not an executory devise, it must be either a vested or [121] contingent remainder,—whether the testator intended it should be one or the other, is never attended to. Here is an estate for life to Thomas, remainder to his first son attaining twenty-one, remainder to the daughters. As some of the sons have attained twenty-one, the daughters cannot take: here the condition is, if any of the sons attain twenty-one at the death of the father: a remainder may be limited of an estate *per autre vie*, and a freehold estate must support it.

The Lord Chancellor: I must direct a case to be made for the opinion of a Court of law on the following question: Whether any of the children of Thomas Brown, in the events which have happened, took any and what interest under the will of William Brown, in the lands called the Throne farm.

On the 21st of May, 1812, the case was argued in the Court of Common Pleas, upon nearly the same grounds which had been urged before the Lord Chancellor: The following certificate was afterwards sent by the Judges to the Lord Chancellor.

"We are of opinion, that in the events which have happened, the defendant William Brown took upon the death of his father, Thomas Brown, the whole interest in the term of lives and years in the lands called the Throne farm, under the will of the said William Brown, subject to be divested, if the said William Brown, the defendant, had died before he attained the age of twenty-one years."

On the 13th of May, 1813, the cause was heard on the Judge's certificate, and also on the question specially reported by the Master, whether the executors of Campbell should be charged with interest on the sum of three thousand two hundred and thirty pounds, part of a sum of five thousand two hundred and eighty-five pounds, applied by Campbell, in paying the debts due to Thomas Brown and John Oakham; when the Lord Chancellor was of opinion that the certificate of the Judges of the Court of Common Pleas should be affirmed, and that the executors of Campbell should be charged interest, and the following decree was made.

Court: Decree the defendant, William Brown, entitled to the farm called the Throne in the pleadings mentioned, devised to him by the will of the late William Brown deceased. Decree the defendants, the executors of John Campbell, deceased, chargeable with the several sums of three hundred and eighteen pounds six shillings and twopence, and three thousand seven hundred and twenty pounds fourteen shillings and tenpence, being the interest reported due by [122] them on the sum of three thousand seven hundred and eighty-five pounds one shilling and fivepence, unapplied by Thomas Brown in said report named out of the sum received by him from the discount company in the pleadings mentioned, together with interest on said sum of three thousand seven hundred and eighty-five pounds one shilling and fivepence, from the 20th day of January, 1811, to which day interest was so reported thereon until paid, and let said several sums be forthwith paid by said defendants to the plaintiff, William Brown Joy, as administrator, *De bonis non*, with the will annexed of said William Brown deceased, and after payment thereof of plaintiff's costs, refer it to the Master to apportion said several sums so to be paid the plaintiff, William Brown Joy, amongst the several legatees of said William Brown according to the sums reported to them, and the sums paid them on foot of their respective legacies, and let the several sums so to be apportioned be paid by the plaintiff, William Brown Joy, to the several persons entitled thereto out of the fund so to be apportioned and paid to him as aforesaid. Refer it to the Master to apportion the stock transferred to the credit of the plaintiffs, Isabella Joy, Robert Joy, and George Joy, minors, pursuant to the said order of the 9th day of May, 1812, together with such interest as hath accrued thereon, to and amongst the said Isabella Joy, Robert Joy, and George Joy, minors, and let the Accountant-General then forthwith draw in favour of and

transfer to the said Isabella, Robert, and George Joy, respectively, on their attaining their respective ages of twenty-one years, so much of said stock and the interest thereof as shall be so apportioned to them respectively, either party, plaintiffs or defendants, to be at liberty to proceed on said references. Reserve the question of costs as against the assignees of Thomas Brown, and the creditors of John Campbell.

JOHN DALY, *Depty. Regr.*

[123]

ENGLAND.

(GREAT SESSIONS, CHESTER, AND KING'S BENCH) (IN ERROR.)

EDWARD VIGOR FOX, Esq.,—*Plaintiff*: GEORGE HENRY, Bishop of Chester,—*Defendant*.

[*Mews' Dig.* v. 1231 : S.C. 1 Dow and Cl. 116 : 6 Bing. 1 : and in K.B. 2 B. and C. 635 : 4 Dowl. and Ry. 93. The sale of next presentations and agreements to exercise rights of patronage in favour of particular persons are rendered invalid by the Benefices Act 1898 [61 and 62 Vict. c. 48] s. 1 (1) (b) (3) : but (s. 1 (7)) in a family settlement a life interest to the settlor may be reserved. See also *Walsh v. Bishop of Lincoln*, 1875, L.R. 10 C. P. 518.]

By the stat. 31 Eliz. c. 6, s. 5, it is enacted, that "If any person, etc. shall, for any sum of money, reward, gift, profit, or benefit, directly, or indirectly, or for or by reason of any promise, agreement, grant, bond, or other assurance of, or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration, that every such presentation, collation, gift and bestowing, and every admission, institution, investiture, and induction thereupon shall be utterly void, frustrate, and of none effect in law."

In *quare impedit* it was found, by special verdict that B. the incumbent of a rectory was on a certain day afflicted with a mortal disease of which he died at eleven o'clock at night, and that at three o'clock in the afternoon of the same day T. the patron of the living, and F. both knowing the condition of B. in pursuance of an agreement, executed a deed by which in consideration of £6000 T. granted to F. the advowson for a term of 99 years, if F. should so long live, with a proviso that as soon as F. by vacancy or otherwise should have made presentation to the Rectory, he should re-assign to T. the residue of the term. It was found also by the verdict that this agreement and deed was a device to convey the next presentation: But that the deed was executed without the knowledge or privity of H. (the person afterwards presented by T. and rejected by the Bishop Ordinary), and without any intention to present him.

Upon this finding, judgments having been given for the Defendant in the Courts of Great Sessions, Chester, and the King's [124] Bench, they were reversed in the House of Lords upon writ of Error, the House being of opinion that this sale of the next presentation was not void under the statute.

This was a Writ of Error, brought by the plaintiff below, from a judgment of the Court of King's Bench at Westminster, affirming a judgment of the Court of great Sessions at Chester, on a special verdict in a *quare impedit* commenced in the latter Court.

In the declaration in the Court below, the first count stated that the advowson of the rectory of the church of Wilmslow was appurtenant to the manor of Bollyn, and set out specially the title of Thomas Joseph Trafford to the manor, with the appurtenances for life; and shewed that J. Bradshaw, the last incumbent, was presented by virtue of a grant of the next avoidance made by Trafford, through whom Thomas Joseph Trafford claimed: and then proceeded: "And the said Thomas Joseph Traf

ford being so seised thereof afterwards, to wit, on the 12th day of November 1819, at, etc. (the said church being then and there full of the said J. Bradshaw, the then incumbent thereof,) by a certain indenture then and there made, between Thomas Joseph Trafford of the one part, and plaintiff of the other part, of which profert is made, he the said Thomas Joseph Trafford, for the consideration therein mentioned, did grant, bargain, sell, and demise unto the plaintiff, his executors, etc. All that the said advowson, donation, right of patronage, presentation, and free disposition of, in, and to the said Rectory and Parish Church of Wilmslow in the County [125] Palatine of Chester, with the rights, members, and appurtenances thereunto belonging, *habendum* to the said plaintiff, his executors, etc. for ninety-nine years, if the said Thomas Joseph Trafford should so long live." By virtue of which said last mentioned indenture, the said plaintiff, then and there became and was possessed of the said advowson, of and in the said Rectory, as in gross by itself for the said term, so to him thereof granted. The declaration then averred that Thomas Joseph Trafford is still living, and that after the making of the indenture, and whilst plaintiff was possessed of the advowson, to wit, on, etc. the said church became vacant by the death of the said J. Bradshaw, the last incumbent thereof, whereby it then belonged and now belongs to the plaintiff to present a fit person to the said church so being vacant; but the said Bishop unjustly hinders him from so doing.

There was a second count, setting out a title to the advowson in gross, and omitting all mention of the manor: in all other respects it was similar to the first.

The defendant craved oyer of the indenture made between the plaintiff and Trafford, whereby it was witnessed, that in consideration of £6000, paid to Trafford by the plaintiff, the former had granted, bargained, sold, and demised, and by the said indenture did grant, etc., all that the advowson, donation, right of patronage, presentation, and free disposition of, in, and to the Rectory and parish Church of Wilmslow, with the rights, members, and appurtenances thereunto belonging, *habendum*, for ninety-nine years, if Trafford should so long live: With a proviso that when [126] and so soon as he the said Edward Vigor Fox, his executors, etc. should have presented to the said Rectory or Church of Wilmslow, by reason of the same having become vacant or void by the death, resignation, deprivation, eviction, promotion, or succession of J. Bradshaw the incumbent, or otherwise, or through the wilful neglect or default of him the said Edward Vigor Fox, his executors, etc., the said Rectory or Church should have been suffered, as to the presentation or right of presentation thereto to lapse, he the said Edward Vigor Fox, his executors, etc. should and would at any time or times thereafter at the request and proper costs and charges of the said Thomas Joseph Trafford, or such person as he should appoint, re-assign the said advowson to him the said Thomas Joseph Trafford, or such person as aforesaid, for all the residue which should be then unexpired of the said term of ninety-nine years, free from all incumbrances, by the said Edward Vigor Fox, his executors, etc. He then craved oyer of the indenture in the second count mentioned, which was declared to be in the same words as the indenture in the first count, and therefore not set out on the record.

He then pleaded several pleas:

1st. That the said Thomas Joseph Trafford did not grant, bargain, sell, and demise unto the said plaintiff, his executors, etc. the said advowson, etc. in the first count of the declaration mentioned in manner and form, etc.

2d. A similar plea to the second count.

3d. The third plea which was pleaded to both counts, traversed the grant, etc. unto the plaintiff, his executors, etc.

[127] 4th. The fourth plea to both counts averred that the said Church of Wilmslow is within the Diocese of Chester, and a benefice with cure of souls, and that whilst the said Thomas Joseph Trafford was so seised of the said manor and of the said advowson, and before the making of the corrupt, simoniacal and unlawful agreement in this plea aftermentioned, to wit, on the 11th day of November, in the year of our Lord 1819, the said J. Bradshaw then being the incumbent of and filling the said church, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then despaired of, whereof, as well the said Edward Vigor Fox and Thomas Joseph Trafford as one George Uppley, clerk, in that plea aftermentioned, to wit, on, etc.; and also at the time of making the

corrupt, simoniacal, and unlawful agreement in that plea aftermentioned, there had notice: and the said Bishop further says, that whilst the said Thomas Joseph Trafford was so seized of the said manor to which, etc. with the appurtenances, etc. and of the said advowson as aforesaid, and whilst the said J. Bradshaw, so being the incumbent of and filling the said church as aforesaid, was so afflicted, and in such danger, state, and condition as aforesaid, to wit, on, etc. at etc. they the said Thomas Joseph Trafford, Edward Vigor Fox, and George Uppleby, and each of them, then and there, well knowing the premises and believing and expecting that the death of the said J. Bradshaw of the mortal disease aforesaid, was then and there fast approaching, and that, by means of the death of the said J. Bradshaw, the said church would forthwith become vacant, it was in such belief and [128] expectation corruptly, simoniacally, and unlawfully, and against the form of the statute in such case made and provided, agreed by and between the said Thomas Joseph Trafford and the said Edward Vigor Fox, with the knowledge of the said George Uppleby, that the said Edward Vigor Fox should pay to the said Thomas Joseph Trafford a sum of money, to wit, the sum of £6000, and that the said Thomas Joseph Trafford, in consideration thereof, should grant, bargain, and sell to the said Edward Vigor Fox the next presentation to the said church; *and that, in order to make such grant, bargain, and sale, and as a means of making such grant, bargain, and sale to the said Edward Vigor Fox of the next presentation to the said church, and as a shift, contrivance, and device, to evade and elude the making such grant, bargain, and sale, as a mere grant, bargain, and sale to the said Edward Vigor Fox, of the next presentation to the said church in express terms, the said indenture in the said declaration mentioned to have been made between the said Thomas Joseph Trafford and the said Edward Vigor Fox should be made, and that the said Thomas Joseph Trafford should seal, and as his act and deed, deliver the said indenture;* and the plea further stated, that afterwards, and whilst the said J. Bradshaw, so being the incumbent of, and filling the said church as aforesaid, was so afflicted and in such danger, state, and condition as aforesaid, to wit, on the 12th day of November, in the year of our Lord 1819, to wit, at, etc. in pursuance, furtherance, and performance of the said corrupt, simoniacal, and unlawful agreement, and in order to make such grant, bargain, and sale of the next presentation to the said church, [129] *and as a means of making such grant, bargain, and sale by the said Thomas Joseph Trafford to the said Edward Vigor Fox of the next presentation to the said church, and as a shift, contrivance, and device, to evade and elude the making such grant, bargain, and sale, as a mere grant, bargain, and sale to the said E. V. Fox, of the next presentation to the said church, in express terms,* the said indenture in the said declaration mentioned to have been made between the said T. J. Trafford and the said E. V. Fox, was made, and the said T. J. Trafford did then and there seal, and as his act and deed deliver the said indenture. And the plea further stated that the said J. Bradshaw, so being the incumbent of and filling the said church as aforesaid remained and continued so afflicted as aforesaid, and in such danger, state, and condition as aforesaid, from the time in that respect in this plea above-mentioned until the time of his death, and that afterwards to wit, on the 12th day of November 1819, Bradshaw so being the incumbent of and filling the said church as aforesaid, of the disease aforesaid, died, to wit, at, etc. and by means thereof the said church then and there became and was vacant, and the plea concluded by saying that, by reason of the premises and by force of the statute in such case made and provided, the said last mentioned indenture became, and was, and is utterly void, frustrate, and of no effect in law, and wholly inoperative to grant, pass, or convey any estate, right, title, or interest in the said advowson, or any presentation, or any right of presentation to the said church to the said Edward Vigor Fox. The plea then stated that afterwards, to wit, on the 30th day of December, [130] 1819, at, etc. the said Edward Vigor Fox, under colour, and by pretence and means of the said last mentioned indenture so made as aforesaid, in pursuance of the said corrupt, simoniacal, and unlawful agreement, did corruptly simoniacally, and unlawfully, and against the form of the statute in such case made and provided, present the said George Uppleby, clerk, to the said Bishop, to be admitted, instituted, and inducted into the said Church of Wilmslow, to wit, at, etc. And the plea insists, that by reason of the premises, and by force of the statute in such case made and provided, the said presentation of the said George Uppleby by the said Edward

Vigor Fox, so made as aforesaid, became, and was, and is utterly void, frustrate, and of no effect in law.

5th. The fifth plea was like the fourth, omitting the parts in *italics*.

6th. The sixth plea varied from the fourth only by omitting to state the privity of Uppleby.

7th. The seventh plea varied from the fifth in the same manner.

8th. The eighth plea alleged that the said Church of Wilmslow, is within Defendant's diocese of Chester, and a benefice with cure of souls; and that whilst the said T. J. Trafford was so seised of the said manor and advowson, and before the making of the corrupt, simoniacal, and unlawful agreement in this plea after mentioned, to wit, on the 11th of November, 1819, the said J. Bradshaw, then being the incumbent of, and filling the said Church, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then despaired of, to wit, at, etc. whereof the said [131] E. V. Fox and T. J. Trafford, to wit, on, etc. and also at the time of making the corrupt, simoniacal, and unlawful agreement in this plea after mentioned, there had notice; and that whilst the said J. Bradshaw, so being the incumbent, and filling the said church as aforesaid, was so afflicted, and in such danger, state and condition as aforesaid, to wit, on, etc. at, etc. they the said T. J. Trafford and E. V. Fox, and each of them, then and there well knowing the premises, and believing and expecting that the death of the said J. Bradshaw, of the mortal disease aforesaid, was then and there fast approaching, and that by means of the death of the said J. Bradshaw, the said church would forthwith become vacant, it was in such belief and expectation corruptly, simoniacally and unlawfully and against the force of the statute in such case made and provided, agreed by and between the said T. J. Trafford and the said E. V. Fox, that in consideration of a large sum of money, to wit, the sum of £6000 to be therefore paid by the said E. V. Fox to the said T. J. Trafford, the said indenture in the said first count of the said declaration mentioned, to have been made between the said T. J. Trafford and the said E. V. Fox, should be made, and that the said T. J. Trafford should seal, and, as his act and deed, deliver the said indenture. And the plea states, that afterwards and whilst the said J. Bradshaw, so being incumbent of, and filling the said Church as aforesaid was so afflicted, and in such danger, state, and condition as aforesaid, to wit, on the 12th day of November, in the year of our Lord, 1819, at, etc. in pursuance, furtherance, and per-[132]-formance of the said corrupt, simoniacal, and unlawful agreement, the said indenture, in the said first count of the said declaration mentioned to have been made between the said T. J. Trafford and the said E. V. Fox was made; and the said T. J. Trafford did seal, and, as his act and deed, deliver the said indenture.

9th. The ninth plea, after stating the illness of the incumbent, and that the Plaintiff and Trafford had notice of it, alleged the corrupt and simoniacal agreement to have been, that Trafford should, "in consideration of money, grant, bargain, and sell to the Plaintiff the next presentation to the said church;" and averred that the indenture in the declaration mentioned, was made in pursuance of that agreement, and concluded as the eighth plea.

10th. The tenth plea, after the same introduction, alleged that Plaintiff and Trafford well knowing the premises, and believing and expecting that the death of the said J. Bradshaw of the mortal disease aforesaid was fast approaching, and that by means of his death, the said church would forthwith become vacant, and the said Plaintiff intending to present the said George Uppleby to be admitted, instituted, and inducted into the said church at Wilmslow, when the same should, by the death of Bradshaw, next become vacant; it was then and there corruptly, etc. agreed between Trafford and the Plaintiff, that the Plaintiff should pay to Trafford £6000, and that he, in consideration thereof, should grant, etc. to the Plaintiff the next presentation to the said church, the said Plaintiff then and there intending to present the said G. Uppleby. The [133] plea then alleged, that in pursuance of that agreement, and in order to make such bargain and sale of the next presentation, the indenture in the declaration mentioned was executed by Trafford, and that the Plaintiff accepted and received it with intent to present Uppleby, and concluded as the former pleas.

11th. The eleventh plea, after the same introductory matter as in the ninth, alleged that it was corruptly, etc. agreed between the Plaintiff and Trafford "that the

indenture mentioned in the declaration should be made, and that it was made in pursuance of that agreement."

12th. The twelfth plea varied from the eleventh only, by omitting to allege that the Plaintiff and Trafford knew of the incumbent's dangerous illness.

13th. The thirteenth plea, after the averment of identity, without mentioning Bradshaw, alleged that whilst Trafford was seised of the manor and advowson, it was corruptly, etc. agreed between him and the Plaintiff, that the indenture in the declaration mentioned should be made, and that it was made and executed in pursuance of that agreement.

14th. The fourteenth plea, after the same introduction, stated, that whilst Trafford was seised of the manor and advowson, and before the making of the said simoniacal and corrupt agreement in this plea after-mentioned, to wit, on, etc. and after the death of the said Bradshaw, the said last incumbent of the said church, and after the church became vacant by the death of Bradshaw, and whilst it remained and was vacant, to wit, on, etc. it was corruptly, etc. agreed by and [134] between Trafford and the Plaintiff, that Trafford should, in consideration of £6000 to be paid by the Plaintiff to him, grant, bargain, and sell to the Plaintiff the next presentation to the said church, and that the indenture before mentioned was made and executed in pursuance of that agreement.

15th. The fifteenth plea was similar to the fourteenth, except as to the corrupt agreement, which it alleged to be that the indenture in the declaration mentioned, should be made; and averred that it was made and executed in pursuance of that agreement.

The replication to the third plea took issue on the traverse of a grant. To the fourth, that it was not corruptly, etc. agreed by and between the Plaintiff and Trafford, with the knowledge of Uppleby, as in that plea alleged. A similar replication to the fifth plea; and to each of the other pleas, the replication denied that it was corruptly, etc. agreed as in those pleas alleged.

The jury found a special verdict: first, they found the identity of the several matters alleged in the two counts of the declaration, as averred in the pleas; and then that before and on the 12th day of November, in the year of our Lord, 1819, the said Thomas Joseph Trafford was seised of the manor and advowson within-mentioned, and that before and on the said 12th day of November, in the said year of our Lord 1819, the within-named Joseph Bradshaw was the incumbent of the within-named church, in the pleadings within-mentioned: And that the said church was then full of the said Joseph Bradshaw, to wit, at the parish of Wilmslow within-men [135] tioned, in the county of Chester within-mentioned; and that the said Joseph Bradshaw, so then being such incumbent of, and filling the said church as aforesaid, was, before and upon the said 12th day of November, in the said year of our Lord 1819, afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then greatly despaired of; and that he was and continued so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly despaired of until the time of his death; and that the said Joseph Bradshaw so being such incumbent as aforesaid, died of the said mortal disease, on the said 12th day of November, in the said year of our Lord 1819, at half-past eleven o'clock at night of the same 12th day of November to wit, at the parish aforesaid, in the county aforesaid: And that on the said 12th day of November, in the said year of our Lord, 1819, at ten minutes before three o'clock in the afternoon of the same day, and whilst the said Joseph Bradshaw was such incumbent as aforesaid, an agreement was made and concluded between the said Thomas Joseph Trafford, so being seised of the said manor and advowson as aforesaid, and the said Edward Vigor Fox for the sale, by the said Thomas Joseph Trafford to the said Edward Vigor Fox, of the next turn or presentation of the said church, for and in consideration of six thousand pounds of lawful money of Great Britain; that on the said 12th day of November, in the said year of our Lord 1819, and immediately after the making of such agreement, they, the said Thomas Joseph Traf-[136] ford and Edward Vigor Fox, in pursuance of such agreement, and in order to carry the same into effect, and as an expedient to convey the next presentation alone, sealed and delivered the within-mentioned indenture, bearing date the 12th day of November, in the said year of our Lord 1819, and of which said indenture the said Bishop hath within had over, and which is within set forth upon

such over thereof, to wit, at the parish aforesaid, in the county aforesaid: and that the said agreement was made, and the said indenture was sealed and delivered in the life time of the said Joseph Bradshaw: and that the said Joseph Bradshaw at the time of making the said agreement, and also at the time of sealing and delivering the said indenture, was afflicted with the said mortal disease, and in extreme danger of his life, and that his life was thereby then greatly despaired of: And that the said Thomas Joseph Trafford and the said Edward Vigor Fox, at the time of making the said agreement, and also at the time of sealing and delivering the said indenture, well knew and believed that the said Joseph Bradshaw was afflicted with the said mortal disease, and was in extreme danger of his life, and that his life was thereby then greatly despaired of, at the parish aforesaid, in the county aforesaid: and that the said agreement was made and concluded, and the said indenture was sealed and delivered without any knowledge or privity whatsoever of the said George Uppleby, and without any intention to present the said George Uppleby to the said church, when it should become vacant, but whether or not, etc.

[137] The argument upon this special verdict, took place on the 14th of June, 1822, when the Court of Great Sessions at Chester were divided in opinion; but in order to carry the cause up to a higher tribunal, the judgment was entered for the defendant by consent.

On a writ of error to the King's Bench, the judgment of the Court below was affirmed in Hilary Term, 1824 (see the Report of the Case in K. B. 2 B. and C. 658); and this writ of error was brought to reverse both judgments.

The case was twice argued, first on the 8th of July, 1828, and afterwards in May 1829.

For the Plaintiff in Error: Mr. Serjeant Cross.

By the law of England, the patronage, or the right of presenting to a benefice, is a property or estate capable of being conveyed in fee, for life, for years, for any number of turns, or for the next turn only, whilst the church is full; when it is empty, it is incapable of being conveyed (*Baker v. Rogers*, Cro. Eliz. 789. *Stevens v. Wall*, Dyer, 282. b. 4 And. 15. *Brookesley v. Wickham*, 1 Leon. 167), because it is like the rent of an estate become in arrear, which is a *chose* in action, and cannot be assigned, but the church is full as long as the incumbent is alive; and is equally so whilst he is in his last sickness, as in full health.

The patron, therefore, of a living may be changed at any time till the last moment of the existence of an incumbent, and a new patron substituted; and neither the common nor statute law imposes any restrictions in this respect on lay patrons (12 Ann. st. 2, c. 12, applies to clerks only).

It is the exercise only of the right of presenting [138] by the patron for the time being, which is a public trust, and as such controlled by law: which sufficiently guards the interests of the church, by providing that the existing patron shall not nominate from corrupt motives, or by reason or in consequence of a corrupt contract.

This restriction arises from the statute 31 Eliz. chap. 6, and from this statute only: and the question turns entirely upon the construction to be put upon its provisions. It is a penal statute, and it creates forfeitures; and therefore, according to the acknowledged principle of law, must be construed strictly, and not extended by a supposed equity.

This statute avoids the presentation which the patron for the time being makes, for any money, reward, gift, profit, or benefit, arising directly or indirectly; or for any promise of such reward, directly or indirectly (see 12 Ann. st. 2, ch. 12; and also the oath in 3 Burn's Eccl. Law, which explains this). It is direct or indirect reward, not direct or indirect presentation, which it prohibits in express terms.

In the present case, Mr. Fox, the plaintiff in error, was the patron at the time of the actual vacancy; and he selected the clerk, without any communication with Mr. Trafford; and his selection was not influenced or produced by money or reward, directly or indirectly. The presentation by the actual patron is not tainted with the least suspicion of simony.

To bring the case within the provisions of the act, it must be contended, as it was in the courts [139] below, that Mr. Trafford was to be considered as the patron presenting the clerk, and receiving the reward for that purpose, and the plaintiff in

error as the mere instrument to carry such presentation into effect. But there is nothing in the finding of the jury to warrant such a conclusion.

It is admitted, that the grant of a next presentation during the life of an incumbent may be void, on the ground of simony; but that is where the contract is really simoniacal; a contract for the presentation *by* the patron of a *particular clerk*, for money, and the conveyance of the next presentation is a contrivance or instrument to carry it into effect, and is so found by the jury; this will be illustrated by the case of *Winchcombe and Puleston* (reported Noy, 25, Hobart, 165, 1 Brownlow and Golds, 164), the leading case on the subject; the pleadings are in *Winch's Entries*, 887, and fully explain the nature of the transaction. The contract was made between the clerk to be presented and the patron, the incumbent being then sick of a grievous disease, and expected every day to die, that in consideration of £90 to be paid by the clerk to the patron, he should procure him to be presented to the church when vacant, and to assure such presentation, he should grant the next avoidance to a person, a familiar friend of the clerk, specially nominated and appointed by him in confidence to make the presentation, with the intent that the clerk should be presented; and it is averred, that in performance of this contract the grant was made, and the contract was so found by the jury. Here was a clear simoniacal contract: [140] and the substituted patron was the mere instrument to carry the contract into effect, and to appoint the particular clerk. The case of *Clusse v. Pomroy* (Cit. Lane, 73) is nearly to the same effect; and is another instance of a contrivance to carry into effect a simoniacal contract.

If the presentation do not appear upon the face of the pleadings to be clearly simoniacal, that is a presentation by the existing patron of the clerk, for reward, it is a question for the Jury whether each transaction be or be not a shift or contrivance to carry a simoniacal contract into effect; as, under the statutes against usury, if there appear on the face of an instrument a loan, and a reservation of illegal interest, the Court can give judgment against its validity, but if the transaction does not appear on the face of it (*Fryman v. Burslow*, Lutw. 273. Per Tenterfield, C. B. *Calvert v. Kitchen*, Lane, 102) necessarily to be usurious, it is a question of fact for the jury, whether it be a shift or contrivance or not. In both the cases, the really simoniacal or usurious contract ought to be shown by a special plea, when a special plea is required; and in all cases found by the jury.

The defendant has not pleaded in this case, and the jury have not found that there was any corrupt or simoniacal contract, that Trafford should present the clerk; and that the grant of the next presentation was a mere contrivance to carry it into effect.

In the absence of such a finding, the Court can [141] not make any presumption against the validity of the grant. Simony as well as fraud is not to be presumed, but found.

If it were competent for the Court to make any presumption, the facts pleaded and found do not warrant any such presumption in this case.

If it had been found that money was to have been given to Trafford, if Uppleby should be presented, or that it was the purpose or even intent of the plaintiff to have presented Uppleby, it might have been argued that the grant was made for that purpose, and if so, the grant might possibly be said to be an instrument to carry into effect the particular appointment; and the clerk might possibly be said to have been presented by the former patron. In such a case the substituted patron has no power of selection, but is a mere instrument, and the appointment made virtually by the old patron, is an appointment made for reward. But if there is no intention or purpose to present any particular clerk, the new patron is a free agent, may select whom he pleases, and if he select any clerk, without reward, he is not within either the letter or spirit of the act. The selection of the clerk, the object aimed at by the statute, is free from all taint. The old patron parts with, and the new patron purchases the right of selection, by means of the grant, and that right is fairly and properly exercised.

The judgment (2 Barn. and Cress, 658) of the Court of King's Bench proceeds in a great degree upon the ground that Courts have a right to consider what is an evasion of a statute, a power which, it is humbly [142] conceived, does not apply at least to the case of a penal statute creating forfeitures, and if allowed to be exercised, would lead to great doubt and uncertainty in the law.

Upon referring to decided cases, there is none in which it has been held that the grant of a next presentation, the incumbent being *in extremis*, is void, a short note in Winch. 63,* excepted, in which mention is made of its having been so adjudged in Chancery, but under what circumstances does not appear; it may have been so adjudged on the special facts.

On the other hand, there is a solemn decision (*Barrett v. Glubb*, 2 Black, 1052) of the Court, that by the grant of an advowson, when the incumbent was on his death-bed, and it was uncertain whether he would live over the night, with full knowledge in the contracting parties, the next presentation did pass, and was not avoided by simony, which is a direct authority for the plaintiff in error. If the grant of the next presentation, when united with all other future presentations, was not void: the grant of the next presentation alone could not be so. This decision has never yet been questioned until the present case.

For the Defendant in Error:

The Solicitor General.†—This is a case within [143] the spirit of the statute of

* *Sheldon v. Brett*. See remark on this case in *Barrett v. Glubb*, 2 Black, 1052.

† The reasons printed at the end of the case for the defendant in Error, having been reprinted in other reports of this case, it is considered advisable to add them in a note, that they may be compared with the argument of the Solicitor General, as it was delivered in the House of Lords. They are as follows:—

First.—Because Simony was an offence by the common law of the land, antecedently to the statute of 31st Eliz. c. 6.; and the transaction as stated upon the record, was a corrupt and simoniacal contract for the sale of the next turn or presentation under the special circumstances of the case. 1 Institute 17 B. 3 Institute 156. *Mackaller v. Todderick*, Cro. Car. 361. *Winchcomb v. Pullerton*, Hob. 167.

Secondly.—Because the presentation in the present case, was substantially a presentation by Mr. Trafford the seller, and was by him a presentation for money. *Bartlett v. Vinor*, Carth. 252.

Thirdly.—Because the transaction in question, was a shift and contrivance to evade the provisions of the statute of the 31st Eliz. c. 6.

Fourthly.—Because it was a presentation by Mr. Trafford, for money, of such clerk as Mr. Fox might nominate; and because a contract to such effect is simoniacal, though it may have passed without the privity of the clerk, who may afterwards happen to be presented: the privity of a clerk is not a necessary ingredient in a corrupt or simoniacal contract, as has been established by several authorities, and particularly in Doctor Hutchinson's case, 12 Rep. 100; and in the case of *Baker v. Rogers*, Cro. Eliz. 788. 3d Inst. 154.

Fifthly.—Because, by law, no grant can be made of the next presentation, when the church is empty, of which rule, though it has been some times said that the reason is, that the presentation is then a fruit fallen, or that it is a mere personal privilege, or that is severed from the advowson, and would pass to the executor; the true and substantial reason is public utility, and the better to guard against the mischiefs of simony, as was expressly laid down by Lord Mansfield, Chief Justice, and Mr. Justice Wilmot, in the *Bishop of Lincoln v. Walforstan*, 3 Burrough 1504, and because the contract in the present instance was made upon the footing and understanding of the church being full in name and form only, but vacant in substance and reality. *Brookesby's Case*, Cro. Eliz. 174. s. c. 1 Leonard 167. 3 Leonard 256. Dyer 282.

Sixthly.—Because the law, of which the object and policy is the presenting to benefices, with cure of souls, of men of learning and piety, and the preventing of scandal to religion, and prejudice to the church, by preferments either of improper persons, or from corrupt motives, will not endure the danger which would arise from the sale of the right of presentation, when the incumbent is at the point of death, where the contracting parties know that fact, and where the contract is made with a view to and upon the terms of an immediate presentation.

Seventhly.—Because there is no mischief intended to be guarded against by the rule of law prohibiting the sale of the next presentation, when the church is empty, which might not be equally incurred, if such presentation could be sold when the incumbent is on his death-bed, and known to be so both to the buyer and to the seller.

Eightly.—Because the statute, 31 Eliz. c. 6, ought to receive a liberal construction,

Elizabeth (31 Eliz. c. 6. s. 5). It is found by the special verdict, that the agreement and the indenture were an expedient "to con-[144]vey the next presentation alone." It is found indeed that the clerk had no knowledge of the contrivance; but that is immaterial if the transaction was simoniacal. The indenture purports to be a grant of the whole advowson, yet there is a covenant by the purchaser after a presentation or default for reconveyance. This unusual species of conveyance bears in itself a badge of fraud. No doubt the case of *Barrett v. Glubb* was under the eyes of the draftsman in framing the conveyance. The transaction amounted to simony by the common law before the passing of the statute. If not within the letter of the statute, it must be construed so as to suppress the mischief.

As a general proposition it may be admitted, that [145] the line of distinction is between vacancy and plenary. But in the *Bishop of Lincoln v. Wolverston* (5 Burr. 1504), the Judges did not agree that the question rested on the ground, that by vacancy the thing became a *chase* in action, but rather that public policy forbade the dealing for presentations during a vacancy, for fear of simony. In the stat. 3. Elizabeth there is no definition of simony. It must therefore have been an offence at common law, which inference is borne out by other authorities (Co. Litt. 17. b. 3. Inst. 153). The statute only provides for penalties, and takes away the necessity of proceeding in the spiritual court. The words of the statute are "directly or indirectly," and it prescribes no time, which is another circumstance to be considered. According to the statute, simony may be when the church is full. The receipt of money by Trafford brings the case within the word "indirectly." He received the money to enable another person to present. The transaction according to the understanding of all the parties, was to be effected the very same day. Upon the question of construction the statute of Elizabeth is penal in some respects, but remedial in others, and statutes are to be construed according to the spirit, not the letter (2 Inst. 152. Hardres 207, 208). In the judgment in the Court below, many cases were cited to show that statutes should be construed by equity. As cases upon the statutes of usury, there being no special words in the statute, so cases on fraudulent preference in bankruptcy.

Lord Eldon: Can we apply the cases as to fraudulent preference in bankruptcy to this spe-[146]cial verdict? The doctrine must now be taken to be law. But I remember when it did not prevail. According to the early cases the doctrine as to fraudulent preference was discountenanced by Courts of Equity.

Lord Maclefield in one case * expresses a very strong opinion upon this subject. The first case in the courts of common law, was *Alderson v. Temple*, 4 Burr. 2235. In that case three of the Judges decided on the ground that the contract was not completed. That case was followed by *Harman v. Fisher* (Cowper, 117).

The Solicitor General: The construction upon the statutes of simony is the same in equity. In *Grey v. Heketh* (Ambler, 268), Lord Hardwicke was of opinion that Courts of Equity contemplate the evasion of the statute.

This contract is a clear evasion upon the facts proved by the special verdict: the incumbent was treated as dead by the parties to the contract. If the living becomes void by other modes, as resignation, which may be contrived, will not the statute apply to such cases? So in the case of cession, where the resignation and cession is contrived between the parties (*Greenwood v. Bishop of London*, 5 Tan. 727). The case in *Winch* is put in the abridgments of Bacon, Viner, and Comyn, and received the sanction of Chief Justice De Grey in *Barrett v. Glubb*. In *Kitchen v. Culvert*, Baron Bromley [147] says, "the intent of the statute is to eradicate all manner of simonies, and therefore, the words are not, 'if any man give money to be presented,' but they are, 'if any present for money,' and the jurors here found £20 given, and

in order to reach the evil for the remedy of which it was passed, and because the deed set forth in the record was only a contrivance to pass an immediate presentation for money, in violation of the policy and evasion of the provisions of the statute.

Lastly,-- Because in *Sheldon v. Brett*, *Winch* 63, it was expressly decided, that a grant of the next turn for money was simoniacal, when the parson was sick in his bed, and ready to die.

* *Cook v. Goodfellow*, 10 Mod. 489, in which Lord Maclefield, according to the report, declared that an assignment made on the eve of bankruptcy by a mother to her children, was just and commendable. The case of *Oudley*, 2 P. Wm. 427.

nothing for what it was given, or to whom it was given; for if money be the meede, a presentation is void, and in our case without notice of the parson, the admission and all which ensued thereupon is void, by reason of the simony in the patron, and is void in the parson also; and if in this case, we are not within the words of the statute, we are within the intent clearly."

It is not the less simony because the presentee is not privy to the contract (*Baker v. Rogers*, Cro. Eliz.). The case of *Barrett v. Glubb* is different in many particulars, and it was a fair purchase of the advowson; there was no fraudulent intent to evade the statute. It was a fair and honest contract.

The Lord Chancellor: It appears by the bill and answer that he was in a very dangerous state at the time of the contract—this appears by a letter, dated the 10th of August.

Lord Eldon: The expression of the letter is "that not a moment is to be lost."

The Solicitor-General: In this case the contract began and ended on the same day: in *Barrett v. Glubb*, it was going on for a month. It was not argued in that case that it was virtually within the statute. Here the finding of the jury is of fraud.

[148] In reply: The case in *Winch* as digested by Comyn, supposes the bargain to be with the presentee. In *Baker v. Rogers*, the living was void: the statute relates only to presentation, not to the contract for conveyance.

Lord Eldon: This is a very important case, regard being had to the various decisions upon the subject. As to the case of *Barrett v. Glubb*, it is certainly a strong decision; there is some difficulty in saying that that was a contract which the judge of a Court of Equity should have directed to be carried into execution. The law of simony was perhaps not so well understood formerly. That case has the authority of Lord Bathurst and of Lord Chief Justice De Grey, who adhered strictly to the rules of law, as contradistinguished from equity. In that case Lord Bathurst was of opinion, that the contract might be enforced in equity, if the law would sanction the means by which it was concocted. The Court of Common Pleas were of opinion that the advowson, including the next presentation, might be sold under the circumstances disclosed by the bill and answer.

The circumstance that the injunction was not continued is of no consequence, because as it was continued until the return of the certificate, the parties would not be at liberty to act without the authority of the Court: that is, therefore, a decision to be reconciled with this. It has been argued that no fact of fraud has been found, but the question is whether it is not a fraud on the law. The question is whether, regard being had to the law of simony, if the doctrines as to fraud [149] on the law are applicable, the case is under the circumstances brought within the rule. As to the modern doctrine upon fraudulent preference in bankruptcy, the case of *Hamby v. Fisher*, could not then have been supported; but having been long followed in subsequent decisions, it is not now to be disturbed. It is not usual to put to the judges a direct question, but I should propose the same question in substance, indirectly, viz. "Whether on the whole of the matter contained in the special verdict, the right to present on the death of Bradshaw was in E. V. Fox."

The following question was then put to the judges: "Whether upon the whole of the matters stated or referred to in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Rev. J. Bradshaw, was by law vested in E. V. Fox, the Plaintiff in error."

Lord Chief Justice Best (3d June): After stating the question put to the Judges, proceeded as follows:—The Judges who heard the argument at your Lordships' bar are unanimously of opinion, that, upon the whole of the matters stated or referred to in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Rev. Joseph Bradshaw, was by law vested in Edward Vigor Fox, the plaintiff in error.

The patronage of churches was at first yielded by the Bishops to the lords of manors, who founded or endowed them, and annexed them to [150] the manors in which the churches were situated. By the grant of a manor, the advowson appendant to it passes to the grantee. Many of these advowsons have since been severed from the manors to which they were appendant. But although advowsons, when in gross, as these which are separated from the manors to which they belonged, are called,

and are a species of spiritual trusts, yet they have been said by Lord Kenyon and other Judges to be trusts connected with interests; and they certainly do not lose the temporal character which originally belonged to them, but may be sold either in perpetuity, or for the next or any number of avoidances.

If the perpetual advowson be sold when the church is void, the next presentation will not pass; and if the next avoidance only be sold after the death of the incumbent, the sale is altogether void. It may be wise to carry the restraint on the sale of this species of property still further, and to say the next avoidance shall in no case be sold. Undoubtedly, much simony is indirectly committed by the sale of next presentations. If it is proper to prevent the giving of money for a presentation, it seems equally proper to prevent the sale of that which gives the immediate right to present. But the Courts of Law have never thought that they were authorized to go to this length: and even in cases where the purchase of the next presentation seemed to bring a party nearer to simony than any other case, it was found necessary to have the aid of the Legislature to prevent such purchases. A clergyman might buy a next presentation, and present himself, before the passing of the statute of 12 Ann. cap. 12. The preamble [151] to the second section of that statute states, that "some of the clergy have procured preferments for themselves by buying ecclesiastical livings:" and then the section provides, that if any one, who shall either directly or indirectly take or procure the next avoidance, for money, reward, gift, profit, or benefit, shall be presented or collated, (which words limit the operation of the act to clergymen,) it shall be deemed simoniacal.

It seems to me, that if the terms of the statute of Elizabeth could be extended by equity, the case of a clergyman buying a presentation with the intention of presenting himself, might have been reached without any other Act of Parliament. If such a case as this was not within the statute of Elizabeth, the case on which your Lordships have desired our opinion cannot be affected by that statute. The church, in the present case, was full: no clergyman was privy to the agreement; and the living was not intended by the plaintiff in error, at the time when he bought the presentation, for the clerk, whom he afterwards presented.

But I would observe, that persons have recovered who appeared to be dying. The special verdict only states that the incumbent, at the time of the sale, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby greatly despaired of, and that he was so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly despaired of until his death, which happened at half-past eleven at night of the day on which the [152] sale was completed. Many who are afflicted with mortal diseases, and are from such diseases thought to be in imminent danger of dying, live for a considerable time; and the effect of the diseases are sometimes so far suspended, that the persons so afflicted become again capable of performing the duties belonging to their stations in life.

If this conveyance was void, it must have been void at the time when it was executed, and would so remain into whatever hands, and under whatever circumstances the right of presentation might have passed. Now, if this incumbent had been restored to apparent health, and the vendor had sold the presentation to another person ignorant of the circumstances under which the first sale was made, it would be most unjust to hold that the second sale was void; and yet this would be the necessary consequence of a decision, that the first sale was simoniacal. While the law permits the next presentations of livings to be sold during the life of the incumbent, as long as the incumbent is alive, the sale is good. Every one who purchases a next presentation, contemplates the death of the incumbent. If this contemplation made the sale void, no sale of a next avoidance could be good. If the death of the incumbent, and the prospect of using the presentations, may be contemplated, the time when the death is to happen cannot be material.

This case has been compared by the counsel for the defendant in error to those of contemplation of bankruptcy; but a party is not permitted to do an act in contemplation of bankruptcy, which is injurious to creditors. A transfer of goods, or payment of money in contemplation of bankruptcy, [153] was before the 6th Geo. 4, void. By that act such a transfer or payment is an act of bankruptcy, because such transactions are direct frauds upon the creditors of the bankrupt. But the

death of an incumbent may be contemplated, and the purchasing of the next avoidance, in consequence of such contemplation, is no fraud upon any one. The cases, therefore, have no resemblance to each other. The making the legality of the transaction to depend upon the state of the incumbent's health, would give occasion to much expensive litigation, and, probably, to much false swearing, and would keep churches for a long time void.

The affairs of men are best regulated by broad rules, such as exclude all subtle disputes, all doubtful unsatisfactory enquires. It would be difficult to establish a rule that should settle what degree of probability of the approaching death of an incumbent should prevent the sale of the next avoidance of a benefice, and more difficult to ascertain by evidence, when an incumbent was within that degree. The most convenient rule is that which I conceive the law has already established; namely, that the right to sell the presentation continues as long as the incumbent is in existence.

The judgment of the Court below is, according to the words of the Chief Justice "founded on the language of the 31st Elizabeth, cap. 6, and the well-known principle of law, that the provisions of an Act of Parliament shall not be evaded by shift or contrivance." The words of the fifth section of the act are, "That if any person shall, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason [154] of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit whatever, directly or indirectly present or collate any person to any benefice, or give or bestow the same, for or in respect of any such corrupt cause or consideration, etc." This clause applies only to the person presenting to the living. If he has received no reward, or promise of reward, the presentation is not affected by the terms of the act. The Plaintiff in error, who made the presentation, received no reward, nor had any expectation of reward, for making this presentation. I agree, that if some other person had received a reward for the Plaintiff in error, and was to account to him for it: if the Plaintiff in error was not the real purchaser of the avoidance, but the person presented, or some one in his behalf, these and many other things might be considered as frauds on the act, and have avoided the contract. But such things should have been shewn by the pleadings and found by the jury. All that appears on this record, is, that the Plaintiff in error bought the next avoidance of a living that was full, and that, without any corrupt consideration, he used the right of presentation, which he had purchased: all this he had a right to do. There is no circumstance found that shews this to have been a fraud on the Act; unless it be a fraud on the Act to buy the presentation to a living, which the seller and buyer expect will soon become vacant. Presentations are bought and sold every day, with this expectation.

There is no legal authority to support the judgment of the Court, except a short and loose [155] note in Winch's Reports of Hatton, saying what used to be done in Chancery: on the other hand, the case of *Barrett v. Glubb*, is directly opposed to the judgment of the Court of King's Bench. It was thought that the case had not the weight of a judicial decision, because it was not acted upon, but it was acted upon—Lord Bathurst decreed the conveyance of the advowson, which included the next presentation, and gave the purchaser and his clerk their costs. The seller must have acquiesced in this decision, or he would have prosecuted his *quare impedit*, and if the Common Pleas had retained the opinion that they had certified to the Chancellor, he might have carried it by a bill of exceptions to the King's Bench. When the Chancellor decreed a conveyance, without doubt it was such a conveyance as gave the purchaser a legal title from a time before the death of the incumbent, by making the assignment take effect from the date of the contract to assign. There was therefore no occasion for any injunction, as was supposed by the King's Bench; the question by the conveyance decreed was fairly raised for another Court of Law, if the party had not completely acquiesced in the judgment of the Common Pleas, confirmed by that of the Chancellor. There are no other cases in the books, which bear much on the question proposed to us.

For the reasons given in support of the Judge's answer to that question I only am responsible.

The Earl of Eldon: This case involves questions certainly of very considerable

importance. A case upon the same subject was decided by the Court of Common Pleas many years ago, [156] and the manner in which that case was decided in the Court of Common Pleas was of very great importance: first, because it was decided by most learned judges, and secondly, because it was a case in which a Court of Equity sent the case for the opinion of that Court of law, in order to enable the Court of Equity to decide what it should do in equity.

The case was thus: There had been a purchase of an advowson, the incumbent being at the time in such a state that he died within two days afterwards. The period was very nearly, if not exactly the same as in the present case. It was one circumstance in that case, that the intended purchaser of the estate stated that there must be no delay, but that the contract should be immediately completed. The Court at that time was filled by Lord Chief Justice De Grey, a very eminent judge, Mr. Justice Blackstone, and by two other judges. The case was sent for the opinion of the Court of Common Pleas, for the purpose of enabling the Lord Chancellor, Lord Bathurst, to determine whether the contract should be carried into execution by an actual conveyance. That being the nature of the case, and that being a case in equity, makes it a much stronger case than if the Court of Equity had not taken that course; for with respect to many cases of contract, which come before Courts of Equity, the parties resort to a Court of Equity because it is conceived there are grounds upon which a Court of Equity will grant its interposition to carry into effect that contract. In that case the controversy was, whether supposing that contract to be good in [157] law, the party ought not to be left to his remedy at law, instead of coming into Equity for a specific performance of the contract. The Chancellor of that day thought fit to take the opinion of the Court of Common Pleas, upon the question whether the advowson being sold at such a period nearly approaching to the death of the clergyman, the presentation as well as the advowson being included in the conveyance, the conveyance carried with it the assignment of the presentation; and the Court of Common Pleas were of opinion that it did, and so they certified to the Court of Chancery.

I observe in the proceedings in this case in the Court below, that the Court seems not to have been fully informed by the counsel at the bar, because two judges of that Court now concur in the opinion that this was a good conveyance, who then thought it was not so. The Court seems to me to have been not specifically informed as to what was the fact. We have heard it stated at the bar, that an injunction had been granted by the Lord Chancellor against the proceedings in the *quare impedit*, and that after that opinion of the Court of Common Pleas was communicated to his Lordship, he did not continue the injunction. Now that circumstance is really of no weight; it was quite unnecessary to continue the injunction, because the moment it was intimated that in the opinion of the Court of Common Law, and in the opinion of the Lord Chancellor, that was a good contract to be carried into execution, it was not necessary to take the trouble of asking for the injunction being continued. For the conveyance [158] was immediately executed which carried the contract into execution, and that conveyance having been executed, it would be a good conveyance of the presentation as well as of the advowson; and the conveyance being a good conveyance of the presentation, being declared by the Court of Chancery to be a good equitable conveyance of the presentation, and the Lord Chancellor proceeding on the opinion of the Court of Common Pleas, there was an end of all question.

Now regarding the effect of this decision on human transactions, seeing that in all probability many transactions have taken place upon the footing of it, it does appear to me, I confess, very undesirable that that decision should be shaken by the Courts of Law. I had much rather an Act of Parliament should be passed on the subject, than see a further extension of that doctrine, of which we have heard much in the argument at the bar. I most fully concur in the opinion which has been expressed by the learned Judges.

The question was then put by the Lord Chancellor.

Judgment reversed.

[161]

IRELAND.

(COMMON PLEAS—EXCHEQUER CHAMBER.)
(IN ERROR.)HENRY HARDING,—*Plaintiff*; JOHN POLLOCK, and ARTHUR HILL CORN-
WALLIS POLLOCK,—*Defendants*.

[*Mews' Dig.* viii. 694. S.C. 1 Dow and Cl. 453; 6 Bing. 25. As to appointment of clerks of the peace in Ireland see County Officers and Courts (Ireland) Act, 1877 (40 and 41 Vict. c. 56), ss. 8, 9. As to England, see *For v. Harcourt*, Shower P.C. 158; Eng. Rep. 1 H.L. 107, and note thereto.]

Upon a special verdict the Jury found that by an act of Parliament in Ireland, of the 3rd and 4th of Philip and Mary, it was enacted that the King and Queen, and her successors, should be entitled to the counties of Leix, Slieve-marge, Erry, Glinaltry, and Offaly, and that for making them shire grounds, a certain portion of the said counties should thenceforth be a shire or county, by the name of the King's county, etc.; and that from the year 1556, (the date of the act) the Kings and Queens of Ireland have nominated and appointed, and been used to nominate and appoint fit persons to fill the office of Clerk of the Peace for the King's county, to the year 1798, in which year it was found that the Defendants in error, were by patent created Clerks of the Peace within every county in the province of Leinster except Kilkenny, to hold for their lives, etc.; and that they under the patent they held, exercised the duties of the office till 1800; and that the King's county is in the province of Leinster. The verdict then found that the Custodes Rotulorum of the county have appointed persons to fill that office in the said county, from the year 1760 to the present time, (1819) who have held and enjoyed the said office accordingly, with the exception of, etc. who were in possession under the Crown; and further set forth letters patent, dated in 1776, appointing the Earl of Drogheda Custos Rotulorum of the King's county during pleasure, and also certain deeds or warrants under seal, whereby the Earl of Drogheda appointed successively two Clerks of the Peace for the King's county, who executed the duties, and received the emoluments of the office without interruption from 1772.

Held reversing the judgment in the Court below, that the Custos Rotulorum, and not the King, has by law, the right to appoint the Clerk of the Peace in the King's county.

[162] This was a writ of error from the judgment of the Court of Exchequer Chamber in Ireland, affirming the judgment of the Court of Common Pleas in Ireland in this cause. The Plaintiff in error, claimed the office of Clerk of the Peace for the King's County in Ireland, and had been several years in possession of it, under an appointment by the Custos Rotulorum of the county. The Defendants in error, claimed the same office, under letters patent from the Crown. The action was brought for money had and received, to ascertain whether the right to make such appointment for that county was in the Crown or in the Custos Rotulorum.

The Defendant below pleaded two pleas: first, the general issue; and, secondly, the statute of limitations, in both of which issue was joined; but, as the Plaintiffs below sought only to establish their right, no question arose on the second plea, the object of which merely was to cover the profits received more than six years before the commencement of the action.

The case was tried before Lord Norbury, at the sittings after Michaelmas Term, 1819, the venue being laid in the county of the city of Dublin. At that trial, a special verdict was found, stating in substance as follows: "That His late Majesty King George the Third, by letters patent, under the great seal of Ireland, dated the 30th of July, 1798, granted to the said John Pollock and Arthur Hill Cornwallis Pollock (the Defendants in error,) the office of Clerk of the Peace within and throughout the province of Leinster, in Ireland, and within every county thereof, ex-[163]-

cept Kilkenny, to hold for their lives, and the life of the survivor of them, which letters patent were duly enrolled in the Rolls Office, on the 4th of August, 1798, and were duly accepted by the said John Pollock and Arthur Hill Cornwallis Pollock, and that they are fit and proper persons to hold the said office; and that by virtue of the said patent, they duly obtained possession of the said office in the King's County, and exercised the duties thereof by them, and their sufficient Deputies, until the year 1800. That the King's County is in the province of Leinster, and is one of the counties thereof; and that by an act of Parliament in Ireland, of the 3rd and 4th of Philip and Mary, and in the year of our Lord, 1556, it was enacted, that the king and queen, and her successors, should be entitled to the counties of Leix, Slieve-marge, Erry, Glinalirry, and Offaly, and that for making them shire grounds a certain portion of the said counties should from thenceforth be a shire or county by the name of the King's County, and that the residue should be a county by the name of the Queen's County. That from the year 1556, (at which time it appears by the act of Parliament that the lands comprised within the King's County were first made a shire by the name of the King's County,) the kings and queens of Ireland have nominated and appointed, and been used and accustomed to nominate and appoint, fit persons to fill the office of Clerk of the Peace for the King's County to the year 1798; and that the Custodes Rotulorum of the county have appointed [164] persons to fill that office in the said county, from the year 1760 to the present time, who have held and enjoyed the said office accordingly, and received the emoluments thereof, with the exception of Hugh and Andrew Carmichael, appointed by the Crown; and of one James Cowly, the deputy of the said John Pollock, who were severally in possession under the Crown." The special verdict then states, "Letters patent of his late Majesty, bearing date October 30th, 1766, and duly enrolled, by which the Earl of Drogheda was appointed Custos Rotulorum of said county during his Majesty's pleasure; and then sets out a writing, under hand and seal, whereby the said Lord Drogheda, in 1772, appointed Edward Moore Dowden Clerk of the Peace and deputy Custos Rotulorum of the said county, during the pleasure of the said Earl: And finds, that the said Dowden took upon himself the execution of the duties of the said office, and executed the duties and received the emoluments thereof, until his death in 1789: And then sets out an appointment of the said Henry Harding, (the Plaintiff in error,) in said year to said office, by said Lord Drogheda, under hand and seal, during good behaviour: And finds, that said Harding was and is a proper person to hold the said office, and did all things necessary to qualify him to hold the said office, and to make him a complete Clerk of the Peace, and was admitted to the said office and took on him the duties thereof, and has continued from thence to the present time to execute the duties and receive the emoluments thereof, without inter [165] ruption by any person, and conducted himself properly therein; and that said Lord Drogheda is still" (at the time of finding said verdict,) "Custos Rotulorum of said county. The special verdict then finds, that within the last six years the Defendant received fees and emoluments of the said office to the amount of one shilling; and with the formal conclusion submits the right to the Court."

On this special verdict the Court of Common Pleas in Ireland, in Trinity Term, 1821, after full argument, gave judgment unanimously in favour of John Pollock and Arthur Hill Cornwallis Pollock, the Plaintiffs in the action.

From this judgment Henry Harding, the Defendant in the action, brought a writ of error returnable into the Court of Exchequer Chamber in Ireland, where he assigned the general error only.

The case was again fully argued in that Court, which in June 1823, affirmed the judgment of the Court of Common Pleas, two of the Judges dissenting; whereupon the original Defendant brought his writ of error returnable into Parliament, where he again assigned the general error.

The case was argued * before the House of Lords, first in 1827, and afterwards before the Judges in 1828.

* The arguments of counsel are omitted, because the topics of argument and the authorities are all noticed in the opinions delivered by the Judges. For the same cause the reasons printed at the end of the cases for the Plaintiff and Defendant in error are not reprinted.

[166] For the Plaintiff in error: Mr. John Campbell and Mr. [1, see 6 Bing. 28].
For the Defendants in error: The Solicitor General and Mr. Brougham.

In the course of the argument a question arose as to a word occurring in the statute 12 Ric. 2. c. 10, whether it was "*clerk or clerks*." Upon this question, the Lord Chancellor said, "Mr. Justice Powell interprets it, clerk of the Justices: 'Whenever the Justices take 4s. a day for their time at the said sessions, their clerk is to take 2s.:' 'in *four clerks*.' It is a clerk of the whole body, both in the French and the English translation. The folio edition of the statutes from which I read, was printed in pursuance of the address of the House of Commons,—to that we must refer. The other printed edition is different, but unless that edition was verified by comparison with the record, the House would consider themselves bound by the edition printed under authority."

Another question arose upon an inconsistency of statement in the special verdict, the allegation in first part being, that "By virtue of a patent (dated the 30th of July, 1798,) John Pollock and Arthur H. C. Pollock obtained possession of the office (of Clerk of the Peace,) in the King's County, and exercised the duties thereof by them and their sufficient deputies until the year 1800." In a subsequent part of the special verdict is set forth an appointment by Lord Drogheda, in 1789, of Henry Harding, as Clerk of the Peace during good behaviour: that he was [167] a proper person to hold the office, and did all things necessary to qualify him to hold the office and to make him a complete Clerk of the Peace, and was admitted to the said office, and took on him the duties thereof, and has continued *from thence to the present time*, to execute the duties and receive the emoluments thereof, without interruption," etc. Upon this question the following observations were made:

The Lord Chancellor (22d April): It says they were in possession, and exercised the duties, but there is no averment that they received the fees. In the latter part it is averred, "that he received the fees, perquisites, and emoluments thereof, without any interruption:" that is, as to the possession of the fees and emoluments, "with the exception of Hugh and Andrew Carmichael, who were in the possession of the office," saying nothing as to the fees and emoluments. Putting the whole record together, it appears, that the Plaintiff in error, was in possession during the whole of the period: that he received the fees and emoluments without interruption; that the Defendants in error were in possession, or a deputy rather in possession, for the period of two years, and received no fees and emoluments: the words "without interruption," appear to be limited to the words "fees and emoluments."

Mr. Campbell: I say the word interruption applies to all.

The Lord Chancellor: Yes, so it does, if it stood by itself, but in the preceding page it is stated thus: "And the jurors upon their oath, do further say and find, that the persons appointed by the Custos Rotulorum, have held and [168] enjoyed the said office of the Clerk of the Peace, from the year 1760 to the present time, and received the fees and emoluments thereof, with the exception of Hugh and Andrew Carmichael, who had been appointed by the Crown, and James Cowley, who had been appointed by the Plaintiff John as his deputy, in the said office of the Clerk of the Peace of the King's County aforesaid, and who severally were in possession of the said office under the Crown:" and in a previous page it is stated, "that they were in possession of the said office, and exercised the duties thereof by themselves, or their sufficient deputies, under or by virtue of said patent, until the year 1800." The only way, therefore, in which you can reconcile these apparently conflicting averments is, to state, that as to the possession, there was an interruption for two years: but no interruption as to the receipt of the fees and emoluments. You may so reconcile them.

Mr. Campbell: The grant by the Crown is to John Pollock, and Arthur Hill Cornwallis Pollock. John could not appoint under this patent. It must be referred to some antecedent grant to John separately, before the joint grant was made.

The Lord Chancellor: In a previous part, it appears they were in possession from 1798 to 1800. It seems impossible to reconcile the statement, if possession is material, in the different parts of this record. With regard to the possession, it states in one part of the record, that in the year 1798 this appointment took place, and that the party was in possession two years till 1800. In a subsequent part, it states that other parties were in possession from an anterior period, down to the

[169] present time, without any interruption whatever. It states first, that the parties who took under the grant of 1798, were in possession, and exercised the duties thereof by themselves, or their sufficient deputies, under or by virtue of the said patent, until the year 1800, a period of about two years. In a subsequent part it states, that the other grantee was in possession, from an anterior period down to the present time, and received the fees and emoluments of the office without any interruption. Those are the findings upon the record, and if they are material, they are directly at variance with each other: how is it possible that this House can deal with it? I said, assuming that it is a material averment on the record, it is inconsistent in itself. It states, without interruption. I point this out for consideration. This cause has been depending ten years, and we should be very sorry to send the record down again.

At the conclusion of the argument the following observations were made:

The Lord Chancellor: It appears that in the year 1556, a statute was passed by the Irish parliament, by which the King's County and the Queen's County were created. The Custos Rotulorum was appointed I believe after that, and it appears according to the special verdict in this case, that for a period of two hundred years, the Crown have uniformly appointed in the King's County to the office of Clerk of the Peace.

This action was tried in the Court of Common Pleas in Ireland; a special verdict was found, and upon that judgment was given for the Plain-[170]-tiff. Upon that judgment, a writ of error was preferred to the Court of Exchequer Chamber. The subject was discussed before ten of the judges: and eight were of opinion to confirm the judgment of the Court of Common Pleas. From that judgment of the Exchequer Chamber of Ireland, the writ of error has been brought to this House.

It was considered during the last session of parliament, when this case came on for consideration before a noble and learned friend of mine, who at that time held the office, which I have now the honor of holding, that the general question was of such importance, that it would be advisable to request the attendance of His Majesty's learned judges, to obtain their opinion upon some of the questions, which might arise out of the discussion of this subject.

The main point for consideration is, as to whether or not the appointment to the office of Clerk of the Peace for the King's County in Ireland is vested in the Crown, or in the Custos Rotulorum. I have, with the view of obtaining the opinion of the learned judges as to this point, which will be a guide to the determination of your Lordships, framed several questions, which, with your approbation, I shall submit to the consideration of the judges: one arising out of the discussion at your Lordships' bar, to ascertain what opinion the learned judges entertain as to this point: namely, whether previously to the statute of Henry 8th, the appointment to the office of Clerk of the Peace in the English Counties was vested of common right in the King, or whether it was in the Custos Rotulorum? [171] I have also framed another question, to ascertain the opinion of the learned judges as to what was the law in Ireland up to the year 1800, with respect to the general counties in Ireland? And I have also framed a question more immediately applicable to the present subject, whether, having regard to the statute passed in the year 1556 by the Irish parliament, and having regard to what has taken place under that statute, the learned judges are of opinion that the appointment to the office of Clerk of the Peace of the King's County in Ireland, belongs of right to the Crown, or whether it belongs to the Custos Rotulorum? Those are the principal points of the case which have been argued at your Lordships' bar.

But other questions have arisen out of the particular form of this Record, and your Lordships will concur with me in lamenting that after this subject, a subject of very great importance, has been now in agitation for a period of ten years, after a judgment pronounced in the Court of Common Pleas in Ireland in the first instance, after an appeal to the Court of Exchequer Chamber in that country, and after an appeal to this House, any doubt should arise, whether from defects in the Record, the case is in such a shape as to enable your Lordships to decide upon it as it at present lies upon your table. Several questions will arise out of those points which are peculiar to this case, originating in the shape of the Record, and with your Lordships' permission I shall prepare some questions, which I consider material

arising out of the Record, and arising out of those particular points to which your attention has been directed, with a view to obtain the opinion of the [172] learned judges on those points which are essential before we come to the consideration of the main question.

On 1828, the following questions were proposed by the Lord Chancellor, and put by the House to the judges for their opinion :

First, whether the appointment to the office of Clerk of the Peace within the shires of England did by law, previously to the passing of the Act 37 Hen. 8, c. 1, belong of right to the Crown or to the Custos Rotulorum of the shire, by virtue of his said office, or to any, and to what person or persons ?

Secondly, whether the appointment to the office of the Clerk of the Peace within the shires of Ireland did by law, in and previously to the year 1800, belong of right to the Crown or to the Custos Rotulorum of the said shire, by virtue of his said office, or to any, and to what person or persons ?

Thirdly, whether the right to appoint to the office of the Clerk of the Peace within the King's County in Ireland did by law, in and previous to the year 1800, belong to the Crown or to the Custos Rotulorum of the said shire, by virtue of his said office, or to any, and what other person or persons ?

On the 18th May, 1829, the judges delivered their opinions as follows :

Littledale J. : Upon the first question, I am of opinion that the right to appoint to all offices connected with the administration of justice, is vested in the Crown by the royal prerogative, and if the [173] Crown, by its royal prerogative, constitutes a new Court of Justice, it may appoint the judges of the Court and all the subordinate officers, upon which terms as it shall think proper. So also if the Crown, by virtue of an Act of Parliament, is authorized to constitute a Court, it may appoint the judges of that Court, and also the officers, in such manner as it may deem most expedient to carry into effect the object of the legislature. But if in the constitution of a Court formed under the authority of Parliament, the Crown is to appoint the judges alone, but not the officers of the Court, the act being silent as to the appointment of any officer, then I apprehend, as a matter of law, the power of appointing the officers belongs to the Court itself, or to some member or members of the Court to whom particular duties are assigned, and who in the discharge of these duties must commit the performance of the minor part of those duties to some subordinate officer or clerk : and if the Crown having the right of appointing the officers, has once waived it, and has suffered either the judges of the Court at large, or some particular judge, to whom special powers are confided, to appoint the officers necessary to conduct the subordinate business of the Court, then I apprehend the Crown cannot afterwards interfere and take from the Court or particular members the appointment of the subordinate officers ; for otherwise great confusion would ensue in the administration of such officers, acting under the authority of the Court, but liable to be displaced, and the Crown by allowing the Court to appoint the officers in the first instance has manifested its intention that that should be the course of proceeding in the [174] administration of justice in that Court. If I am right in taking this view of the subject, I think it will follow that the appointment to the office of Clerk of the Peace within the shires of England did by law previously to the passing of the Act of 37 Hen. 8th, cap. 1, belong of the right to the Custos Rotulorum of the shire, by virtue of his office.

The office of Custos Rotulorum and that of Clerk of the Peace, are offices created within time of legal memory : no immemorial usage or prescription can therefore be applied to either of them. But, if it be true, that in the cases of courts, or superior offices entrusted with the administration of public justice, the principle be recognized that the members of the court, or some superior officer, have appointed the subordinate officers or clerks to assist in the administration of justice, then I take it on the creation of new courts or superior officers within time of memory : the same principle will apply that the Court or superior officer, as the case may be, have, as incident to the Court or office, a right to appoint the subordinate officers or clerks, saving always the right of the Crown, on the first creation of the Court or superior office, to constitute and regulate it as it thinks proper, both as to the subordinate officers and clerks, and in other respects as the Crown thinks fit.

The oldest authority that recognizes this common law principle is the statute of Westminster, 2nd, 13 Edw. 1. stat. 1. cap. 30, "that all justices of the benches from henceforth shall have in their circuits clerks, to enrol all pleas pleaded before them, like as they have used to have in [175] time passed." And Lord Coke, in commenting upon this statute, in 2nd Institute, 125, says "this power is as antiently they used to have, that is by the common law." And he states the reason why this clause of the Act was passed, that the king had been informed that he might appoint the officers on the circuits, which this writer declares to belong to the justices, and that they enjoyed the same of antient time, that is by the common law; and then he goes on to give the reason of the justices having this power. (At present indeed the senior judge appoints, and has done for a considerable time past; how this has happened I cannot now ascertain, whether the second judge had acquiesced in the senior judge appointing so long that it cannot now be objected to, or whether the practice in modern times may be evidence of a usage before the time of legal memory, so as to found a right, such as the statute referred to an antient usage) "and the reason thereof is twofold: 1st For that the law doth ever appoint those that have the greatest knowledge and skill to perform that which is to be done; 2nd. The officers and clerks are but to enter, enroll or effect that which the justices do adjudge, award, or order, the insufficient doing whereof maketh the proceeding of the justices erroneous, than the which nothing can be more dishonourable and grievous to the justices, and prejudicial to the party, therefore the law, as here it appeareth, did appropriate to the justices the making of their own clerks and officers, and so to proceed judicially by their own instruments, and that this was the common law. The king cannot grant the office of the shire or county clerk " (who is to [176] enter all judgments and proceedings in the County Court) " for that the making of the shire clerk belongeth to the sheriff by the common law, as in Mitton's case it appeareth, "*et sic de cæteris*." In Mitton's case, 1 Coke 32, the queen Elizabeth had granted the office of county clerk, or shire clerk, to Mitton and others. The queen appointed Hopton to be sheriff of the county, who interrupted Mitton. It was resolved that the County Court, and the entering of all proceedings in it, are incident to the office of sheriffs, and therefore cannot by letters patent be divided from it, and after advert- ing to some other points which had been raised, it goes on to state, as a general answer to all objections, that "great inconvenience would ensue to sheriffs, who are great and ancient officers and ministers of justice, if such grants should be of validity, for by such, as well the entering of all proceedings in the same Court, as the custody of the entries and Rolls thereof, do belong to the office of sheriff." He proceeds afterwards to say "if the Record be embezzled the sheriff shall answer for it, and therefore it would be full of danger and damage to sheriffs if others should be appointed to keep the entries and Rolls of the County Court, and yet the sheriffs should answer for them as immediate officers to the Court, and therefore the sheriff shall appoint clerks under him in his County Court, for whom he shall answer at his peril. The same law of the sheriffs turn, and law and reason require that the sheriff, who is a public officer and minister of justice, and who as an officer of such eminency, confidence, peril, and charge, ought to have all rights appertaining to [175] his office, and ought to be favoured in law before any private person, for his singular benefit and avail." And then it goes on to state, that the sheriffs shall have custody of gaols, and shall put in such keepers, for whom they will answer, and the reason given is, because they shall be answerable for escapes; and it goes on to state, that it would be against all reason that they should be answerable for escapes, and subject to amerciaments, and yet that another should have the keeping and custody of the goal. The Parliamentary declaration in the statute of Westminster, and Lord Coke's Commentary, and also the resolutions in Mitton's case, seem sufficient to show that in antient offices the right of appointment of the subordinate officers and clerks is in the Court or the superior officer, as the case may be; and I apprehend that if a new Court or office be created, the same rules will attach upon them. The reasons for it are precisely the same. The language of Lord Coke in his Institutes, and the language of the Court in Mitton's case, apply in every respect to such officers as the Custos Rotulorum and the Clerk of the Peace, whose case is now under consideration.

With respect to the principle of new offices being to be governed by the rules of the common law, I would refer to the case of *Wilkes v. Williams* (8 Term Reports, p.

631.) That was an action on promises, and the Defendant pleaded in abatement, that he was a tipstaff of the Court of Chancery, and then he says, that there is an antient custom in the High Court of [176] Chancery, time out of mind, that all the resident officers, clerks and ministers of the same Court of Chancery, shall be freed and quieted, as antiently used to be, according to the liberties and privileges of the Court immemorially used, and ought not to be impleaded elsewhere than before the Chancellor or Keeper of the Great Seal: and on a demurrer to the plea, objections were taken to the plea, and amongst others it was stated to be pleaded, as an exemption to offices created within time of memory, as to which the Court held that such a custom might well extend to new created offices, for where an immemorial privilege is claimed for all the officers of the Court, and some officers are made within the time of legal memory, they must also fall within the privilege. So I say here, that if the common law allows antient Courts and superior officers to appoint their clerks and subordinate officers, the same common law principle applies to new Courts and newly created offices.

The precise origin, either of the *Custos Rotulorum* or of the Clerk of the Peace, does not appear to be very well known. There were, at the common law, persons who were called Conservators of the Peace: some of these were such by virtue of certain offices which they held, others appear to have been elected: the precise nature and extent of their functions do not appear clearly defined, nor whether they had a clerk to enrol and enter their proceedings, nor how that clerk was appointed. These conservators were discontinued, and the mode in which the constitution of the conservators of the peace was changed, and the present justices of the peace were constituted, [177] will be seen in Lambard's *Eirenarcha* (Cap. 4, p. 21.) The origin of the justices of the peace, as at present constituted, is to be found in statutes passed in the reign of Edward the 3rd (1st Edw. 3, stat. 2, cap. 16. 4 Edw. 3, cap. 2. 18 Edw. 3, stat. 2, and 34 Edw. 3, cap. 1), and consequently, within time of legal memory. It may be considered that the last of these was more particularly that which decided the character and constitution of the present justices. These justices at large had at first the custody or keeping of the rolls, and even still they have them in point of law, as all writs of *certiorari* and error are directed to them. No mention is made in any of these acts of Edward 3rd, of any such officer as *Custos Rotulorum*, (and it is not very clear when he was first constituted), nor of any such office as Clerk of the Peace: but in the 12th Richard 2nd, cap. 10, it is provided that the clerk of the justices shall have 2s. a day for his wages, and the clerk of the justices I take to be the present Clerk of the Peace. In the 11th Henry 7th, cap. 15, the *Custos Rotulorum* is mentioned as being to have the oversight of the sheriffs in the cases mentioned, and it seems from the reference in Lambard (*Eiren.* p. 42), that there was such an office as *Custos Rotulorum* as early as the 14th of Richard 2nd. It does not appear whether, previously to that time, there was any such person as the *Custos Rotulorum*, and if there was not, the justices would, as incident to their office, have a right to appoint the clerk, according to the rules of the common law.

But as soon as the justices became a distinct [178] Court, it would be inconvenient that the records should be dispersed amongst them promiscuously, and not kept together in one place. Lord Holt, in *Harcourt v. For* (see 1 Shower 426, 506, 516, and Shower's Parl. Ca. 158, 4 Mod. 167, 12 Mod. 42), says, he looks upon it, it was in the power of the king to appoint some particular person to have the custody and charge of the Records, and that he should be a person responsible to the justices for the safe keeping of them, and he says this was thought convenient, for the words at the end of the commission of the peace are "we appoint you," such a one, "to be Keeper of the Records and Rolls of the County." He goes on to say "this seems to me to be the commencement of the office of *Custos Rotulorum*, for no one being more in commission than another, it was in the power of the king, by his prerogative, to appoint one to keep the records. But, therefore, it does necessarily follow, that no person whatsoever could be *Custos* that was not a justice of peace in commission." Then Lord Holt goes on to consider how the *Custos* came to appoint the Clerk of the Peace, he says "the *Custos* names him for this reason, because the rolls and records of the sessions being by the Commission put into the custody of the *Custos Rotulorum*, the clerk being the person that must be trusted with the rolls to make entries upon, to draw judgments, to record pleas, to join issues and enter judgments, then, by com-

mon right, and by the common law of the land, it belongs to him that hath the keeping of the records to nominate this clerk, and not to any one else, and it would be the most in-[179]-convenient thing in the world that the Custos Rotulorum being entrusted with the custody of the records, by his commission, any other should be made Clerk of the Peace for the actual possession of these records, than such a one as he should appoint, where upon any loss or miscarriage he is answerable for it himself to the king and the subject."

This reasoning of Lord Holt, as to the propriety of the person who has the records of a Court entrusted to him, appointing a subordinate officer to take care of them, is certainly extra judicial, but it tells in precisely with what is said by Lord Coke in his 2nd Institute, commenting on the statute of Westminster the 2nd, as to clerks of assize, and the language of the Court in Mitton's case.

This conjecture of the origin of the Clerk of the Peace being appointed by the Custos Rotulorum, is called in question, first, because in 12 Richard 2nd (cap. 10) he is called clerk to the justices; secondly, because Lambard (Eirenarcha, p. 394) calls him, in conformity with the statute of Ireland the second, clerk to the justices, and not the clerk of the Custos Rotulorum only; thirdly, because in the Year Books (2nd Hen. 7th fol. 1) he is called the clerk and attorney of the king. In the reign of Richard the 2nd, when he was called clerk of the justices, it does not appear that there was any Custos Rotulorum; but, admitting that there was, and adopting the assertion of Lambard, that at the time when he wrote, the officer was clerk to the justices, it does not follow that he is to be appointed by the justices. The justices form the Court, and therefore he may with [180] propriety be called their clerk, because he is to record their proceedings, and it is his duty to attend the Court.

It is to be observed also, that the legal custody of the rolls and records is in the justices, though the actual custody is in the Custos Rotulorum, who is to produce them at the sessions, and upon other proper occasions, to the justices, and therefore there is no more inconsistency in calling him clerk to the justices when he is appointed by the Custos Rotulorum, than there is in saying that the rolls are in the legal custody of the justices, though the actual custody is in the Custos, by virtue of the King's commission. But if Lambard's authority is to be taken, that at the time when there was a Custos, the Clerk of the Peace was the clerk of the justices, his authority must be taken altogether; and in the next paragraph he says "Howbeit" (as much as to say, notwithstanding he is clerk to the justices) "the nomination and appointment of him hath long time belonged to the Custos Rotulorum. And this office was also for a time given by the king's letters patent for term of life, as that of the Custos Rotulorum was, until the statute of 37 Henry 8, cap. 1, recontinued the *antient order of giving it by the Custos Rotulorum only*." He therefore considers, that the antient order of giving it was in the Custos.

Then, as to his being called in the year books clerk and attorney of the king, nothing can be inferred against the right of the Custos from that; if he is to enter the proceedings on the rolls and records, he is, as far as that applies to entries in which the king is concerned, the clerk and at [181] torney for the king; but that has nothing to do with the right of appointment. The officer on the circuit who, in common parlance, is called clerk of assize, is really the *clerk of the assize and clerk of the Crown*, and is so called in his grant of office. The statute of Westminster speaks of the justices within their circuits, appointing their clerks to enrol pleas pleaded before them, in general terms; and when his duties come to be specified, he is called clerk of the assizes and clerk of the Crown; that is, he is the clerk of the assizes as to those things which relate to civil suits, and clerk of the Crown as to those things which relate to the Crown. It is not material to consider in what relation this officer stood to the Custos, whether he is his deputy or his clerk, or the clerk to the body of justices, for whom the Custos keeps the rolls and records; but this question is, in whom is the right of appointment? He cannot be considered as the deputy of the Custos in the legal sense of the word, because a deputy may perform all the duties of the principal, which the Clerk of the Peace cannot.

Besides the case of *Harcourt v. Fox*, there is the case of *Saunders v. Owen* (Salk. 167. 5 Mod. 386. 1st Ed. Raym. 158. Carth. 126.) That was an assize of *novel disseisin* of the office of Clerk of the Peace. The case turned upon the manner of the appointment, because at that time there was no doubt about the right of the Custos.

to appoint. In the report of the case in Salkeld, the Court say that it always belonged to the Custos Rotulorum to nominate the Clerk of the Peace, but the Clerk of the Peace was removable whenever the Custos Rotulorum was removed or changed, and, moreover, was [182] removable at the will of the Custos till the 32nd of Henry 8th, which makes him to continue *in quousque* the Custos shall continue in. This, therefore, is a declaration of the Court as to the original right of the Custos, and also considers that the effect of the statute of the 37th of Henry 8th, only altered the period of the duration of the office. In Jenkins (Cent. 216. fo. 59) it is stated, that the Custos Rotulorum appoints the Clerk of the Peace.

In *the King v. Evans* (4 Mod. 31. 1 Show. 282. 12 Mod. 13) the Custos Rotulorum having been displaced, the Clerk of the Peace refused to deliver the rolls to the new Custos; he was indicted and found guilty, and removed from his office and brought a *mandamus* to be restored. It was said that he was a ministerial officer to the Custos, and ought to deliver the records to him at the end of the session. The Chief Justice says, "The Clerk of the Peace ought to make out all the process which cannot be done without the rolls. When they are completed, he must deliver them to the Custos, but so long as they are in process they are to be with the Clerk of the Peace;" and, therefore, it seemed reasonable that the Defendant should be restored; but three judges were of a contrary opinion. This case does not seem to prove much either way as to the right of appointment, but only as to the conduct of the Clerk of the Peace, and that the Custos might require the rolls to be delivered to himself, if he thought fit, of which there could be no doubt. In the same case, as reported in 12 Modern Reports, Holt says, "the custody of the rolls belongs to the [183] Custos Rotulorum. The Clerk of the Peace is a distinct officer, and not a mere servant." A peremptory *mandamus* was ordered.

Then it is material to consider, whether the statute of the 37th of Henry 8th, cap. 1, throws any light upon the subject. It begins, "Where, before this time, the Lord Chancellor of England, for the time being, hath, by reason of his office of the Chancellorship, the nomination and appointment of the Custos Rotulorum, and that in like manner all and every person which hath had and enjoyed the said office of the Custos Rotulorum hath had, until now of late, the nomination and appointment of the Clerk of the Peace: And whereas now of late divers and sundry persons, not being learned, nor being able for lack of knowledge, to exercise the offices of Custos Rotulorum and Clerk of the Peace, have of late years, by labour, friendship, and other means, attained and gotten for term of their lives, of the King's Majesty, several grants, by his Highness's Letters patent to them made, of the said Clerkships of the Peace:" and then it goes on to enact how the appointments to these offices shall be made in future, and as to the Clerk of the Peace, that he shall be appointed by the Custos. Further acts of Parliament have since been passed as to these offices, but they are not material to the present enquiry. This recital then appears to contain a direct recognition of the right of the Custos Rotulorum to appoint the Clerk of the Peace. It says, that the Custos hath had, until now of late, the nomination and appointment. That must [184] mean the lawful and rightful nomination and appointment, and then it goes on to give the Custos a distinct power of appointment to the office, to be held as long as he should continue Custos.

It may however be said, that this act cannot be taken to recognize any pre-existing right in the Custos, because it says that the Lord Chancellor had, by virtue of his office, the nomination and appointment of the Custos, and which he had not by law. I admit that he had it not by law. The only way to account for this recital in the act is, that in point of fact, he had exercised the right, and which he probably had done, because he made out the commission; and he might consider that it was proper for him to direct who were to keep the records. But at all events, there is a parliamentary recognition that the Crown had not appointed the Clerk of the Peace, at the first formation of the Court of the Justices, because it says, that the Custos Rotulorum had until now of late appointed the Clerk of the Peace; and that now of late, persons had got grants from the Crown; and of course, it follows, that at the first formation, the Crown had not exercised the right, and that being so, the title of the Crown cannot be supported; and then it becomes a question, whether the nomination be in the Justices at large, or in the Custos Rotulorum.

It may be said there are a great many offices in Courts of Justice, where the

power of nomination is not as is contended for by the Plaintiff in error. No doubt many are in the Crown, as to which, I consider that the right of nomination was reserved by the Crown, at the original formation of the Court. In others, it is in the Chief Justice: and [185] as to them, I consider that the right of the Chief Justice is founded in prescription, which has taken it away from the Court at large. There are many which are appointed by the Chief Officer, but these are subordinate officers or clerks, who are appointed by the superior officers.

In *Skrogges v. Coleshill* (Dyer 175), it appears that the office of Exigenter became vacant in 1558, and afterwards Sir Richard Brooke, Chief Justice of the Common Pleas died, and during the vacancy of both offices Queen Mary granted the office of Exigenter to Coleshill, and afterwards granted the office of Chief Justice to Anthony Brown, who refused to admit Coleshill, and granted the office to Skrogges: and then in 1st and 2d Elizabeth, the right of the parties were discussed, and it was held by the Judges present, viz. the Judges of the King's Bench and the Chief Baron, (the Judges of the Common Pleas being excluded), that the title of Coleshill was null, and that the gift of the office by no means, and at no time, belongs or can belong to the Queen, but is only in the disposal of the Chief Justice for the time being, as an inseparable incident belonging to the person of the Chief Justice, by reason of prescription and usage. At the end of the case, a reference is made to the statute of Westminster, and it then goes on thus: "and so it seems in reason that the Justices were before the clerks, and made clerks at their pleasure." In this case, the title of the Chief Justice stands upon usage and prescription, and very properly so, because by the Common Law, the right to appoint [186] the officers of the Court, was in all the Judges of the Court, and the Chief Justice alone, could only appoint by usage and prescription. But the case is important in this point of view, that it says the gift of the office by no means, and at no time, belongs or can belong to the queen: and the question then I apprehend was between the right of the whole Court and the right of the Chief Justice, which latter could only be founded on prescription.

The next case to that of Skrogges is in Dyer 176 a (*Kirkham's Case*), by which it appears, that the office of Chirographer, and of Custos Brevium in the Common Pleas, both belong to the king.

The next cases are *Duchess of Grafton v. Holt* (Skinner 354), and *Bridgman v. Holt* (Shower's Parliamentary Cases 411). In these cases, the question was between the Crown and the Chief Justice of the King's Bench, as to the right of appointing the chief clerk of the King's Bench. The Chief Justice claimed the right by prescription: and one question was, whether the prescription was interrupted by an act of Parliament of 15th Edward the 3d? But the right of the Chief Justice was put on the point of prescription, and not upon the Common Law right, nor that would have given it to the whole Court.

Another question is, whether this right of nomination is not a matter of fact, to be decided by a Jury, rather than a matter of law? But I think it is a question of mere law, for the reasons I have given. The only thing that could be considered as a matter of fact, to be tried by a [187] Jury, would be, whether the Crown had reserved the right of nominating the Clerk of the Justices, or whatever he may be called, at the time, when the first commission issued for appointing Justices of the Peace? and I think that Courts of Law may take judicial notice that the Crown did not do so, from a total absence of any thing appearing to countenance such a supposition, and from the language of the statute of 37 Henry 8, where such exercise in fact is distinctly negatived, and from the various authorities which I have referred to, as to the office in question, in none of which is it in any way supposed that the Crown did exercise such a right in the first instance. It may be said, that in the Counties Palatine, a different rule prevails: and that in the County Palatine of Lancaster, the Clerk of the Peace is not appointed by the Custos Rotulorum; and that in Durham, the Bishop does not appoint in the character of Custos Rotulorum. Whatever is done in the Counties Palatine, is not necessarily according to the rule of the Common Law. But it depends altogether on the particular constitution of each county, as it was originally formed by act of Parliament, or otherwise; and I do not consider that what has been done in Counties Palatine, can affect the general principles of the Common Law.

I am therefore of opinion upon the first question, that the appointment to the

office of Clerk of the Peace, within the shires of England, did by law, previously to the passing of the act 37 Henry 8, cap. 1, belong of right to the Custos Rotulorum of the shire, by virtue of his said office.

The law of Ireland before the time of Henry the [188] 2nd, was the Brehon Law. King John in the twelfth year of his reign, is said (Co. Lit. 141, *de Communi omnium de Hibernia consensu*) to have gone into Ireland, and there, by the advice of grave and learned men in the laws, whom he carried with him, by Parliament, to have ordained and established that Ireland should be governed by the laws of England: some of the Irish accepted, but others objected to this. In the parliament at Rithensy (40 Edward 3d), the Brehon Law was abolished. In Poyning's Law (10 Henry 7th), it is provided, that the English statutes before that made in England, shall be in force in Ireland.

Whatever therefore were the rights of the Crown, or other persons in England, at the formation of the Courts of Justices in England, were also the rights of the corresponding persons in Ireland. No act of Parliament in Ireland, before the year 1800, took away the right of the Custos. I am of opinion, therefore, on the second question, that the appointment of the office of Clerk of the Peace within the shires of Ireland, did by law, in and previously to the year 1800, belong of right to the Custos Rotulorum of the shire, by virtue of his said office.

The King's County was created by 3 and 4 Philip and Mary, c. 2, s. 3. A new county with all the officers attached to it, will follow the rule of all other counties: and if the Crown at the time of the original formation of the Court of the Justices in England, did not exercise the right of nomination and appointment of the officers, it could not do so in Ireland, either when the Court of Justices was [189] first formed there, or at the time of the formation of the King's County. The clause of the Act creating the King's County is as follows: "And be it also enacted, by the authorities aforesaid, that the New Fort in Offaly be from henceforth for ever called and named Phillipstown, and that the said countie of Offaly, and such portion of the said Glinmalry as standeth, and is situated of that side of the river of Barrow, whereupon the said Phillipstown standeth and is situated: and all the seigniories, honors, manors, lands, tenements and hereditaments of the same country and portion, and every of them, be from the Feast of St. Michael the Archangel, next coming after the first day of this present Parliament, one shire or countie named, known and called the King's Countie: and shall from the said Feast be taken, reputed and used as a countie or shire to all purposes for ever: and that there shall be appointed, ordayned and made, within the said countie or shire, for the rule thereof and execution of things there, sherife, coroners, escheator, clerke of the market, and other officers and ministers of justice, yearly, as in other the shires or counties of this realm of Ireland be or should be."

I am therefore of opinion as to the third question, that the right to appoint to the office of Clerk of the Peace, within the King's County of Ireland, did by law in, and previously to the year 1800, belong to the Custos Rotulorum of the said shire, by virtue of his said office.

Vaughan, B.: With reference to the last two questions, it is to be considered as admitted that the Crown, if it ever possessed the right of [190] appointment to the office of Clerk of the Peace within the shires to which these questions refer, has never parted with that right, unless it passed to the Custos Rotulorum in each county, merely by virtue and in right of his said office of Custos Rotulorum.

To the first question I answer, that the office of Clerk of the Peace, within the shires of England, did by law, previously to the passing of the act of 37 Hen. 8th, cap. 1, belong of right to the Crown. The king, by prerogative, has the creation of all powers and offices in the state, especially those connected with the administration of justice. Whoever therefore insists on the right to appoint to any such office, must to establish a legitimate claim, derive his title through the Crown. But I apprehend this may be done, first by grant from the Crown: secondly, by prescription, which presupposes such grant: thirdly, by Act of Parliament, to which the King is a consenting party.

It is not argued, nor is there colour for contending, that the office of Clerk of the Peace rests on any act of Parliament, as its foundation prior to the 37 Hen. 8. Nor can the doctrine of prescription, in the legal acceptation of that term, assist the claim, because, neither the office of Custos Rotulorum, nor of Clerk of the

Peace, had any existence before the time of legal memory. The case of the Plaintiff in error must depend therefore on the question, whether the right of the Custos to appoint can be derived from any grant mediately or immediately from the Crown; and on this ground I conceive it may be defended. When I use the words mediately or immediately, I would be understood that the right to appoint [191] to the office of Clerk of the Peace may be derived through the Crown by the grant of some other office, to which it may be inseparably incident; and that it did of right belong to the office of Custos Rotulorum to appoint to the office of Clerk of the Peace in England, not by virtue of any express grant from the Crown, but as incidental to the office of Custos Rotulorum, prior to the statute of 37 Hen. 8th, *accessorium sequitur principale*. It passes as an accessory to its principal.

I think that can be shown by a consideration, first, of the origin and nature of the respective offices of Custos Rotulorum and Clerk of the Peace, and of their relative duties, as arising out of and connected with the Commission of the Peace; secondly, by the strongest legislative declarations and recognitions on the subject; thirdly, by the authority of solemnly adjudged cases, some of which appear to me to be strictly analogous; and by the declarations and opinions of the most eminent judges. And, first, as to the origin (as far as it can be traced) and nature of the respective offices and their duties, as connected with the Commission of the Peace.

It is difficult to fix, with any precision, the period when any of these offices were first created. Their origin is involved in obscurity; and if the attempt to discover it, eluded the researches of the eminent judges, who must have employed many watchful hours in this enquiry, in the reign of William 3rd, (I allude to the case of *Harcourt v. Fox*) the subsequent lapse of 130 years, has only enveloped the subject in darker mystery. That the office of Custos Rotulorum is not an im-[192]memorial one, must be conceded, because the Commission of the Peace which gave birth to it is within the time of legal memory; but that it is a very ancient office will not be disputed. In what manner the peace was maintained in very ancient times, and before the reign of Edw. 3rd, whether by persons under the name of Conservators; whether some of them, (for example) the king's justices, and inferior judges, and ministers of justice, as sheriffs, constables, tithing men, headboroughs, and the like, were *ex officio* wardens of the peace; whether others were entitled to hold the same office by tenure or prescription; whether others were elected in full County Court, in pursuance of a writ directed to the sheriff for that purpose; whether others again were occasionally appointed by a committee of the Crown; what was the extent of their authority, and what the precise limits of their jurisdiction, are questions which it might gratify a spirit of antiquarian curiosity to investigate, but from which investigation I conceive no clear light would be reflected to guide us in our present enquiry.

Before the reign of Edward 3rd, it should seem that Commissions of the Peace were not confined within the limits of particular counties, not addressed exclusively to persons resident within them; their authority however, was restrained strictly *ad conservandam pacem*.

As soon as Edward 3rd, ascended the throne, which became vacant by the imprisonment, deposit, and murder of his father, the stat. of 1 Edw. 3rd, cap. 16, was passed, intituled, "who shall be assigned justices and keepers of the peace;" and containing this simple enactment [193] "*Item* For the better keeping and maintenance of the peace, the king wills, that in every county good men and lawful, which be no maintainers of evil, nor barrators in the county, shall be assigned to keep the peace." This short and general act gave very limited authority to the persons to be appointed under it, making them nothing more than Conservators of the Peace, nominated by the Crown, in addition to those who were already such by the pre-existing laws and usages of the realm. Within three years afterwards these justices and keepers of the peace were entrusted with somewhat more enlarged powers, being invested with the additional authority to take, but not to try indictments. The statute of Edw. 3rd, cap. 2, after some regulations respecting the appointment of justices of assize and gaol delivery, ordained that there should be assigned good and lawful men in every county to keep the peace; and the justices assigned to deliver the gaols had power given them to deliver the gaols of those that should be indicted before the keepers of the peace; and such keepers were directed for that purpose

to send their indictments before those justices. After this statute I find no material alteration in their authority until the eighteenth of the same reign, when they were to be empowered by a commission from the Crown, (if need should be) "to hear and determine felonies and trespasses." 18 Edw. 3rd, cap. 2, title, "justices of the peace shall be appointed, and their authority." "Item.—That two or three of the best of reputation in the counties shall be assigned keepers of the peace by the king's commission: and at what time need shall be. [194] the same with other wise and learned in the land, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same county, and to inflict punishment reasonably, according to law and reason, and the manner of the deeds." When, in obedience to this statute, it was prayed by the Commons, in the twentieth year of the same reign, that they might have a power to hear and determine felonies; it was answered that the king would appoint learned persons for that office.

So in the twenty-first year of the same monarch, the Commons being charged to advise the king what was the best way of keeping the peace of the kingdom, they recommended that six persons in every county, of whom two were to be *de plus grounds*, two knights and two men of the land, and so more or less, as need should require, should have the power and commission out of Chancery to hear and determine the keeping of the peace.

In conformity with these petitions and statutes, and others which may be seen in Cotton's Extracts from records in the Tower, commissions were at various times framed, assigning certain persons to execute the powers which the statutes authorized the king to confer: in which, in addition to the general powers for keeping the peace, a special charge was introduced to enforce the observance also of particular statutes, viz. statutes of Winton, 2 Edw. 3rd, and the statute of Northampton, 20 Edw. 3rd, with some others: but the general standing authority given to the justices to hear and determine felonies and trespasses, thereby constituting them complete judges of a [195] Court of Record, was not conferred upon them until the 34 Edw. 3rd, cap. 1, and I conceive that statute gave occasion to the commencement of the office of *Custos Rotulorum*, and the necessity of appointing an officer to make and keep the rolls or records of the peace, naturally arising out of the execution of this commission, so much enlarging their jurisdiction and powers. Observe the title and language of the statute 34 Edw. 3, cap. 1: "What sort of persons shall be justices of the peace, and what authority they shall have." The act states, first, "in every county in England shall be assigned for the keeping of the peace, one lord, and with him three or four of the most worthy in the county, with some learned in the land, and they shall have power, etc. And also to hear and determine, at the king's suit, all manner of felonies and trespasses done in the same county, according to the laws and customs aforesaid."

I have endeavoured to trace the rise and progress of the growing authority and jurisdiction of the justices of the peace, with a view to ascertain whether they had power to hear and determine felonies and trespasses, until 34 Edw. 3rd, and consequently, were a Court of Record before that time: because, if I am correct in supposing that they had no such authority, there was no necessity for any such officer as *Custos Rotulorum* or Clerk of the Peace, nor do I believe either of them to have existed in fact prior to that period. But a Court of Record being then organized, and the justices assembled for the first time under the commission directed by that statute, I apprehend it would of right belong to them, as incident to [196] the administration of justice, having records which must be in their custody, to appoint an officer, by whatever name he might be called: whether Clerk of the Crown, Clerk of the Justices, or Clerk of the Peace, to assist them in drawing their indictments, in arraigning their prisoners, in joining issues for the Crown, in entering their judgments, in awarding their process, and in making up and keeping their records.

The nature of these duties, may sufficiently account for his being sometimes called not only Clerk of the Peace, but also Clerk and Attorney for the Crown (Year Book, 2 Hen. 7, p. 31, pl. 2). Where a question arose, whether all the Justices of the Peace ought to bring their recognizances to that Justice which was *Custos Rotulorum*! all agreed it was good so to order it, and well done: and the Clerk of the Peace at the Sessions, is there described as Clerk of the Peace, who is Clerk and Attorney for the advantage of the King.

In *Harcourt v. Fox*, as reported in 1 Mod. 173, and in Holt's Rep. 189, the Court is reported to have affirmed, that the first beginning of a Custos Rotulorum was in the 34th year of the reign of Edw. 3: and that the reason why he was appointed at that time was, because the Justices of the Peace could not then agree among themselves, who should keep the records: and that upon application made to the King concerning the matter, his Majesty (to prevent all disputes) appointed a fit person to keep them, and gave him the custody of the records in every county. But from very careful perusal of what [197] may perhaps be considered as a more full and accurate report of the same case in Shower, where the opinions of the judges are reported *seriatim*, I do not collect with certainty, that the Custos Rotulorum was nominated by the Crown, so early as in the 34th year of Edward 3. Lord Holt indeed observes, "That that statute gave occasion to the commencement of the office of Custos Rotulorum: for the justices being judges of record, the records of that Court must be in their custody. But as it might be inconvenient that the records should be dispersed amongst them promiscuously, and not kept together in one hand, it was in the power of the Crown, to appoint a particular person to have the custody and charge of them." Such is the language ascribed to Lord Holt by the report in Shower: but at what precise period of time the King first exercised that power, whether on the issuing of the first commission, after the 34 Edw. 3, or in consequence of the supposed disagreement, stated to have arisen amongst the justices themselves, does not distinctly appear in the judgments of any of the judges, and I incline to the opinion that it was not until a later period.

To hazard any conjectures on the subject is, (to adopt the phrase used in the argument of *Harcourt v. Fox*), *ambulare in teuebris*: but whatever cloud may obscure this enquiry, my researches have led me to conclude, that in a short succession of years, subsequent to the 34 Edw. 3, the King introduced the clause now found in every commission of the peace, containing a special designation of the Custos Rotulorum by name. [198] This fact is manifested from several passages in Lambard, who in page 10 of his valuable work says, "That the earliest commission extant, expressly appointing by name, the individual to whom the custody of the records of the peace was committed by the Crown, was in the 11th year of the reign of Richard 2d." In mentioning the alterations made in the terms of the commission of the peace, he adds, "And Stephen Bateman was then the first for Kent, to whom the credit of the records of the peace was thereby committed, which officer is now since then called the Custos Rotulorum: all which matters you may find in the records 28th of June, 11 R. 2, part 2, membrana 35."

From whence I infer, that although during the interval between 34 Edw. 3, and the 14 R. 2, comprising a period of about thirty years, the justices had generally the custody of the records, and, as incident to that custody, the appointment of any ministerial officer to assist them in that duty, (by whatever name he might be called), yet when, in progress of time, whether from differences arising between the justices themselves, or from any other cause, the Crown appointed the Custos Rotulorum by name, (a course of proceeding, which according to Lambard, obtained from the 11 Rich. 2), that appointment in any judgment, drew after it as incidental to it, the nomination of Clerk of the Peace, by reason of his possession and custody of the records. It is true, there is no mention of Clerk of the Peace, by that precise name, until some time after the statute, 12 Rich. 2, c. 10, which recognizes an officer as ministerial to the justices in the dis[199]charge of their duties at the sessions, under the denomination of their clerk. The clause to which I refer, is that which directs that every of the said justices shall take for their wages four shillings the day, for the time of their sessions, and then clerk two shillings; but I conceive there is nothing in that statute to negative the presumption, that the officer therein described as Clerk of the Justices of the Peace, or by abbreviating the expression, Clerk of the Peace, the same individual officer performing the same duties, is clearly designated.

Indeed in the 13th year of the reign of Hen. 1, the reign immediately succeeding that of Rich. 2, and within twenty years of the period of time, when the Crown had introduced into the commission of the peace, the name of an individual justice as the keeper of the rolls, I find the Clerk of the Peace described in the year books, 12 H. 1, p. 10, pl. 30, as Clerk of the Sessions of the Peace: for it is there stated,

that at a gaol delivery in the castle of Sarum, one of the justices Hawkes, addressing himself to Horn, who was Clerk of the Sessions of the Peace, directed him to take down the name of the prisoner, who was not then indicted, that he might be enquired of at the next sessions of the peace.

I now proceed to the consideration of the question, whether there be not on the rolls of Parliament a direct legislative recognition of the rights of the Custos to appoint the Clerk of the Peace? and beg leave to refer to the statute, 37 H. 8.

In my humble judgment, the language of the statute is plainly declaratory of the right of the [200] Custos by law, to appoint to the office of Clerk of the Peace: nor can I conceive that the law officers of the Crown, whose duty it was to protect the rights and interests of his Majesty, would have permitted such a preamble to have stained the rolls of Parliament, unless they had regarded the recent grants, by his highness's letters patent, of the clerkship of the peace, as an encroachment and usurpation upon the ancient legitimate right of the Custos, to appoint by virtue of his office. The immediate occasion of passing that statute, will appear from the language of the preamble: "Whereas before this time, the Lord Chancellor, by reason of his office, hath had the nomination and appointment of Custos: and that in like manner, (that is, by reason of his office, and incident thereto) all and every person which had and enjoyed the said office of Custos, hath had until now of late, the nomination and appointment of Clerk of the Peace:" then it goes on to recite the mischiefs resulting from the nomination of persons not sufficiently learned to exercise the said offices, by reason whereof, indictments for felony and murder, and other offences and misdemeanors, and the process awarded upon them have not only been frustrate and void, sometimes by negligent engrossing, by the embezzling or rasure of the same indictments, but also sundry bargains and sales have also been void, for lack of sufficient enrolment of the same.

Some of the duties of Custos Rotulorum are here enumerated: viz. the drawing the indictments for felonies and other offences: the keeping of them, and the awarding of process upon the [201] same: and the enrolment of bargains and sales. That these duties extend as well to the proper making, as to the keeping of the records, cannot be disputed: for if the naked custody of them, without regard to their due entry and enrolment, were the only office required from the Custos or his agent, the lack of sufficient knowledge could not have been urged as the mischief which called for a remedy. From this act, therefore, I conceive the inference almost irresistible, that the Clerk of the Peace, had at all times, until recently before the passing of it, been appointed by the keeper of the records. In this opinion I am fortified by great authorities. Lambard, in commenting upon this statute, p. 378, after observing that the nomination and appointment of Clerk of the Peace, had long time belonged to the Custos Rotulorum, adds: "And this office was also for a time, given by the king's letters patent for the term of life, as that of the Custos was, until the second stat. of 37 H. 8. c. 1. recontinued the ancient order of giving it by the Custos Rotulorum only."

Is it possible for language to express, in terms more clear, appropriate, and forcible, the opinion entertained by this author, that this act was declaratory of the legitimate right of the Custos to appoint, and of his sense of the usurpation of the Crown? Eyres J. in the case of *Harcourt v. For*, as reported in Shower (1 Shower 518), in discussing the several provisions of the statute 37 H. 8. expresses his opinion, that it must be regarded as a declaratory law. He expresses himself in these [202] terms:—"From all which parts of this act so perused, I think it must be obvious to every man's understanding, that this act was but declarative of what the law was before the making of the act:" nor does it appear to me, that the argument of its being a declaratory law is at all weakened, or the right of the Custos to appoint the Clerk of the Peace in any manner impugned, by the fourth or fifth sections of the act: the first of which continued and confirmed all such as (being found when the act passed, in the actual possession of those offices) had derived their titles to them, under any letters patent or commission from the crown: and the last of which, the fifth section reserved to the Archbishop of York, the Bishop of Durham, the Bishop of Ely, and every of their successors, the exercise of the same rights which they had been accustomed to enjoy.

The fourth section I think, can be regarded only as the confirmation of a suspicious

and doubtful title. For if the king's right to appoint had been clear and unquestionable, where was the necessity of a special enactment to establish it? Nor does the view which I have taken of the character of this monarch, induce me to conclude that he would have condescended to compromise an acknowledged right in the Crown, upon terms of continuing the then present possessors in office for the period of their lives. As to the fifth section, I am not aware that any argument has been founded upon the construction of this clause unfavorable to the right of the Custos. Those jurisdictions are specially excepted from the general provisions of the act. They may, or may not, have originated in similar usurpations: [203] and it may have been thought expedient to confirm the Archbishop of York, the Bishop of Durham, and the Bishop of Ely, and their successors, in the exercise of all the liberties and authorities, according as they had enjoyed the same, by the seal of a parliamentary enactment.

I cannot close my observations on this subject, without remarking, that although the reign of Henry 8, has been considered as a very distinguished era in the annals of our judicial history, yet the royal prerogative was then strained, more particularly in his latter years, to a very tyrannical height, and its encroachments sanctioned (to use the language of the elegant commentator on the laws of England) by those pusillanimous Parliaments, one of which, to its eternal disgrace, passed a statute, whereby it was enacted, that the king's proclamations should have the force of law.

I now propose to shew by cases strictly analogous, and by the opinions and judgments of the most eminent lawyers, formed after much consideration, that the appointments of the Clerk of the Peace may properly be regarded by law, as incident to the office of Custos. Mr. Justice Gregory, in *Harcourt v. For* (1 Shower 523), says, "I do not see but that the Clerk of the Peace, being an officer relating to the execution of the law, his office must be governed by those rules, which govern other offices of the like nature." I would, therefore adopt this mode of illustrating the subject, and refer to the several offices of Clerk of Assize, of the Shire Clerk in the County [204] Court of the Sheriff, of the Exigenter in the Court of Common Pleas, and the Clerk of the Pleas in the Court of King's Bench. I would apply the reasoning by which the right to appoint to those offices was sustained, and the principle to be extracted from them, namely, that law and reason require that the Custos should appoint, to the question I am called to answer.

To take first the office of clerk of assize: it is difficult to conceive two offices bearing a stronger resemblance to each other, than that of Clerk of Assize and Clerk of the Peace. The relation of Clerk of the Peace to the Justices at Sessions, is precisely the relation of Clerk of Assize to the Justices of Assize: they are the very indenture and counterpart, formed upon the same model, created by the same necessity, and discharging the same duties. By whom is the Clerk of Assize appointed? By the Justices of Assize. If it be said that the Justices of Assize derived their right to appoint from the provisions of the statute of Westminster, which transferred it to them from the Crown, I would answer that their right is laid in a deeper foundation, not in the statute, but in the common law. For, according to my Lord Coke, there exists a common law principle, which, without intrrenching upon the prerogative of the Crown, gives to the justices of the court, the right of appointing such officers as are necessary auxiliaries to them in the discharge of their judicial functions, and for whose qualifications and fidelity they are responsible. This principle is directly recognized by Lord Coke, in his commentaries upon the statute of Westminster 2; from which, according to his opinion, the [205] Judges of Assize had exercised the right, long before the existence of that statute. "*Habeant de eorum omnes justiciarii de bancis in circuitibus suis clericos notulantes omnia placita eorum eis placitata, sicut antiquitus habere consueverunt* (Statute of Westminster 2d, c. 30, 2 Inst. 425). Hereby it appeareth, that the justices of courts (generally) did ever appoint their clerks: as here it is put, for example, that the justices of the benches in their circuits, had clerks that enrolled all pleas pleaded in them, as anciently they used to have, *i. e.* by common law." In the next passage he reiterates and confirms the same position, that this branch of the statute declareth it to belong to the justices, and that they had enjoyed the same of ancient time, *i. e.* by common law. Here, then, is a studious disclaimer of the statute of Westminster, as being the origin

of the right, and an anxiety manifested to prevent any misconception of his clear opinion, that the appointment did of right belong, and was incident to the common law. His reasons for this opinion appear to me conclusive, and his authorities incontrovertible: "and the reason thereof is twofold: first, the law doth ever appoint those who have the greatest knowledge and skill;" secondly, he says, that the officers and clerks are but to enter, enrol, or effect that which the justices adjudge, award, or order: the insufficient doing whereof, maketh the proceeding erroneous; therefore the law (as it here appeareth) did appropriate to the justices, the making of their own clerks and officers, and so to proceed judicially by their own instruments; and this was the common law.

[206] "The king cannot grant the office of clerk of the shire or county clerk, (who is to enter judgments and proceedings in the county court) for that the making of the shire clerk belongeth to the sheriff of the common law; as in Mitton's case, it appeareth, *et sic de ceteris*, 4 Rep. 31." It appears that Queen Elizabeth, by patent, granted the office of county clerk to Mitton for life, and afterwards constituted Arthur Hopton, sheriff of Somerset, who interrupted Mitton, claiming the appointment as incident to his office of sheriff, and thereupon appointed a Clerk himself of the County Court. For Mitton, it was argued that the grant was good, because the County Court was the Queen's Court; and that the Queen might, in her own Court, appoint a clerk to enter the judgments and proceedings. Secondly, that A. H. who was made sheriff after the patent, could not avoid it, for the Sheriff held his office only at the will of the Queen, who might determine it at her pleasure, and the Queen had granted it to Mitton for life. Thirdly, precedents were shewn, by which it appeared that such offices had been granted by King Henry 8.

It was resolved by the two Chief Justices and all the Judges, *nullo contradicente aut reluctante*, that the patent was void in law; that the office of Sheriff was an ancient office, before the Conquest, of great trust and authority; and although the King appointed the Sheriff *durante bene placito*, yet he could not determine in part, nor abridge him of any thing incident or appurtenant to his office. "Resolved that the County Court, and the entering of all proceedings in it, are incidental to the office of Sheriff, and therefore cannot be [207] divided from it." And Scrogg's case, 2 Eliz. was cited. The Exigenter's case was referred to in Dyer 175, as to the third objection.

But for general answer to all objections, it was observed, that great inconvenience would ensue to sheriffs, who are great and ancient officers and ministers of justice, if such grants are valid. For that as well the entry of all proceedings in the same Court, as the custody of the entries and rolls thereof, do belong to the office of sheriff; and if the record be embezzled, the sheriff shall answer for it; and therefore it would be full of danger and damage to sheriffs, if others should be appointed to keep the entries and rolls of the County Court, and yet the sheriff should answer for them; and therefore the sheriff shall appoint clerks under him in his County Court, for whom he shall answer at his peril. And law and reason require that the sheriff, who is a public officer and minister of justice, and who has an office of such eminence, confidence, peril, and charge, ought to have all right appertaining to his office, and to be favored in law. This is illustrated by the case of gaols: the custody of which of right belongs, and is incident to the office of sheriff, who must answer for excesses.

Mitton's case recognizes, and was decided upon principles directly applicable to the case of the Custos Rotulorum; for it does not appear, either from the argument of counsel, or from the judgment of the Court, that the right of the sheriff, although a very ancient officer, existing before the conquest, was founded on prescription, but on the fact of his being the actual keeper of the rolls and entries of the Court, for which he was re-[208]-sponsible; and when it is remembered that the sheriff exercised a criminal jurisdiction, the sheriff's clerk might with propriety be considered as much the Attorney-General of the King, in joining issues for the Crown, as the Clerk of the Peace.

In addition to those cases of the Clerk of Assize, and the Clerk of the Sheriff's Court, which appear to be strictly analogous, I would mention the Exigenter's case, *Scroggs v. Colleshill* (Dyer *qui supra*), for the principle on which it was decided; viz. that the title of Colleshill was null, and that the gift of the office at no time belonged to the Queen, but was at the disposal of the Chief Justice, for the time being.

as an inseparable incident belonging to him, and this by reason of prescription and usage. In 1558, Queen Mary, during the vacancy of the office of Exigenter, and of Chief Justice of the Common Bench, granted the Exigenter's office by patent to Colleshill: she afterwards, by patent of same date, granted the office of Chief Justice to Browne, who refused to admit Colleshill, and appointed Scroggs. Sir Nicholas Bacon was commanded by the Queen, to examine the right and title of Colleshill, and to report. He convened all the Judges of the Queen's Bench: Saunders, Chief Baron and Gerard, Attorney-General, and Caril, Attorney of the Duchy, (all the Judges of the Common Pleas excluded) who took a clear resolution that the title of Colleshill was null, and that the gift of the office at no time belonged to the Queen, but was at the disposal of the Chief Justice, for the time being, as an inseparable incident belonging to the said Chief Justice: and this by reason of prescription and usage. Dyer, [209] after citing the words of the statute of Westminster 2d, *Habeant de cetero omnia placita eorum eis*, concludes with these words: "And so it seems in reason that the justices were before the clerks, and made clerks at their pleasure."

To this may be added, the case of *Bridgman v. Holt* (Shower's Parl. Ca. 111), where the question was, whether the office of Clerk of the Pleas in the King's Bench, was grantable by the Crown, or belonged to the Chief Justice, and was granted by him? This officer was to enrol pleas between party and party only, having nothing to do with any pleas of the Crown. All the rolls and records in this office, were in the custody of the Chief Justice. All writs to certify and remove the records, were directed to the Chief Justice. From the nature of the employment, it was insisted, that in truth he was but the Chief Justice's Clerk: and further, it was shewn that for two hundred and thirty-five years, the office when void, had been granted by the Chief Justice, and enjoyed accordingly under such grants: and that in those grants were introduced these words, after the mention of the surrender to the Chief Justice:—"To whom of right it doth belong to grant that office whensoever it shall be void." This declaration by the party claiming to appoint is weak, when compared with the strong legislative recital of the right of the Custos to appoint, in the preamble of the statute of 37 H. 8.

In addition to these authorities, the case of *Harcourt v. For*, to which I already have had frequent occasion to refer, should never be lost sight of. It is true, the question there to be decided was, whether upon the construction of [210] the several acts of 37 H. 8, and the 1st of William and Mary, the office of Clerk of the Peace, determined by the death or removal of the Custos; or whether being appointed, he did not acquire under the statutes, an interest *quandiu se bene gesserit*!

In the decision of that question, which arose within five years after the passing of the act, it became an essential part of the enquiry, to ascertain the origin and nature of the respective offices of Custos Rotulorum and Clerk of the Peace. I cannot therefore consider the opinions delivered by Lord Holt, and the other Judges, upon this branch of the subject, as *obiter* and extra-judicial *dicta*, but bearing pertinently and directly on the point. And although it was insinuated that Lord Holt's mind had insensibly contracted a bias, from his connection with one of the litigant parties in another cause, unfavorable to the pure administration of justice, yet I am persuaded, that his spotless integrity, and high judicial character with the present age, and with posterity, will afford him an ample shield against so severe and undeserved an imputation.

The case of *Saunders v. Owen* (Raymond's Rep. and Salkeld *qua supra*) followed soon afterwards, which establishes the same principles. The Court held that it always belonged to the Custos Rotulorum to nominate the Clerk of the Peace, but that he was removable whenever the Custos was removed or changed: and moreover, that he was removable at the will of the Custos, until 37 Hen. 8, which continued him in office *quousque*, the Custos continued, so that he de [211] deemed himself in his said office justly and honestly.

The point therefore for decision was, whether the nomination by parol was sufficient, or whether it required an appointment by deed? But I am not aware that there was any dissatisfaction expressed at the decision of Lord Holt, in *Harcourt v. For*, which was afterwards affirmed in the House of Lords: and under these circumstances, after a careful examination of the origin (as far as I have been able to trace it) of the respective offices of Custos Rotulorum and Clerk of the Peace, and of vicea

duties, as arising out of and connected with the commission of the peace; from the legislative declaration, and recognition of the right of the Custos Rotulorum to appoint, which, as it appears to me, is to be found on the rolls of Parliament (statute 37 Hen. 8), and from the accumulated weight and authority of the cases to which I have referred as analogous, and the principles to be extracted from them, my mind (with great deference to the opinion of others, from whom it may be my misfortune to differ) has arrived at the conclusion, that the appointment of the office of Clerk of the Peace within the shires of England, did, by law, previously to the passing of the act of 37 Hen. 8, belong of right to the Custos Rotulorum of the shire, by virtue of his said office.

To the second question, whether the appointment to the office of Clerk of the Peace within the shires of Ireland did by law, in and previously to the year 1800, belong of right to the Crown, or to the Custos Rotulorum of the shire, by [212] virtue of his said office, or to any and what other person or persons? I answer that I conceive it to have belonged of right to the Custos Rotulorum of the shire, by virtue of his office.

As early as the reign of King John, a regular code or charter of English laws was granted by that monarch, about the twelfth year of his reign, and deposited in the Exchequer of Dublin, under the king's seal, for the common benefit of the land, (as the public records express it) that is, for the common benefit of all who should acknowledge allegiance to the Crown; and for the regular and effectual execution of those laws, the king's four Courts of judicature were established upon the model of the four superior Courts of England; and a new and more ample division was then made of the king's lands of Ireland into counties, in which sheriffs and other officers were appointed, in accordance with the system of government prevailing in England. If then the office of Clerk of the Peace was incident to the office of Custos Rotulorum in England, it seems to me to follow as a necessary natural consequence, that the same rule must hold in Ireland: the nature of those several offices and the duties required in relation to them being the same in both countries. The various Irish acts of Parliament referred to (13 and 14 G. 3, c. 26; 23 and 24 G. 3, c. 39, 40; 35 G. 3, c. 29; 34 G. 3, c. 25; 40 G. 3, c. 80), directing documents to be deposited by the Clerks of the Peace, among the records of their respective counties, and requiring them to give attested copies, appear to me strong legislative recognitions, that [213] the appointment of the office of Clerk of the Peace in Ireland is incidental to the office of Custos. The act passed so recently as 1 G. 4, c. 27, which gives the Clerk of the Peace right to hold the office *quamdiu se bene gesserit*, shews that before that time, the appointment of Clerk of the Peace was determined by the death or removal of the Custos who appointed, and therefore furnishes a strong inference that the appointment of Clerk of the Peace in Ireland, was, by law, incident to the office of Custos before the union.

By the cases also that have been decided in Ireland, of the *King v. Fergusson*, and the *King v. Severney and Falkiner* (post, p. 216), this seems to have been received, declared, and acted upon, as the law of that country.

To the third question, whether the right to appoint to the office of Clerk of the Peace within the king's county in Ireland, did, by law, in and previously to the year 1800, belong to the Crown, or to the Custos Rotulorum of the said shire, by virtue of his said office, or, etc.? I also answer, that the right to appoint to the office of Clerk of the Peace within the king's county in Ireland, did, by law, in and previously to the year 1800, belong to the Custos Rotulorum of the said shire, by virtue of his said office.

The frame of this question, has not failed to draw my attention to the consideration of any distinction, which the historical fact, that the king's county was not formed into a county until the 3d and 4th year of the reign of Philip and Mary, in the year 1556, might naturally suggest.

I do not, however, apprehend that this circum-[214]-stance can in any manner vary the question, having taken occasion to state in the most distinct and unqualified terms, that neither in England nor in Ireland can the right of the Custos to nominate the Clerk of the Peace be maintained upon the ground of prescription: the office of Custos Rotulorum and of Clerk of the Peace in both countries, and the very county also in Ireland to which this question more directly applies, being each and every of them created and existing only within the time of legal memory.

But the moment in which the king's county became a county, however recent its formation, I conceive that the right to appoint a Clerk of the Peace, upon the principle, and for the reasons I have before stated, as applicable to England, became *eo instanti* indispensably incident to the office of Custos Rotulorum in Ireland, there being no provision in the statute of Philip and Mary to alter the law in this respect.

Being formed upon the model of other counties, with similar officers, such as Custos Rotulorum, sheriffs, etc., their appointment would be regulated and controlled by the same laws which prevailed in the government of those counties.

When, in the reign of Henry 8, the shire of Monmouth was created by a severance and divisions of the Lordships and marches within the country or dominion of Wales, and by a union and annexation of certain portions of them thenceforth, by legislative enactment, became part and member of the new shire of Monmouth, with a Custos, sheriff, and other officers, I conceive that to the sheriff belonged the right of [215] appointing the shire clerk of the County Court, and to the Custos Rotulorum the right of appointing the Clerk of the Peace, as incident to his office, in the same manner as in the most ancient counties in this realm.

Conceiving therefore the decision of this last question to depend upon the same principles, in the explanation and development of which, I fear that I have drawn but too largely upon your Lordships' patient attention, in my discussion of the merits of the first question, I conclude with expressing my humble opinion, that the right to appoint to the office of Clerk of the Peace within the king's county in Ireland, did, by law, in and previously to the year 1800, belong to the Custos Rotulorum of the said shire, by virtue of his said office.

Gaslee, J.: As I have reason to believe that all my learned brethren who are now present, with the exception of one, will concur in the answer which has been given by my learned brother who has preceded me, to the several questions propounded by your Lordships; and as he has entered so fully and ably into the investigation of the grounds and reasons, on which he has founded those answers; I think it is not only unnecessary, but that it would be an inexcusable waste of your Lordships' time, were I to enter into any lengthened discussion upon the present occasion. I shall, therefore, content myself with saying generally upon the first of the questions, that it appears to me clearly, that the act of Parliament referred to in this case, is a declaratory act; and that upon an attentive consideration of that act, and the several authorities which have [216] been cited and commented upon by my learned brother, I am of opinion, that the appointment to the office of Clerk of the Peace within the shires of England, did, by law, previously to the passing of the act of 37 Hen. 8, c. 1, belong of right to the Custos Rotulorum of the shire, by virtue of his said office.

Upon the second question, in the absence of any means of ascertaining precisely the course adopted upon the introduction of the sessions, and of the office of Custos Rotulorum, and Clerk of the Peace into Ireland, the natural presumption is, that it would be that which had been pursued in England. But it does not rest on presumption only. The two cases of the *King v. Ferguson*, and the *King v. the Justices of the Peace, of the county of Tipperary*, and *Frederick Falkner the Clerk of the Peace in the said county* (cited in the appendix to the case of the Plaintiff in error), appear to me to be decisive, and to be in support of the rights of the Custos Rotulorum. It is observable, that the grant under which the Defendant in error claims, which is a grant of the office of Clerk of the Peace of the whole province of Leinster, of which the county of Longford, and also the king's county, are members, (except Kilkenny) is dated the 30th July, 1798, and that seven months after the date of that grant, the right of Ferguson to the office of Clerk of the Peace for the county of Longford was established. I am therefore of opinion, that the appointment to the office of Clerk of the Peace within the shires of Ireland, did, by law, in and previously to the year 1800, belong of right to the Custos [217] Rotulorum of the shire, by virtue of his said office.

Upon the third question, I do not see any sufficient ground for making a distinction between the king's county and the other shires of Ireland. The act of Parliament constituting the king's county, does not recite any. The clause is very short; it enacts "That certain portions of land therein described, shall be one shire or county, named, known, and called the king's county, and shall be taken, reputed, and used as a county or shire, to all purposes whatsoever." It goes on to add that

"there shall be appointed, ordained, and made within the said county or shire, for the rule thereof and good order of things, three sheriffs, coroner, escheators, clerk of the market, and other officers, and ministers of justice, yearly, as in other the shires or counties of this realm of Ireland be, or should be." It might, perhaps, be sufficient to say, that the Clerk of the Peace is one of the officers and ministers of justice; but in addition to that, I would refer to the case of the county of Monmouth, as strictly analogous to the present. The statute making that an English county, says nothing of a *Custos Rotulorum*, yet he is appointed, and appoints the Clerk of the Peace, in the same manner as is done in other English counties. It is made an English county by the 27th Hen. 8, c. 26. I do not find that there was any *Custos Rotulorum* of any of the Welsh counties, until after that period. The 27th Hen. 8, c. 5, authorises the making Justices of the Peace within Chester and Wales. By 34 and 35 Hen. 8, c. 26, intituled an act for certain ordinances in [218] the king's dominion, and principality of Wales, reciting that there were twelve shires in Wales, eight old ones and four new, by 27 Hen. 6, besides Monmouth; it enacts (section 53) "that in each of the twelve shires there shall be Justices of the Peace and Quorum, and also one *Custos Rotulorum*; that the said Justices of the Peace, Justices of Quorum, and *Custos Rotulorum*, shall be named and appointed by the Chancellor of England, by commission under the king's great seal of England," taking no notice of the Clerk of the Peace, who, I believe, is constantly appointed by the *Custos Rotulorum*, as in the English counties.

With respect to any objection which may be made, on account of the length of time, during which, it appears by this case, that the Crown have actually appointed the Clerk of the Peace in the king's county, I would merely observe, that in the case of the *King v. Falkener*, it appeared that the Crown had appointed the Clerk of the Peace for the county of Tipperary, for a very considerable period after the act of Parliament, which abolished the appointment in the Duke of Ormond, though not so long as the Crown appointed the Clerk of the Peace for this county; but notwithstanding that, the appointment was held to be in the *Custos Rotulorum*.

On these grounds, I state it to your Lordships, as my humble opinion, that the right to appoint to the office of Clerk of the Peace within the king's county in Ireland, did, by law, in and previously to the year 1800, belong to the *Custos Rotulorum* of the said shire, by virtue of his said office.

[219] Bayley, J.: I regret extremely, that I cannot bring myself to concur in the opinion, which the other Judges have formed in this case. The first question proposed by your Lordships to our consideration is this: Whether the appointment to the office of Clerk of the Peace within the shires of England, did, by law, previously to the passing of the act of 37 Hen. 8, c. 1, belong of right to the Crown, or to the *Custos Rotulorum* of the shire, by virtue of his said office, or to any and to what other person or persons? I have the misfortune to think it of right belonged to the Crown, if the Crown reserved it to itself; that it belonged to any other person or persons, (at least if named in the commission of the peace) upon whom the Crown chose to confer it, if the Crown thought fit to give it away; or that if the Crown did not think fit to reserve or confer it, it belonged of right to the Justices at large in Quarter Sessions assembled. Your Lordships' question appears to me, to propose as a mere point of law, to whom by law the right belonged; and my answer is framed upon that view of the question. I do not say, therefore, that the Crown did not in fact confer this right upon the *Custos Rotulorum*; all I say is, that unless it did so confer it, the *Custos* has it not.

The Courts of Sessions of the Peace originated, I apprehend, in the reign of Edw. 3, and were founded upon commissions issued in pursuance either of 18 Edw. 3, stat. 2, c. 1, or of 34 Edw. 3, c. 1. The former of those statutes provides, that two or three of the best reputation in the counties, shall be assigned keepers of the peace by the king's commission, and at what time need [220] shall be, the same with other wise and learned in the law, shall be assigned by the king's commission, to hear and determine felonies and trespasses done against the peace in the same counties. The 34 Edw. 3, c. 1, directs that in every county of England shall be assigned for keeping the peace one Lord, (*une Seigneur*) and with him three or four of the most worthy in the county, with some learned in the law, with power to hear and determine at the king's suit, all manner of trespass done in the same county. Both these statutes are

silent as to the officers and the constitution of the Court. Then, as it seems to me, a question of law arises, what could legally be done? and secondly, a question of fact, what was done? Where the Crown erects a Court of Justice of its own authority, it may, I apprehend, fix and nominate what officers it shall have, and how their successors shall be appointed; and I take it, it has the same power, where it creates a Court of Justice under the direction of Parliament; unless there be something in the act of Parliament, from which a contrary intention in the legislature may be collected; the legal presumption appears to me to be, that the legislature will break in as little as possible upon the prerogative of the Crown; and that what it does not by express words, or by necessary implication take away, it leaves in the Crown. Upon the establishment of this Court, therefore, the Crown might if it thought fit, appoint one of the Justices to be *Custos Rotulorum*, or it might omit it. It might name a Clerk of the Peace, or reserve to itself the future right of nominating the successors; or it might omit to name him, and be silent as to the [221] office; and then the Sessions would have the right, as incident to their being a Court to decide upon having such an officer; and the right to appoint him would either be in the Sessions, if the Crown made no other provision as to the appointment of officers, or in such other person or persons on whom the Crown had conferred the right. And whatever the Crown might do in the first instance, would either be variable upon future occasions or not. In the former case, the Crown might resume to itself the right when it thought fit; in the latter, the nomination and appointment could not have belonged to the *Custos Rotulorum*, unless he had been appointed *ab initio*.

Lambard, in his *Eirenarcha*, intimates, that there was extant in his time, one of the commissions granted in the 35th Edw. 3. and if we could discover the commissions granted at that time, and could be satisfied that the commissions for the different counties were uniform, and all of the same tenor, they might throw great light upon the question, as a question of fact, though they could not be admitted in argument upon the question of law. Suppose those commissions to have been silent as to the *Custos*, and to have reserved to the Crown the right of appointing a Clerk to the Justices, can there be a doubt but that such right would have been well reserved? Suppose the commissions to have nominated a *Custos*, and to have given him the power *pro hac vice*, to nominate the Clerk of the Peace, would not that have been a valid gift, and would it have been valid for more than that turn? Would it not equally have been valid, had the nomination been given to the Jus-[222]tices at large, though it had appointed one in particular to be *Custos Rotulorum*? Suppose it to have nominated no *Custos*, and to have been silent as to the Clerk of the Peace, would not the Justices in Sessions, that is the Court, have had the power to nominate such Clerk? Such power according to Rolle (*Abridgement*, 426, Court F.), is incident to every Court. Suppose the commissions for different counties to have varied, or suppose them to have varied at different times, what would then have been the case? That they did vary as to the county palatine of Lancaster is clear, from the exception in the statute of William and Mary (1 William and Mary, stat. 1, c. 21), and from the modern practice; that they varied as to other places, may be collected from the exception in the statute of Hen. 8 (37 Hen. 8, c. 1, s. 5). In Durham at present, the Bishop is his own *Custos*. The provisions in the statutes of Hen. 8, and Edw. 6 (37 Hen. 8, c. 3 and 4, and Edw. 6, c. 1, s. 5), shew that he may make another person so; but he appoints the Clerk of the Peace for the county, without noticing his own character as *Custos Rotulorum*; and his grant of the office is confirmed by the Dean and Chapter of Durham. In Lancashire, Lord Derby is appointed *Custos Rotulorum* by the king, under the seals of the duchy and county palatine of Lancaster, and Lord Clarendon is appointed Clerk of the Peace, under the same seals; and the instrument so far from containing any expression that he is the deputy to the *Custos Rotulorum*, distinctly enjoins the *Custos Rotulorum* to permit him to exercise his office, [223] without impediment, hindrance, molestation, interruption, or denial. Let me press upon your consideration, the argument which arises from the practice in Lancashire, and other privileged places. The statute 34 Edw. 3, applies to every county in England, Lancaster therefore is included; and what is the case in the other counties in England, must be the case there. If the *Custos* had *ex officio* as matter of law, the right in every county in England before the 37 Hen. 8, he must have had it there. If the king were precluded from nominating in ordinary counties, he must have been

precluded there. If it would have been illegal elsewhere, it would have been equally so there (4 Institute 204). It was not until the 50 Edw. 3, that the county of Lancaster was erected into a county palatine in Parliament. The practice, therefore, even if it be confined to Lancashire alone, seems to establish the point, that this is a question of fact, not matter of law. If the early commissions passed immediately after the 34 Edw. 3, were before your eyes, and you were to find that many of them sanctioned the same practice as has prevailed in Lancashire, would this have no influence upon your judgment? Would it not be the foundation on which you would act?

The argument that we are at liberty to decide as matter of law, upon the right of the Custos Rotulorum to nominate, is founded on the recital in the 37 Hen. 8, cap. 1, on Lord Coke's comment (2 Institute 425) on the statute (13 Edw. 1, st. 1, c. 2) of Westminster 2, and on the opinion of Lord Chief Justice Holt in *Harcourt v. For.* [224]-*court v. For.* The recital in 37 Hen. 8, cap. 1, is that "where before this time, the Lord Chancellor hath by reason of his office, the nomination and appointment of the Custos Rotulorum; and in like manner, the Custos Rotulorum hath had until now of late, the nomination and appointment of the Clerk of the Peace, within the shire where he was Custos Rotulorum; and where now of late, sundry persons not learned, nor meet, nor able for lack of knowledge to occupy the said offices of Custos Rotulorum and Clerk of the Peace, have by labour, friendship, and means, gotten grants by the king's letter patents, of the said clerkships of the peace;" and upon this it enacts that every Custos shall nominate the Clerk of the Peace within his shire; and the Custos and Clerk of the Peace shall execute the said offices by themselves or by sufficient and able deputy. This recital that the Custos till of late hath had the nomination, may, as it seems to me, refer to the practice as matter of fact, without referring to the right as matter of law. The recital does not state that of right he hath had, but states the fact only, that he has had; and the statute does not declare and enact, but enacts only; and it does not from beginning to end, insinuate that the patents of the Clerks of the Peace were illegal, or the grants void: on the contrary, it confirms the persons then in office, in their respective offices. If it were referring to the right as matter of law, it would, as it seems to me, go too far, and mistake the right; as the right, unless there were something to shew the contrary, would be in the Sessions, not in the Custos. I admit Lord Holt's opinion in *Harcourt v. For.* is very strong, that [225] the right of nominating the Clerk of the Peace belongs to the Custos Rotulorum of common right, by the common law of the land; but that was not the point in judgment: it was incidental to the case under consideration. None of the other judges concur with him, and his conclusion is, "So that now having as well as I can, given an account of the nature of the office of Custos, and the reason of his having the nomination of the Clerk of the Peace, I shall now give my particular reasons, upon which I ground my judgment in this case."

I am aware that one of the main foundations for his opinion is, that the Clerk of the Peace must be trusted with the possession of the rolls, to make entries upon, and that the Custos Rotulorum would be answerable to the king and to the subject, in case of their loss; and that it would be the most unreasonable thing in the world, that the Custos Rotulorum should be answerable for such miscarriage, unless he had the appointment. But the answer to that argument is, that if the Clerk of the Peace has the possession of the rolls, not as deputy to the Custos, but as the officer of the Court, the Custos would not be answerable to the king or to the public, in case of their loss or destruction, whilst they remained necessarily in the hands of the Clerk of the Peace; and as to the notion of unreasonableness, that objection has applied at all times, as to the county palatine of Lancaster; and it has applied in every county in England, since the 1st William and Mary, where a new Custos Rotulorum has been appointed in the lifetime of a preceding Clerk of the Peace, and it applied to the very [226] case they were then deciding, for the decision was that the old Clerk of the Peace was entitled to continue, though the Custos who appointed him was removed, and a new Custos appointed.

Another argument he relies upon, is drawn from the practice as to the Clerk of Assize and the County Clerk in Mitton's case, and the reasons given in 2d Institute 425, for that practice: but both those offices are considered in 2d Institute, as having existed before time of legal memory, and the Crown may be excluded by time, from

interfering as to ancient offices, though it is not prevented from interfering as to offices created within time of legal memory. It may be observed too, that Lord Holt speaks of the possession of the rolls by the Custos, as possession of them by all the justices (1 Show. Rep. 528), that he speaks of the Custos Rotulorum as the senior of the justices in Court.

It may be of some service, if I shortly notice how this power was treated by the counsel in argument, and by the other judges, and how it was again treated, when another opportunity occurred. Sir T. Powys argued that anciently the Custos was in the nomination of the Lord Keeper, and as anciently, the nomination of the Clerk of the Peace in the Custos, but that the Clerk of the Peace was not the Clerk of the Custos, but of all the justices in general, and properly the Clerk of the Sessions (Id. 429). Mr. Hawler who argued for the Defendant says, that the statute of Edw. 3. makes no mention of such an office, but it was an incident. Justices would not make and draw out their own records, and in all probability, he who [227] is called in the statute of 3 Rich. 2. their clerk, was appointed by the justices, to do that work for them. He supposed that the Clerk of the Peace was at first the keeper of the records, but afterwards he that was most eminent among the justices was appointed Custos, and he appointed the Clerk of the Peace, his deputy or servant (1 Show. P. C. 159). Levinz, who was for the Plaintiff, upon the second argument says, "Should I go about to enquire into the origin of the office of Custos, I should attempt *ambulare in tenebris*" (1 Show. Rep. 512). As to the office of Clerk of the Peace, he says, "I cannot say how it was before the statute of Hen. 8. etc. Before there were justices, there were conservators, and it is likely they had their clerk to do their business, and keep their records; and it is likely this officer was in imitation of that, but I cannot directly tell how things might be, for this matter is all *in nubibus*" (Id. 513). Justice Eyre says, "We are I confess much in the dark, as to the beginning of the office of Clerk of the Peace; but the statute of William and Mary (1 W. and M. (s. 1) c. 24) takes him wholly out of the power of the Custos, and subjects him to another jurisdiction, that is to the Sessions of the Peace, to which he is properly an attendant" (Id. 519). Mr. Justice Gregory notices that in 2 Hen. 7. fo. 1 (the Year Book, pl. 2), he is called not only Clerk of the Peace, but *attornatus domini regis*, and that says he, is a proper name of office for him: for he draws the issues upon traverses, and so acts as attorney in that Court for the king (Id. 523). Mr. Justice Dollen is silent as to these points; [228] and it is by Lord Chief Justice Holt, and by him only, that they are principally discussed.

These opinions were delivered in Trinity Term, 5 William and Mary. None of the other reporters of this case give the detailed account of Lord Holt's argument. One of the reports (1 Modern 172) unites all the arguments of the Court, and puts it thus: "As to the beginning of this office, we are much in the dark, for we can only make probable conjectures about it, and as to his continuance in office, it is not to be collected out of any of the law books before 37 Hen. 8. It is plain it was not an office from time immemorial, because the commission of the peace is not so. Afterwards it became necessary for one to make entries and join issues: the Custos appointed a Clerk for that purpose, who is now called the Clerk of the Peace; and this seems very agreeable to the statute of Westminster, by which it appears, that such officers and clerks who are to enter and enrol the pleas, were always appointed by the judge or chief minister of the Court." Comberbach (Rep. 240) only says the nomination of the Clerk of the Peace belonged to the Custos, as the most proper person.

Within five years, namely in Hilary Term, 8th and 9th William 3. whilst the opinion of Lord Holt must have been within the recollection of every judge in Westminster Hall, a question as to the office of Clerk of the Peace again arose in *Owen v. Saunders* (1 Lord Raymond 158), and *Harcourt v. Ear* was expressly referred to. The question was, whether under the statute of 1 William and Mary, a nomination [229] by the Custos Rotulorum to the office of Clerk of the Peace by parol was good? and Mr. Justice Powell, a lawyer of no mean talent and acquirements, said, "It had been objected that this Clerk of the Peace was originally but a deputy to the Custos Rotulorum, and therefore not properly an officer. But he was of opinion that he is, and was originally an officer, and not merely a deputy to the Custos Rotulorum. The statute 12, Rich. 2. cap. 10, appoints him wages, and there he is called Clerk of the Justices of the Peace, and he is in the nature of Attorney General to the king. In 2

Hen. 7, c. 1, he is called the Clerk of the Peace" (L. Raym. 139). Lord Chief Justice Treby said, the origin of this office of Custos Rotulorum is not very clear, but in all probability the trust of the conservation of the rolls was committed to one of the justices, and then he was called Custos Rotulorum, and probably by the consent of his brethren (13 Hen. 4, cap. 10, plac. 33), he nominated the Clerk of the Peace (Id. 163). In 12 Rich. 2, cap. 10, he is called Clerk of the Justices, and wages are appointed. The statute 2, Henry 7, cap. 1, first makes mention of the Custos Rotulorum.

In this case Justice Powell almost goes out of his way, to state that the Clerk of the Peace is not a deputy to the Custos, but an original officer; and Lord Chief Justice Treby, notwithstanding the previous opinion of Lord Holt, intimates that the origin of the Custos Rotulorum was not very clear, and that instead of its belonging to the Custos Rotulorum of common right, and by the common law of the land, to nominate the Clerk of [230] the Peace, he probably nominated him by consent of his brethren. The charge of the Custos Rotulorum in the ordinary commissions of the peace, and the observations as to the duties at the Sessions of the Custos Rotulorum and the Clerk of the Peace, in Lambard's Eirenarchia, deserves attention. The earliest commission I have met with, is at the commencement of Herbert's Justice, in the edition of 1517, and at the conclusion it commands "John Fitzjames that at the days and places aforesaid, he cause to come, writs, precepts, processses, and indictments aforesaid, before himself and his said companions, and inspect and determine the same." In another edition of the same book, printed in 1606, there is a similar clause, except that it seems addressed to all the justices, and not to any one by name; but this may be a mistake in the text, because in the margin it is stated to be "al. Custos Rotulorum," and the same book, in the form of what is called "the new commission," contains this clause, "*assignavimus denique te prefatum Edw. II. Militem*, (not the person first named in the commission, for the officers of state are first named) *Custodem R. pacis nostrae in dicto comitatu nostro, ac propterea tu ad dies et loca predicta breviter precepta, processus et indictamenta predicta coram te et dictis sociis tuis venire facias ut inspiciantur, et debito modo terminentur.*"

Lambard in his Eirenarchia, speaks of Sessions, and of the officers bound to attend, and among those one is the Custos Rotulorum, who is to attend in respect of his duties, and another for his own duties, separate and distinct from those of the Custos, the Clerk of the Peace. "Two [231] sorts of men there are, that are the ordinary attendants at these Sessions; that is the officers of the Court and the jurors. Among the officers, the Custos Rotulorum hath worthily the first place, both for that, he is always a justice of the quorum in the commission, and among them of the quorum, a man (for the most part) especially picked out for wisdom and credit; and yet in this behalf he beareth the person of an officer, and ought to attend, etc. for the words in the commission be to him now by his proper name: '*Quod ad dies et loca predicta breviter precepta, processus et indictamenta, predicta coram te et dictis sociis tuis venire facias.*' Whereas until the 14 Richard the 2d, that charge was general to all justices, and not laid specially upon any one person in the commission, as it doth appear in the Tower by the records, which I have already vouched" (see Lambard 373, etc. printed in 1594).

By the commission in a county, the Custos Rotulorum ought to attend at the Sessions with records, etc. (Com. Dig. Justices of the Peace, D. 4). "The Clerk of the Peace oweth his attendance at the Sessions also, for (omitting certain things specified) he readeth the indictments, and serveth the Court. He enrolleth the acts of the Sessions, and draweth the process, etc. (He also must deliver letters to all such as be acquitted of felony, etc. :) all which things he cannot do if he be not present; so that he is an officer to this Court, and Clerk of the Justices, as the 12th of Richard the 2d, c. 10, nameth him, and not as Mr. Marrow thought the Clerk of the Custos Rotulorum only" (Id. 406, 7). And [232] this as it seems to me, is the true state of the case. The Custos Rotulorum, though one of the justices, is in respect of his custody of the rolls, to attend with the rolls in the Court; and the Clerk of the Peace, as a distinct officer of the Court, is to record upon such rolls, such acts of Court as are to be recorded; and when he has recorded them, it is his duty to hand them over to the Custos Rotulorum, that he may keep them in safe custody, though the Clerk is entitled to have them whilst in process. In *Rex v. Evans* (4 Mod. 31), the opinion of Lord Chief Justice Holt approaches this point, where he says the Clerk of the Peace

is bound to deliver the rolls to the Custos when completed, though he is entitled to have them whilst in process. If there ever was a time when the rolls were in the custody of the justices at large, without any Custos Rotulorum, this would be the case; and I see no reason why it should not continue to be the case, where one justice in particular was selected to be Custos Rotulorum.

My opinion, therefore, is not negatively that the right of appointing is not with the Custos Rotulorum, not that the right is affirmatively either with the king or with the Quarter Sessions; but that the question with which of them it is, is matter of fact for the consideration of a jury; not matter of law for the decision of a Court: and with this view, the case of *Bridgman v. Holt* (Show, Parl. Ca. 115), and the state of the officers in the superior Courts exactly accord. In *Bridgman v. Holt*, the question was, whether the office of Clerk of the Pleas for enrolling pleas in the King's Bench, [233] was in the king or in the chief justice? The Defendant who claimed under the Chief Justice, proved a series of grants for a period of two hundred and thirty-five years, whenever the office became void. It was treated therefore as a question of fact, not as a question of law. And what is the state of the other officers of the superior Courts, and upon what principle is it to be explained? Why does the Chief Justice of the King's Bench appoint the Custos Brevium in the King's Bench, whilst the gift of the same office in the Common Pleas is not in the Chief Justice there, but in the king or his grantee? Why are the first and third prothonotaries in the Common Pleas in the gift of the Chief Justice, and the second in the Custos Brevium? Why does the king appoint the master of the Crown office in the King's Bench, and the chirographer in the Common Pleas? Why is the office of Exigenter in the Common Pleas an inseparable incident to the person of the Chief Justice, so that a grant thereof by the king, whilst the office of Chief Justice is vacant, is null and void? Why do the three puisne Judges of the King's Bench appoint the Signer of the Bills of Middlesex? All is referable to what is mentioned as the ground of the opinion in *Scruggs v. Coleshill* (Dyer 175), viz. prescription and usage; and what is the foundation of prescription and usage but a lost grant?

Upon the whole, therefore, I submit that the question in whom the right of appointing was in England before the 37 Henry 8, is matter of fact, [234] depending upon the commissions issued in the different counties in England, and the usages thereon; and that until such matter of fact is duly enquired into and ascertained, it cannot be answered as a question of law.

To the second question, as every observation I have made upon the first question, applies with equal force to the second, I humbly submit that it is also a question of fact, not a question of law, in whom the right in Ireland was.

The third question appears to me, to depend upon the point already noticed, viz. the right of the Crown in the commissions it first granted under the statute of Edw. 3, to reserve to itself the right of nominating to the office of Clerk of the Peace; for if the right existed when those commissions were granted, it seems to me to have existed as to this county, when a commission for this county was first granted. If the Crown had originally a right as to each county, to mould the machinery as it pleased, and to reserve to itself such nominations as it thought it behoved the public weal it should reserve, it must have had the same right as to this county, when first it became an object of consideration, as it had in every other. I am therefore of opinion upon the last question proposed by your Lordships, that the right of appointing the Clerk of the Peace in the king's county in Ireland, when the district that county comprises was first made a county, was in the Crown.

The other judges who were present concurred in the opinions delivered by Little Dale, J. Vaughan, B. and Gaschee, J.

[235] The Lord Chancellor: This is a writ of error from the Court of Exchequer Chamber in Ireland. The question relates to the appointment of the Clerk of the Peace in the king's county in Ireland. It was contended on the one side, that the appointment of Clerk of the Peace of the king's county in Ireland was in the Crown; on the other hand it was contended, that it belonged to the Custos Rotulorum of the county. The Court of Exchequer Chamber in Ireland, was of opinion that the appointment belonged to the Crown.

A writ of error was brought, and it was argued in this House during the last Session of Parliament. It was a case of great importance, and all the judges were

assembled for the purpose of hearing the arguments, in order that your Lordships might have the benefit of their advice and assistance with respect to the subject.

The learned judges differed in opinion, and they postponed, therefore, delivering their judgments till the present Session. That difference still continued; a great majority of the judges, however, were of opinion, that the right to that appointment was in the Custos Rotulorum of the king's county, one judge only dissenting. The opinions of the learned judges were delivered at great length in this House. I had an opportunity of attending to their reasonings at the time. I have since been favored with copies of their judgments, and have had an opportunity of again considering them; and without troubling you by going over the same arguments which have been already advanced upon the subject in great detail, it may be sufficient for me to state, that I am [236] satisfied that the decision of the Court below was erroneous, and that the appointment of this office is not in the Crown, but in the Custos Rotulorum. I am of that opinion upon the authorities that were cited by the learned judges, by which they fortified their opinions, and by the reasonings which they employed in support of their opinions. I therefore propose that the judgment of the Court below be reversed.

Judgment reversed.

[237]

IRELAND.

(COURT OF CHANCERY.)

ROBERT BLAKENEY and CATHERINE ANN BLAKENEY otherwise OWENS
his Wife.—*Appellants*; THOMAS NEVILLE BAGOTT,—*Respondent*.

[*Mews' Dig.* vii. 241: viii. 774, 827: xiv. 1773, S. C. 1 Dow and Cl. 405.

See *Butler v. Miller* 1867, I. R. 1 Eq. 195.]

AN agreement for a Reversionary Lease having been obtained by an attorney from the son of his employer, who was remainder man in a settlement under which his father who had granted the existing Lease was tenant for life—On a bill for specific performance, the Court refused under the circumstances to enforce the agreement.

F. C. under a settlement executed in 1716 was tenant for life of certain lands, with a power to lease for any term not exceeding thirty-one years, remainder to his first and other sons successively in tail male. In 1745 F. C. granted to S. O. who was then acting as his attorney, a lease of lands, comprising two hundred acres of good land, Irish plantation measure, for three lives or thirty-one years, whichever should last the longest. M. C. was the only son of F. C. In 1749 M. C. by a writing indorsed upon that part of the lease of 1745, which was in the possession of S. O. in consideration of £20, agreed to ratify that lease, and on the expiration of the term, to grant a renewal for a further term of lives, a blank being left in the agreement as to the number of lives. The agreement was not indorsed on the counterpart of the lease in the possession of F. C. and was not registered till June 1760. In May 1760 F. C. died, leaving M. C. surviving, who by deed in 1760, settled the lands in trust for himself for life; remainder to his two daughters as tenants in common. The Respondent became entitled to one moiety of the lands, as the only son of one of the daughters; and at a sale under a decree in Chancery in 1814, purchased the other moiety. At the time of the sale, it was mentioned that the lands were sold subject to the lease of 1745. S. O. died in 1780, leaving [238] S. L. O. who was the last surviving life in the lease of 1745, and held the lands under the lease till his death, which took place in 1817. The Appellants claimed as devisees of S. L. O. In 1820 the Appellants filed a bill in Chancery, stating the facts above mentioned, and praying a specific performance of the agreement to grant a renewal of the lease.

Held that under the circumstances, the Appellants were not entitled to such relief.

The facts of this case as stated upon the bill and answer, and appearing by proofs in the cause, are as follows:

By indenture of marriage settlement, bearing date the 19th of July, 1716, and made between Francis Cuff, of the first part; Henry Richardson, of the second part; John Maxwell, and Robert Maxwell, of the third part; Gerald Cuff, and Edward Lucas, of the fourth part; and Michael Cuff, and Samuel Warring, of the fifth part: reciting that a marriage was then intended to be had, between the said Francis Cuff and Catherine Richardson, one of the daughters of the said Henry Richardson, Francis Cuff for the considerations therein mentioned, granted to Michael Cuff and Samuel Warring, amongst other, the lands and premises of Ballaghinurry, Shanbellymore, and Gortneafaly, to hold to Michael Cuff and Samuel Warring, their heirs and assigns, to the use of Francis Cuff for life; remainder to the first and every other son of Francis Cuff on the body of Catherine Richardson, lawfully to be begotten: in tail male.

By this deed it was provided, that Francis Cuff should have full power to make leases of the [239] lands, or any part thereof, for any term not exceeding thirty-one years in possession and not in reversion, without any fine, and at the best improved rent.

Francis Cuff, by indenture of lease, bearing date the 15th of October, 1745, demised the lands comprising two hundred acres of good land, Irish plantation measure, to Samuel Owens, for three lives, or thirty-one years, which ever should last the longest, at a rent of £40 sterling yearly.

Samuel Owens at the time of obtaining the lease, resided upon the estate, and was at the time of the execution of the lease, the law agent and attorney of Francis Cuff.

By an indenture dated the 1st of February, 1749, and made between Francis Cuff and Michael Cuff, the only son and heir apparent of Francis, of the one part; and James Cuff of the other part: reciting the deed of the 19th of July, 1716, and particularly setting forth the leasing power reserved to Francis, under that deed, and that Francis Cuff was tenant for life. Francis and Michael, for the considerations therein mentioned, granted to James Cuff, his heirs and assigns, the several lands before mentioned, to hold upon the trusts therein mentioned, and among others to the use of Francis Cuff for life, with a power to charge £600 for younger children.

This deed was registered in May, 1750.

By article of agreement, dated the 11th of December, 1749, written on the back of the lease of the 15th of October, 1715, Michael Cuff, in consideration of £20 * paid to him by Samuel Owens, [240] covenanted to ratify the existing lease, and also to grant renewals to Samuel Owens, at the determination of the existing lease, for a further term of lives, a blank being left in the agreement as to the number of lives.

At the date of the execution of this agreement Samuel Owens continued to be the law agent of Francis, the father of Michael Cuff.

This agreement was registered on the 17th of June, 1760.

Francis Cuff remained in possession of the lands until the time of his death, in May 1760, when Michael Cuff, his son and heir at law, became entitled to the possession as a remainder man under the settlement.

Michael Cuff, by deed bearing date the 21st of July, 1760, after the birth of his only children, Catherine Ann, and Wilhelmina Cuff, conveyed the lands to Saint George Caulfield and James Cuff, Esq. in trust to the use of himself for life; remainder to his two daughters; to each, one undivided moiety as tenant in common, and thereby reserved to himself, and to every person to whom any estate of freehold was thereby limited, when in possession, and not in reversion, power to make leases not exceeding twenty-one years, at the best improved rent, without any fine. There was a saving in this deed, for all the leases and incumbrances then in being, and lawfully and justly made by Francis Cuff, and such as he had a good and lawful right to execute; but no mention was made of the lease of 1745, nor of the article endorsed thereon.

[241] This settlement was registered on the 23d July, 1760

* Of the sum paid there was no legal evidence; but it was assumed in the argument in the Court below, and stated in one of the reasons of the Appellant's printed case.

Michael Cuff died in the year 1763, leaving issue Catherine Ann, and Wilhelmina Cuff, who thereupon entered into, and became possessed of the lands.

By deed of settlement, bearing date the 13th of October, 1775, and made between Catherine Ann Cuff of the first part; Henry Upton, and Jane Ord, guardians of the said Catherine Ann, and Charles Walker of the second part; John Bagott of the third part; and Christopher Clarges and William Green of the fourth part; Catherine Ann Cuff, for the consideration therein mentioned, released to Christopher Clarges and William Green, her undivided moiety of the lands, upon the trusts therein expressed.

This deed was registered in the year 1775.

Upon the death of John Bagott and Catherine his wife, the father and mother of the Respondent he came into possession of their moiety of the lands, and the undivided moiety of the lands which belonged to Wilhelmina Cuff, were purchased by the Respondent at a sale in 1814, under a decree of the Court of Chancery in Ireland.

While the lands were held by Samuel Owens, under the lease of 1745, he also possessed himself of certain bogs and turbaries, the property of the Respondent, adjoining the lands.

Samuel Owens died in 1780, leaving Samuel Lea Owens, his nephew, who held the lands under the lease until his death, which happened in the year 1817.

Samuel Lea Owens was the surviving life in the lease of 1745, and upon his death, the Respondent [242] demanded possession of the lands from the occupying tenants, which they refused to give, alleging that they withheld such possession, by direction of the daughter of Samuel Lea Owens, who had intermarried with the Appellant, Robert Blakeney, and claimed as devisee of Samuel Lea Owens, to be entitled to a renewal thereof for lives, under the article indorsed on the lease of 1745.

On the Respondent's counterpart of the lease of 1745, there was no agreement or article indorsed.

At the sale before the Master, the lease of 1745, and the claim upon the article were stated, and Wilhelmina Cuff's moiety of the lands was sold subject to the lease, but no mention was made of the article in the abstract of the title; and there was no mention of the article in the master's notes, made at the time of the sale, nor in the deed which conveyed the moiety to the Respondent.

The greater part of the estate, of which the lands in question were part, were subject to a rent charge for ever of £40 per annum; and the part sold was subject to the moiety thereof.

On the 15th of December, 1820, the Appellants filed their bill in the Court of Chancery in Ireland, and thereby, amongst other things, stated the original lease, and the agreement for the renewal thereof for lives, and that they were entitled to the benefit of such renewal; and prayed that the agreement for renewal might be carried into specific execution, and that the Respondent might be compelled to execute to them, such draft of renewal, as might be approved of by one of the masters of the Court.

[243] The Respondent put in his answer to this bill, insisting on the several facts before stated, in bar of the relief sought by the bill. Issue having been joined in the cause, it was agreed that each party should be at liberty to read and give in evidence on the hearing of the cause, the matters in the consent mentioned, and witnesses having been examined on both sides, the cause was heard; and a decree pronounced on the 22d of June, 1825, whereby it was ordered and decreed that the Appellant's bill should be dismissed.

On the 9th of July, 1825, the Appellants preferred a petition to the Court, complaining that they were aggrieved by the decree, and praying that the cause might be reheard.

On this petition, an order was made that the cause should be reheard on the first rehearing day of the then next term; and the cause having been accordingly reheard on the 8th of December, 1825, and further reheard on the 26th of January, 1826, the Court on the 17th of February, 1826, pronounced judgment thereon, and ordered that the decree should be affirmed.

The appeal was presented against this decree and the order on rehearing.

For the Appellants, (the Plaintiffs in the suit), on the original hearing were read,

by consent, copies of the memorials of the deed of 1745, and the agreement of 1749; and also depositions of a witness, who swore that the moiety of the lands subject to the lease, were sold subject to the lease and the agreement to renew, and a passage [244] from the further answer of the Defendant to the same effect.

For the Respondent, the Defendant in the suit, were read the settlement of 1716: Memorials of two deeds, one of settlement, to which Francis Cuff and Michael Cuff were parties, the other of mortgage, both dated in 1749, with indorsements shewing that Samuel Owens was the attorney of Francis Cuff: A patent for holding fairs and markets in Ballymore, with an indorsement in the hand writing of Samuel Owens,—“Owens, agent:” An account for news and advertisements, 1743-6, made out to Samuel Owens, and indorsed thus:—“Mr. Cuff paid me for news and advertisements:” A memorial of the settlement of 1760: Deposition and survey, proving that the lands in lease measured two hundred acres, arable and pasture, and thirty acres of bog: That arable and pasture were at the time of the survey, worth on an average twenty-five shillings an acre, and the bog half a crown an acre: Depositions proving the handwriting of Samuel Owens on the patent, and the account before mentioned, and that he was a practising attorney.

For the Appellants: Mr. Sugden and Mr. Pepys.

The question is, whether the whole is one instrument, and one equitable demise?

It appears by the settlement of 1716, that the lands were settled upon Francis Cuff for life, he having a power to lease for thirty-one years, with remainder to his issue male, which remainder vested in Michael Cuff.

[245] There is no proof that Owens was the law agent of Francis Cuff: and if it were proved, it would be immaterial, as Francis Cuff lived until May 1760, and never complained. But the question depends upon the agreement by Michael Cuff the son. There is no proof that Samuel Owens was the attorney of the son. The lease having exceeded the power, could not bind the son, except in so far as he confirmed it.

The father and son were dealing with the estate, and the son was induced to grant an extension of the lease, which was invalid.

The original lease with the indorsement was lost. It was in the possession of Kelly, a friend of the Respondent, who could not be forced to produce it. The expression in the memorial, “for the consideration therein mentioned,” after such length of time is no evidence. This is not the case of an heir expectant. It is incumbent on those who impeach the lease, to shew the want of consideration. The answer states a belief that £20 was the consideration. If this is the case of an heir expectant, he is dealing with his father. The rule of equity has never been applied to such a case. *Goulard v. De Faria* (17 Ves. 20; see *Whalley v. Whalley*, 3 Bligh's Rep. 1), is shaken as an authority on the doctrine of dealings with heirs expectant. The Courts now will not set aside a fair contract. It has been held that where the sale is by auction, the rule does not apply: so where the tenant for life and the remainder man join, the grant is not of a reversionary lease by an expectant heir. Here as it was preceded by the lease of 1715, and followed by the [246] deed of 1749, and the agreement of 1749, it must be considered as part of a family arrangement. Francis Cuff acquiesced till his death in 1760. Michael Cuff also acquiesced till 1760. Then a new right sprung up: a right to hold free from all incumbrances. All the parties acquiesced during their respective interests. The agreement is entire, and cannot be separated. It is a rule of equity, that that which is agreed to be done, shall be considered as done. The agreement therefore is a lease. It would be a fraud, if the Respondent were permitted now to refuse to execute a lease. The consideration goes to the whole agreement. If it is binding as to the lease of 1715, it must be equally so as to the agreement of 1749. Upon the purchase in 1811, there was direct notice of the agreement given to the purchaser.

The Respondent by his original answer, denies that he had notice of the agreement. By his farther answer, after exceptions allowed, he admits that the agreement by way of indorsement upon the lease was publicly stated.

The Lord Chancellor: And he goes on to say, that it was further stated that the agreement was fraudulently obtained.

Lord Manners: It was relied upon in the Court below, that if the Appellant was not entitled to the lease, at least, he was entitled to the £20 with interest.

For the Appellant: There is no evidence whatever that the consideration was

£20 or any other sum. The agreement was entire, both parts standing on covenant equally.

On the death of Francis in 1760, the lessee held under the agreement of 1749, and not by [247] the lease of 1745, because it was void on the face of it. Since the death of Francis, the estate has belonged to Michael alone, and there has been acquiescence ever since.

The Lord Chancellor: If there is nothing appearing on the memorial, it may be that there were two distinct considerations, one for the confirmation of the lease, the other for the agreement to renew.

For the Appellant: That is not possible. The estate was held from 1760 to 1817, under acquiescence. Suppose the three lives had dropped early, and three new lives had been called for; it is probable that all the lives would have run out. If parties have a right to set aside an agreement, but acquiesce, a Court of equity will not relieve.

The settlement of 1760, and the exception of the leases, cannot affect the Appellants. They have nothing to do with that settlement, and it was voluntary.

No question was raised in the Court below on the point of uncertainty.

The question as to the £20 is put in issue by the answer; but there is no evidence to support the allegation. It is admitted by the answer, that there was possession, and payment of rent, under the lease.

As to the purchase in 1814, possession is in equity evidence of the interest of a party. *Daniels v. Davison* (16 Ves. 249). This rule applies in the case of collateral, *a fortiori* in case of direct notice. A purchaser buying property, takes it [248] subject to the engagements of the seller. The purchaser is bound to perform the covenants, and indemnify the seller.

Lord Manners: The question here is, whether the vendor is bound.

For the Appellant: The party bought subject to the lease and agreement to renew. For there was due notice of the incumbrance. Suppose Michael Cuff had been living, and sold subject to the lease of 1749: if the bill had been dismissed, the vendee might have brought an action. All the parties according to their successive interests, acquiesced in this, which is an *entire* agreement. The seller has concluded the purchaser, *Walton v. Com. Stamford* (2 Vern. 279). In *McGuire v. Armstrong* (2 Bull v. Beatty, 538), the purchaser was held a trustee for the seller: that is directly applicable to this case.

Lord Manners: I did not consider the case inconsistent: it is an equity between the seller and the purchaser, not giving a right to other parties.

For the Appellant: It turns him into a trustee for the seller. The Respondent comes here claiming the benefit he contracted, not to insist upon. He is to become a trustee for the seller, upon the consideration of having bought at an under-value. Suppose I buy an estate subject to bad leases, I know that they are impeachable by the party who sold. A party who buys an estate subject to an incumbrance, is bound to the full extent. The purchaser here bought subject to an agreement, *Taylor v. Stibbert* (2 Ves. J. 437), and *Crofton v. Ormsby* (2 S. and L. 604). If the purchaser were not bound, the original equity would revive against the seller.

[249] The Lord Chancellor: This part of the argument only goes to half.

For the Appellant: It goes to the whole: the claim is under a voluntary settlement as to one moiety, and for consideration as to the other. In the latter case there is notice: in the other they are bound without notice.

For the Respondent: Mr. Horne and Mr. Bligh.

The elaborate argument for the Appellants, proceeds upon an ingenious assumption of facts without proof, and bold inferences of law without authority. It is supposed for instance, that the instrument of contract is an actual demise, which is answered first by reference to the words of the instrument, and secondly by the proceeding of the Respondent. If the indorsement operates as a lease, his bill for the specific performance of a contract already performed according to the supposition is unnecessary. The argument then supposes that it is an equitable demise. How that differs from an unperformed contract is not suggested. Having assumed the fact that this is a lease, it is properly argued as a legal consequence, that it is for those who impeach it, to shew the want of consideration. This consequence is displaced, by shewing that the fact from which it is drawn, namely, that the instru-

ment operates as a lease, is invented, and the premises being unfounded, the inference fails.

It is then assumed that this was a family arrangement, in which the father stipulated with the son, for a confirmation of the original lease, and the extension of it by the indorsed agreement; and upon this assumption, it is argued that in such a [250] case, where father and son being respectively tenant for life and remainder man in fee, join in a lease, it is not a dealing with an heir expectant for a reversionary lease. To this we answer, that the foundation of the argument is assumed. There is no proof of any family arrangement, of any dealing upon the subject, or that the father was even cognizant of the agreement. Such facts cannot be presumed; and the facts in proof lead to a contrary hypothesis; for the counterpart of the lease in the possession of the father, had no indorsement of the agreement, and the part which had the indorsement, was kept by Samuel Owens unregistered, until after the death of the father in 1760. The next hypothesis assumes, that the father acquiesced till his death, and the son till 1760. But in what did they acquiesce? not in the indorsed agreement. The father knew nothing of it, and the son could not remove Samuel Owens from the possession, while the original lease was subsisting, which, as the Appellants, and we admit, he confirmed by the indorsed agreement. The argument is inconsistent. If he confirmed the lease, how could he dispute the possession before the expiration of the lease? The acquiescence, if such it may be termed, was in the legal right of the lessee.

The son might indeed, before he signed the indorsement, have disputed the legality of the lease under the power, or he might have proceeded to set aside the agreement, on the ground of improvidence and inadequacy of consideration; and not having done so in due time, relief might have been refused after long delay, as to the original lease, in a suit where he was Plaintiff. But the agree-[251]ment to grant a new lease was distinct from the agreement to confirm the old one; and the right to a renewal did not arise until the falling of the last life in the lease. It was then time enough to dispute that part of the agreement. It is said that on the death of the father, as he had exceeded his power in granting the lease, a new right sprung up in the son, to hold free from all incumbrances; but this is inconsistent with the assertion as to family arrangement, and the confirmation of the lease by the son. Sometimes it is supposed in the argument, that there is no proof of any consideration; if so, the case of the Plaintiff must fail: for he comes to a Court of Equity to enforce an agreement without consideration. But then it is argued, that the consideration being indivisible, the agreement is entire, and incapable of being severed; and that on the death of the father, the lease being void, the lessee held under the agreement or demise, as it is called. But if the son had proceeded by ejectment on the father's death, might not the lessee, supposing his conduct fair, have had relief in equity on that part of the agreement, which operated as a confirmation of the lease, postponing or waiving the other part of the agreement?

As to the argument derived from the notice given of the agreement at the auction, that moiety of the estate was put up to sale by an incumbrancer; but in any case, that notice could only operate to relieve the vendor from any subsequent question or caveat, as to an agreement, which in the same notice was stated to be invalid. Could such a notice have the effect to set up an agreement unfairly obtained, and unavailable in [252] equity? If notice of a disputed claim turns, as it has been argued, the purchaser into a trustee for the claimant, then no estate with a limited title, can safely be brought to market. If the estate is sold absolutely subject to a lease or incumbrance, the purchaser is bound; so if the disputed claim turns out to be a fair one. That was the case in *Taylor v. Stibbert*. The fallacy of the argument lies in treating that as absolute, which is only a conditional engagement, not to insist on warranty. It is said that if the purchaser were not bound, the original equity would revive against the vendor. That original equity is now in question before the House on this appeal.

This is said not to be the case of an expectant heir bargaining for his reversion. It is, however, the case of a young man not in possession, but while he acquires the vesting of a remainder, granting a lease in reversion, for a mere nominal consideration, to the attorney of his father. Such being the respective characters of the parties to the contract, it was the peculiar duty of the attorney to preserve evidence. But over

existed, of the fairness of the transaction. It is clear that Michael Cuff was in some way overreached or deceived. In the lease and the memorial, he is described as son and heir of the father, and the reversion is reserved to the father, his heirs and assigns. One of the lives named in the lease was that of Michael, so that as heir of his father, he could not by possibility have any benefit from the reversion. If, as from these facts it might be inferred, he was persuaded by the attorney that his father had absolute power over the property, the [253] consideration must have appeared ample under such persuasion.

The following authorities were cited, besides those stated in the argument:

Upon lapse of time—*Bonny v. Ridgard*, 1 Cox, 149; *Moth v. Attwood*, 5 Ves. 845; *Morse v. Royal*, 12 Ves. 355; *Lord Kensington v. Philipps*, D. P. MSS. and 5 Dow. p. . . .; *Scott v. Dunbar*.*

[254] In the course of the argument, the following observations were made:

The Lord Chancellor: What acquiescence is there under the second part of the agreement! The agreement appears on the memorial to be severed into two parts. The consideration might be reasonable, so far as the confirmation of the lease goes, but bad as to the agreement for renewal.

Lord Eldon: It appears that the Appellant states in his case, that Francis Cuff was seized in fee: if that is not correct, it appears that then Francis Cuff was tenant for life: and that Michael gave the confirmation, and agreed for the new lease while his father was living.

What is the evidence that the agreement was in consideration of a sum of money, as it is stated in the case! Taking the copy to be true, there is no statement in the memorial that the agreement was in consideration of a sum of money. How does it happen that it is differently stated in the case! Can it be for any purpose but to deceive! These Irish cases are so stated, that we never know the facts.

The Lord Chancellor: It was assumed and argued below, that £20 was the consideration. If [255] the agreement had been registered before 1760, the father might have detected the fraud.

* D. P. 1826, MSS. The bill was by the assignee of an equity of redemption, against the mortgagee, etc. praying redemption, etc. The defence was that the conveyance was obtained by a steward from his employer at an inadequate price, and while he was in a state of distress, and pecuniary embarrassment. In the Court below, the bill as to redemption was dismissed with costs: but this decree was reversed on appeal to the House of Lords, principally on the ground that the transaction was not questioned, until after the lapse of thirty-eight years. Judgment, in D. P. 27th Feb. 1826. See also as to execution of power, *Commons v. Marshall*, 6 B. P. C. 168, Power reserved by grantor in a settlement, to lease for thirty-one years or three lives. Lease executed for thirty-one years or three lives, which shall last longest, held good. Sugden on Powers, 550-1, that a condition not authorised by the power annexed to the appointment, does not invalidate the appointment. As to confirmation of void leases, *Doc v. Watts*, 7 T. R. 83, acceptance of rent by remainder-man, held a confirmation of void lease granted by tenant for life. *Roe v. Prideaux*, 10 East, 158, acceptance of rent by remainder-man in tail, a confirmation of lease made, by a tenant in tail exceeding his power. As to notice, *Hall v. Smith*, 14 Ves. 426, notice of a lease is notice of all the contents, Dict. M. R. On the question of fraud and title to specific performance, *Twistleton v. Griffith*, 1 P. W. 310, sale by expectant heir at an inadequate price set aside. *Gwynn v. Heaton*, 1 B. C. C. 1, on a bill to be relieved from an unconscionable bargain, for a reversionary rent charge obtained from an expectant heir, it was set aside on terms, the rent charge to stand as security for money advanced and costs. *Nott v. Hill*, 1 Vern. 167, 2 Vern. 83, unconscionable bargain with heir expectant set aside. *Davis v. Symonds*, 1 Cox, 402, discretion of Court as to bills of specific performance, to dismiss, although they would not cancel the agreement, on a bill by the other party. *Kerneys v. Hansard*, Cooper 125, refusal to execute a hard agreement obtained from a person in distress. *Peacock v. Evans*, 16 Ves. 512, unequal bargain obtained from a person of weak capacity set aside on terms. *Gowland v. De Faria*, 17 Ves. 20, Fonbl. Eq. Note K. p. 135, 5th edit. and Cases in Marg. p. 137. See also *Whalley v. Whalley*, 3 Bli. 1, and the authorities collected in the notes.

Lord Eldon: It appears that the property was set up to auction, (not where) but it was then stated that the property was subject to a lease, and covenant in the lease for renewal.

Lord Manners: It is fair to the Appellants to state, that my judgment was founded on the admission, that the consideration of the agreement was £20.

Lord Eldon: The lease takes no notice of any power. It is for life of Michael Cuff, etc. Owens covenants to pay £40 to Francis Cuff, his heirs and assigns, and then Francis Cuff covenants for his heirs, executors, administrators, and assigns, for quiet enjoyment.

Lord Manners: Upon the hearing in the Court below, I was of opinion, that this was not a case in which the Court ought to interfere to enforce a specific performance, and dismissed the bill on the grounds which I will state.* The consideration for the renewal is not stated in the memorial, but it was admitted at the bar, that £20 was the consideration for the agreement to renew the lease. It was argued by the counsel for the Appellant, that the omission to register, or the delay in registering the agreement, was immaterial; and at this distance of time, it may not be a circumstance to be much relied upon, although it is matter of suspicion. It is, however, material in this respect, that in Ireland it depends upon the registry, whether a deed, whether legal [256] or equitable, is to have priority; and one would have imagined, that in such a transaction between an attorney and an improvident young man, the attorney would have been anxious to get his document of title registered: to him it must have been a matter of importance.

The settlement of 1760, was executed for a valuable consideration. Under that deed the Respondent derives title to one moiety of the lands in question. The bill for the specific performance was filed in 1821. The Court thought that the Plaintiff had not made out a sufficient title, and dismissed the bill. If the case had been brought before the Court recently after the transaction, depending upon such a title, it would have been impossible, consistently with the rules of equity, to have granted relief. That a young man, an expectant heir, should be induced by his father's attorney, for a consideration of £20 to ratify a lease which was void as against him, and also for the same consideration, to grant in reversion another lease for lives undefined, imports in itself, a transaction so grossly fraudulent, that no court of equity could give its assistance to effectuate such an agreement.

Then arises the question, whether from length of time and possession, there has been an acquiescence which deprives the Respondent of his ground of defence? As to possession, it is clear that it must be referred to the lease of 1745. Samuel Owens was in possession under that lease. The last renewed lease according to the agreement, was not to commence until the expiration of the former lease. But then it is argued here at the bar, that the agreement is one [257] and entire; that it must be good or bad for the whole. That was not so considered, or argued, upon the hearing in Ireland. It appeared, and was there assumed, that the agreement related to distinct matters, and had operation accordingly: one part to confirm the act of the father, the other to grant a renewal of the lease. The Court considered one part of the agreement fair and sustainable, the other invalid: that the consideration of the £20 was the only circumstance connecting the two parts of the agreement. If that were the only question, and it turned upon adequacy or inadequacy of price, I might agree with the counsel for the Appellant, that the agreement must be considered as entire. But looking at the whole question, it could not be so treated; for the consideration itself was evidence of the unfairness of the transaction—a mere bribe—a gross imposition: the consideration could prove nothing but fraud. On this ground the Court proceeded as to one moiety. The same reasoning applies to the other moiety purchased in 1814. It appears that moiety was sold subject to the lease of 1745, and purchased with notice; which is supposed to have the effect of compelling the purchaser to perform the agreement. It is clear that the person who sold meant to exonerate himself, and that the party who bought had the benefit in a lower price. That may create an equity between the vendor and the purchaser, but the lessee has nothing to do with it. Upon this ground I formed my opinion, in *M'Cur*

* His Lordship here stated the facts of the case as set forth in the text, and then proceeded as above.

v. *Armstrong* (2 Ba. and Be. 538). The case from *Vernon* (*Walton v. Com. Stamford*, 2 Vern.) is a loose [258] note, but shews that the vendor meant to release the subject. In the case of *Earl Brooke v. Bulkeley* (2 Ves. 498), the bill was filed by a vendor against a purchaser, and person claiming the benefit of a lease; calling on the purchaser to execute the lease. Lord Hardwick says, "The first question will depend on the obligation the Plaintiff was under to renew at the time of the agreement for the purchase; and next, on the notice of that obligation: for if the Plaintiff was under an obligation, either in law or equity, to renew, and the purchaser or his agent at the time of the purchase had notice of such obligation, the estate must be taken subject thereto." If the vendor is bound, so is the purchaser, and *vice versa*. The reasoning, therefore, as to the moiety purchased, applies equally as to the other. The question in the case in *Vesey*, was between the vendor and purchaser, who was entitled to the benefit? There is no material distinction.

If evidence was necessary, it ought to have been treasured up by Samuel Owens. The possession is accounted for, by reference to the lease of 1715. There is nothing to connect the two parts of the agreement but the single consideration of £20. This is not a case for the extraordinary interference of a Court of equity. No evidence was required on the part of the Respondent, because he relied upon the unfairness of the transaction, apparent on the face of it. In the Court below, it was insisted that the £20 with interest, should be repaid. Upon this question the Appellants were left to their remedy at law. The Appel-[259]lants, or those under whom they claim, might have filed a bill to perpetuate testimony; and in such a case, it was highly necessary to do away all imputation which might attach upon such an agreement: this they have failed to do.

The Lord Chancellor then put the question, and the judgment was affirmed. Judgment affirmed by order, 10th June.

[260]

ENGLAND.

(COURT OF CHANCERY.)

THOMAS DUFFIELD, and EMILY FRANCIS his Wife, Plaintiffs in the Court of Chancery,—*Appellants*; AMELIA MARIA ELWES, FRANCIS CONST, GEORGE LAW, ABRAHAM HENRY CHAMBERS, WILLIAM HICKS, GEORGE THOMAS WARREN HASTINGS DUFFIELD, CAROLINE DUFFIELD, MARIA DUFFIELD, ANNA DUFFIELD, SUSAN ELIZA DUFFIELD, Infants, Defendants in the same Court, by Original and Amended Bill,—*Respondents*.

The same Plaintiffs in the Court of Chancery,—*Appellants*; ROBERT GREENHILL RUSSELL, Esq., GEORGE SPENCER SMITH, WILLIAM HICKS, and AMELIA MARIA his Wife, late AMELIA MARIA ELWES, Defendants in the same Court, by Supplemental Bill,—*Respondents*.

The same Plaintiffs in the Court of Chancery,—*Appellants*; HENRY DUFFIELD, an Infant, Defendant in the same Court, by second Supplemental Bill,—*Respondents*.

[*Mews'* Dig. xv. 112. S. C. 1 Dow and Cl. 268, 395; in Ch. 2 Sim. and St. 544; 4 L.J. (O.S.) Ch. 189. Discussed in *Percival v Percival*, 1870, L.R. 9 Eq. 393. Approved on point as to revocation in *Doe d. Evers v. Ward*, 1852, 21 L.J. Q.B. 145, 150; considered on point as to interest taken under devise in *Holmes v. Prescott*, 1864, 33 L.J. Ch. 261.]

[261] A testator by his will, devised to trustees and their heirs, all his freehold and copyhold land at S. and also his freehold land at H. in case there should be but one son of his daughter A. who should attain the age of twenty-one

years, upon trust for such son and his heirs; and in case there should be two or more sons of A. who should attain the age of twenty-one years, then in trust for the second of such sons and his heirs; and in case there should be no son of A. upon trust for such of the daughters of A. (if any) as should first attain the age of twenty-one years, etc.; and then after certain bequests of stock in trust, to pay the dividends by way of life annuities, the testator devised and bequeathed all the residue of his property, whether freehold, copyhold, or for years, money in the funds, upon mortgage or otherwise, upon security or at interest, debts of whatever other nature or kind, to the same trustees, their heirs, executors, and administrators, upon trust, to sell, get in, etc. and to apply the proceeds in payment of debts and legacies, etc.; and as to the residue of the monies to arise by such sales, to invest the same in the public funds or real securities; and if there should be only one child of A. upon trust, to transfer or assure the funds, and the dividends, interest, and annual proceeds thereof, to such only child, at or on his attaining the age of twenty-one years, etc.; and if there should be two or three children of A. in trust, for such two or three children, equally to be divided between them, the shares of sons to be transferred on their attaining the age of twenty-one years, etc.

The testator afterwards made a codicil to his will in these words, to the effect following:—"Having some short time back drawn my pen through the first fifteen lines of the sixth sheet of my will, and being apprehensive that such rasure not being witnessed, might lead to litigation, I declare that the sole intention of such rasure is, to revoke that part only of the will, whereby I direct the sale of my freehold property; and I hereby direct and appoint, that the son of my daughter A. who shall first attain the age of twenty-one years, shall on attaining that age change his name to Elwes; and I give and devise to the said son of A. on his attaining the age of twenty-one years, and changing his name to Elwes, all my freehold property, lands, tenements, and hereditaments, to hold to my said grandson, his heirs, and assigns, etc.; and I do hereby [262] ratify and confirm the said will, except as before is excepted."

Held that the will was revoked by the codicil, expressly as to the power of sale; and as to the *corpus* of the lands at S. and H. by the effect of inconsistency of devise, but that the will was unrevoked and operative in all other respects; and that under the devise by the effect of the will and codicil, no estate in the lands at S. and H. and the other freehold estates, was vested, but remained contingent upon the event of sons or daughters of the testator's daughter, according to the limitations of the will, living to attain the age of twenty-one, etc.; and that until such vesting upon such event, (or until such event should become impossible) the estate in the lands vested in the trustees, and the rents and profits were applicable according to the trusts of the will.

George Elwes being at the time of making his will, and until his death, seised of or well entitled to an estate of inheritance in fee simple, of and in divers freehold manors, messuages, lands, and hereditaments, situate in the counties of Berks, Surrey, Middlesex, and Suffolk, and elsewhere, and also to an estate of inheritance in fee of, and in divers copyhold and customary hereditaments, situate in the counties of Berks, Essex, and Suffolk, and elsewhere; and also possessed of and well entitled to a very considerable personal estate and effects, consisting of valuable leasehold messuages and hereditaments, monies in the funds, and various other particulars; when he was of sound and disposing mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the 1st day of March, 1811, and duly executed by him, and attested as by law required, to pass [263] freehold estates by devise; and he thereby among other things, devised and bequeathed as follows: "I give and bequeath unto my brother John Elwes, and Abraham Henry Chambers, (the Respondent) and their heirs, all that my freehold and copyhold farm and estate, situate, lying, and being in Southwood Park, in the county of Suffolk, which I lately purchased from John Pytches, Esquire, (and the copyhold part, whereof I have already surrendered to the uses of my will;) and

also all that my freehold farm and estate at Haverhill, in the county of Essex, to, for, and upon such trusts as are in and by this my will expressed and declared thereof; (that is to say) in case there shall be but one son of my daughter Amelia Maria Frances Duffield, by her present husband, the said Thomas Duffield, who shall attain the age of twenty-one years, upon trust for such son, his heirs and assigns, for ever; and in case there shall be two or more sons of the said Amelia Maria Frances Duffield, who shall attain the age of twenty-one years, then in trust for the second of such sons, his heirs and assigns for ever; and in case there shall be no son of the said Amelia Maria Frances Duffield, by the said Thomas Duffield, who shall attain the age of twenty-one years, then upon trust for such of the daughters (if any) of the said Amelia Maria Frances Duffield, by the said Thomas Duffield, as shall first attain the age of twenty-one years, or be married under that age, with the consent of the trustees or trustee for the time being of this my will, and the heirs and assigns of such daughter for ever; but if [264] there shall not be any son of the said Amelia Maria Frances Duffield, by the said Thomas Duffield, who shall attain the age of twenty-one years, nor any daughter who shall attain that age or be married, and the said Thomas Duffield shall depart this life leaving the said Amelia Maria Frances Duffield him surviving, then upon such and the same trusts for the benefit of the children, as well sons as daughters, of the said Amelia Maria Frances Duffield by any second husband with whom she may happen to intermarry, as are hereinbefore expressed and declared of and concerning the said freehold and copyhold farms and estates, for the benefit of the children of the said Amelia Maria Frances Duffield by the said Thomas Duffield; but if there shall not be any son of the said Amelia Maria Frances Duffield, by such after taken husband, who shall attain the age of twenty-one years, nor a daughter who shall attain that age, or be married with such consent as aforesaid, then upon trust for my brother John Elwes, his heirs and assigns for ever." And then after bequeathing certain legacies, the testator devised and bequeathed as follows: "And as to for and concerning all the rest, residue and remainder of the property of which I shall be possessed, or to which I shall be entitled at the time of my decease, or over which I have a disposing power, whether the same consist wholly or in part of estates, of freehold, copyhold, or for years, money in the funds, upon mortgage, or otherwise out upon security or at interest, debts, or of whatever other nature or kind the same or any part [265] thereof may be, I give, devise, and bequeath the same and every part thereof, unto the said John Elwes and Abraham Henry Chambers, their heirs, executors, administrators, and assigns, upon trust, that they the said John Elwes and Abraham Henry Chambers, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, do and shall with all convenient speed after my decease, sell, dispose of, and convey all and singular my freehold, copyhold, and leasehold estates, with the appurtenances, etc.; and also do, and shall make sale of and convert into money, all such part and parts thereof, as shall consist of money out upon mortgage or other security at interest or otherwise, and also get in all debts which shall be due and owing to me at the time of my decease, in such manner as they shall think expedient, etc. And I do hereby declare and direct, that the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators, and assigns, shall stand and be possessed of and interested in the monies to arise or be gotten in by the means aforesaid or otherwise, under and by virtue of this my will, in trust, in the first place, from and immediately after my decease, to satisfy and discharge all such debts, as shall be due and owing by me to any person or persons whomsoever at the time of my decease, or which shall afterwards accrue due; and in the next place, to pay, satisfy, and discharge my funeral expences, and the expences of proving this my will; and then to pay and discharge the several legacies and bequests which I have [266] given or bequeathed, or shall give or bequeath by this my will, or by any codicil or codicils thereto; and after full payment and satisfaction thereof, in trust, forthwith to lay out and invest such a portion of the residue of the monies to arise and be produced by the means aforesaid, in the purchase of so much and such sum of 3 per cent. consolidated bank annuities, in the names of them the said John Elwes and Abraham Henry Chambers, or of the survivor of them, his executors, administrators, or assigns, as the yearly dividends thereof will amount to the sum of £1000 of lawful money current in England; and upon trust, that they

the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators, and assigns, do and shall from time to time, during the natural life of my said daughter Amelia Maria Frances Duffield, pay, or cause to be paid, all the dividends of the said 3 per cent. consolidated bank annuities so to be purchased, as the same shall accrue and be received, into the proper hands of the said Amelia Maria Frances Duffield, etc. And I do hereby declare and direct, that the said 3 per cent. consolidated bank annuities so to be purchased as last aforesaid, shall from and after the decease of my said daughter Amelia Maria Frances Duffield, fall into and be taken as part of my said personal estate, and be disposed in manner hereinafter declared thereof: And as to for and concerning the then residue of the monies to arise and be produced by the sales hereinafore directed to be made of my said real and personal estate, upon trust, to lay out [267] and invest the same in the purchase of parliamentary stocks or funds of Great Britain, or upon real securities at interest, in the names of them the said John Elwes and Abraham Henry Chambers, or of the survivor of them, his executors, administrators, or assigns, upon the trusts, and for the intents and purposes, and with under and subject to the several powers, provisoes, and declarations, hereinafter expressed: (that is to say) in case there shall be only one child of the said Amelia Maria Frances Duffield, by the said Thomas Duffield, in trust, that they the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators, or assigns, do and shall pay, assign, transfer, or assure the said stocks, funds, and securities, and the dividends, interest, and annual proceeds thereof, unto such one or only child, at or on his attaining the age of twenty-one years if a son, or at or on her attaining that age, or being married with the consent in writing of the trustees, for the time being of this my will if a daughter: and in case there shall be two or three children of the said Amelia Maria Frances Duffield, by the said Thomas Duffield, then that they the said John Elwes and Abraham Henry Chambers, or the survivor of them, shall and do stand possessed of the said stocks, funds, and securities, and the dividends, interest, and annual proceeds thereof, upon trust, for such two or three children, equally to be divided between them share and share alike, the share or shares of such of them as shall be a son or sons, to be paid, assigned, transferred, or assured to him or [268] them, on his or their attaining the age of twenty-one years: and the share or shares of such of them as shall be a daughter or daughters, to be paid, assigned, transferred, or assured to her or them, on her or their attaining the age of twenty-one years, or being married with such consent as aforesaid: And my will is, that in case any one or more of such children, being a son or sons, shall depart this life under the age of twenty-one years, or being a daughter or daughters shall depart this life under that age, and without being married with such consent as aforesaid, then the shares of him, her, or them so dying, shall accrue and go to the survivors and survivor of such children in equal shares and proportions if more than one: and if but one, then the whole to such one, and be paid, assigned, transferred, or assured to him, her, or them, together, with, and at the same time, as his, her, or their original share or shares are and is by this my will directed to be paid, assigned, transferred, or assured: provided always, that if any or either of such children, being a son or sons, shall happen to depart this life under the age of twenty-one years, having lawful issue of his or their bodies living at the time of his or their decease or deceases, or born within due time thereafter, then the share or shares of him, her, or them so dying and having issue, shall go and belong to his or their child or children, and shall not survive to or amongst the others or other of such two or three children: And my will is, that in case there shall be four or more children of the said Amelia Maria Frances Duffield, by the said Thomas [269] Duffield, that the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators, and assigns, shall stand and be possessed of the said stocks, funds, and securities, and the dividends, interest, and annual proceeds thereof, upon trust, in the first place to purchase with a competent part thereof, or otherwise to set apart thereout, the sum of £50,000 3 per cent. consolidated bank annuities, and to stand possessed thereof, and of the dividends, interest, and annual proceeds thereof, in trust, for such son of the said Amelia Maria Frances Duffield, by the said Thomas Duffield, who under the trusts of a settlement now intended to be forthwith made, shall become possessed of an estate tail in the said manor of Marcham, and the

messuages, farms, lands, tenements, and hereditaments, which shall be comprised in the same settlement; and subject to the payment or setting apart of the said sum of £50,000 3 per cent. consolidated bank annuities, my will is, that the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators, and assigns, shall stand and be possessed of the then residue of the said stocks, funds, and securities, and the dividends, interest, and annual proceeds thereof, upon trust, for such four or more children (exclusive of such son as last aforesaid) of the said Amelia Maria Frances Duffield, equally to be divided between them, share and share alike, and to be paid, assigned, transferred, or assured to them respectively, at the same time or times, and with such benefit of survivorship [270] amongst them, and in such manner in all respects as hereinbefore directed and declared of and concerning the said stocks, funds and securities, and the dividends, interest, and annual proceeds thereof, in the event of there being only two or three children of the said Amelia Maria Frances Duffield, by the said Thomas Duffield. And in case the said Thomas Duffield shall happen to depart this life, leaving the said Amelia Maria Frances Duffield him surviving, and without leaving any issue by her, or if he shall leave issue by her, and all such issue, being sons, shall depart this life under the age of twenty-one years, and without lawful issue, and being daughters, shall depart this life under that age, without having been married with such consent as aforesaid, then my will is, and I do hereby declare and direct, that the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators, and assigns, shall from and after such the decease of the said Thomas Duffield, and failure of issue as aforesaid, stand and be possessed of and interested in the stocks, funds, and securities, in or on which the monies to arise and be produced from the residue of my real and personal estate hereinbefore devised under the trusts hereinbefore declared thereof, shall be laid out or invested, upon trust, to pay the interest, dividends, and annual proceeds thereof, from time to time, during the natural life of the said Amelia Maria Frances Duffield, to such person or persons, as she by any note in writing signed with her own hand, shall, whether covert or sole, and notwithstanding [271]-ing her coverture, (but so as the same be not by way of anticipation) appoint to receive the same; and in default of such appointment, then upon trust, to pay the said interest, dividends, and annual proceeds, into the proper hands of the said Amelia Maria Frances Duffield, for her separate and peculiar use and benefit, not subject or liable to the debts, control, dispositions, or engagements of any husband with whom she may hereafter happen to intermarry, and for which her receipts alone shall be good and sufficient discharges: And in case the said Amelia Maria Frances Duffield shall happen to marry a second husband, and there shall be any issue of her body by such second husband, then my will is, and I do direct, that the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators, and assigns, shall, from and after her decease, stand possessed of the said stocks, funds, and securities, and the interest, dividends, and annual proceeds thereof, upon such and the same trusts, for the benefit of the children of such second marriage, as are by this my will, declared of and concerning the said stocks, funds, securities, interest, dividends, and annual proceeds, for the benefit of the children of the said Amelia Maria Frances Duffield, by the said Thomas Duffield. And in case of the decease of the said Amelia Maria Frances Duffield, without leaving any issue of her body, who by virtue of the trusts of this my will, shall become entitled to the said stocks, funds, and securities, and the dividends, interest, and annual proceeds thereof, then [272] I give, bequeath, and dispose of the same stocks, funds, and securities, and the dividends, interest, and annual proceeds thereof, in manner following, (that is to say) I give the sum of £1000 etc. And as to, for, and concerning all the then residue of the said stocks, funds, and securities, and the interest, dividends, and annual proceeds thereof, I give and bequeath the same and every part thereof, unto the said John Elwes, his executors, administrators, and assigns, to and for his and their own use and benefit, and to be paid, assigned, transferred and assured to him and them accordingly. And my will further is, and I do hereby declare and direct, that the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators, and assigns, and other the trustee and trustees, for the time being of this my will, shall by and out of the rents, issues, and profits of the

said freehold and copyhold estates, by this my will first devised, and by and out of the part or share of and in the said stocks, funds, and securities, and the dividends, interest, and annual proceeds thereof, to which any child or children of the said Amelia Maria Frances Duffield, by the said Thomas Duffield, or by my after taken husband, shall be presumptively entitled, pay and apply for the maintenance and education of any such child or children, in the mean time, and until his, her, or their share or portion, shares or portions, shall become payable, such yearly sum and sums of money, as to them the said John Elwes and Abraham Henry Chambers, or the survivor of them, his executors or [273] administrators, or other the trustees or trustee, for the time being of this my will, shall seem meet, etc." And the testator nominated and appointed John Elwes and Abraham Henry Chambers, joint executors of that his will, etc.

Some time after the date and execution of the will, the testator drew two cross lines with his pen over a part of his will, which contained the trust or direction for the sale of his residuary freehold, leasehold, and copyhold estates. The testator after the date and execution of his will, and before the date and execution of the codicil after stated, purchased certain other freehold and copyhold messuages, lands, and hereditaments in fee, and was seised thereof at the respective times of making his codicil, and of his death; and he afterwards, when of sound and disposing mind, memory, and understanding, duly made and published a codicil, bearing date the 3d day of March, 1821, which was executed by him, and attested, so as to pass freehold estates by devise; and to the purport and effect following: "Having some short time back drawn my pen through the first fifteen lines of the sixth sheet of my last will and testament, dated on or about the 1st day of March, in the year of our Lord one thousand eight hundred and eleven, and being apprehensive that such rasure not being witnessed might lead to litigation, I, George Elwes, do hereby declare by this my codicil to the said will, that the sole intention of such rasure was, and is to revoke that part only of the aforesaid will, whereby I direct the sale of my freehold property, which sale I accordingly do hereby revoke; and I do hereby direct and [274] appoint, that the son lawfully begotten of my daughter Emily Frances Duffield, who shall first attain the age of twenty-one years, shall on attaining that age change his name for that of Elwes: And I give and devise to the said son of my daughter aforesaid, on his attaining the age of twenty-one years, and changing his name to Elwes, all my freehold property, lands, tenements, and hereditaments, to have and to hold to him my said grandson, his heirs, and assigns, for ever: Also I give and bequeath to my wife Amelia Maria Elwes, for and during the term of her natural life, my dwelling house, situate and being on the Terrace in High Street, in the parish of Mary-le-bone; and I also give unto my said wife, the contents of the said house: And I do hereby nominate and appoint the Reverend William Hicks, of Whittington Rectory, in the county of Gloucestershire, to be my executor, in the room of my late brother John Elwes, Esquire, deceased; and I do hereby ratify and confirm the aforementioned will and testament, dated as aforesaid, except as is before excepted."

On the 2d day of September, 1821, George Elwes died, without having revoked or altered his will, save as the same was altered by the codicil, and without having altered or revoked his said codicil.

George Elwes on his death, left the Respondent Amelia Maria Elwes his widow, and the Appellant Emily Frances Duffield his daughter, and only child and heir at law, and heir according to the custom of the manors, whereof his copyhold estates were holden, and also his sole next of kin.

[275] The Appellants had then five children; namely the Respondent George Thomas Warren Hastings Duffield, their then only son, an infant then of the age of nine years and upwards, and four infant daughters, namely, the Respondents Caroline Duffield, Maria Duffield, Anna Duffield, and Susan Eliza Duffield, younger than their said brother.

After the death of George Elwes, the Respondent Abraham Henry Chambers, the executor named and appointed by his said will, and the Respondent William Hicks, appointed executor by the said codicil, duly proved his said will and codicil in the Prerogative Court of the Archbishop of Canterbury, and received and got in some parts of his personal estate, and of the profits and produce thereof, and had thereout paid his funeral expenses, and all or most of his debts, the whole amount whereof was inconsiderable.

In 1821 a bill was filed, and afterwards amended, stating among others, the facts herein before set forth, and contending among other points, that the devises of the lands at S. and H. and the residuary freehold lands, were not vested under the will and codicil, but future and executory, and that until the events happened on which the vesting should take place, the Appellant E. F. Duffield, as heir at law, and customary heir, was entitled to the rents and profits of the lands, subject to application of such part as might be necessary for the maintenance of the presumptive devisee under the will. The bill among other things, prayed a declaration in this respect accordingly.

The several Defendants to the original and amended bill having appeared, and put in their answers, and the cause being at issue, witnesses [276] were examined, and certain documentary evidence was adduced on the part of the Appellants: among other documents, the will and codicil of the testator George Elwes, were proved by the attesting witnesses.

The cause came on, and was heard before the Vice Chancellor, on the 22d, 24th, and 28th days of February, the 1st day of March, and the 9th day of April, 1823; and on the 17th day of April, 1823, the Court by decree of that date, (among other things) declared that the will of the testator George Elwes, bearing date the 1st day of March, 1811, and the codicil thereto, bearing date the 3d day of March, 1821, were well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution; and the same was ordered accordingly; and to take an account of the personal estate, etc. And it was ordered that the said master should inquire and state to the Court, what freehold and copyhold estates of inheritance the said testator was seised of at the times respectively of making his will, of making his codicil thereto, and of his death: And it was ordered, that the said master should take an account of the rents and profits of the said testator's freehold and copyhold estates, accrued since his death, and received by the Respondents Abraham Henry Chambers and William Hicks, or either of them, or by any other persons, by their or either of their order, or for their or either of their use. And it was declared, that the appointment made by the said codicil of the Respondent William Hicks to be an executor, in the room of the testator's deceased brother John Elwes, does not operate as an appointment of the [277] said William Hicks to be a trustee as well as executor. And it was ordered, that it should be referred to the said master, to inquire and state to the Court, what children of the marriage between the Appellants were living at the time of the death of the said testator, and whether any, and what children had been since born, and what were their respective ages. And it was ordered, that a case should be made for the opinion of the judges of the Court of King's Bench; and that the questions in such case should be, first, whether the devise of the freehold part of the estate at Southwood Park, and of the freehold farm and estate at Haverhill, contained in the will, is revoked by the codicil? Second, did the manor of Marcham pass under the residuary devise contained in the testator's will; and if it did, was such devise revoked by the codicil? Third, did the manor of Marcham pass under the codicil to the first son of the Plaintiff Emily Frances Duffield, who shall attain twenty-one years and change his name to Elwes, or to whom does the same belong? Fourth, does the estate at Withersfield and Haverhill, purchased after the testator made his will, pass under the devise in the codicil to the first son of the Plaintiff Emily Frances Duffield, who shall attain the age of twenty-one years and change his name to Elwes, or does it go to the residuary devisee, under the joint operation of the will and codicil, or does it descend to the testator's heir at law? Fifth, to whom belong the surplus rents and profits of the said copyhold estate at Southwood Park, and of the said freehold estate at the same place, and of the said freehold farm and estate at Haverhill, (if [278] the devise of such estates contained in the will was not revoked by the codicil) after providing for the maintenance of the devisee thereof, until a first son of the said Plaintiff Emily Frances Duffield shall attain twenty-one years; or in failure of such son, till a daughter shall attain that age, or be married with consent according to the will? Sixth, to whom do the intermediate rents and profits of such of the testator's freehold estates as are effectually devised by his codicil, to the son of the Plaintiff Emily Frances Duffield, who shall first attain twenty-one years and change his name to Elwes, until such events take place, belong? And it was ordered, that all proper facts necessary to bring such matters in question, should be stated in the said case: And it was ordered,

that it should be referred to the said master to settle the said case, if the parties differed about the same. And, etc. (declaration as to *donatio mortis causa*). And it was ordered, that the copyhold estates of the said testator, (other than his copyhold estate at Southwood Park) and the leasehold estates of the said testator, should be sold, with the approbation of the said master, to the best purchaser or purchasers that could be got for the same, to be allowed of by the said master: And it was ordered, that the money to arise by the said sale should be paid into the bank, with the privity of the said Accountant-General, to be there placed to the credit of this cause, as follows: viz. such part thereof as should arise by sale of the testator's said copyhold estates, to the account of monies arising by sale of the said testator's said copyhold estates, and such parts thereof as should arise by sale of the said testator's [279] leasehold estates, to the said account, "the testator's personal estate," subject to the further order of the Court: And, etc. (receiver:) And, etc. (reference as to maintenance of infants, etc.) And the Court reserved the consideration of the question relating to the sum of £50,000 three per cent. consolidated bank annuities, and of the several questions thereinbefore directed to be sent for the opinion of the judges of His Majesty's Court of King's Bench, until the judges of the said Court should have returned their certificate; and also reserved the consideration of all other further directions, and of the subsequent costs of this suit, until after the master should have made his general report; and any of the parties were to be at liberty to apply to the said Court, as there should be occasion.

The Respondent Amelia Maria, the widow of George Elwes, on the 3d day of July, 1824, intermarried with the Respondent William Hicks. Previous to that marriage, an indenture of settlement, dated the 3d day of July, 1821, was executed, whereby all the annuities, and other property which the Respondent Amelia Maria Hicks was possessed of or entitled to, as a provision made for her by her late husband George Elwes, were assigned to the Respondents Robert Greenhill Russell, and George Spencer Smith, upon the trusts therein mentioned, for the benefit of the Respondents Amelia Maria Hicks and William Hicks. In consequence of this arrangement, the Appellants on the 2d day of August, 1824, exhibited their supplemental bill in the Court of Chancery against the Respondents Robert Greenhill Russell, George Spencer Smith, [280] the Reverend William Hicks and Amelia Maria his wife, as Defendants, stating the original suit and decree, and proceedings, and the marriage of the Respondents William Hicks and Amelia Maria his wife, and the indenture of settlement made upon their marriage; and praying, that the Appellants might have the benefit of the original suit and proceedings, and that the decree and proceedings, whether by way of appeal or otherwise, might be carried on and prosecuted as well against Robert Greenhill Russell, and George Spencer Smith, as against the Respondents William Hicks and Amelia Maria his wife, in respect of their new interests in the matters in question in the suit, and for general relief.

To this supplemental bill, the Defendants Robert Greenhill Russell, George Spencer Smith, William Hicks and Amelia Maria his wife, appeared, and put in their answers, admitting the material facts stated in the supplemental bill. The Plaintiffs entered into evidence to prove the marriage of the Defendants William Hicks and Amelia Maria his wife, and the said indenture of settlement made on that occasion. The supplemental suit came on to be heard by consent, before the Right Honourable the Master of the Rolls, on the 13th day of August, 1824, when his Lordship was pleased to order and decree, that the former decree, bearing date the 17th day of April, 1823, and the several proceedings should be carried on and prosecuted, and the accounts and inquiries thereby directed, taken and made between the said parties to the said supplemental suit, in like manner as thereby directed as to the [281] parties to the former suit, with directions as to costs and taking accounts, etc.

The master made a separate report of the testator's debts and legacies, dated the 2d day of December, 1824, which was confirmed by order, dated 9th December 1824.

On the 16th December, 1824, he made his separate report respecting the maintenance to be allowed for the infant Respondents.

By an order of the Master of the Rolls, bearing date the 18th day of December, 1824, the master's report of the 16th of the same month was confirmed; and it was ordered that the sum of £2000 a year, etc.

The payments for the maintenance of the five infant Respondents were made agreeable to the last mentioned orders.

On the 14th day of July, 1825, the Respondent Henry Duffield, another son of the Appellants, was born, who being the second living son of the Appellants, was the presumptive devisee of the Southwood Park and Haverhill estates, devised by the testator's will, and also, as a child of the Appellants, entitled to a share of the testator's residuary personal estate, and to have maintenance allowed him out of his expectant property.

The Appellants on the 9th day of December, 1825, filed a supplemental bill in the Court of Chancery against the Respondent Henry Duffield as a Defendant, stating the original and former supplemental suits, and the decrees and proceedings had therein, etc. and the birth of the Respondent, and his claim on the matters in question; and praying that the Appellants might have the benefit of the original and former sup-[282]-plemental suits and proceedings; and that the decree and proceedings, whether by way of appeal or otherwise, might be carried on and prosecuted against the Respondent Henry Duffield.

To this supplemental bill, the Respondent Henry Duffield appeared, and put in his answer by his guardian, thereby claiming all such rights and interests in the testator George Elwes's real and personal estate as he was entitled to, and submitting the same to the protection of the Court. This supplemental cause came on to be heard upon bill and answer, before the Master of the Rolls, on the 17th day of December, 1825, when it was ordered and decreed, that the former decrees, bearing date the 17th April, 1823, and the 13th August, 1824, and the several proceedings, should be carried on and prosecuted, and the accounts and inquiries thereby directed, be taken and made between the parties to that supplemental suit, in like manner as thereby directed as to the parties to the former suit; and after directing the taxation and payment of the costs of that supplemental suit to that time, the consideration of all further directions, and of the subsequent costs of that suit, were reserved in like manner as the same were reserved by the former decrees; and any of the parties were to be at liberty to apply to the Court as there should be occasion.

In pursuance of the Vice-Chancellor's decree of the 17th April, 1823, a case was prepared for the opinion of the judges of the Court of King's Bench; that case contained a statement of the facts, except that, to avoid the impropriety of [283] proposing to a Court of common law, a question concerning the devise of a mere trust estate, the ultimate limitation of the manor of Marcham, and the freehold hereditaments comprised in the indenture of settlement, of 7th October, 1802, made to George Elwes in fee, in the event of the Appellant Emily Frances Duffield marrying without his consent in writing, was described in the case to be a use capable of being executed in possession by the statute, and not a mere trust estate as the settlement makes it. The questions in the case were those directed by the Vice Chancellor's decree, as before stated.

In the sittings after Easter Term 1824, the case was argued before three of the judges of the Court of King's Bench, (in the absence of the Lord Chief Justice) who certified their opinion thereon to the Court of Chancery, as follows:

"This case has been argued before us by counsel. We have considered it, and are of opinion,

"1st. That the devise of the freehold part of the estate at Southwood Park, and of the freehold farm and estate at Haverhill, contained in the will, is not revoked by the codicil.

"2d. That the manor of Marcham did pass under the residuary devise contained in the testator's will, and that such devise was revoked by the codicil.

"3d. That the manor of Marcham did pass under the codicil to the first son of the Plaintiff Emily Frances Duffield, who shall attain twenty-one years and change his name to Elwes.

[284] "4th. That the estate at Withersfield and Haverhill, purchased after the testator made his will, passed under the devise in the codicil to the first son of the Plaintiff Emily Frances Duffield, who shall attain twenty-one years and change his name to Elwes.

"5th. That the surplus rents and profits of the said copyhold estate at Southwood Park, and of the said freehold estate at the same place, and of the said free-

hold farm and estate at Haverhill, after providing for the maintenance of the devisee thereof, belong to Abraham Henry Chambers, the surviving trustee under the will of the said testator, until a first son of the Plaintiff Emily Frances Duffield shall attain twenty-one years, or in failure of such son, till a daughter shall attain that age, or be married with consent according to the will.

" 6th. That the intermediate rents and profits of such of the testator's freehold estates, as are effectually devised by his codicil to the son of the Plaintiff Emily Frances Duffield, who shall first attain twenty-one years and change his name to Elwes, until such events take place, belong to Abraham Henry Chambers, the surviving trustee under the will of the testator.

" J. Bayley. G. S. Holroyd. J. Littledale."

Upon the return of this certificate, the causes came on to be heard on the 26th day of April, 1826, before the Vice Chancellor, upon further directions: and on the 29th day of April, 1826, [285] a decretal order was pronounced, whereof the declaration and mandatory part is as follows:—

This Court doth declare, that the said certificate of the judges of the Court of King's Bench is hereby confirmed, as to their answers to the first and second questions proposed in the said case: And as to the matter of the third, fourth, fifth and sixth questions, this Court doth declare, that the equitable estate and interest of which the said testator George Elwes died seised or entitled to in the manor of Marcham, and the other freehold hereditaments comprised in the said settlements of the 7th day of October, 1802, and the 15th day of October, 1807, passed by the general devise in the said codicil of all the testator's freehold property, lands, tenements, and hereditaments.

" And this Court doth declare, that under and by virtue of the said will of the testator George Elwes, the Defendant George Thomas Warren Hastings Duffield, as the only son of the Plaintiff Emily Frances Duffield, by her husband the Plaintiff Thomas Duffield, living at the testator's death, took upon the testator's death, a presently vested equitable estate in fee, in the testator's freehold and copyhold farm and estate in Southwood Park, and freehold farm and estate at Haverhill, specifically devised by his will, subject to be divested by the death of the said George Thomas Warren Hastings Duffield under the age of twenty-one years, or by the birth of a second son of the Plaintiffs: And this Court doth declare, that upon the birth of the Defendant Henry Duffield, the second son of the Plaintiffs, the said equitable estate of the [286] said George Thomas Warren Hastings Duffield was divested, and the said Henry Duffield took a vested equitable estate in fee, in the said Southwood Park and Haverhill estates, subject to be divested, in the event of the said Henry Duffield dying, or becoming neither the second nor only son of the Plaintiffs, before he attains the age of twenty-one years." And in taking the account directed by the decree, of the rents and profits of the testator's freehold and copyhold estates accruing since his death, this Court doth order, that the master do distinguish which of such rents and profits arose from the testator's freehold and copyhold farm and estate in Southwood Park, and his freehold farm and estate at Haverhill, specifically devised by his said will: And it is ordered, that the master do also distinguish what part of the rents and profits of the said specifically devised estates, accrued previous to the birth of the Defendant Henry Duffield, and what part thereof has accrued since that time. " And this Court doth declare, that such of the said rents and profits as accrued before the birth of the said Henry Duffield, belong to the said George Thomas Warren Hastings Duffield, subject only to the allowance for his maintenance directed by the said will, and that such of the said rents as accrued since the birth of the said Henry Duffield, belong to the said Henry Duffield, subject only to the allowance for his maintenance directed by the said will." And this Court doth declare that the devise of the said testator's residuary freehold estates to trustees, made by his will, is wholly revoked by the said codicil. " And this Court [287] doth declare, that under and by virtue of the said codicil, the Defendant George Thomas Warren Hastings Duffield, the eldest son of the Plaintiff Emily Frances Duffield, upon the testator's death took a presently vested legal estate in fee, in all the testator's freehold property, lands, tenements, and hereditaments (except only the said Southwood Park and Haverhill estates, specifically devised by his said will) subject to be divested

in case of the death of the said George Thomas Warren Hastings Duffield under the age of twenty-one years, but without prejudice to the question, how far such estate may be affected in case the said Defendant George Thomas Warren Hastings Duffield should not, on attaining his age of twenty-one years, change his name for that of Elwes: And this Court doth declare, that the rents and profits of the said freehold property devised by the said codicil, accrued since the said testator's death, belong to the said George Thomas Warren Hastings Duffield." And in taking the said account directed by the decree, of the rents and profits of the testator's freehold and copyhold estates accrued since his death, it is ordered, that the master do distinguish which of such rents and profits arose from his said freehold property devised by his said codicil. And this Court doth declare, that the direction in the said will, that the trustees thereof should out of the produce of the testator's residuary real and personal estates, purchase or set apart the sum of £50,000 3 per cent. consolidated bank annuities, is to be considered only as a charge on the said residuary fund; and that the said testator [288] not having, after the execution of his will, made any settlement whatever of the manor of Marcham, the said charge or sum of £50,000 bank annuities, is not to be raised, but sinks into the said residuary fund, for the benefit of the persons entitled to such fund. And, etc. (costs and reservation of further directions.)

This decretal order was signed by the Lord Chancellor and enrolled.

The appeal was directed against so much of this decretal order as is printed between inverted commas.

For the Appellants: Mr. Sugden and Mr. Longley.

Mr. Sugden: The testator clearly did not intend the Marcham estate to pass under the residuary clause of the will. It thereby appeared that he intended to dispose of it otherwise. For there is a provision in case there should be four children, to raise £50,000 for the person who would be entitled to the Marcham estate, under a settlement then intended to be made. The obliteration of the will applied only to the direction to sell; not to the trusts as to the purchase money. It is found as to the Marcham and Withersfield estates, that the surplus rents passed under the residuary clause in the will: that is the nicest point that ever was decided. The Court held, that although the estates purchased after the will, could not pass by it; yet as the codicil republished the will, the residuary clause in the will passed what was not disposed of by the codicil. No case is to be found in support of the [289] doctrine, that a codicil containing a devise of after purchased lands shall republish a will, so as to pass by the will an interest which is not disposed of by the codicil. As to the Southwood and Haverhill estates, the devise is to trustees, in case there should be only one son who attains twenty-one; if two, then to the second of such sons; if no sons, then to daughters who should attain twenty-one or marry.

The declaration is, that the eldest son on the testator's death, took a vested estate, liable to be divested; and that on the birth of the second son, that son took a vested estate.

There might be a limitation constructed with great care, by which, what the Vice Chancellor says has been done, might be done. There might be a devise in tail, with a proviso to shift the uses from time to time, till the estate was barred. It might have been done by executory devise, though with great difficulty: thus ——— to the eldest son in fee, and if he should have a brother born in his life time, then to the second son. But it would be necessary to make a great many provisions with respect to the failure of issue. How is the second son here to take? not by description; for he does not answer the description till twenty-one. When can it be said that the description is answered? Supposing there were no son, what is to be done? What daughter is to take? Supposing the eldest daughter died under twenty-one, or that a younger daughter marries before the eldest attains the age of twenty-one? Whenever the estate is divested, you are, according to this declaration, to give it to a person who does not answer the description. Who can say [290] that the second son is more entitled than the eldest? for the eldest after all may be the only son when he attains twenty-one.

You are therefore taking it away from one who may be entitled, in favour of one who may never be entitled.

The eldest son's estate can never be divested, if it be vested till a second, or some other son attains twenty-one.

But it is to be divested in the event of his becoming neither the second nor the only son.

Then is an eldest daughter to take a vested interest?

There are cases, undoubtedly, in which what has seemed to be contingent, has been held to be vested: those cases, however, have no application here. So much for the estates given by the will: now for the codicil.

Here the devise is to the first son who shall attain twenty-one, and shall change his name to Elwes. Who is here intended to take? The testator did not like the name of Duffield, and chose that his own name should go with the estate. The first son might not attain twenty-one, or he might not choose to change his name: any other son might first take the name. The reservation of the question, as to the necessity of taking the name, is avoiding the difficulty: not deciding it. Is not taking the name as much part of the description as attaining twenty-one? One is as much a branch of the description as the other. Supposing Mr. Duffield was to take the name of Elwes, and have a son born afterwards; would that son take upon his birth? It must be now decided what is the effect of that provision, [291] of which the Vice Chancellor has reserved the consideration?

The decisions on which this decree was founded, are not applicable (*Bromfield v. Crowder*, etc.): where there is a devise to A. if he attains twenty-one, and if not over; it has been held that the devise is immediate. The only question is, whether the condition is precedent or subsequent? The object in those cases is certain: but here it is to one of a class. You can never tell who is to answer the description. Those cases all turn upon the devise over. The other class of cases is, where the devise is to A. until B. attains twenty-one, and then to B. Those cases are cases of exception out of the gift and turn upon the adverbs of time, "when, until," etc. Suppose I devise to my first daughter who shall marry! no unmarried daughter could take.

The decision in Grant's case (10 Rep. 50), was represented to have been a decision that the estate was vested: but that was not so. The reason why the estate was held to be barred was, that the statute of fines enables the party to bar a possibility. There the person was in *esse*. He was ascertained and described in the will.

In the *habendum* the words when he shall attain twenty-five were omitted: yet there being no devise over, it was held that he took only a possibility. It is an express decision that upon a devise to A. when he answers a particular description, he can take nothing in the mean time. The Vice Chancellor relied on Spring and Caesar (1 Roll. Abr. 415). He said it shewed that the event being collateral, did not prevent the estate from vesting: that case [292] really has no application to this. The decision proceeds upon the subsequent words, showing the intent against the first words. Why do you in this case give it to the first son? he does not answer the description: but he may answer the description, and therefore you give it to him. But when a second son is born you take it away: why? because he may answer the description, not because he does answer it. But he may not answer the description, and the first son may. That is the person to whom you first give it, and afterwards take it away. You give it him because he may answer the description; and he may still answer the description when you take it away. (*Dever v. Frank*, 3 M. and S. 25-6 Pri. 46, 8 Tau. 571.)

The King's Bench has held that the will was republished by the codicil, and passed all the interest undisposed of expressly by the codicil; but the trusts upon which the property was devised to the trustees were revoked, and the will contained an express devise of all the estates to other purposes. How then can it operate as a republication for this purpose? But it is not material to argue this question, for the King's Bench has only decided what is the legal devise, leaving the beneficial interest undisposed of. Now the trusts being revoked by the codicil, the rents remain undisposed of.

With respect to the declaration of right by the Vice Chancellor, he has reserved one of the principal questions, which ought to have influenced his decision. He has reserved the question as to the effect of the devise not taking the name of Elwes: so that he is to take the estate, leaving [293] it in doubt whether he will ever answer the description.

With respect to the Southwood and Haverhill lands, the estate is given to the eldest son: why? because he answered the description? no, he did not answer it, but he might answer it. Then the estate is taken from the first son, to give it to the second: why? because he answered the description? no, because he may. Then suppose the second son dies, is the first son to take the estate again?

Lord Eldon: The maintenance is out of the estate, to which the son is *presumptively* entitled, not to which he is entitled. I take it a person is said to be presumptively entitled to that to which he is not actually entitled, but may become entitled.

For the Appellants: The question which is reserved, is a part of the description. What is the construction of the will, if the estate is to go to daughters? Is a daughter to take whether she marries or not, or marries with or without consent? so that this construction totally defeats the intention: and it is equally against the rules of law and the decisions. Grant's case cited in Lampet's case (10 Rep. 51). It was said that the decision in Grant's case, proceeded upon the ground that the estate was vested; had it been vested, there would have been no question. There is a case, in which it has been held, that a devise to A. at twenty-one without more is not executed. All the cases are where there is either an intermediate estate or a devise over. Boraston's case is of the first class. It was held that the word "when," had merely [294] relation to the preceding estate. They are mere adverbs of time, and not of contingency. Nobody can contend that the son of an eldest son dying under twenty-one would take in this case.

There is another class of cases, *Bromfield v. Crowder* (1 N. R. 313); the doctrine of shifting estates was there very much discussed. *Doe v. Moore*, and many other cases. In all those cases there was a devise over. It is there held that it is a condition subsequent. They all depend upon the devise over. There is neither decision nor declaration that a devise to A. at twenty-one is not contingent. He does not answer the description before that age. Then it is impossible to say which child will be entitled till one has attained twenty-one. It is impossible to produce a case, in which the estates have been permitted to shift, in the way in which they have been made to shift here. In order to make estates shift, very nice provisions are necessary, *Driver v. Frank* (3 Maule and Sel. 25).

Upon this point I have the opinion of the King's Bench with me. The Vice Chancellor has declared an opinion decidedly the contrary. *Stevens v. Stevens* (Forr. Rep. 228), shews that where there is an executory devise, the intermediate rents go to the heir at law. In *Bullock v. Stones* (2 Ves. Senr. 521), it was held that a devise to A. when he should attain twenty-one was contingent; but that as A. was to be maintained out of the rents, the estate was to be held vested in the heir.

In the argument below, the two classes of cases depending upon adverbs of time and devise [295] over were cited. *Spring v. Caesar* was relied on below, to shew that it would make no difference upon the circumstance of contingency, whether it was the party attaining twenty-one, or any other event.

Lord Eldon: In that case it seems to have been held it was a present estate in fee, to be melted down to an estate for life, if A. did not pay 10s. on a given day.

For the Appellants: The clause providing for maintenance is a strong corroboration of our argument, speaking of the shares as presumptive shares (Fearn's Exec. Dev. 547).

Mr. Longley: The surplus rents of the Southwood Park estate result to the heir at law. They do not go to the presumptive devisee, because the devise is executory; and such devisee's interest in the intermediate rents is limited to maintenance merely.

Maintenance given out of interest does not vest a personal legacy. *Pulsford v. Hunter* (3 Bro. C. C. 417), *a fortiori* maintenance out of rents shall not vest a real estate devised before the time appointed, or deprive the heir of his rights.

The surplus rents do not go to the eldest son under the devise in the codicil. The claim has never been made by the eldest son; and the answers of the judges to the first and fifth questions, decide it against him.

They do not pass under the residuary clause in the will. General words are not always of universal operation. *Strong v. Teate* (2 Burr. 912); *Roe d. Helling v. Yeud* (2 New Rep. 214); *Roe d. James v. Avis* (4 T. R. 605); *Goodtitle v. Miles* (6 East, 494): [296] this is confirmed by the answer of the King's Bench to the first question.

Now all that is given by the will to the trustees under the residuary clause, is given in trust to sell. The testator has directed the application of part of the rents in question, in maintenance of the presumptive devisee. The surplus rents are of uncertain duration, and of variable amount, according to events which might happen; therefore no purchaser could be found for the surplus rents, and the testator could never intend they should be sold; consequently these surplus rents do not pass by the residuary clause in the will; and being undisposed of by the will or codicil, these surplus rents fall by way of resulting trust, to the testator's heir at law. This conclusion is consistent with the answer of the judges to the fifth question; who only find that the surplus rents belong to A. H. Chambers, the surviving trustee under the will; but do not declare the trusts, which it would have exceeded their province to notice.

As to the intermediate rents of the Marcham freeholds, of which the testator was seized at the date of his will, the effect of the clause of revocation in the codicil, taken singly, is expressly to revoke the direction to trustees to sell, contained in the will; and impliedly to revoke the devise itself to the trustees. This follows from the principle that trustees under a will, shall take no larger estate than is necessary, for the purposes of their trust (*Doe d. White v. Simpson*, 5 East, 162; *Glover v. Monkton*, 3 Bing. 13. See also *Morant v. Gough*, 7 Bar. and Cress. 206). That this is also the opinion of the judges [297] appears from the comparison of their answers to the second and sixth questions. This being so under this clause alone, no estate whatever in the Marcham freeholds remains in the trustees; and the clause of disposition contained in the codicil, gives only a future and executory interest to an uncertain devisee. This is executory, both as to the devise in the codicil, and the devise of the Southwood Park estate, contained in the will, according to all the authorities. Fearn's definition of an executory devise (*Exec. Dev.* 100); Ch. J. Bridgman's definition (Sir T. Raymond's Reports 83); Grant's case cited in *Hunt v. King* (Cro. Eliz. 610); *Stevens v. Stevens* (Ch. T. Talb. (Forr. Rep.) 228); a case where the devise closely resembled the devise in Mr. Elwes's codicil; Fearn's opinion in his Posthumous Works (p. 191). These authorities shew that both the devise of the Southwood Park estate in the will, and the general devise in the codicil, are executory.

The cases cited against us, do not disprove this position. *Spring v. Caesar* (1 Roll's Abr. 415) was much relied on by the Vice Chancellor in his judgment. That case is thus reported: "*Si A. Tenant pour vie et R. en reversion en fee covenant a lever un fine, et que ceo serra al use A. et son heirs, si R. ne paie 10s. al A. 10 Septemberis apres, et sil eeo pay, donque al use A. par vie, et apres al use R. en fee, en cest case cest paroll, (si, etc.) est un condition subsequent en new precedent, issint que A. ad un estate en fee tanque R. paie 10s.; et les subsequents parolls ceplaine l'intent ditte subsequent condition, scilicet, et sil eeo pay donque serra al A. par vie et [298] puis al use R. en fee, que montee l'intent detre que A. aura un estate en fee tanque les 10s. pay." Here the words "*si, ne,*" if not, are equivalent to "*nisi,*" or unless. So the limitation will stand—To the use of A. and his heirs, unless R. shall on the 10th September next pay 10s.; but if R. shall then pay 10s. then "*donque,*" i.e. from that time, the fine is to enure to the use of A. for life, with remainder to R. in fee. So the condition was plainly subsequent, and the estate first limited intended to vest immediately. It is to be observed, that as far as regards the fee first limited to A. the condition was subsequent; but with respect to the estate for life of A. and the remainder to R. in fee, the condition was precedent: and in order to make this case an authority to justify the decision in *Duffield v. Elwes*, it should have been shewn, that the estate for life to A. and the remainder to R. vested immediately, before the 10th of September, and before any payment of the money. In effect, the words "*si R. ne paie 10s. al A. 10 Septemberis apres,*" which come between the limitation to A. and his heirs, and the operative words of condition, viz. "*et sil eeo pay donque, etc.*" merely have a prospect towards the condition subsequent which follows; as if the limitation had been to the use of A. and his heirs, *subject to the condition of defeasance hereinafter mentioned*, that is to say, provided that if R. shall pay to A. 10s. on 10th September next, then the estate shall be to A. for life, remainder to R. in fee.*

The case of *Edwards v. Hammond* (2 Show. 398, and 1 New Rep. 324, in Notes) admits of a similar explanation; there is a clear present firm [299] tation, with a notice of a clause of defeasance to follow.

The class of cases in which there was either a devise over in case of the death of the first taker under twenty-one, or a present disposition of the rents and profits until he attained twenty-one, are distinguishable from the present. Thus in *Boraston's case* (3 Co. 19), there was a devise of a chattel interest in the rents and profits, until Hugh Boraston should attain twenty-one; and Hugh Boraston was mentioned by name, and described as the heir in remainder. In *Doe v. Moore* (11 East, 601), the devise was to John Moore when he attains twenty-one; but in case he should die before twenty-one, then over to James Moore his brother. So there the devisee was named, and there was a gift over, in case of his death under twenty-one. In *Bromfield v. Crowder* (1 N. R. 313), the estate given to John D. Bromfield on attaining twenty-one, was, in case of his death under twenty-one, given over to C. Bromfield; and Ch. J. Mansfield thought the *intention* was to give a vested estate to the first taker immediately. *Doe v. Nowell* (1 Maule and Sel. 327), was a devise *in remainder* to all the children of J. Roake equally at twenty-one; but if only one child attains twenty-one, then to such child at twenty-one; and in case J. Roake shall die without issue, or such issue shall die before twenty-one, then over. So there was a gift over upon death under twenty-one. The same rule of construction applies to the cases of *Goodtitle v. Whitby* (1 Burr. 228); *Mansfield v. Dagard* (1 Eq. Abr. 195); *Doe v. Lea* (3 T. R. 41); and *Warter v. Hutchinson* (1 Barn. and Cr. 721).

[300] It has been much insisted on by the counsel for the eldest son of Mrs. Duffield, that "an event may be more or less probable, but cannot be more or less contingent;" this we admit; but the law itself in determining what shall constitute a legal contingency, does estimate the different degrees of moral probability. There are known and distinguished in law, *a potentia propinqua*, a near or common possibility; *a potentia remota*, a remote possibility; and *a potentia remotissima*, a very remote or most improbable possibility. The first of these degrees may make a legal contingency; the two latter cannot. All that we contend in the present case is, that the uncertainty of the person to take under the description assigned, is fully sufficient to create a legal contingency; and yet the events are not too remote in time or possibility, to form the basis of an executory devise.

The authorities clearly shew that the devise of the Southwood Park and Haverhill estates in the will, and the devise of the testator's general freeholds in the codicil, are both of them contingent and executory.

Supposing that the clause which revokes the direction to sell, leaves the estate in the trustees yet revoking the trust for sale, it revokes all the trusts declared upon the sale and sale monies; for it is only through the medium of a sale, that the freehold property is by the will, made applicable to the purposes of the residuary fund; and the maxim that "*qui destruit medium destruit finem*" (Lampet's case, 10 Rep. 51), must prevail; consequently the bare [301] legal estate remains in the trustees, without any trust declared; and the trust results to the heir at law, until the vesting of the executory devise shall divest both trustees and heir of any interest in the property.

The younger children of the Plaintiffs who are Appellants in the second appeal, concur with us in contending that these devises are executory; but they argue further, and the judges of the King's Bench, as far as we can conjecture from their answers, seem also to hold the opinion, that the codicil in some way or other, effected such a republication of the will, as to give the intermediate interest in the freeholds undisposed of by the codicil, to the trustees named in the will; we insist that this notion is erroneous, and that there is not in the present case any such republication as can by law have the effect ascribed to it.

Republications are of two kinds, expressed and implied. We admit the doctrine to be settled by a series of authorities, that the mere execution of a codicil in the requisite form for a devise of freehold estate, will, *without more*, effect an implied republication of a will. But we insist that such implied republication can never be set up against the words of a codicil expressly preventing or limiting that effect, upon the maxim that "*Omne expressum facit cessare tacitum*." A testator may limit the republication effected by his codicil to the estates already devised by his will, *Bowes v. Strathmore* (7 T. R. 482; 2 Bos. and Pull. 500), a codicil expressly confirming a will by date, will not set up the whole will against an intermediate codicil re-[302]-voking a part of that will, *Crosbie v. Macdonall* (1 Ves. 610). And a confirming clause in the conclusion of a codicil, cannot set up a trust in a will, revoked by the earlier part of the codicil, *Holder v. Howell* (8 Ves. 97).

To apply these principles to the present case—The testator George Elwes in the outset of his codicil, refers to his will by date, and revokes the direction therein contained to sell his freehold property: he then disposes of all his freehold property, lands, tenements, and hereditaments, by way of executory devise, bequeaths a leasehold house to his widow, adds a new executor, and concludes his codicil by saying, that he does thereby “ratify and confirm the aforementioned will and testament dated as aforesaid, except as is before excepted.” Therefore we have here an express clause of confirmation, or republication of the will, limited by an express exception. Every thing which by the earlier part of the codicil is excepted or taken out of the operation of the will, remains excepted at the conclusion and consummation of the codicil. No implication can be admitted to contradict this plain expression. Now by the operation of the clause of revocation contained in the earlier part of the codicil, there was excepted out of the will, the devise of the Marcham freeholds, or at any rate the direction to sell, and its dependent trusts; therefore by the just legal construction and effect of the codicil, the same exception continues in force: hence it follows, that the heir takes the intermediate estate, or a resulting trust of the [303] intermediate rents and profits of the Marcham freeholds.

As to Withersfield, being an after purchased estate, the will alone could have no operation on it; therefore the clause of revocation in the codicil could not affect it. The only clause affecting it, is the disposition in the codicil. This, however, is an executory devise, and partial disposition; therefore the part of the fee undisposed of descends to the heir, until the period when the executory devise shall become vested.

If it be said, that the confirming clause in the codicil republicates the will, and so makes the will affect the Withersfield estate, still the confirming clause confirms with the exception, and not only republicates the devise to trustees, but confirms the clause of revocation also; in which case the intermediate rents of the Withersfield estate, would fall precisely under the same line of argument as those of the Marcham freeholds, and belong like them to the heir at law.*

For the Respondent, the eldest son: Mr. Horne and Mr. Pemberton.

The argument on the other side is, that a party cannot take any interest, till he fully answers the description: our proposition is, that he can when the devise is to an individual when he attains twenty-one, or to a class who shall attain that age, whether the devise is immediate or in remainder: the parties *in esse* for the time being, who, if they attain twenty-one, would answer the description to take a present vested interest.

[304] As to the Southwood and Haverhill estates, there is by the will, a devise to trustees of the whole legal fee, then a devise to the eldest son, if only one, on attaining twenty-one; if two sons to the second; then there is a provision for maintenance out of the rents: it is said, indeed, that this is out of the property to which the devisee is presumptively entitled, but that is not so: presumptively applies only to the shares of personality. The effect then of this devise is to trustees, till a son shall attain twenty-one; then to the son, with a provision for maintenance in the mean time. Now this is the identical case of *Bullock v. Stours* (2 Ves. 521), which is supposed to be against us. There the rents were held to be given to the devisee, as soon as he came into *esse*: here the devisee was actually *in esse*.

But then it is said the estate cannot shift in the manner stated in the decree, and that it would require intricate limitations to effect this purpose, and *Devere v. Frank* is cited; but the only question is, whether the intention is apparent: if apparent, in the case of a will, it must take effect whether expressed in six lines, or six sheets of parchment: that was not disputed in *Devere v. Frank*. But the majority of the judges thought the intention not apparent, and the case was decided against the opinion of great judges.

It is then said, what would be the case if there were no sons, and the estate were to go to daughters, would they take vested interests? The answer is, that question does not occur. The conditions are perfectly different. In this latter case, there is no time fixed, which makes the distinction.

[305] Then as to the codicil. The devise is to the first son, on his attaining

* Mr. Rose and Mr. West appeared for the younger children, on whose behalf a distinct appeal was presented.

twenty-one and changing his name to Elwes. How would it be if the condition as to changing the name were omitted, would that circumstance make any difference? A devise to A. on attaining twenty-one, cannot be more contingent than a devise to him if he attains twenty-one, or when he attains twenty-one: but it is said according to the authorities this is executory. Now for this proposition not one decision is cited. Grant's (cited in *Lampet's Case*, 10 Rep. 50) case is the only one referred to. But that, though not an authority for the Respondent, is no authority against him. There the conveyance was to the use of A. when he attained twenty-five: before he attained twenty-five, he levied a fine to B., then he attained twenty-five and claimed the estate, and he was held to be barred. It is clear the decision must have been the same, whether he had an interest, or no interest. It seems from the citation in *Coke*, to have been assumed, that he had not an estate, but only a possibility, which was barred by the fine: it is stated, however, that no judgment was entered. But all that could be decided was, that he was barred, even if at the time of the fine levied he had no estate.

At the date of that case, the rule of construction now firmly established, had not been introduced. *Snow v. Tucker*, does not come within the principle for which we contend; but that was no decision upon the point: it was merely a decision, that a devise to a woman when she shall marry, is a good contingent devise, with a [306] declaration that the estate shall go to the heir in the mean time, which nobody disputes. There is no time limited, which makes all the difference.

These are all the authorities which have been cited against the Respondents. The others are cases in his favor, which the Appellants' counsel have attempted to distinguish; but unsuccessfully. If the rule be, as they lay it down, is it possible that it can be so destitute of authority?

On the other side: From *Boraston's* case downwards, there is one uniform current of decisions. It is said, indeed, that *Boraston's* case and the others of that class, depend upon the adverbs of time, and an intermediate estate: if that were so, it would apply to this case; there being a devise to the trustees till the devisee attains twenty-one. But this distinction has been exploded, as will appear by subsequent authorities. There are others which are not open to this supposed objection, as *Edwards v. Hammond* (1 N. R. 324, in not. 3 Lev. 432): where a surrender was made to the use of the surrenderee for life, then to A. at the age of eighteen; if he die under eighteen, then to remain to the use of the surrenderor. It was held that A. at fifteen had a vested interest. Was it not as impossible then to say, that A. under eighteen answered the description of the devisee, as to say, that here the Respondent under twenty-one answers the description? There was no intermediate estate; no devise over. The estate was to remain to the surrenderor and his heirs: which is just the same, as if there had been no limitation to him. This was a case of a specific [307] devisee named: but all the cases hold, that where there is a child born who answers the description, such a devise applies to him, as if he were specifically named.

In *Bromfield v. Crowder* (1 N. R. 313), the devise was to two for life, at the death of the survivor to A. if he should live to attain twenty-one, but in case he should die under twenty-one, to B. at twenty-one, if B. should die under twenty-one, to C. This is in truth the same case with the last; except that there is a devise over, which is said to make so much difference: yet that circumstance is not relied on: in fact, what difference can it make, unless the devise is to the heir, how can it afford any inference of intention? This again is a case of specific devisees.

Doe v. Moore (14 East 601), is the same in substance, but Lord Ellenborough's judgment is very important. The pressure of this case has been so strongly felt, that one of the Appellant's counsel has denied it to be law. But it has never been overruled nor questioned. It is said not to be supported by the authorities on which it rests; but that is a mistake. It is followed by the important case of *Doe v. Nowell* (1 M. and S. 327). That is the case of a devise to a class, and furnishes an answer to all the arguments on the other side. It was a devise to the children of A. when and as they attain twenty-one. There is not an argument against this decision, which would not apply to that. It was a devise to persons who should answer a particular description. How could any take who did not answer it? Was the estate to open and [308] shift from time to time, to vest and divest as children

were born and died? These are the objections to this decision. They all applied to that case, yet the judgment was against them; and that case was confirmed in the House of Lords (*Randall v. Doe*, 5 Dow).

It is true in that case there was a devise over; but that circumstance is no where the foundation of any decision. Fearn's opinion has been cited against us; but it is manifest that Fearn would have been of opinion against the decision in *Bromfield v. Crowder*. But it is remarkable that this distinction of a devise over, never occurred to him as of any weight, though he adverts to the distinction of an intermediate estate, which is now exploded.

Thus then stands the case as to the will, and as to the codicil also, unless it can be distinguished on the ground of taking the name.

With respect to the codicil, it is said, there is another and distinct condition, that the devisee is to take the name: they say that it is an uncertain act in itself, and that the thing being uncertain, the estate is contingent. For this they cite two cases: *Snowy v. Tucker* (1 Sid. 153), that a devise to a woman when she shall marry, is good as an executory devise. *Atkins v. Hiccocks* (1 Atk. 500), was the case of a bequest to a daughter when she shall marry with consent: the last case is one of personality, as to which the question is different from realty. Both these cases turn upon the circumstance that there is no time fixed. *Dies incertus conditionem facit*. When a time is limited at which the act is to be [309] done, it is the same thing as if the event must happen, as the legatee attaining twenty-one. This distinction runs through all the cases. In *Spring v. Casar* (1 Roll. Ab.), the reason given is, that a day is fixed for the payment: a condition that A. shall do, and for the doing B. shall pay, is a condition precedent; but a time fixed for payment will vary the construction (1 Salk. 171). Though in grants estates shall not be till the condition precedent is performed, yet it is otherwise in a will; for the will shall be expounded by the intent of the party, *Jennings v. Gower* (Cro. Eliz. 249). A condition to take a name, is clearly a condition subsequent: upon a devise to the second son of A. taking my name, and in default of such issue, to the daughter, it was held that a son who died at eighteen without taking the name, was entitled to the rents which accrued during his minority, *Trafford v. Ashton* (2 Vern. 661). Suppose the son had attained twenty-one, but died before he had assumed the name, leaving children? Suppose there had been no son born at the death of the testator, would the devise have been void as too remote, inasmuch as the attaining twenty-one must precede the taking the name? After all it is a mere question of intention; if the rule compels us to say he meant the sons to take before twenty-one, can it be said still he meant him first to change his name?

If the intermediate rents are not given to the devisee, they are given to the trustees upon the trusts declared. As to the Southwood and Ha-[310] verhall estates, the devise is to the trustees, of all the property, and the trusts are declared of all. As to the bulk of the estate for the son at twenty-one, as to the rest subject to maintenance upon the trusts of the residue, there is nothing afterwards to affect this disposition. As to the estates purchased before the date of the will, every thing is given to the trustees; the devise is revoked only as far as the codicil revokes it. There is no revocation of the devise by the erasure, but only of the trust to sell. The codicil explains how far that devise is revoked, only to the extent in which an interest is taken out of that devise for an eldest son. What is not taken from the trustees remains in them, except as far as this alteration extends, the codicil confirms the will. The residuary clause will pass any interest which the testator had at the time, whether he contemplated it or not. It is for those who would restrict the words, to shew a manifest intention to the contrary. The codicil makes the will speak from the date. Then how does the residuary clause stand? It is a general devise of all his property, not specifically disposed of by the will and codicil. *Goodtitle v. Meredith* (2 M. and S. 5); *Hulm v. Heygate* (1 Mer. 285). The trust to sell forms no part of the residuary clause so altered; if so, what becomes of the argument of intention arising from that circumstance? The same principle necessarily carries the after purchased estates. It is for those who would restrict the generality of the expression, to shew a clear intention to contradict it. That the testator expresses certain specific purposes for [311] which he makes his codicil is not sufficient to prove that he has not intentions more extensive.

Lord Eldon (29th June, 1827): The judges of the King's Bench appear in this

case to have been of opinion, that no son of the testator's daughter was entitled to the estate devised, until he should attain the age of twenty-one, and that in the mean time, the rents and profits belonged to the person having the legal estate, giving no opinion as to the question of trust, which was not within their jurisdiction. The Vice Chancellor differed in opinion from the judges of the King's Bench; and it is certain that the judge in equity may decide against the opinion of the Court to which he sends for information. Lord Thurlow on one occasion, not being satisfied, sent back a case to the King's Bench for a better opinion: the proceeding was unusual, and Lord Kenyon was angry; but the judges of the King's Bench unanimously gave a different opinion. I followed this precedent myself, in a case (*Wykham v. Wykham*, 18 Ves. 395) relating to the estates of Miss Wykham in Oxfordshire. Having sent to the Court of King's Bench to ask what estate was created by the words of an instrument, the judges certified that it was an estate tail. I then sent the case to the Court of Common Pleas; they certified that there was no estate at all. I was not satisfied with these opinions, and decided differently from both. In *Boraston's* case, it appears from the margin of the report, that there were then one hundred and seventy authorities upon the same subject: yet the circumstances of this case are not precisely similar to those of any preceding case. Here [312] the lands are given when the devisee attains the age of twenty-one, and not with a gift over, if he dies under that age; which latter form of limitation does not prevent the vesting of the subject devised. As the judgment stands, the eldest, though he should not attain the age of twenty-one, is held entitled to the rents and profits. Upon the birth of a second son, he, according to the judgment, becomes entitled, divesting the right of the first son. If the second son should die under the age of twenty-one, the right to the rents and profits shifts back again to the first son; and there may be ten sons in existence in the twenty-one years, who may each have some enjoyment; so under this process of shifting the right, daughters might take before the events prescribed by the will: the age of twenty-one, or marriage with consent; and according to the same doctrine, the remainder man might take the estate every other year.

Such being the case, I have conversed with other noble Lords on the subject; and this appears to me to be a question, which the House would not be justified in deciding, without calling on the judges for their opinions. It would have been a great satisfaction if I could have looked in this case only to the interest of the parties, but considering how few of these cases upon questions of vested or contingent interests have come before this House, and that it is the duty of judges to decide questions with a view to all other persons having similar interests, and affected by the same circumstances, and saying no more, than that I have great difficulty in acceding to the doctrines of the judgment in the [313] Court below, I cannot advise the House to proceed to judgment in this case, without having the opinion of the twelve judges, on the matters of law comprised in it. I therefore move, that the judges be summoned to attend, and that the case should be argued before them in the next Session of Parliament.

The Lord Chancellor agreeing in this opinion, an order was made accordingly; and the case was afterwards, in April 1828, argued before the judges; at the conclusion of which argument, Lord Eldon delivered the following opinion:

Lord Eldon (after stating the case sent by the Vice Chancellor to the Court of King's Bench): When this case was made for the opinion of the Court of King's Bench, it seems to have been assumed for the occasion, that the devisees in the will, which I shall have occasion to point out, were devisees of the legal estate. I take it to be perfectly certain, that the Court of Equity must itself decide upon the effect of trust devisees, and cannot call in the assistance of the learned judges of any of the Courts of Westminster Hall, by so stating the expressions of the will, as to propose to them the consideration of a testamentary instrument which shall amount to a devise of equitable estates. I take it to be extremely clear according to all the rules of practice, that the Courts of Common Law cannot decide questions as to estates upon trust; and when we look to the nature of those questions, perhaps it may be in some degree as well, that they do not. It is quite clear that a Court of Equity can decide a legal question, because the authority of a Court of Equity, its judicial authority, enables it not [314] only to decide questions of fact, not only to decide matters of evidence, but it has a right of itself, also to decide matters of

law : there are many cases, in which, having by the interposition of a jury ascertained the fact, it has proceeded to decide upon it. That a Court of Equity frequently calls for the assistance of the judges of the Common Law Courts, with respect to matters of law, is undoubtedly true ; but it may, if it thinks proper, assume the jurisdiction of deciding on matters of law, as well as matters of equity : and of course the judges of a Court of Equity, ought to know what is law, in order to make the application. I mention this circumstance, because we have heard of its being said, that such men as Lord Hardwicke and Lord Thurlow knew nothing about law : and some of the judges of later time, have thought they did sufficient to get rid of a decision in the Court of Chancery, by saying, that is nothing but Chancery practice.

These questions having been by the Vice Chancellor, referred to the Court of King's Bench, it is to be lamented, that the course of proceeding is such, when a case is sent from the Chancery Court to a Court of Common Law, that having to return again to the Court of Chancery, the Lord Chancellor, or the other judges sitting in that Court, has not the benefit of knowing on what grounds it is, that the judges have decided the question. Whether that can be altered or not I do not know : I think it is extremely desirable it should be. But we cannot expect the Common Law judges will be very hasty in consenting to alter the practice, unless we, sitting in Courts of Equity, will alter our practice, when they are [315] called upon to alter theirs. There is nothing so mischievous as sitting in an Equity Court, to find out that you have asked the Common Law Court a question, or have sent an issue to a jury, without first of all seeing that you have so far explained the object of the question, that the answer to it will enable you to decide the law and the fact. It does not appear to me, that a Common Law Court should be burthened with our equity cases, unless in questions where it is expedient and necessary that their assistance should be called for. It is the more important for other reasons that the judge in equity should look at the sort of cases which he sends to a Common Law Court, in order to assist his judgment, as to what is law in a certain case ; because if he does not do so, or if he does not, when it becomes a case for a jury, express the grounds of his own difficulties, and state with what view the case is sent to the Common Law Courts, it is impossible that the Common Law judges should afford him effectual assistance ; and if they do not, permit me to say that is his own fault in many cases.

Having had the misfortune of being in the Court of Chancery about four and forty years, I can speak from my own experience, from the time of Lord Bathurst, that we have had cases brought back from the Common Law Courts, where it was no fault of the Common Law Courts ; but where they certified their opinion on the precise question referred to them, without its being mentioned to those Courts, or their being able from the case sent to them, to discover what were the difficulties that the judge in the Court of Equity had, at the time when he sent the case for their opinion. I [316] could refer to several cases, in which the Courts of Common Law have determined, and rightly determined on that which was stated to them, but where they have determined the points submitted to their judgment, without the counsel who argued the case, ever themselves knowing what were the points on which the Lord Chancellor, or the Master of the Rolls, or the Vice Chancellor desired assistance, without their knowing what was the difficulty of the learned judge in Equity. I say, therefore, that where a Court of Equity in special cases, calls for the benefit of a trial by jury, with respect to a fact, or for the benefit of the opinion of the Common Law judges in matters of law, it is time and expence thrown away, unless the matter is put into such a shape, that it may be perfectly understood, what it is that the Court of Equity wishes to have decided. I cannot find from any report of this case, what led to the statement of those questions for a Court of Common Law. The case was heard in the Vice Chancellor's Court, and these questions were framed for the opinion of the Court of King's Bench, but before this House we have none of the detail (here the answers of the judges were stated).

The answer to the question, (relating to the devise to the trustees) is the only answer which it was competent for a Court of Common Law to give, namely, that the devise of the legal estate being in trustees, the trustees were to have the rents and profits. What equitable dispositions were made of those rents and profits, it was not for a Court of Common Law to consider or to de[317]termine. They state that the rents and profits belonged to the trustees, until the first son of the Plaintiff Emily Frances Duffield should attain twenty one years, or in failure

of such son, or his attaining that age, till a daughter should attain that age, or be married with consent, according to the will; that is, they being the legal holders, would according to the effect of this as being a legal devise, take the rents and profits; and that is the only answer which they could give to a question so framed.

With respect then to the intermediate legal rents and profits, it only states, they are effectually devised by his codicil, until the son of the Plaintiff Emily Frances Duffield shall attain twenty-one years and change his name to Elwes, or until the events which are referred to take place; and that they belong to Abraham Henry Chambers the surviving trustee, under the will of the testator.

This information having been conveyed from the Court of King's Bench to the Court of Chancery, that Court (here the declarations of the decree were stated) made a declaration, the result of which is, that the eldest son took a vested estate, subject to be divested by his death under twenty-one, or by the birth of a second son; and that the second son took a vested equitable estate in fee on his birth, but that that estate was subject to be divested in case of the second son dying, or becoming neither the second or only son. The declaration does not go on to state, that if it should come to pass that the second son died, leaving an eldest son the only [318] son, the estate must go back again; and if a third son was afterwards born, the estate would be again divested, and go to the third son; and so the estate would be changed for twenty-one years as often as events of such a nature could happen.

Taking it to be real property and legal estate, if on the opinion of the Court of Common Law being expressed, the conscience of the judge in the Court of Equity is not satisfied, it is his duty judicially to differ from them, and to declare that difference. My memory calls back instances, in which the case has been sent a second time for the opinion of a Court of Common Law. According to the practice of this House, you cannot put to the judges any question directly upon the point before the House; that is, you cannot ask them such a question, as whether the opinion of the judge in the Court below, is right or wrong; nor can you point to them the question which the learned judge put to himself, when he decided the cause. Whether this is a wise mode or not, the practice of this House is, so to frame the state of facts, and so to raise the question upon that state of facts, as to enable you to find doctrine out of the answer applicable to the case before you. It is established also, as the practice of this House, that you cannot ask the judges any question, with respect to equitable estates. It becomes therefore necessary, in order to bring us to the point, that a statement should be made and delivered to the judges, before you can reasonably ask their opinion upon the effect of this will; that statement I will cause to be drawn out, with a review of the case, which questions may be delivered to the judges, in order that [319] they may have, upon the case so stated, an opportunity of considering the questions which it presents for the decision of this House.

With respect to the devise of the Southwood Park estate, it will be in substance, leaving out the names of the trustees, "I give and bequeath all that my freehold and copyhold farm," etc. (here the devise of the Southwood estate was stated). He says nothing about third sons, except by implication, providing for the third, fourth and fifth sons. So likewise with respect to daughters, all he says is, "in case there shall be no son," etc. "then to such of the daughters," etc. By altering the frame of the devise, with respect to the Southwood Park farm and estate, so as to make it a devise without the intervention of trustees, the case for the opinion of the judges, may present it as the devise of a legal estate throughout.

With respect to the part of the will, which adverts to the maintenance of the children, and the fund still existing under this will, except so far as the object of it may have been effected, the fund for children, and the maintenance of children, that clause applies to the rents and profits of Southwood and Haverhill, with reference to the maintenance of such child or children, as might be entitled to that property. It is necessary that, on this part of the case, it should be stated to be a power unconnected with a trust; a power given to A. and B. to apply the fund to be raised (here the power was stated). The observation that arises upon this provision, I shall state to you presently. The question being considered as arising on the legal estates, I [320] propose to address some question, if it becomes necessary, to the judges, with respect to the point what is to be considered either as to the substance of the devise, or as to the undisposed rents and profits, if there are undisposed rents and profits, under the residuary clause in this will.

I have before stated, that the effect of the declaration in the Court of Chancery is, that the first son of Mrs. Duffield is to take, as I understand it, a vested interest in the property, subject to be divested in case of the birth of a second son; that the effect of the destination in the will is, that if the second son dies, and a third son is born, the existence of the third son divests the property out of the first son again, unless you should be of opinion, that the third son is not at all provided for. It appears to me, I confess, that by implication the third son is provided for, but the effect will not be this, if the first son takes immediately upon the interest of the second being divested. If that second son should die before the third son is born, the estate must go back; and then if a third son comes into existence, the estate having so gone back to the first son, would be divested out of him again, and go to the third son; the change of interest taking place according to those events which may occur.

There is one leading question, therefore, to be put upon this part of the case: whether according to law, (for the equity must be left out,) it is the true construction of this will, that the first son took a vested interest in the estate before he attained twenty-one? If you are furnished with the opinions of the judges on that point, you will be able by your own reasoning, to apply the [321] principle of that decision, to all the subsequent parts of this clause—Whether a second son being born divested the estate, and a third son coming into being after the second son died, again divested it out of the first son? and so on, going backwards and forwards. If in the case of the first son that might take place: if it be true, that the first son takes the estate on his birth till it be divested on the birth of the second son, the consequence must be the same, as it appears to me, with respect to all of them.

On this part of the case, I will take the liberty of stating, and calling your Lordships' attention particularly to the clause in the will. It has been argued on a former occasion in this House, that the words imported that there was a vested interest on the birth of a son. I confess that after all I have learned in the course of a long professional life, I should have argued it just the other way: that the words presumptively do not mean now, but at a future time. At the same time, these words may be qualified by other words, that may be found in the will. There is one question which it may be desirable to ask the judges, with reference to this matter, because the maintenance of a third son being to be provided for out of the trust devise, that maintenance is devised out of the rents and profits of the estate, which is either vested or not vested, at the birth of that son. The maintenance undoubtedly, may very well come out of the rents and profits of an estate, when the estate itself is not vested in the son; but you will have to consider this. What says the will, with reference to the application of maintenance, in case a second son should be born? If that second son [322] should be born, there would be a son entitled. Then how are you to find the maintenance of a son presumptively entitled? and how is a maintenance to be given to the eldest son, who is no longer entitled? Then again, supposing the second son to die, the eldest son will again be presumptively entitled; and then, though during the existence of a second son, you could not take a maintenance for the eldest son, the eldest son, who would be unprovided with a maintenance during the life of the second son, would become entitled to a maintenance out of the rents and profits of those estates, on the decease of the second son. Then you have a third son comes into existence, and that third son coming into existence, he is one of the objects of the devise, he would become the person presumptively entitled; the consequence of that would be, that there would be a provision for his maintenance; but if the eldest son was under the age of twenty-one, there would be no provision for his maintenance. It must be considered, and that may furnish an answer to some arguments which might be raised, that the fund is not constituted of the rents and profits only of this estate, but a fund constituted by the use of other property, which is comprised in the disposition, with reference to which, this provision for maintenance is made. If then, we look at this other property, perhaps we may be allowed to look at it in reference to the maintenance of the eldest son, if he should lose his maintenance by the birth of a second son. A question, therefore, should be put to the judges, with respect to that point also, in order that we may be furnished with their opinion, and one general question, taking [323] this as a devise of legal estates, as I should by the alteration of the will state it, in order that the judges may understand the statement and the questions together.

Another question will be, to whom do the rents and profits *ultra* the maintenance (to whatever son the maintenance is to be paid) belong, until the first son and second son, and so on, attain the age of twenty-one years? If you should be advised that the decree is wrong, in stating that the estate vested on the birth of a first son, the answers to two or three questions of that sort will assist you in respect to the Southwood estate. If the rents and profits do not go with the body of the estate, they must be regulated by some principle according to the will, or they must be embodied in the devise of the estate: some way or other they must be disposed of.

Then with respect to the other property as to the devise in the codicil, one question will be, what is the effect of the codicil on the dispositions in the will? Another question will be, as to its revoking or not revoking? Another question will be, stating this also as a matter of legal enquiry, whether the codicil destroys the effect of the will, with respect to the freehold property, taking it out of the trustees or not? If it leaves the land itself as belonging to the trustees, then under the codicil, it would be an equitable estate: if on the other hand, it destroys both the power of sale, and the estate which was given to the trustees, then it would be a legal estate under the effect of the codicil: and that question might arise, because although by the codicil he affects the property in the way supposed, yet he does not utter [324] the words, I devise this property immediately, so and so, but he says, my meaning is only to revoke that part of the will, whereby I direct the sale of my freehold property, not in express terms revoking the devise to trustees. When he comes to make the devise, he does not devise the property immediately to them, but gives it to a son or daughter on their attaining the age of twenty-one years, and taking his name of Elwes. There will be questions, whether the estate is given to the trustees for twenty-one years, or whether the estate is given to the first son presently, as the decree understands it to be divested in case he does not attain the age of twenty-one, and does not change his name to Elwes: or whether until he has attained the age of twenty-one and changed his name to Elwes, he has an interest in the property connected with the beneficial interest in the property undisposed of during infancy? and there being property undisposed of, according to the will and codicil, to whom does the property in the mesne rents and profits, between his birth and his attaining twenty-one years, go? but before that question can be asked, it will be necessary to have the opinion of the judges, whether the declaration in this decree, that he takes an immediate interest on his birth, to be divested on his attaining twenty-one, can or cannot be supported, if this is to be taken as a legal devise?

Another question will be, putting it in another way indeed, whether he has any interest on attaining twenty-one, between the period of his attaining twenty-one, and taking the name of Elwes?

[325] These are all the questions arising on this will, which I propose should be put to the judges, so corrected, as to point out the questions which may arise, as to the equitable interests.

The questions for the opinions of the judges having been drawn up by Lord Eldon, and proposed by order of the House to the judges for their opinion, on the 2d of March, 1829, Best, C. J. delivered the unanimous opinion of the judges, stating the questions with their answers, as follows:

First question: According to the true construction of the testator's will and codicil, as above stated, would any son of the testator's daughter by her said husband, during his infancy, be entitled to the rents and profits of the testator's estate called Southwood Park or the farm at Haverhill: or any daughter of his said daughter by her said husband, being unmarried, and under the age of twenty-one, be so entitled during her infancy or before she married?

We think that no son of the testator's daughter by her present husband, during the infancy of such son, nor any daughter of the testator's daughter by her said husband, being unmarried, and under the age of twenty-one, would be entitled to the rents and profits of the estate called Southwood Park, or of the farm at Haverhill.

Second question: If the younger of the said infant sons should die in infancy, would the elder of such two sons, during his infancy, be entitled to such rents and profits? if he would be so entitled, and a third [326] son should be born of the testator's daughter by her said husband, would such elder son continue entitled during his infancy, or would such third son becoming a second son, be so entitled?

We think that if the younger of the two sons should die in infancy, the elder of

such two sons would not be entitled to such rents and profits during his infancy; and that a third son becoming a second son, would not be entitled to such rents and profits during his infancy.

Third question: If no son of the testator's daughter by her said husband, would be entitled to such rents and profits during his infancy, and no daughter of the testator's daughter by her said husband, would, during her infancy, and before marriage, be so entitled, to whom would the rents and profits of the said premises belong, during the infancy of such sons and daughters of the testator's daughter?

We think that the rents and profits of the said premises, would belong, during the infancy of such sons, and during the infancy, and before the marriage of any daughter to the testator's heir at law.

Fourth question: The testator having given such power to Elwes and Chambers as aforesaid, and to the survivor of them, out of the rents and profits of the said premises, (by his will first devised) to which any child of his daughter should be presumptively entitled, to provide maintenance for such child: and there being two sons of his daughter, infants, at the time of his death, can Elwes and Chambers execute such power, by applying part of the [327] rents and profits of the said premises, for the maintenance of the second of such sons in his infancy; and in case he (such second son) should die in his infancy, the elder of such sons being at the time of such death also an infant and an only son, can Elwes and Chambers in that case apply part of the said rents and profits for the maintenance of such only son during his infancy? and in case after the death of such second son in his infancy, the testator's daughter should have a third son born during the infancy of the testator's daughter's first son, could the said Elwes and Chambers in execution of the said power, apply part of the rents and profits for the maintenance of such third son having become a second son, and would they cease to have a power of applying any part thereof to the maintenance of an only son; or supposing there was an only son, and a daughter of the testator's daughter unmarried, and an infant, would Elwes and Chambers have the power of applying part of the rents and profits for the maintenance of such daughter during her minority?

We think, that there being two sons of the testator's daughter, infants, at the time of his death, Elwes and Chambers should execute the power, by applying part of the rents and profits of the premises first devised for the maintenance of the second of such sons, during his infancy; and in case such second son should die an infant, the elder son being an infant and only son, Elwes and Chambers might apply part of the said rents and profits for such only son's maintenance during his infancy, and whilst he continued an only son; and that in case after the death of such second son in [328] his infancy, the testator's daughter should have a third son born during the infancy of the first, the power of Elwes and Chambers to allow any part of the said rents and profits to the maintenance of the first son would cease, and they should apply part of the rents and profits for the maintenance of such third son; and that supposing there was an only son, and a daughter of the testator's daughter unmarried, and an infant, Elwes and Chambers would not have the power of applying any part of the rents and profits for the maintenance of such daughter during her minority.

Fifth question: According to the true intent of the testator, is any son of the testator's daughter entitled to the rents and profits of the freehold estates mentioned in the testator's codicil, (assuming that the legal estate in such freehold estates is thereby devised) until and before he attains the age of twenty-one years, and also assumes the name of Elwes, and if not, to whom do the rents and profits of such freehold estates (assuming as aforesaid) belong, under the true effect of the *will and codicil*, until a son attains that age and assumes that name?

The judges are of opinion, that no son of the testator's daughter is entitled to the freehold estates mentioned in the testator's codicil, until he attains the age of twenty-one years and assumes the name of Elwes; and that until a son attains that age and assumes that name, the rents and profits of such estates belong to the testator's heir at law.

All the judges who were present at the argument of this case, concur in the answers which I have [329] given to the questions proposed to us by your Lordships; but for the reasons which I shall proceed to give, I only am responsible.

These questions refer to a codicil; your Lordships will observe that only the will

of the testator has been sent to us: we have therefore considered, that the codicil referred to by your Lordships' question, is that which appears in the printed case.

As the case sent to us states a (see *Percival v. Percival*, 1870, L. R. 9 Eq. 393) residuary clause, we have not felt ourselves at liberty to consider the effect of the residuary clause, which appears in the printed case, but have formed our opinions upon that which is stated to us by your Lordships: and it not appearing on that statement, that the residue of the testator's property is devised to *any particular person*, we have said that during the contingencies, the estates would descend to the heir at law; and do not, as in the case of *Stephens v. Stephens*, (Cases Temp. Talbot 228) where the residue was expressly devised to Sir Thomas Stevens, pass under the residuary devise in the will.

The estates in the Southwood park and Haverhill farm given to the second son, and if there be only one son, to the eldest, and if there be no son, to a daughter, do not vest until a second or only son attains twenty-one; or in case of the failure of male issue, until a daughter attains twenty-one, or marries with the consent of the trustees appointed by the will.

The testator's other freehold estates do not vest until some son of the testator's daughter shall attain the age of twenty-one years and take the name of Elwes.

[330] Until these estates become vested, the estates, and the rents and profits derived from them, pass to the heir at law of the testator, as estates not disposed of by the will.

Whilst estates remain contingent, those in whom they are at a future time to be vested, have no interest in the estates, or the rents and profits of such estates.

Such estates must descend to the heir, if they are not given to any person to hold until the events happen, on which they are to become vested. This point is too clear to require any observation: indeed, it was not disputed at the bar. Testators who create contingent estates, often forget to make any provision for the preservation of their estates, and for the disposition of the rents and profits in the intermediate period, between their deaths and the vesting of their estates. In such cases, the estates descend to the heirs, who, knowing that they are to enjoy them only for a short period, and that they have obtained the possession of them from the inattention of, and not from the bounty of the testator, or from the mistake of the professional man who drew the will, will make the most that they can of them during the time that they remain theirs, regardless of any injury that the estates may suffer from their conduct. The rights of the different members of families not being ascertained whilst estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience, and sometimes of injury to them. If the parents attaining a certain age, be a condition precedent to the vesting estates by the death of their parents, before they [331] are of that age, children lose estates which were intended for them, and which their relation to the testators may give them the strongest claim to.

In consideration of these circumstances, the judges from the earliest times were always inclined to decide, that estates devised were vested; and it has long been an established rule for the guidance of the Courts of Westminster in construing devises, that all estates are to be holden to be vested, except estates, in the devise of which a condition precedent to the vesting is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession. To accomplish this purpose, a distinction has been made between the adverbs *if* and *when*, to which the learned in our language, not of the profession of the law, would perhaps not agree: upon this distinction, however, many equitable arrangements of property have been made; upon this distinction the titles of many estates depend, and it will therefore be the duty of the judges to observe it. The condition precedent to the vesting of these estates is so apparent—it is declared in such express terms by the will, that no ingenuity can explain it away; no refinement can get rid of it; and by holding that these estates are vested, we must overthrow the case of *Stephens v. Stephens*, which is directly in point to the questions submitted to us, and the authority [332] of which was never questioned. The state of the affairs of this family will not be sooner settled by the

artificial contrivance of vesting and divesting the estates, than by keeping them contingent, until a final vesting of them can take place, agreeable to the disposition made by the testator. How can it be said, that the affairs of a family are settled, by vesting an estate in an eldest son, and divesting when a second is born; then vesting it in the second, and divesting on the birth of a third son, and death of the eldest; and by again vesting it in a daughter when there are no sons, and divesting it again on the birth of a son. The only effect of vesting these estates would be, to preserve them for the children of sons that die before they attain the ages at which the estates would vest.

But is it wise to encourage the marriage of infants, by making a provision for the children, however imprudently, and however much in opposition to the wishes of their guardians, such marriages may be contracted. The uncertainty of a provision for a family may occasion a pause, before the most important step in life be taken, which cannot be attended with lasting inconvenience, and may prevent lasting misery. Children will seldom suffer from estates remaining contingent, until their parents attain the age of twenty-one; as few, to whom such estates are given, will have legitimate children before they are of age. This objection, if of any weight, will only partially apply to this case, for provision is made for daughters, who may marry with the consent of their guardians, and die before they are of age leaving issue. As the testator has not made [333] the same provision in favour of the children of those sons, who are to succeed to his estates, as he has made for the children of his daughters, and the younger sons, who are to divide with his daughters the residue of his property, it is to be supposed, that he did not intend that the families of the first or second sons should inherit, if their parents did not live until their estates became vested. Knowing how difficult it is to get at the intent of parties, when all possible care is taken to express their intent with the greatest precision in the instruments made by them, and what different interpretations from the different constitutions of men's minds, and from their different habits and educations, are put on the same words, I do not much rely on the intent of the testator. I take for my guide, what I think is a sounder principle of decision in a case, where a testator has expressly secured what he has given to some of his grandchildren, to their issue, and has not expressly secured the freehold estates to the families of those children, to whom he has devised them, namely, whatever his intention may be, that intention is not sufficiently expressed for any Court to act upon it, when by so doing, we must get rid of a condition clearly expressed in the other parts of the will.

It is impossible to say that the words of this will do not import conditions precedent to the vesting these estates.

The estates are not given to any *particular children* by name, but to *such children as shall attain the age of twenty-one years*. Until they have attained that age, no one completely answers the description which the testator has given of those [334] who are to be devisees under his will, and therefore there is no person in whom the estates can vest. It is an established principle of law recognized by all the cases that are in the books, and founded on the nature of things, that estates must remain contingent until there be a person having all the qualifications that the testator requires, and completely answering the description given of the object of his bounty in his will.—In *Frank v. Frank*, 8 Taunton 115, it is said "to make an estate contingent we must have such words as these, I give the estate to *such persons* who shall at the death of B. E. be the second, third or fourth sons." The present will has the substance of these words, for the devisees are to such only son as shall first attain the age of twenty-one; in case there shall be two or more sons who shall attain the age of twenty-one, then in trust for the second of such sons, (then in trust for such daughters as shall first attain the age of twenty-one years.) The codicil gives the estates to *that son* who shall first attain the age of twenty-one, and change his name to Elwes. In *Frank v. Frank*, (Gibbs, C. J.) says, "there was a son in case who answered the description in the will." "A contingent remainder devised to a first, second or other son would vest absolutely as soon as such son should come into being, unless there was a clear intent expressed or implied that it should remain contingent until some later specified time." In the case submitted to us by your Lordships, there is a clear intent expressed that these estates shall remain contingent until it be seen whether one or more sons would attain the age of twenty-one years, and if there be no sons

whether any [335] daughter would live to that age, or be married with the consent of the trustees.

The testator has given us an explanation of the terms of the devises of his real estates. In the clause of maintenance he directs his trustees to provide maintenance for the children of his daughter out of the estates or property to which any child shall be presumptively entitled.

A presumptive title is only a possibility, a presumptive heir is one who will be the heir if no one having a preferable claim be in existence at the time of the death of the person to whom the presumptive heir stands in that relation.

When the testator speaks of his grandchildren as presumptively entitled, he must be understood to say that they have no absolute or vested interest.

In the case of *Stephens v. Stephens* (Ca. Temp. Talb., Forr. Rep., 228), the testator after giving estates to his grandson William and Thomas devised the same property to such other son of the body of his daughter Mary Stephens as should happen to attain the age of twenty-one years. There is scarcely any difference in the terms of the devise in that case and in those in the devises under consideration. The meaning of each is precisely the same. In the case referred to, the judges of the King's Bench (Lord Hardwicke being then at the head of that Court) certified that the vesting of the estate was suspended until a son unborn should attain the age of twenty-one years. Lord Chancellor Talbot made a decree according to this certificate and said that it agreed with his own sentiments and he hoped it would be for the [336] future a leading case in the determination of questions of this kind—I believe that his Lordship's hopes were realized—it has been considered as a leading case—and the impugning its authority would shake a principle of law on which the titles of many estates depend.

It only remains for me to take notice of that part of the will to which your Lordship's fourth question relates, that is the clause which gives to the trustees the power to provide a maintenance for the testator's grandchildren. The words of this clause are as follow :

"And my will further is and I do hereby declare and direct that the said John Elwes and Abraham Henry Chambers and the survivor of them, his executors, administrators and assigns, shall by and out of the rents, issues and profits of the said freehold and copyhold estates by this my will first devised, and by and out of the part or share of and in the said stocks, funds and securities, and the dividends, interest and annual proceeds thereof, to which any child or children of the said Amelia Maria Frances Duffield by the said Thomas Duffield or by any aftertaken husband shall be presumptively entitled, pay and apply for the maintenance of any such child or children in the mean time and until his, her or their share or portion, shares or portions, shall become payable, such yearly sum or sums of money as to them the said John Elwes and Abraham Henry Chambers, or the survivor of them, his executors, administrators or other the trustees or trustee for the time being of this my will shall seem meet."

[337] The trustees are directed to execute this power by providing a fund for the maintenance of each child out of the property to which such child is in the language of the will presumptively entitled: an only son would under the will be presumptively entitled to Southwood Park and Haverhill Estates. The testator says nothing about providing maintenance out of the estate left by the codicil to the eldest son—because these he then intended should be sold. As being presumptively entitled to these estates, the only son would be entitled to a maintenance out of the rents and profits of them: when his presumptive title ceased by the birth of a second son, the right to maintenance of the first would be determined. On the birth of a second son, that second son would become presumptively entitled to the Southwood Park and Haverhill Estates, and it would become the duty of the trustees to provide for his maintenance and education out of the rents of those estates. Upon the death of an elder son and the birth of a third, the second would become an elder son and he would cease to be presumptively entitled to the Southwood Park and Haverhill Estates. A presumptive title to which estates would commence in the third son. From this period the son which was born second must be maintained out of the estates destined for the first: and the son born third out of these given to the second: this change in the mode of executing the power must take place whenever a second

son becomes an elder, and any son becomes a second. No daughter can ever be entitled to a maintenance out of the estates whilst there is a son in existence, for no daughter will be [338] presumptively entitled until there is a failure of male issue. It may perhaps occur to your Lordships that these changes in the execution of the power of maintenance may render the accounts unnecessarily complicated. Courts of justice are not to consider the inconveniences that may follow from the execution of powers according to the terms by which they are created.

We can find nothing in the will that would authorize any Court to dispense with an exact compliance with the terms of this power, and we therefore think that it should be complied with to the letter.

Lord Eldon: This was an appeal from a decision made by the present Master of the Rolls, which came before this House in consequence of the Lord Chancellor of that day having signed an appeal, with a view to the case finding its way to this House, without its being immediately decided by the Lord Chancellor himself, and I confess it is matter of great satisfaction to me that the case has taken that course. From the first moment I read this will, I entertained considerable doubt whether, notwithstanding all the attention which had been paid to it in the Court below by a most able Judge, the decree which he had delivered was correct. When the matter was argued at the Bar of this House it occurred to me, notwithstanding what Lord Hardwicke had said in the case of *Stephens v. Stephens*, and what Lord Talbot had said in consequence of that determination, that the decision which had been made, with the subsequent decisions formed upon it, left the matter in such a state that it was of great importance to [339] have the question settled in the most solemn manner; and looking to those decisions which had taken place between the decision in the case of *Stephens v. Stephens* and the present, I found it one of the most difficult tasks that I ever have had to execute, to draw out the proper questions for the opinions of the learned judges; I think they will do me the justice to say that I exhausted the merits of the case by the questions which I addressed to them, and I should not satisfy myself if I did not say that the learned judges have given a most attentive consideration to this case, and have most plainly stated by the Lord Chief Justice their reasons for the opinion they have given. That opinion must necessarily lead to the reversal of the decree pronounced by the Master of the Rolls, and I conclude the little with which I have to trouble your Lordships, by stating, that having in view all the doctrines which have been stated in the answers to the questions addressed to the learned judges, I do hope that this at least will be a leading case, not affecting so much the distinctions in the earlier case as those which appear to me to exist in the cases between the decision of *Stephens v. Stephens* and this case.

The answers of the learned judges will necessarily lead to a reversal of this decree. The reversal of the decree will create the necessity of great care in forming the decree now to be made arising out of a will and codicil so singularly expressed as this is. I feel it my duty to return my humble thanks to the learned judges for having pointed out so distinctly what belongs to the case. With respect to the maintenance, I am happy that I have succeeded in drawing the [340] consideration of the learned judges to the point which was material; and I feel obliged to them for the rule which they have given in their answer in reference to that point, which will enable the House to do justice more fully than it could otherwise have done.

It is impossible, without taking these papers and going through them with great attention, to draw that which must be the judgment of the House. That may be done in one or other of two courses: the one is to state the law as it has been delivered by the judges, and to remit the case to the Court of Chancery to apply that law; the other is, instead of following that course ourselves, to pronounce a decree, and having had the assistance of the learned judges, I think it my duty to propose a decree in the very form in which it ought to be sent to the Court of Chancery by this House: thus, endeavouring to save that Court the trouble which must belong to the drawing out of a decree in a case so difficult as this is. I think that is the more wholesome way of proceeding, and I conceive my time will be thought by your Lordships not ill bestowed, if I can accomplish the purpose of drawing out such a decree as I think ought to be made, and ought to regulate subsequent cases, carrying with it the authority which belongs to a decree pronounced in the terms in which this decree should be.

In May 1829, further questions were put to the judges as follows :

1. Upon its being presumed that the decree, or decretal order, ought to be reversed, so far as the same declares that any son of the daughter of the [341] testator would have a present vested interest in, or be entitled to the estates at Southwood and Haverhill, in the will mentioned, or the rents and profits thereof, before he attains the age of twenty-one years, or have a present vested interest in or be entitled to the freehold estates devised by the codicil, or the rents and profits thereof, until he attains the age of twenty-one years, and takes upon himself the name of Elwes according to the testator's direction, and assuming that some son of the testator's daughter will hereafter acquire a vested interest therein, to whom do the rents and profits of the freehold and copyhold estates of the testator at Southwood and Haverhill in the will mentioned, and the rents and profits of the freehold estate in the codicil mentioned, go and belong respectively, until some son of the testator's daughter shall acquire a vested interest therein respectively, having regard to the whole words, contents and effect of the testator's will and codicil?

2. And assuming that the testator purchased copyhold estates after the date of the will, are such copyhold estates having such regard as aforesaid, to be considered as devised by the testator?

On the 23d of June, 1829, Alexander, C. B. after stating the provisions of the will and codicil on which the questions arose, delivered the unanimous opinion of the judges as follows :

The first question respects the rents and profits of the freehold and copyhold estates at Southwood and Haverhill. We are to assume that the specific devise of these estates is not immediate [342] and vested, but future and contingent; that it does not draw along with it the rents and profits intermediate between the death of the testator and the happening of the contingency, and we are desired to testify our opinion to whom, upon the whole frame of these testamentary dispositions, these intermediate profits go and belong.

We are of opinion that they go and belong to the surviving trustee of the testator's will, by force of the residuary clause in the will. This clause is as comprehensive as can be imagined. It extends in express words to "the residue of all the property to which he should be entitled at his decease, or over which he had a disposing power, to the residue of his estate of freehold, copyhold, or for years;" and then after some further enumeration, and lest something should escape, he adds "of whatever other nature or kind the same or any part thereof may be."

There can be no doubt that these would pass the intermediate rents not specifically disposed of. It is not essential to the effect of a residuary clause, that the testator should have had in his immediate contemplation, the property to which his expression applies. Its very nature and object is to envelope every thing, whether present at the moment to the mind of the testator or not. In *Stephens v. Stephens* (Ca. Temp. Talb. (Forr. Rep.) p. 228), a leading case on the subject of executory devises, of the same description with this, a residuary clause was held by the Court of King's Bench, with Lord Hardwicke at its head, to pass the intermediate rents and profits. Many other cases, if necessary, might be cited to [343] the same effect. It would not have been safe to have come to the conclusion I have intimated, without examining whether here is any other provision in the will, to narrow and limit the residuary clause, so as to exclude these intermediate rents. One only passage has been mentioned, the direction for sale. It is said, the testator could not mean an interest such as this to be sold: that it would be a strange direction to be applied to property of this description, and therefore that he could not intend to include it in his residuary bequest. Observations of this sort, oppose but a feeble obstacle to the necessary effect of clear words. They merit attention when the words are equivocal and ambiguous, and where, from the indistinctness of the language used, you must, to give it any meaning, from necessity, resort to probability and conjecture: but here the language is plain and explicit: and if upon any such reasoning, this interest were withdrawn from the residuary clause, the testator's language would not be construed but contradicted.

I feel that these observations may be deemed unnecessary, because in truth, the fact in which this doubt originates, fails almost entirely. The will, though it did originally, does not now direct any part of the freehold to be sold. The codicil re-

vokes the power of sale, as to the freehold, and confirms the will: the will, therefore, must be read, as if there was no such direction to sell: and, therefore, that circumstance at this day, interposes no obstacle to the true construction of the words used in the residuary clause.

[344] We are of opinion, that by force of the residuary clause, the legal interest in the intermediate rents and profits of the Southwood and Haverhill estates, belongs to the surviving trustee of the testator's residuary estate.

The second question respects the intermediate rents of the freehold estates, devised by the codicil to the son of Mrs. Duffield, who shall first attain twenty-one, on his attaining that age.

The judges are also of opinion, that these rents and profits belong to the surviving trustee, by force of the same residuary clause, bound, as the former was, by the trusts declared in the will.

It is without question, that the legal fee simple of the estate, out of which these rents and profits are to arise, was devised, by the residuary clause in the will, to the trustees.

That devise must remain at this day in full force, except in so far as it is altered by the codicil. We must look, therefore, at the codicil, in order to ascertain how far it has altered the devise of these freehold estates, and to what extent it leaves them vested in the original devisees undisturbed. There are only two provisions in the codicil, which touch the freehold in question. The first is the revocation of the direction to sell this estate: the second is the contingent and executory devise to the first son of Mrs. Duffield attaining twenty-one, when that event shall happen.

How far do either of these curtail or limit the absolute gift in fee simple of the estate itself, contained in the previous will, to the trustee, upon the general trust reposed in him by the testator?

[345] It is obvious, that the revocation of the direction to sell, has no effect whatever of this nature. It left the legal estate in fee, as well as the beneficial trusts, absolutely untouched, and amounts only to an arrangement respecting the mode in which the trusts are to be executed.

The contingent and executory devise in the codicil, is a revocation *pro tanto* of the devise in the will of the same estates: it is an indirect revocation. The last revokes the first because they are inconsistent, and for that reason only. It revokes therefore to the extent in which they are inconsistent, and no further. Now how far are they inconsistent?

The gift is "of his freehold estates to the son of his daughter, who shall first attain twenty-one." We are to assume that this devise is contingent and executory: that nothing vests till the event happens; that no estate or interest, either legal or equitable, passes, until a son attains twenty-one. What becomes of it in the meantime? The prior devise found in the will, remains unrevoked. The estate or interest continues where the will had placed it, that is, in the trustees.

We are of opinion, therefore, that until the contingency shall happen, which is to vest the freehold estate in a devisee by force of the codicil, the rents and profits of that estate go and belong to the surviving devisee in trust of the residue named in the will.

As to the last question put by your Lordships, we are of opinion, that any copyhold purchased by the testator *mesne* between the will and the codicil passes by the will.

[346] The will has the effect upon this subject, which it would have had, if it had been made at the date of the codicil: for many years this has been the rule. The cases are too numerous to require that any of them should be mentioned. A codicil confirming a will, brings the will down to the date of the codicil. As the codicil bears date on the 3d of March, 1821, so in effect does the will. Then as the residuary clause devises all his copyhold estates, the estates supposed in the question, being at that time his copyhold estates, must pass by it. There have been some cases in which the republication of a will by a codicil, has not had this effect. The case of *Strathmore v. Bowes* (7 Term Reports, p. 182), is one. In these cases, it was manifest from the language of the codicil, that the testator did not intend to pass his lands purchased after the will.

Nothing of that kind is to be found in this codicil: it must therefore have the usual effect, and the will must pass these copyholds.

Lord Eldon: The judges having given their opinions, in answer to the questions put to them, on this and the former occasion, it is sufficient for me to say, that I concur in all those opinions.

[347] In the appeal on behalf of the children, the following order was made: (23d June, 1829). It is ordered and adjudged, that so much of the said decretal order as declares, that under and by virtue of the said will of the testator George Elwes, the said Defendant G. T. W. H. Duffield, as only son of the Plaintiff E. F. Duffield, by her husband the Plaintiff Thomas Duffield, living at the testator's death, took upon the testator's death, a presently vested equitable estate in fee, in the testator's freehold and copyhold farm and estate in Southwood Park, and freehold farm and estate at Haverhill, specifically devised by his will: subject to be divested by the death of the said G. T. W. H. Duffield under the age of twenty-one years, or by the birth of a second son of the Plaintiffs: and so much of the said decretal order as declares, that upon the birth of the Defendant Henry Duffield, the second son of the Plaintiffs, the said equitable estate of the said G. T. W. H. Duffield was divested, and that the said Henry Duffield took a vested equitable estate in fee, in the said Southwood Park and Haverhill estates, subject to be divested in the event of the said Henry Duffield dying, or becoming neither the second nor only son of the Plaintiffs, before he attains the age of twenty-one years be reversed: and it is declared, that no estate, according to the true construction of the will, would vest in any son, prior to his attaining the age of twenty-one years: and it is further ordered and adjudged, that so much of the said decretal order as declares, that such of the rents and profits of the said estates at Southwood Park and Haverhill, as [348] accrued before the birth of the said Henry Duffield, belong to the said G. T. W. H. Duffield, subject only to the allowance for his maintenance directed by the said will: and that such of the said rents as accrued since the birth of the said Henry Duffield, belong to the said H. Duffield, subject only to the allowance for his maintenance directed by the said will, be also reversed: but without prejudice to any question, with respect to the application of the rents and profits, or any part thereof, for the purpose of maintenance: and it is also declared, that the devise of the said testator's residuary freehold estates to trustees made by his will, is revoked by the codicil, subject to what is hereinafter stated, respecting the intermediate rents, issues, and profits thereof: and it is further ordered and adjudged, that so much of the said decretal order as declares, that under and by virtue of the said codicil, the Defendant G. T. W. H. Duffield, the eldest son of the Plaintiff E. F. Duffield, upon the testator's death, took a presently vested legal estate in fee, in all the testator's freehold property, lands, tenements and hereditaments, (except only the said Southwood and Haverhill estates specifically devised by his said will,) subject to be divested in case of the death of the said G. T. W. H. Duffield, under the age of twenty-one years: but without prejudice to the question, how far such estate may be affected, in case of the said Defendant G. T. W. H. Duffield should not, on his attaining his age of twenty-one years, change his name for that of Elwes, be also reversed: and it is further ordered and adjudged, that so much of the said decretal order as declares, that the rents and profits of [349] the said freehold property devised by the said codicil, accrued since the said testator's death, belong to the said G. T. W. H. Duffield, be also reversed: and it is further declared, that no son of the testator's daughter, under the effect of the codicil, took a presently vested estate in the testator's said freehold estates, but that the same will belong to the son of the testator's daughter, who shall first attain the age of twenty-one years: and according to the testator's direction, change his name for that of Elwes: and it is further declared, that the copyhold estates of the testator, purchased after the execution of his will, and before the execution of his codicil, if such be, had passed by the effect of the will to the person or persons, trustee or trustees, to whom copyhold estates are devised by the will, upon the trusts in the will mentioned: and it is also further declared, without prejudice to any question respecting maintenance, that the intermediate rents, issues, and profits of the testator's freehold and copyhold estates at Southwood Park and Haverhill, and his other freehold estates devised by the codicil, during the suspense and until the vesting of the executory devises thereof respectively, are to be considered, according to the

effect of the will and codicil, as belonging and devised to the person or persons, the trustee or trustees, of the testator's residuary estates in his will mentioned, upon the trusts by the said will declared thereof: and it is further ordered, that with the reversals and declarations aforesaid, the cause be remitted back to the Court of Chancery, to do therein what is just, and in all respects consistent with this judgment.

[350] In the appeal on behalf of Mr. and Mrs. Duffield, in the right of Mrs. Duffield as heir at law, an order was made, containing the same declarations as in the order upon the appeal of the infants, and concluding thus:

It is ordered and adjudged, that the appeal so far as it seeks a declaration that the intermediate rents, issues, and profits of the estates at Southwood Park and Haverhill, and the freehold estate devised by the codicil, belong to the Appellants, in right of the Appellant E. F. Duffield, be dismissed, etc.

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APPENDIX.

SCOTLAND.

(COURT OF SESSION.)

GORDON OF CLUNY,—*Appellant*; JOHN ANDERSON,—*Respondent*.

ET E CONTRA.

[S. C. 5 Scots R. R. 1, 3 Wils. and Sh. 1. See Hunter on *Landlord and Tenant*, i. pp. 115 *et seq.*]

A. being a tenant in possession of a farm, which he held after the expiration of a lease, made a proposal by missive, to take a new lease, upon the conditions of an offer made by W. for another farm belonging to the same estate. W. had engaged to enter into a lease, which was to contain "all the regulations to be laid down for the estate." G. the owner of the estate, by letter, accepted the proposal of A. on the footing of the offer of W. and "the general conditions laid down by him for the whole estate;" and this letter of acceptance provided, that a lease should be executed as soon as the other leases of the estate could be got ready. Three years after this proposal and acceptance, a document entitled articles and conditions, was signed by G. and various other proposed tenants of the estate, but not by W. or A. By one of these conditions it was provided, that "all the fodder should be used upon the farm, and none sold or carried away at any time." This document concluded by providing that the leases on the estate were to be granted upon, and to refer to the conditions therein contained. A few days after the signature of this document, a draft tack with various blanks, but containing a reference to the articles and conditions, and an obligation to [352] perform them, and a consent to the registration of them, was signed by the tenants, including W. but not A. He did however, two years afterwards, sign this draft tack which was never extended, or otherwise executed.

Held, that the draft tack as signed by A. was a probative document, and not a new contract between the parties, but referable to the preceding agreement and conditions; and that the condition prohibiting the sale or removal of straw, etc. applied to the last year of the term, and the way-going crop.

The draft tack not having been produced on the first hearing of the cause, held that the Appellant was liable for all the costs consequent upon the non production.

The Appellant was the proprietor of a large estate called Slains, consisting of a number of farms, subject to leases, which expired in 1801.

The Respondent being in possession, after the expiration of one of these leases, of a farm belonging to the Appellant, made proposals for a new lease, in a missive dated on the 28th of May, 1801, containing nine articles or conditions. By the last of

which, he proposed to be bound to the conditions of an offer made by Mr. Wilkins for another farm belonging to the Appellant.

The offer of Mr. Wilkins had been made on the 23d of May, 1801, in a note or missive, containing various conditions, of which the last was in these terms:—"I engage to enter into a lease on the foregoing terms; the lease to contain all the regulations to be laid down for the estate, if by *that* * time digested and ready."

[353] By a letter addressed to the Respondent on the 2d of June, 1801, the Appellant prefixing a copy of the offer, added:—"I accept thereof, on the footing of Mr. Wilkins's offer, and the general conditions *laid down* by me for the whole estate;" and then after stating other stipulations, the letter concludes thus:—"A lease to be prepared and executed, as soon as the other leases of the estate can be got ready."

On the 5th of May, 1804, a document was drawn up, entitled "articles and conditions laid down by Mr. Gordon, for letting the estate of Slains." It consisted of twenty-one articles. The sixteenth article was in the following terms: "The whole fodder to be used upon the ground, and none sold or carried away at any time, hay only excepted, and all the dung to be laid upon the farm the last year of the lease." At the end of the articles these words were added:—"These are the articles and conditions referred to in the several offers made by us respectively, for different farms on the estate of Slains, of the dates hereto annexed to our respective subscriptions." The tenants to the number of twenty-one, subscribed the articles; but they were not subscribed either by Anderson or by George Wilkins. Then the articles proceeded in these terms:—"The above are the general articles and conditions, on which the leases on the estate of Slains are to be granted by me, and to be referred to therein."

The document at the conclusion had the signature of the Appellant and witnesses.

On the 12th of May, 1804, a draft tack between the Appellant and the tenants, was prepared in [354] the following terms:—"It is contracted, agreed, and enacted, between Charles Gordon of Chuny, Esq. heritable proprietor of the estate of Slains, of which the lands and others after mentioned are a part, of the one part, and

of the other part, in manner and to the effect following, that is to say, the said Charles Gordon in consideration of the yearly tack duty of money and victual underwritten, and of the other prestations, conditions, stipulations, and reservations, specified and contained in a separate paper of general articles, subscribed by him, as relative to his leases of said estate, and to be held as part of these presents, hath set, and in tack and lease let, as he hereby sets, and in tack and asseda-

tion lets to the said and his heirs, secluding assignees or sub-tenants, legal or voluntary, without the express consent of the proprietor, all and whole

lying in the parish of Slains, and county of Aberdeen, as the same have been marched and bounded according to a new arrangement and plan of said estate, made by Thomas Johnston, land surveyor, subscribed by the said Charles Gordon, and already subscribed, or to be subscribed by the said

with which contents and boundaries he holds himself satisfied, and that for the space of twenty-one years, and crops from and after the terms of Whitsunday 1801, which is hereby declared to have been the commencement of this tack, and the term of the said

, his entry; which tack, *with and under* the several prestations, conditions, stipulations, and reservations, before and after [355] specified, and in the articles referred to, the said Charles Gordon binds and obliges himself, his heirs and successors, to warrant at all points: For the which causes on the other part, the said

binds and obliges himself, his heirs and successors, not only to adhere to, obey, and perform the whole articles, conditions, stipulations, and others contained in the general articles regarding said estate hereinbefore referred to, and held as part of these presents, but also to pay, etc." And then, after various provisions made respecting rent, etc. the draft concluded in the following terms:—"And both parties oblige themselves and their foresaids, to implement and perform their respective parts of the premises, and of the said separate articles to each other, under the penalty of £100 etc., and consent to the registration hereof, and of the said

* No other time is stated in the conditions, but that which appears in the paragraph in the text, viz. that of making the lease.

separate articles, as part, in the books of counsel and session, Sheriff Court books of Aberdeen, or others competent, etc." This document was signed by twenty-one tenants, including Wilkins, but not Anderson: he however, signed it two years afterwards.

The Appellant became entitled to the estate some time before the expiration of the tack, and having reason to suppose that the Respondent intended to carry off the straw of the way-going crop upon his removal, he obtained from the sheriff of Aberdeenshire an interim interdict, to prevent the Respondent's purpose: but the interdict was afterwards recalled. The Appellant thereupon advocated: and the Lord Ordinary in respect of the decision of the House of Lords, in [356] the case of the *Duke of Roxburgh v. Robertson* (2 Bligh's Reports, 156), ordered informations to the Court, adding in a note, "that in a case where the practice which has so long subsisted in Scotland, is said to be totally subverted by a judgment of the Court of Review, it is necessary that both landlords and tenants should be speedily acquainted with the construction to be put upon such clauses, etc."

At this time the Appellant had not produced in evidence, the subscription of the Respondent to the draft tack: and on this ground the cause was remitted *simpliciter*. This evidence was afterwards supplied by leave of the Court, on payment of costs: but the Court in May 1825, found "that the sixteenth article of the general articles of lease, could not be held as applying to the crop of the last year of the lease: and that the rights of the parties respecting the same, must be regulated by the common law and usage of the county, etc."

Against this decision there was an appeal and cross appeal.

For the Respondent in the original, and Appellant in the cross appeal, the question upon the construction of clause was given up: but it was argued that the draft tack was not a probative document: that the provision not to remove straw the last year of the term, operated as a new and distinct contract, and could not be considered as a condition, even if there were a sufficient reference to the conditions in the documents signed by the Respondents.

[357] For the Appellant: Mr. Wilson and Mr. Wright.

For the Respondent: Mr. Keay and Mr. Miller.

The Lord Chancellor: The argument upon the construction of the clause has been properly given up: but it is contended that it was not binding on the tenant Mr. Anderson: that he had not subscribed it, and that he had never seen it when the lease was granted, and when he had taken possession of the farm. But in his letter, he refers distinctly to the proposal made by Mr. Wilkins, which had been accepted by Mr. Gordon, and which was to include the general conditions laid down for the whole estate. The Court below did not originally think it necessary, to decide the general question upon the construction of the clause, whether it applied to the last year of the lease, because they were of opinion, that there was not sufficient evidence that those regulations had been adopted by the tenant Mr. Anderson. He did not subscribe the paper of articles and conditions, and there was then no evidence that he had seen it. Afterwards the draft tack being produced, Mr. Gordon was permitted, on payment of costs, to make a new case. It then became, and is now the question, whether there was evidence to shew that the articles had been adopted? On the production of the draft tack, the Court below were of opinion, that the articles had been adopted by Anderson: the House will probably be of the same opinion.

It has been argued that this is a new contract, and if so, not having been entered into according [358] to the forms and ceremonies required by the law of Scotland it could not be binding upon the parties. It was said, that Mr. Anderson was in possession of the property as tenant, under the original agreement, and that if this were an entire new contract, not being executed in the manner required by the law of Scotland, it could not have varied the original terms. But this is not to be considered a new contract. It is nothing more than a completion of the first contract. There were certain terms and stipulations, by which one of the farms was to be held by Mr. Wilkins: these terms and stipulations were also to be binding on Mr. Anderson. There was a reference by one contract to the other. If those are not the terms and stipulations, there are no terms and stipulations existing with respect to the farm; but Mr. Anderson having subscribed this paper, although not until four years after he entered on the farm, has identified it as containing the regulations by which

he was to be bound. It is to be viewed as nothing but a recognition by Mr. Anderson, that those are the regulations referred to in this contract. In this respect, the judgment should be affirmed. Upon the construction of the clause, it must be reversed. The costs consequent upon the non-production of this instrument in the first instance, were properly thrown upon Mr. Gordon. That part of the judgment should also be affirmed.

[359]

SCOTLAND.

(ADMIRALTY AND COURT OF SESSION.)

STRACHAN and GAVIN.—*Appellants*; PATON and others.—*Respondents*.[Mews' Dig. xiii. 16, 5 Scots R.R. 13. See *Orington v. M'Vicar*, 2 Macph. 1069.]

The owners of a ship applied by letter to S. and G. shipwrights, to lengthen and repair the ship, requesting them "to furnish an estimate of the probable cost, and also to note the prices of timber, and the rate of wages." The letter contained this passage: "The timber must be all English oak, and if you have a sufficient quantity on hand for the repair of the ship, besides her lengthening." S. and G. by letter, in answer, say, the expence of lengthening, on a rough calculation, will be £900; and as the vessel would require other repairs, it would be the best for both parties, to do the whole by day work. The letter then contains this passage: "The captain will have it in his power to keep an exact account of the articles expended, and to turn off any workmen that does not please him. We have on hand an excellent assortment of English oak timber of a suitable size for the vessel." A note of prices was added, "wages per day, 3s. 1d.; common English oak timber per foot, 5s." In a subsequent letter from the owners, announcing the dispatch of the ship, this postscript is added: "As it is understood that nothing is to be put into the ship but English oak timber and Dantzic oak plank, to which you must bind yourselves by letter, etc." To this, S. and G. answer thus: "With respect to the materials, we have a good stock of English timber and Dantzic plank, and little or no Hamburgh; so that Captain Young will have it in his power to take what he likes best." In a subsequent letter, the agent of the owners says: "I hope you will put on her the best of materials, and also the best of workmanship."

[360] The repairs were superintended by the captain, the carpenter, the master, and a part owner of the ship, and were completed in 1807. While the repairs were going on, the wages of carpenters were increased, by order of justices, to 6d. a day.

Immediately after the completion of the repairs, the ship sprang a leak of an alarming description on her return to port, when she was repaired by the owners, upon a notice given to the builders, who sent their foreman to inspect. After these repairs, the vessel was proceeding on a voyage to Davis Straits, but was obliged to put back on account of her leaky condition, and was detained twenty-two days on repairs, when the season being too late for the fishery in Davis Straits, she sailed on a fishing voyage to Greenland, and brought home a short cargo. These transactions took place in 1806 and 1807. In 1813, after various legal proceedings, upon inspection of the ship, it appeared that American oak had been used in the repairs of the ship: that two of the bolts had been driven and clenched imperfectly; that there was one hole without a tree-nail; and that the vessel after the lengthening and repair, had increased in the midships five feet in width.

Held, under these pleadings and proofs, that the shipwrights had no right to charge in their account, the additional 6d. per day for wages, nor for the price of superior oak timber; that they were answerable in damages, for having used American instead of English oak, for the repairs done by the Respond-

ents, and for the supposed loss in the fishing voyage, consequent upon the detention for repairs.

Held also, that the costs were properly given against the Appellants, although they had a judgment for a balance after allowance of all the deductions for damages.

The Appellants were shipwrights at Leith. The Respondents were partners in a whale fishing company at Montrose.

In 1806, the agent of the Respondents applied by letter to the Appellants, requesting them to furnish an estimate of the probable cost of lengthening and repairing a whaler, called the *Eliza Swan*. The letter contained the following passage: "I am required also to request you to note the prices of timber, planks, etc. and the rate of wages, together with your dock dues: the timber must be all English oak: and if you have a sufficient quantity on hand for the repair of the ship, besides her lengthening, etc." The Appellants, by a letter, in answer to this application, say, that the expence of lengthening cannot be estimated correctly, without further information, but upon a rough calculation, it would be about £900; and as the vessel would require other repairs, it would be the best for both parties, to do the whole by day work. The letter then contains this passage: "The captain will have it in his power to keep an exact account of the articles expended, and to turn off any workmen that does not please him. We have on hand an excellent assortment of English oak timber, of a suitable size for the vessel." A note of prices was added: and among others, "wages per day, 3s. 4d., common English oak timber per foot, 5s." After some further correspondence, the agent of the Respondents informed the Appellants, that the ship would be with them in a few days, and adds this postscript: "As it is understood, that nothing is to be put into the ship but English oak timber and Dantzic oak plank, to which you must bind yourselves by letter, as you did not mention in your letter of the 11th current, the plank to be Dantzic." To this the Appellants answered: "The *Eliza Swan* is not yet arrived; we are all clear for her, and expect [362] her up every tide. With respect to the materials, we have a good stock of English timber and Dantzic plank, and little or no Hamburgh; so that Captain Young will have it in his power to take what he likes best: and we hope to be able to execute the work to the satisfaction of every one concerned." After the receipt of this letter, the Respondents' agent wrote thus to the Appellants: "I had a letter from Captain Young on the arrival of the *Eliza Swan*, and that she goes into dock on the 15th current: and hope you will put on her the best of materials, and likewise the best of workmanship on her, and return her as soon as possible."

After this correspondence the ship was docked, the repairs were completed in January, 1807; having been personally superintended by the captain, the master, the carpenter, and a part owner of the ship. The charge for the repairs amounted to £2685 3s. 8d., of which £1350 were paid on account. During the repairs, the wages of carpenters were increased 6d. a day, by order of justices. The Respondents having refused to pay the remainder of the demand, alleging that the repairs had been inefficiently done, and not according to contract, an action was raised against them in the Court of Admiralty, concluding for payment of the balance of their bill with interest.

To this action, the Appellants put in defences, in which they objected to a charge in the account of 6d. a day additional for wages, and 6s. per foot for oak. They also raised a counter-action, and afterwards a supplemental counter-action, concluding that the Appellants should remove the foreign timber, which had been used in the [363] repairs, or that the Respondents might substitute British oak, at the cost of the Appellants, and that the Appellants might pay damages for the loss, which had been consequent upon the default in the repair of the ship, which consisted chiefly in repairs done by the Respondents in 1807, 1811, and 1814, and the deficiency of the cargo on the voyage to Greenland.

It appeared in evidence, that immediately after the completion of the repairs, on the voyage from Leith to Montrose, the vessel became so leaky, that she was in danger of being water-logged. At Montrose she was repaired by the Respondents, notice having been given to the Appellants, who sent their foreman to inspect the state of the vessel. After this repair, the vessel was proceeding on her fishing voyage to

Davis Straits, but was obliged to put back on account of her leaky condition. She was at that time judiciously inspected at Montrose; several deficiencies were discovered in the outward planking, both as to the planks and the caulking, and plugging of the seams and holes: no other defect is mentioned, as the result of this examination. The vessel was detained for these repairs twenty-two days, and was then employed in the Greenland Fishery, the season being too late for the fishery in Davis Straits, and she brought home a short cargo. There was proof that American oak had been used in the repairs, but that it had been selected by the Respondents. There was also proof that one of the tree-nail holes and some of the nail-holes were empty: that two of the bolts were short, not going through the knees so as to clench, and pieces of bolts were driven from the inside, to [364] give the appearance of being properly clenched; that the caulking was found to be slack after the ship had left the repairing docks; and that she had become five feet wider in the midships, but from what precise cause was not ascertained, otherwise than by the opinion of Mr. Stone, in his report as stated below.

The inspection of the vessel, from which principally the evidence in the cause was furnished, took place in the year 1814. The actions being conjoined, the Judge-Admiral pronounced a judgment, by which he found that the Appellants were not intitled to charge for work or timber, any higher rates than were specified in the letter of the 14th of July: that they were bound to furnish the sorts of timber agreed to, but were intitled nevertheless to charge for the American oak used in the repairs. He farther found that the Respondents were intitled in the counter action, to the expense of the repairs at Montrose, the wages of the captain and crew during the repairs, and the expense of the repairs done after the Greenland voyage. But he repelled the claim for damages, for the loss alleged to have been sustained by the unsuccessful fishing in the Greenland voyage, and the claim for repairs with English instead of American oak. This judgment was afterwards brought before the Court of Session, where the Lord Ordinary having advocated the cause, and having in part reversed the judgment of the Judge-Admiral, the Respondents reclaimed to the Inner House, who remitted the case to Mr. Stone, the master builder, at the dock yard at Deptford, to consider the same, with the proof particularly as regards the manner in which the bolts were [365] driven and clenched, and the length and sufficiency of the beams.

Mr. Stone made a report, stating his opinion, collected from the proofs in the cause; which opinion as to the bolts, was to the effect before set forth in the statement of the evidence: and as to the length and sufficiency of the beams, he says: "I am at a loss to account for any motive (on the part of the Appellants,) in allowing such a thing; but I admit the probability, that the beam said to be five inches short, might have been so much short, or nearly so when put in." He then gave an opinion in form hypothetical, but appearing to be founded upon evidence in the cause, "that the increase of width in the midships, was not the effect of working, but for want of a proper security to connect the beam to the side, or shortness of the beam when put into the ship, want of judgment in proportioning the quantum of fastening, or negligence in the execution of the work." As to the use of American oak, he said, "that experience had since proved, that in a very short time, oak of American growth becomes very defective, and is very subject to *fungi*."

Upon advising the cause with this report, in 1824, the Court approved the report: altered the interlocutor of the Lord Ordinary, as to the additional charge for wages and the price of timber, and as to the counter-claim of the Respondents, for repairs done by them in 1811 and 1814, the short fishing in 1807, and the use of American instead of English oak by the Appellants in the original repairs, and found accordingly, directing a condescendence as to particulars and amount.

[366] After this interlocutor, the parties agreed, (without prejudice to the question on appeal,) that £100 should be taken as the damages for the short fishing, and the use of American oak.

The Court thereupon decerned accordingly.

The appeal was against this decision.

For the Appellants: The Solicitor General (Tindal) and Mr. J. Campbell.

For the Respondents: Dr. Lushington and Mr. Keay.

The Lord Chancellor, after stating some of the facts of the case, proceeded thus:

The first question that will arise will be, whether or not the shipwrights at Leith, having instituted the suit against the ship owners for the recovery of the sum due for the repairs, amounting to £1700, any reduction should be made in consequence of the insufficiency of the repairs? According to the law of this part of the island, much that is insisted on the part of the Defendants, would have been the subject of a cross action: but no such question arises according to the state of the pleadings in this case (see p. 62).

The expences incurred after the return of the vessel to Montrose, ought to fall upon the Appellants. The work became necessary, in consequence of their default. They sent their foreman, upon a notice, to view the state of the vessel: and no witnesses having been examined to rebut the evidence of the Respondents on this point. The same argument applies to the repairs done [367] after the return of the vessel from the first Greenland voyage. Upon taking off the doubling, she was found to be in an imperfect condition. What was then done was absolutely necessary, and resulted from the omission of the Appellants.

In the year 1814, which is several years afterwards, the vessel was inspected, and it was then those defects were discovered. The vessel was examined by persons every way competent to form a judgment. It is sworn, that at that period some of the beams that were put in were too short, some of the bolts, (one of them, if not more,) were too short, and bolts were driven in on the other side, to give them the appearance of having passed through. The whole of that evidence was submitted by the Court below to Mr. Stone the master shipwright, at Deptford dock-yard, and he has made a report. I do not at all concur in the observations made at the bar upon that report, for I find no fault with regard to the general scope and tenor of it: he is of opinion, that those defects discovered in 1814, were the effects of the imperfect manner in which the work had been done by the shipwrights at Leith. I am ready to make every allowance for the interval of time that has elapsed from 1806 to 1814, and particularly with respect to a vessel engaged in the Greenland fisheries: but still, looking at this evidence—paying attention to it, and making every fair and just allowance—the impression upon my mind is, that it is satisfactorily made out, that those defects which were discovered in the year 1814, and which were then repaired, are properly referable to the original omission of the shipwrights: and if so, I think they are bound [368] to make compensation. The Court below were of that opinion. I concur in that opinion, and submit to your Lordships that it would be proper in that respect, to confirm the opinion of the judges in Scotland.

Your Lordships will not think it necessary for me to read the evidence to you. It is very voluminous, and in detail. I state fairly, that, after much attention, that is the result of the impression it has made upon my mind. I think the evidence is all one way. There is much reasoning, and very good reasoning, on the other side; but almost all the evidence is in favour of the present Respondent.

Another question that arose, which, though not a question very material in point of amount, is not immaterial in principle, was this: The vessel was detained upon the first repair twenty-two days at Montrose. She afterwards sailed upon her fishing voyage, and came back with an imperfect cargo. The owners of the vessel claim compensation upon this account. The answer that is given, or at least one of the answers, is this, if the vessel had sailed upon the original destination, you are not sure, upon so precarious an adventure, that she would have come back with a larger cargo. But if a vessel is detained for twenty-two days, at a time when she ought to have been on her voyage, (and she was detained these twenty-two days in consequence of the deficiency of the repairs of the shipwrights,) and the parties have been deprived of the fair chance of gaining the advantage resulting from the use of their vessel during that time, I apprehend they are entitled to compensation in the shape of [369] damages. I am quite satisfied, upon an action so framed in this part of the island, that damages would be recovered, for the parties had lost for twenty-two days the use of their vessel.

I do not mean, nor do the parties who are concerned in this appeal mean, to impute moral blame to the shipwrights, for using American oak instead of English oak, because at that period, according to the evidence, it was supposed that American oak was as good as English oak: and the evidence states that the price was about the same: but it has turned out in the result—the evidence establishes the fact—that

American oak decays much more rapidly than English oak, and in the present instance, the orders were "English oak." These orders were accepted by the shipwrights, and by the acceptance of those orders it was incumbent upon them to see that nothing but English oak should be used: if they took upon themselves to use any other, they have been guilty of an infringement of the contract; and if they have been guilty of an infringement of the contract, they are liable to an action, and liable to make compensation in damages, for the consequences that have resulted from the breach of that contract. The only ground upon which it is resisted is, that Captain Young was present at the time. But I do not find that Captain Young was vested with any authority, to dispense with the terms of this written contract, with regard to the particulars I have before alluded to; and if the parties take upon themselves to use American instead of English oak, contrary to the terms of their contract, supposing it to be as good,—if it has turned out that their judgment is erroneous, [370] they are bound to make compensation to the ship owners.

There are two other points remaining for consideration. Before the vessel was sent to Leith, the company took the precaution to direct their agent to write a letter, to ascertain the probable expence of lengthening the vessel, and to ascertain the rate of charge, with respect to the wages and materials. For a part of the time those wages were charged at 3s. 4d. and for a part of the time an increased rate of 6d. was charged: and the ground upon which this increased charge was made was, that in fact, while this work was going on, there was a general increase of wages at the rate of 6d. a day: but looking at the distinct and precise terms of this contract, if any loss arises from that increase of wages, it ought to fall, not upon the ship owners, but the shipwrights. The parties sent to know the rate of wages. "What do you mean to charge?" "3s. 4d. a day." It does not appear that 3s. 4d. a day is the price that is paid to the men: 3s. 4d. is the price that the shipwrights are to charge the ship owner. There is no evidence to shew the actual price paid to the labourers by the shipwrights. I consider that they contract, "While this work is going on, we will charge at the rate of 3s. 4d. No matter what contract we have made with our men. We may agree with them by the day, by the week, or by the year. We may employ our apprentices, who are perhaps not paid at all, or at a very low rate. We shall charge you 3s. 4d." If an increase has taken place before this work was completed, the loss, I think, ought in justice to fall upon the shipwrights.

[371] The other point is as to the common English oak. That is charged in the note at 5s. and part of the timber has been charged at the rate of 6s.; and the ground upon which that charge is made is, that it was oak of a superior quality, and ought to be charged at the rate of 6s. They were not justified in making that charge. When they say that common oak is to be charged at such a rate, the party is deluded, unless that is meant to apply to the general run of oak timber throughout the vessel. It was incumbent upon them to have stated, that the common oak timber was to be charged so much, but that it was necessary for certain purposes to use superior oak, to be charged at an increased rate. The Appellants saying the price was 5s. without making any distinction as to the use of any superior oak timber, must be considered bound by it. But the case does not rest here: they say for the beams, and the keel, and the keelson, and for the knees, superior oak timber is requisite: but upon the evidence it turns out, that in the keel and keelson, or in a great part of what they did, they did not use superior oak timber, which means superior English oak timber, but they used American oak: and it appeared also, as to some of the knees, that they were American oak. Therefore, I think upon the fact, that they are not entitled to have this charge sustained.

There is one remaining point, which relates to the expenses. The expenses of the proceedings have been, by the Court below, thrown upon the shipwrights. Now it is said at the bar, (and upon the part of the Appellants the case was argued [372] by English counsel,) that that is not just and does not correspond with our practice in this part of the island, because the shipwrights have recovered a considerable part of their demand: they have recovered to the extent of £600, and having recovered to that extent, it is very hard and unjust that they should have to pay all the expenses. But I think, in the first place, that the rules with respect to costs in this part of the island, are rules of practice: rules of law established with regard to our proceedings. We cannot well reason, from our practice, as to such questions in Courts in any other

jurisdiction. But if we come to sift the question, I do not think the argument applies in the manner in which it is pressed. If this inquiry had taken place in England, there must have been two actions. The shipwrights must have proceeded in their action to recover their demand, and the ship owners must have brought a cross action for the damage they had sustained, by the imperfect manner in which the contract was executed; and these two actions must have gone to their termination as two separate actions. Upon the action for damages brought by the ship owners, if they recovered, they would have recovered the entire costs. Now when we advert to these proceedings, almost all the expenses result out of that part of the investigation. Therefore, applying the principle that prevails in this country, and the practice in this country, to the proceedings in this instance, it appears to me, that the result would be nearly the same. And with respect to the action brought by the shipwrights, the ship owner would have had an easy mode of obviating [373] the necessity of paying costs in that action. He would have said, "I claim to deduct two items; that part of your charge for superior oak, and that part of your charge for wages." He might have paid into Court the difference; and if the party had gone on to try the merits of the case, as far as it relates to these points, and he had failed, the costs of the action would have been thrown upon the shipwrights; and therefore, as, when we apply the principle that prevails here to this particular case, there would not be much diversity in the result, I propose that that part also of the decision should be affirmed.

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SCOTLAND.

(COURT OF SESSION.)

POOR ISOBEL M'DIARMID with her Husband. *Appellants*; JOHN and JAMES M'DIARMID, *Respondents*.

[S. C. in Court of Session, 3 Wils. and Sh. 37: 1 Shaw 583. See note to *Ball v. Mannin*, 1829, 3 Bli. N. S. 1.]

J. M., a man eighty-three years old, being entitled under the provisions of a trust disposition and settlement, to the annual produce of a fund, during his life, estimated at the value of £6000, but subject to reduction, in the proportion of one-third, upon the event of a suit, executed a deed, by which he renounced all his interest in the fund, and assigned it to his daughter and her husband, to whom the reversion belonged, in consideration of an annuity of £10 a year, to be paid to him for life out of the fund, and his funeral expenses. In a suit instituted to reduce this deed, it was admitted that he was weak and infirm, and addicted to intoxication; and it appeared that the deed was drawn up by the agents of the daughter and her husband, and that no agent or other person was employed on the part of the father. Under these circumstances, the deed was held void and reduced, and the judgment affirmed on appeal.

By a trust-disposition and settlement executed in 1813, by Angus M'Diarmid and his wife, making a provision for her, by way of annuity, in bar of her legal rights, their heritable and moveable estate, in case Angus M'Diarmid should [375] leave no issue of his body at his death, or their afterwards failing, was limited to John and Catherine M'Diarmid, his father and mother, and the survivor, whom failing, to Hugh M'Diarmid, Christian M'Diarmid, and the Appellant Isobel, his brother and sisters, equally among them, their respective heirs, executors, or assignees. There was also a provision, that in case his mother should die, and his father marry again, his right should determine, and the estate devolve to his brother and sisters; in which case the father was to have right to the occupation of a house, and the trustees to pay him an annuity of £10 during life.

In February 1823, Angus died, leaving his widow, his father, and the Appellant Isobel surviving. His mother, and Hugh and Christian M'Diarmid, his brother and sister, were dead.

The property left was estimated at £6000. The widow thinking her provision inadequate, instituted a suit to reduce the deed, and re-establish her legal provision.

In March 1823, a deed was drawn up by the agent of the Appellants, and by their direction, in which John M'Diarmid and the Appellants were made parties. It recited the trust-disposition and settlement, and an agreement, whereupon it provided, that in consideration of an annuity of £40 a year, to be paid to John M'Diarmid out of the trust funds, he renounced all his right and interest in the trust property, except, etc. the annuity, and thereby agreed and declared, and bound and obliged himself, etc. "that his right to the heritable and moveable estate, except, etc. (as to the annuity) should thenceforth cease and determine, and that the same should [376] devolve and belong, and he thereby gave, granted, assigned, and disposed the same from him, etc. to the person or persons having right after him to the said heritable and moveable property by the deed of settlement." There was a farther obligation on his part, to execute deeds in legal form to effectuate the agreement; and the Appellants on their part, bound themselves to pay to John M'Diarmid £40 a year out of the trust-funds; and both parties thereby authorized the trustees to pay the annuity, and to give effect to all the provisions of the deed.

The draft of this deed was sent to the Appellants by their agent, with an intimation that it would be proper that some man of business should revise it on the part of John M'Diarmid, or that it should be read over and explained to him by some intelligent person, not interested in the matter.

The deed was executed on the 1st of April, no agent having been employed on the part of the father.

On the 7th of May following, he executed a deed in favor of the Respondent James M'Diarmid, with a power to set aside the former deed.

An action of reduction was thereupon brought by the Respondents against the Appellants, charging fraud on the part of the Appellants, in obtaining the agreement, and facility on the part of the Respondent John M'Diarmid in granting it; charging also want of consideration, enormous lesion, and that the deed was intrinsically irrational. The Appellants in their defence, admitted the age and infirmity of the Respondent John M'Diarmid, and that he was liable to get [377] intoxicated, that no agent was employed on his part, and that the amount of the trust-funds, deducting the widow's claim, would be about £4000. The Court finally sustained the reasons of reduction, and adjudged accordingly. The appeal to the House of Lords was from this judgment.

For the Appellants: Mr. Fullerton and Mr. Wilson.

For the Respondents: Mr. Keay and Mr. Miller (the counsel for the Respondents were not heard).

Authorities for the Appellants: Smith, Dec. 23, 1697 (4955); Gordon, Feb. 7, 1729 (4956); Maitland, Feb. 13, 1729 (4956), and Craigie and Stewart's Appeal Cases, April 20, 1732, p. 73; Swintoun, Dec. 10, 1679, (4962); Mackie, Nov. 24, 1752 (4963); Scott, Nov. 17, 1789 (4964); Ersk. Inst. 4, 1, 27.

Authorities for the Respondents: Ersk. 4, 1, 27; Gordon, April 28, 1730, (Craigie and Stewart, p. 47); Murray, Jan. 24, 1826, (4 Shaw and Dunlop, 374); M'Neil, May 26, 1826, (4 Shaw and Dunlop, 620, 2, Shaw's Appeal Cases, No. 29, and MSS.).

The Lord Chancellor, after stating the facts of the case, proceeded as follows:

It does not appear that any legal adviser whatever, was called in on the part of the Respondent, previously to the execution of this deed, although it was suggested by the solicitors on the part of the Appellants, that that was the course which ought to be taken. It does not ap-[378]-pear that any one of the trustees of this property was informed of the existence of the deed, although the solicitors for the Appellants, suggested that that was the proper course. Under these circumstances, the deed which was thus executed is the subject of a very strong suspicion; but that suspicion is very much strengthened, when we come to look at the deed itself.

In the situation in which John M'Diarmid stood, he was entitled to an income arising out of the property, to the extent of upwards of £200 a year. In another view of the case, he was entitled to the whole property and the disposition of it (during life.) The property amounted, as far as he was interested in it, to £3000 or £4000. The whole of this property was conveyed away by this deed, with the reservation of £40 a year to John M'Diarmid for his life, without any equivalent whatever. Con-

sidering the manner in which the deed was obtained, the situation of the party executing the deed, and the dispositions of the deed itself, you will view the transaction with very great suspicion.

But it is material to consider the frame of the deed itself, according to the substance of the deed. It was nothing more than a renunciation of property to which this old man was entitled. He gives up the whole of the property, reserving to himself £40 a year during his life. It is nothing more than a relinquishment of property, and it ought to have appeared obviously on the face of the deed. But when you look at the deed itself, it purports to be an obligation or agreement between the parties; and the deed professes to give something as an equivalent for that renunciation [379] of property, being entitled an obligation and agreement on the back of the deed itself. The consideration is stated to be the grant of this annuity. There was no annuity granted; it was nothing more than a retention on the part of this individual of property to which he was entitled. There was, in point of fact, no consideration whatever; and yet on the face of the deed, it purports to be for the consideration of this annuity, which the parties do not bind themselves to pay, but which is to be paid out of the trust-funds.

Considering the situation of the individual himself, who executed the deed,—his character,—his age,—his infirmity,—his liability to be operated upon by the suggestions of those who were about him; considering the manner in which that deed was obtained, no person having been called in to advise upon it; and considering that the suggestions which were made by the solicitors for the Appellants themselves, as to the course which ought to be pursued, were disregarded; considering also the frame of the deed, it appears to me, that there was abundantly sufficient to justify the decision of the Court below, who considered this transaction as an imposition and fraud on this old man.

One of the grounds stated by the Appellants for the purpose of justifying this transaction is this, that a provision was made for the widow of Angus by the original deed; that she was dissatisfied with that provision, and that she had instituted proceedings for the purpose of reducing the original deed; and it is supposed that the old man was apprehensive that if the original deed [380] was set aside in this action by the widow, he would be deprived of all means of subsistence, and therefore that he was willing to make this species of compromise. But that was a gross delusion. If the widow had a right to set aside the deed, she had a right to set it aside only to the extent to which she was herself interested, and the rest of the deed must remain; and, as one of the learned judges stated in the Court below, that forms an additional reason for vacating this transaction, as having been founded in delusion on the part of this old man. The Court below were fully justified in the opinion they formed of this transaction. There is sufficient in the case, as it now appears, to justify the Court in setting aside this deed, under the circumstances under which it was obtained.

It may be satisfactory to your Lordships to know, that when this case was opened by the Appellants' counsel, a noble and learned Lord (Lord Eldon), who held the office to which I have the honour to succeed, was present, and paid great attention to every part of it. I have had some conversation with him upon the subject, and he has authorized me to state, that he perfectly concurs in the view I have stated to your Lordships.

Judgment affirmed.

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SCOTLAND.

(COURT OF SESSION.)

GRAHAM and another, *Appellants*; TEMPLER and others, *Respondents*

[*Mews' Dig.* xiv. 360; *S. C.* 3 *Wils.* and *Shaw* 47.]

G. by trust deed, disposed lands at his death to trustees, to convey to his first and other sons in succession, and the heirs male of their bodies respectively,

and in default of such issue, to the first son of either of his daughters who should first attain the age of twenty-one years and his heirs; but in case his daughters should both die, and have no such son of either of them, to convey to G. and R. his nephews. The residue of his real estate he gave to the same trustees to sell, for the use of his daughters; and he assigned and disposed to the same trustees, for the use of his heirs and substitutes, etc. in the order in the deed mentioned, the charters, etc. and rents, "for now, and in all time coming."

Held, that the rents accruing between the death of the disposer, and the event on which the lands were to vest in a son of the daughter, belonged not to the daughters as heirs portioners, nor as disposed to them under the residuary clause of the deed, but were to be held in trust for the parties who should become entitled under the dispositions of the deed.

By a trust-deed executed in 1808, Thomas Graham granted, disposed, and assigned to, and in favour of himself during his life; and at his death, to, and in favour of his wife and other trustees, all his estates real and personal, according to their respective qualities, upon trust, for the pay-[382]-ment of an annuity to his wife, and a sum of £5000 to his daughter; and subject to those burdens, the trustees were to convey the estates to the first and other sons of the disposer in succession, and the heirs male of their bodies respectively; and in default of such issue, to the first son of either of his daughters, who should first attain the age of twenty-one years and his heirs; but in case his daughters should both die, and have no such son of either of them, to convey certain lands to George Graham and his heirs; and other lands, or an estate called Burleigh, to his nephew Robert Graham; and then upon further trust, to sell the residue of his real estate, and assign the produce of the sale, together with the residue of his personal estate, equally, "share and share alike as tenants in common, between his wife and his two daughters, for their separate use." The Disposer then by the deed, assigned and disposed to himself and the trustees, for the use of his heirs and substitutes, and in the order there-inbefore mentioned, all his charters, etc.; and also the whole rents, feu duties, maills, profits, and casualties thereto belonging, and tacks, if any be subsisting at the time, "for now, and in all time coming."

This deed was drawn up by an English conveyancer, and executed in England by the disposer, upon the eve of his departure for India. He afterwards resided partly, and died in England in 1819, leaving a widow and two daughters. The widow died in 1820. The suit in the Court below was commenced by the two daughters, who by an action raised against the trustees, claimed the by-gone and future rents of the lands of Bur-[383]-leigh and Kinross, from the death of their father, until an heir should appear, entitled to take up the succession to those lands. These rents were so claimed, either as not disposed of by the deed, or as passing to them under the residuary clause.

The trustees in their defences contended that the rents passed together with the lands as accessories, and belonged to the heirs named in the deed.

The Lord Ordinary held that the direction (in the deed) was such, as necessarily to imply, that the conveyance of the land should not be made until after an event should have happened, and that there was no provision that the daughter's son should have the intermediate rents, or that in the intermediate time, it should be managed for his profit, and decreed in terms of the conclusions of the libel.

The trustees having reclaimed against this judgment, the Court altered the interlocutor and assolized the defenders.

The appeal was against this decision.

For the Appellants were cited as authorities.—Hyslop, Fac. Coll. Jan. 18, 1811; Arkwright, J. D. Dec. 3, 1819; Niven, March 6, 1823; 2 Shaw and Dunlop, 250; Souther, Jan. 22, 1801, (No. 2, Imp. Will.); Earl of Stair, in D. P. May 24, 1826, June 19, 1827, MSS.

The counsel for the Respondents were not heard in argument, the Lord Chancellor having intimated an opinion that the clause assigning the rents was conclusive, and upon his motion and opinion the judgment was affirmed. (See the English Case of *Duffield v. Duffield*, ante p. 342.)

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SCOTLAND.

(COURT OF SESSION.)

The INCORPORATION of FLESHERS of GLASGOW, —*Appellants*; CHRISTIAN (NELSON) SCOTLAND, —*Respondent*.

A trading corporation having by its bye-laws fixed a rate of allowance to be made to the widows of deceased members, subject only to variation upon a defect of funds, cannot exercise a discretionary power as to the rate of allowance, but may be compelled by process in the ordinary Courts of Justice, (no defect of funds being alleged) to make the allowance fixed in a bye-law in favour of the widow of a freeman, who had entered after the date of the bye-law in question, and paid upon his entry a sum of money to the funds of the corporation, and made a small annual payment to the time of his death.

The costs incurred by an investigation of a disputed fact not allowed to a party who had the judgment upon the general question of right, the fact being found against that party.

In 1807, the Incorporation of Fleshers in Glasgow recorded in their books, a resolution proposed by the deacon and masters, and adopted by the whole body of the ordinary members, "that the annual allowances to reduced members and widows, should in future, be to men bers who have carried on the Flesher trade for five years, £12 sterling; to members who have not carried [385] on the trade five years, £6 3s.; to pendicles, (members not carrying on the trade) £3; to widows of the first class, £8; of the second class, £5; of the third class, £3; but with power to the master-court to increase their allowances as circumstances shall require, or diminish the same, if the funds of the trade are to be encroached on, or will not afford these allowances."

In 1809, James Scotland, who had married the Respondent, entered as a member of the Incorporation, and paid upon his entry, £1 8s. 10½d. to the funds, and afterwards, until his death in 1819, paid annually a contribution of one shilling.

Upon the death of her husband, the Respondent raised an action before the magistrates of Glasgow against the Corporation, setting forth in her summons the facts before stated, except the resolution recorded in the books, to which she alleged that access had been refused by the Corporation. The summons concluded for payment of the yearly sum of £8 sterling, or such other sum as should be found upon inspection of the regulations, to be the amount to which she was entitled.

The Corporation in their defences, contended, 1st. That the allowance was in their discretion, as a matter of charity, which could not be controlled by a Court of Justice. 2d. That the Respondent's husband had not carried on the trade for five years before his death, and therefore, conceding the first point, that she was not entitled to a larger allowance than an annuity of £5.

Upon advising proofs, the magistrates citing [386] *Finlay v. Newbiggin* (15th Jan. 1793), found that Corporations of tradesmen in royal burghs, were subject to the control of competent Courts, with regard to the application of their funds, to the legitimate purposes to which these funds were destined; and afterwards they found, that from the minutes of the Corporation, and other evidence, the Respondent's claim to aliment appeared to rest on the contract of the parties, express or implied, and not to fall under the rule recognized in the case of *Paterson v. the Corporation of the Skinners of Edinburgh* (10th Feb. 1803), in which it does not appear that the deceased husband of the claimant had made any payment at the date of his entry, or any subsequent payments, on the condition, express or implied, of his widow receiving a corresponding aliment. Afterwards on advising additional proof, they found the pursuer entitled to an annuity of £8 and decreed accordingly.

Upon advocacy to the Lord Ordinary, he reversed this judgment, on the authority of the case of *Paterson*. But the Respondent having reclaimed to the Court

of Session, the interlocutor of the Lord Ordinary was varied: the Court decreeing for the payment of the annual allowance of £5 sterling, and allowed only the costs incurred in the discussion of the question of right.

Against this decision there was an appeal and cross appeal.

For the Appellants: The Solicitor General and Mr. Fullerton.

[387] For the Respondents: Mr. Keay and Mr. Miller.

The Lord Chancellor: Upon the agitation of this question, two points have been submitted to the consideration of the various tribunals, before whom this question has been considered. One point, and a material point for consideration, is, as to whether or not this right can be enforced in a Court of Justice? Another question, and that is a question of fact, is, as to whether the Respondent is entitled to the £5 annuity, or to the annuity of £8 a year? With respect to the first and material point for consideration, it is to be recollected, that this was an agreement entered into between the members of this society; that after that agreement had been entered into, Mr. Scotland became a member of the society; made his payments as a member of the society; continued a member of the society till the time of his death; and became therefore a party to the agreement, and entitled to all the benefits of the agreement for himself, and for his widow in the event of her surviving.

There has been no dispute in the progress of this cause, as to the poverty of the claimant, as to her being in indigent circumstances, so as to entitle her to the benefit of this regulation. There has been no impeachment whatever of her moral conduct. It is admitted that she comes fairly within the rule; and the question is, whether, coming fairly within the rule, there being no exception on the ground of her not being indigent, there being no exception whatever to her on account of any impropriety of conduct, this so-[388]-ciety have a right arbitrarily to withhold this payment; because they can arbitrarily withhold this payment, unless there is a means of enforcing the payment through the medium of a Court of Justice? I apprehend this is to be considered as an agreement and an arrangement, between this society and every individual member of the society, and, so long as this arrangement continues in force, every member has a right to the benefit of it; and if that benefit is attempted to be withheld from him, he is entitled to come to a Court of Justice for the purpose of claiming redress.

This was the view of the case taken by the Court of Session, and accordingly they pronounced the interlocutor, against which this appeal has been preferred.

This judgment ought to be affirmed. The only argument that was pressed against it, in point of authority, arose out of the case of *Paterson against the Corporation of Skinners of Edinburgh*; but that case has no reference whatever to that before your Lordships. It is true, that was a case of aliment; but in the case of *Paterson against the Corporation of Skinners*, it appears, according to the facts of that case, that in the regulations which existed for the original constitution of that corporation, each individual case was considered by itself; that the claimant preferred her claim to the corporation—they considered the nature of her claim, and made her such allowance as they thought proper; and it appeared that they were in the habit, from time to time, of withdrawing those allowances, according to their own discretion, and their sense of the propriety [389] of the act. It is perfectly clear, therefore, that that case has no resemblance to a case like the present, where an arrangement was entered into with respect to a fixed amount, appropriated according to a certain course of payment, to which all the members of the corporation were parties.

With respect to the question of fact, as to whether the woman is entitled to the five or the eight pounds, I will not go through the detail of the evidence. I will only state generally, that after having looked with as much attention as I can into the subject, it is not made out in a manner satisfactory to my mind; at least it is not made out and established in evidence, that her husband carried on the business of a flesher for a period of five years and upwards; and that not being made out satisfactorily in point of evidence, the consequence is, that she cannot be entitled to claim more than the sum of £5 a year.

With respect to the costs, the manner in which the costs have been arranged, appears to me also to be fair and equitable; that part of the costs which arose out of the discussion of the question of right, has been allowed to the widow, but she has not been considered by the Court below, as entitled to those costs resulting out of

the investigation of the question of fact, the decision as to the fact having been against her: and they ought to be disallowed, provided you are of opinion, that the judgment of the Court on the other points ought to be affirmed. I should submit to your Lordships, therefore, upon the whole case, that the final judgment of the Court of Session [390] should be affirmed, and both appeals dismissed. There is an original appeal by the corporation, and there is a cross appeal by the widow: the decision, therefore, I should recommend is, to dismiss both appeals, and I think upon the whole, it will be better that there should be costs on neither side.

[391]

SCOTLAND.

(COURT OF SESSION.)

MANNERS, MILLER, and others.—*Appellants*: Sir D. HUNTER BLAIR, and others.—*Respondents*.

AND

BUCHAN and others.—*Appellants*: The OFFICERS of STATE, and Sir D. H. BLAIR and others.—*Respondents*.

[See *Donaldson v. Beckett*, 1774, 2 Bro. P. C. 129; *Grierson v. Jackson*, 1791, Ridg. Ir. T. R. 304; *Universities of Oxford and Cambridge v. Richardson*, 1802, 6 Ves. 689; Copinger on Copyright 3rd Ed. p. 310; Shortt on Copyright, 2nd Ed. 48.]

The King by letters patent, granted to B. and B. their heirs and assigns, to be his only printers in Scotland for forty-one years, to use and enjoy with all its profits and privileges, so far as the same were consistent with the articles of the Union, and especially the sole privilege of printing in Scotland, Bibles, (*Biblia Sacra*) Testaments, the Psalms, the Book of Common Prayer, Confessions of Faith, the greater and lesser Catechisms in the English tongue. The letters prohibited all other persons, subjects and foreigners, to print in or import into Scotland from any parts beyond the seas, any of the said books, without the licence or authority of B. and B. their heirs, assigns, and substitutes, under pain of confiscation.

Held, that the patentees had under this patent, the exclusive right of printing in Scotland, all the books enumerated in the patent, and that the received English translation of the Bible was within the terms of the patent, and could not be sold in Scotland without the authority of the patentees, although the prohibition in terms extended only to importation from parts beyond seas.

In the year 1785, the office of Printer to his Majesty for Scotland, was granted in reversion to the late Sir James Hunter Blair, Baronet, and [392] the Respondents Mr. Bruce. Sir James Hunter Blair was succeeded in his right as joint patentee by the other Respondent, Sir David Hunter Blair.

By the patent of appointment to this office, which bears date on the 2d November, 1785, the commencement of the right is declared to be from the expiry of the then existing patent to Alexander Kincaid, which event took place in the year 1798, and from thence to endure for forty-one years.

By this writ, which is in the form of a commission or letters patent under the Union Seal, his Majesty nominates, constitutes, and appoints, *Memoratis Jacobum Hunter Blair, et Joannem Bruce, conjunctim, heredes eorum, substitutes, seu assignatos, solos et unicos nostros architypographos, in illa parte regni nostri Magna Britannia Scotia vocata; idque pro spatio quadraginta unius annorum, computanda ab et post expirationem diplomatis, pro present. et sensus, prefato Alexandro Kincaid, pro simili spatio quadraginta unius annorum concessisse, cum plena potestate ipsis Jacobo Hunter Blair, et Joanni Bruce, conjunctim, eorumque heredibus, assignatis, seu substitutes, antedictis, prefato munere et officio, durante spatio antedicto, utendi, exercendi, et gaudendi, cum omnibus proficiis, emolumentis,*

immunitatibus, exemptionibus, et privilegiis, quibuscunque eidem spectantibus, in quantum cum articulis Unionis, legibus que Magnæ Britannie nunc existentibus, congruant: Et speciatim, solum et unicum privilegium imprimendi, in Scotia, Biblia Sacra, Novi Testamenti, Psalmorum libros, libros Precum Communiū, Confes-[393]-siones Fidei, majores et minores Catechismos in lingua Anglicana;—necnon solam potestatem imprimendi et reimprimendi acta Parlamenti, edicta, proclamationes, omnesque alias chartas in usum nostrorum publicorum in Scotia officiorum imprimendas: Et generaliter omne quod ibidem publicandum erit, auctoritate regali, imprimendi et reimprimendi: Prohiben, per presentes, omnes alias personas quascunque, tam natos quam extraneos, imprimere vel reimprimere, seu imprimi seu reimprimi in Scotia causare, vel importare seu importari facere in Scotiam, a quibuscunque locis transmarinis, ullos dict. librorum, et chartarum publicarum supra mentionat. absque licentia vel auctoritate a dict. Jacobo Hunter Blair et Joanne Bruce, heredibus eorum, assignatis, vel substitutis, sub pena confiscationis omnium talium librorum, chartarumque publicarum, ita impress. seu importat. in Scotia; unius eorund. dimidii ad nos, alteriusque in usum dict. Jacobi Hunter Blair, et Joannis Bruce, eorumque antedict."

Under these letters patent, the Appellants in the first appeal, had obtained an interdict against the Respondents, restraining them from importing or selling, or exposing to sale, any of the books enumerated in the letters patent. Against this decision, Miller and Manners appealed to the House of Lords, and upon the hearing in 1825, after observing that the only question substantially discussed in the argument of counsel, had turned principally on the language of the patent, which, although it conferred the sole right of printing in Scotland, yet the prohibition was only of printing in Scotland, or importing from places [394] beyond the seas, Lord Gifford proceeded as follows:

In considering this case, since it was argued, it appears to me, that a very important question has not been fully discussed. I apprehend, that the prerogative in this country, to grant the right of printing Bibles, New Testaments, etc. belongs to the King as supreme head of the church, and he only has a right to authorise the publication of the Book of Common Prayer, and the liturgy of the church.

Now this interdict applies not only to Bibles, New Testaments, Psalm Books, and Books of Common Prayer, which I apprehend mean books of English communion, but Confessions of Faith, (whether the Scotch Confession of Faith or the thirty-nine Articles does not appear), or larger or smaller Catechism, (what Catechisms they are does not appear). With respect to some of those works, it may be, that the prerogative of the Crown of Scotland may be larger than the prerogative of the Crown of England. But upon looking into the statute of 1690, by which the church government in Scotland was settled, there is this remarkable passage with respect to the Bible:

Section 8. "The Old Testament in Hebrew, (which was the native language of the people of God of old), and the New Testament in Greek, (which, at the time of the writing of it, was most generally known to the nation), being immediately inspired by God, and by his singular care and providence kept pure in all ages, and therefore authentical, so as in all controversies of religion, the church [395] is finally to appeal unto them: But because these original tongues are not known to all the people of God, who have right unto and interest in the Scriptures, and are commanded in the fear of God to read and search them, therefore they are to be translated into the vulgar language of every nation unto which they come, that the word of God dwelling plentifully in all, they may worship him in an acceptable manner, and through patience and comfort of the Scriptures, may have hope."

Now I cannot find, that by any Act of the Crown of Scotland, or the Government of Scotland, there has been any authorized translation of the Bible for the use of the people of Scotland. I have been unable to find such, if any there is. I believe there is none. Then comes the question, Whether, supposing the privilege of the Crown in Scotland was the same as in England, to authorize a translation of the Bible, yet, not having done so, is it competent for the Crown of Scotland to say, you shall not import into Scotland a translation of the Bible authorized by the law of England? With respect to the Book of Common Prayer, if it alludes to the Book of Common Prayer of England, that is no part of the church establishment of Scotland; and has the Crown of Scotland the privilege to say, that that which is the form of the

liturgy of the church of England, with which they have nothing to do, shall not be sold in Scotland, unless printed by the king's printer in Scotland! With respect to the Confessions of Faith, there was a Confession of Faith published in 1690, (which is the Con-[396]fession of Faith adopted in Scotland, and authorized by the Crown), and the Crown has, as it was contended, and not denied, the same sort of privilege in Scotland as to the printing Acts of State, and those particular works which are peculiar to the church of Scotland, if there be any such: but has it the privilege of prohibiting the printing or selling in Scotland, the form of prayer of the church of England, with which form of prayer they themselves say, they have nothing to do in Scotland! So, as to the Psalms, there may be Psalm Books in Scotland, which are peculiarly used by the church of Scotland. Whether they have the power of preventing surreptitious copies of them, I know not. Then, as to the larger or smaller Catechism, it is possible they may have such works. These questions appear to me important, and perhaps I ought to take blame to myself, for not, at the time of the argument, having suggested these difficulties: but they did not then occur to me, for my attention was turned to the prohibitory clause. A good deal of the argument turned upon the case cited at the bar, which was said by the Appellants, to be the converse of this. In that case (*Univ. of Orford and Cambridge v. Richardson*, 6 Ves. 689) it was decided, that the king's printer in England, had a right to prohibit Bibles printed in Scotland, from being circulated in England, because it would be an infringement of the prerogative, which conferred the right upon a particular individual; and passages were cited from the judgment pronounced by the Lord Chancellor. He was of opinion that the power [397] was reciprocal. He seemed to admit, that the Scotch printer could prevent the English printer from selling the English Bibles, or Book of Common Prayer, in Scotland: but the attention of the Lord Chancellor, and the noble Lord who assisted, was not drawn to the rights of the church of Scotland: nor do I see any thing in the judgment, that warranted the conclusion that he had formed a decisive opinion upon that point, but there are passages that are thought to bear that way.

It seems to me, with a view to save expense to the parties, and the delay that would take place, that it would be better for me to ask your Lordships to adjourn the case till the next session of Parliament, and have a farther argument upon this question, which affects the privilege of the Crown of Scotland, exercised in Scotland over works of this nature. Your Lordships have had an argument directed to the various species of works interdicted by this interdictor, some of which may, for ought I know, come within the prerogative of the Crown of Scotland, conferring a monopoly upon the printer: but I do not profess to have formed any opinion upon the subject. It is of great importance to consider, whether the prerogative of Scotland can extend to a translation of the Bible, which the Crown of Scotland has never authorized itself. If it has, we shall be informed of it. Is it the translation printed in England? or what translation of the Bible is it, which the king's printer in Scotland has the sole privilege of printing? Is it every Bible, or the English translation? I apprehend the [398] principal question in this case, will turn mainly upon the printing of the Bible and the New Testament.

I therefore propose to your Lordships to adjourn this case till the next session.

The case was accordingly adjourned (29th June, 1825).

In the mean time, the question came under discussion in a similar suspension and interdict presented to the Court of Session by the King's Printers against Buchan and others, members of the Edinburgh and Glasgow Bible Societies. The Lord Ordinary in that case, "in respect of the charges (Buchan and others) having failed to point out any distinction between the matters at issue in the present process of suspension, and those determined after the fullest discussion and consideration by the first division of the Court in the case of the *King's Printers v. Mannings and Miller*, and other booksellers in Edinburgh, and that no documents which appear to the Lord Ordinary materially to affect the grounds of that judgment, are now founded on, which were not before the Court as aforesaid, or that any allegations in point of fact, are made by the chargers, different from those which were made in the said case before the Court," suspended the letters supplicatory, continued the interdict and decreed. The Court, on the case being brought under their review, in consideration of the doubt as to the royal prerogative in Scotland, expressed in the House of Lords, appointed intimation to be made of the Officers of State, and allowed

them to appear for his Majesty's interest; and thereafter (12th May, 1826) adhered, except as to [399] the Book of Common Prayer, as to which they altered the Lord Ordinary's interlocutor, and removed the interdict in *hoc statu* (4 Shaw and Dunlop, No. 365).

Buchan and others appealed, and the King's Printers presented a cross appeal, in regard to the Book of Common Prayer.

For the Appellants (in chief): Dr. Lushington and Mr. Keay.

For the Respondents: Mr. Sugden and Mr. Bell.

Authorities for the Appellants: Rob. App. Ca. 197; St. 1551, c. 27; 1606, c. 1; 1669, c. 1; 1689, c. 3; 1690, c. 1, 5, and 23; 1700, c. 2; 1702, c. 3; 1703, c. 2; 1707, c. 6; King's Printer, May 22, 1790, (8316); March 7, 1823, (2 Shaw and Dunlop, No. 254); Mackenzie's Obs. 153; 4 Bank, 22, 14; 1 Ersk. 5, 6; *Miller v. Taylor*, 4 Burrow, 2381, 2417; 5 Bac. Abr. 599; 1 Burn. Eccl. Law, 347, 373, 4to. edit.; *Basket v. Univ. of Cambridge*, 1 Blac. Rep. 114; *Stationers' Co. v. Carnan*, 2 Blac. 1004.

Authorities for the Respondents: 1 Mackenzie's Works, vol. i. p. 257; Anderson, Jan. 5, 1683, (Fountainhall); Rob. App. Ca. 197; *King's Printer v. Bell and Bradfute*, May 22, 1790 (8316); 1 Burn. 348, 4to. edit.; 4 Burrow, 2381; Hinton, July 27, 1773, (8307); Becket, Feb. 22, 1774; 5 Bacon, 599; 1663, c. 27; 1701, c. 7; 14 Rymer, 650, 766; 2 Blackstone, Comm. 410.

[400] The Lord Chancellor: The principal Respondents in this case are the King's printers in Scotland. They hold that office under a patent from the Crown. The Appellants are members of certain Bible Societies in Scotland, and have been in the habit of importing Bibles from England; and the material question to be decided in this case, is whether or not the King's printers in Scotland have, by virtue of their office and their patent, a right to exclude persons from importing Bibles, and the other works which are contained in the patent, from England?

Two important questions were raised in this case. One, which was raised, and which was argued at great length in the Court below, and argued very ably at your Lordships' bar, was as to the right of the Crown to grant a patent, the effect of which shall be, to prevent persons in Scotland from importing Bibles, and other works of the description mentioned in the patent, certain religious works, from England; and the second question turned upon the particular construction of the terms of this patent.

With respect to the first question, it arose out of the case of *Manners and Miller v. Blair*, which was before your Lordships' House two or three sessions ago. When that case came on for argument, and was argued at your Lordships' bar, it occurred to the learned Lord who then presided here (Lord Gifford), that there was a doubt as to the validity of the patent, and as to the power of the King to grant a patent of that description. I do not mean to suggest that the [401] noble and learned Lord expressed any opinion upon that subject, but that he was desirous, before he decided that question, that that point should be argued at your Lordships' bar; but which was in fact, never argued in the particular case, because the case in which I am about to propose that your Lordships should give judgment, was before the Courts below; and being before the Courts below, the point was raised before the judges of the Court in Scotland, which had not in fact been raised in the case of *Manners and Miller v. Blair*; and that case having come before your Lordships upon appeal, it was considered more convenient and proper, that the argument, with respect to the validity of the patent, and with respect to the prerogative of the Crown, should be on that particular case, than on the case of *Manners and Miller*; but your Lordships' decision in the one case, will be of course governed by the decision in the other.

In conducting the argument, with respect to the prerogative of the Crown, reference was made, and very properly made, to the cases of prerogative in England. For two hundred years and more, the kings have, in England, granted patents to their printers here, as extensive as the patent we are now considering, and perhaps more extensive, but extensive enough to raise the question we are now considering. In England, the power of the king to grant patents of this description, or to appoint to such an office, has never been seriously questioned. Those patents have from time to time come under the review of our Courts, and the judges have been called upon [402] to decide upon them. One case occurred before Sir Joseph Jekyll, so far back as the year 1720, and others at different periods, both in the Courts of Equity, and also before this House during the last century; and I would state it as a point not

admitting now of doubt or controversy, that as far as relates to the office of King's printer in England, the Crown has the prerogative to grant a patent as extensive as that we are now considering,—assuming, for the purpose of argument, that the patent is as extensive as it is contended on the part of the Respondents to be.*

But although the power of the King and his prerogative in England has never been questioned, it has been rested by judges on different principles. Some judges have been of opinion, that it is to be founded on the circumstance of the translation of the Bible, having been actually paid for by King James, and its having become the property of the Crown, and therefore it has been referred to a species of copyright. Other judges have referred it to the circumstance of the King of England being the supreme head of the church of England, and that he is vested with the prerogative with reference to that character. Other judges have been of opinion, and I confess, for my own part, I am disposed to accede to that opinion, that it is to be referred to another consideration, namely, to the character of the duty imposed upon the chief executive officer of the Government, to superintend the publication, of [403] the Acts of the Legislature, and Acts of State of that description, and also of those works, upon which the established doctrines of our religion are founded, that it is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative. That was the opinion of Lord Camden, as expressed in the case of *Donaldson v. Becket* (4 Burr. 2408), in most direct and eloquent terms in this House: that was the opinion also expressed by Chief Baron Skinner, in the case of *Eyre and Strahan v. Curran* (Court of Excheq. 1781); and I think that may be collected or inferred to be the opinion of a learned and noble Earl, now a member of your Lordships' House, from what fell from that noble and learned Lord, in the case of *the Universities of Oxford and Cambridge v. Richardson* (6 Ves. 701, 5).

If that be so, if that is the true principle upon which this prerogative is to be rested, it appears to me that all difficulty ceases with respect to the prerogative in Scotland. In Scotland, as well as England, patents of this description have been granted without dispute or contest, for more than two hundred years. These patents have at different periods been made the subject of suits in the Courts of Scotland, and particularly in the case of *Watson v. Baskett*, in the year 1716, or the year 1717, which cases came afterwards by appeal to the House of Lords. In another case, that of the *King's Printers v. Bell and Bradgate*, this patent came under the consideration of the Courts of Justice in Scotland; and many other cases may be referred to, for the purpose of establishing the same fact, so that we have in Scotland, as [404] well as England, patents granted successively for a period of more than two hundred years. These patents have been the subjects of suits. These cases have come to your Lordships' House; and I do not think, that until the doubt was thrown out by the noble and learned Lord to whom I have referred, the late Lord Gifford, the prerogative of the Crown of Scotland was ever called in question. Certainly it never did occur to the very able counsel who argued the case of *Manners and Miller v. Blair* in the Court below, seriously to consider or to contest that point.

In the course of this argument it was assumed, as the basis of a part of an argument, that the prerogative in England depended upon the King's character as supreme head of the church; and it was argued, that that principle did not apply to Scotland, for that although the King was the supreme head of the church in England, he was not the supreme head of the church in Scotland; and therefore the prerogative might well exist in this part of the island, and yet not exist in Scotland. But, I have already stated, that I do not refer the prerogative to the circumstance of the King being, in a spiritual or ecclesiastical sense, the supreme head of the church in England, but to the kingly character—to his being at the head of the church and state, and it being his duty to act as guardian and protector of both—a character which he has equally in Scotland and England. It is perfectly clear, that it is the duty of the King to act thus part, as the guardian of the church in Scotland. That is a principle laid down by the authorities in Scotland as much as in England. By the authority of the statute [405] by which the Reformation was established in Scotland, it is declared to be the duty of the magistrates, and the King as supreme magistrate, to be the protector of the church; and in

* *Baskett v. Parsons*. At the Rolls 1718. In D. P. 1719. Cited in *Univ. of Oxf. and Cam. v. Richardson*, 6 Ves. 699.

the Act of 1690, by which the Presbyterian church was established, when the Episcopalian church authority was finally put an end to in Scotland, the same principle is laid down and acknowledged. I think, therefore, that this right and prerogative depends upon the King's character as guardian of the church and guardian of the state, to take care that works of this description are published in a correct and authentic form; and that those arguments upon which the authority rests in this country apply also in Scotland.

But it was said at the bar, that in England, as far as relates to the translation of the Holy Bible, we have the translation recognized by public authority, introduced into the service of the church by public authority; and that the prerogative in England will properly apply to this translation, but that the same principle does not apply in Scotland.

With respect to the Bible which was translated in the reign of James the First, and which indisputably was translated under his sanction, and by virtue of his authority, it does not appear that he contributed any thing towards the expense. It does not appear that that translation of the Bible was introduced into the church by the authority of any Act of Parliament, by the authority of any Act of Convention, or by proclamation; but undoubtedly it was introduced under the sanction and authority of the head of the church, under the sanction of the King of that [406] period,—in what precise way does not appear by evidence. It is probable, that after it was completed, and the heads of the church were satisfied with it, it was by the authority of the bishops, in their respective dioceses, introduced into general use throughout the kingdom, possibly without any further act for that purpose. But is there any essential difference between the situation of England and Scotland in this respect? I apprehend clearly none; because the same translation has, if not by the actual authority, at least by the sanction of the General Assembly of Scotland, been introduced into their church, and used there for a period I believe of one hundred and fifty years; and I understand that use of it in Scotland is as general, and indeed as exclusive and universal as in England. This translation, therefore, has been sanctioned in the country by the church of that country, and by the proper ecclesiastical authorities; and I apprehend that it stands in the same situation, and is guarded by the same privileges, and is in point of law, unless the General Assembly should order otherwise, as compellable to be used in the churches of Scotland as it is in the churches of England. I do not apprehend, therefore, that there is any difficulty in this respect, or that any argument whatever, can be founded on the idea, that by some authority in this country that particular translation has been introduced into universal use in our church, and that no corresponding authority exists in Scotland. I have no doubt there is some authority, at least some implied authority, for the introduction of it in England; and I apprehend there is [407] the same implied authority, the same sanction for it by ecclesiastical authorities in Scotland.

It was in consequence of this circumstance, and some doubts arising out of this particular view of the case, that the noble and learned Lord to whom I have referred, was desirous that in this particular view, it should be considered again.

It appears to me, that as far as relates to the translation of the Holy Scriptures, the case with respect to Scotland is precisely the same as it is with respect to England. But in this patent there are other works noticed. There is the Confession of Faith. I find that the Confession of Faith was ratified by the General Assembly, in the year 1649; it is therefore a book adopted by the proper ecclesiastical authority in the country. The larger and the shorter Catechisms were also ratified by the General Assembly about that same period; and with respect to the metrical version of the Psalms, which is also contained in that patent, that was, as I am informed, prepared by the authority of the General Assembly, and it is used in the churches by authority of that General Assembly. It appears to me, therefore, that these works come within the same principle as the Holy Scriptures, and within the same principle as the Book of Common Prayer in this country.

A question has been raised with respect to the Book of Common Prayer, which is also contained in this patent; and it is said, that at all events, the King could not in Scotland, confer the exclusive right of printing this work on his printer in Scotland. The Court below entertained some [408] doubt upon this point, and in this particular stage of the cause, they have excepted the Common Prayer from the

operation of their interdict, without, however, pronouncing any decision upon it. At one period episcopacy existed in Scotland. During that time, there is no doubt the King's authority applied to the Book of Common Prayer, as well as to the other works to which I have referred. It is true that by the Act of Parliament passed in the year 1690, an alteration was made in this respect. By the effect of that Act of Parliament in 1690, the presbyterian form of worship became the established form in Scotland, and the church of that persuasion became the established church of Scotland: but, those persons who were members of the church of England, who were in her communion, were still entitled to the protection of the Crown: there was nothing in that Act of Parliament to deprive them of that protection: and if the King possessed the prerogative previous to the passing of the Act in 1690, by which he had the exclusive right, by himself or his officers, in Scotland, to publish the Book of Common Prayer, there is nothing in the Act of 1690, to deprive him of that prerogative, which he had previously enjoyed.

It does not appear to me, therefore, in this view of the case, that there is any essential difference between that part of the patent which relates to the Book of Common Prayer, and that which relates to the other works. I think, therefore, that with respect to this question, which was not originally mooted in the Court below, [409] namely, the general question of the validity of the patent, which was only afterwards argued in the second case, in consequence of the wish intimated by the noble and learned Lord to whom I have adverted, that your Lordships will have no difficulty in coming to the opinion, that in Scotland, as in England, the King possesses this prerogative, and that he has a right to confer it upon his printer.

If that be so, the only remaining question to which I propose to call your attention is, the construction of the patent.

I confess I had considerable doubts at first, in determining what was the proper construction of this patent: but in looking very attentively at the patent, considering the whole bearing of it, and all the facts of the case, those doubts and difficulties have ceased. The patent is in substance this, that those particular individuals are declared to have the sole and exclusive right of printing in Scotland the particular works which are mentioned in it. They are to have the office, and discharge the duties, with all its perquisites, all its emoluments, and all its privileges, as far as it is consistent with the articles of Union. That is the granting part of the patent, to which I shall at present confine my observations.

The expression, "as far as it is consistent with the articles of Union," requires some explanation. A short time before the patent was granted to Baskett in the year 1716, which was in the same terms as this, a patent had been granted to a person of the name of Frechairn, in the year 1711. That patent was, in the granting part of it, as general as this which I have stated; but [410] it contained a prohibition against all persons importing, either from England, or any parts beyond the seas, any of the particular works enumerated in the patent. Some doubts were created in the minds of some persons, with respect to the validity of that patent: it was submitted for the consideration of the Lord Advocate of Scotland, Sir James Stewart; and Sir James Stewart was of opinion, that it was contrary to the fourth article of the Union between England and Scotland, to prohibit the importation of those works from England. The patent was also referred to the consideration and opinion of Mr. Kennedy, who held at that time, the office of Solicitor General at Scotland: he gave an opinion upon this point, directly the reverse of that expressed by the Lord Advocate; and it turns out in the result, as appears by the decision in the case of *Richardson v. the Universities of Oxford and Cambridge*, that the opinion which the Solicitor General gave was the correct opinion, and that the patent was not contrary to the terms of the article of Union. If that be so, then we may read this patent precisely as if those words were not contained in the patent: and then it is a question, as to the exclusive right of printing these particular works, granted with the office of King's printer, with all the privileges, and with all the emoluments incident to that office. With reference to the previous part of it, the exclusive right of printing works of this description, must carry with it the right of excluding all other persons from the participation, from the right of printing them or circulating them. The one is a consequence of the other. The Crown, [111] by its prerogative, has a right of printing by its officer, it has by its prerogative, the right to exclude all others from the enjoyment of the right, by importation or otherwise.

Therefore, when the King grants the right of printing, he grants the other part, namely, the authority he possesses, or rather, as Lord Eldon has said, the duty consequent upon that authority, the duty of excluding others: and it appears to me, therefore, on looking at the subject in this view, with reference to the granting part of the patent, the patentees have clearly a right to exclude.

But there is a prohibition which follows the granting part of the patent, and it is said, the prohibition extends only to parts beyond the seas; and there is a penalty annexed to the prohibition,—all persons are prohibited from importing the specified works from parts beyond the seas, under the penalty of losing those works. But it is no objection to a patent, which conveys a particular power and a particular authority, that there is a prohibition accompanied with a penalty, and that that prohibition accompanied with a penalty is not co-extensive with what is supposed to be the grant. An argument may arise out of the prohibition, for the purpose of construing the grant, and for the purpose of ascertaining what the intention of the granter was; but if the intention of the granter be clear, it does not follow that the grant is at all limited, from the circumstance of there being a prohibition, accompanied with a penalty, which is not co-extensive with the grant.

But in this case no question can arise upon the limitation of the prohibition, because we can un-[412]-derstand at once, what was the reason of the limited nature of the prohibition. That prohibition arose out of the doubt expressed in the opinion of the Lord Advocate of Scotland. In the granting part of the patent, reference was made to the articles of Union. We grant you all the powers which have been enjoyed by any of your predecessors in this office, as far as they are consistent with the articles of the Union, but no further. It was supposed that the prohibition of importation from England, was contrary to the fourth article of the Union: and therefore, when the party drawing that patent came to the prohibition to be followed by a penalty, he did not choose to carry that prohibition beyond the point, to which it could be with safety and certainty extended. When we find that it has been decided, that the articles of the Union do not bear upon this case, we have at once an interpretation of the whole patent, and see the reason for the limited prohibition, and that these words were not intended to have any effect in limiting the patent, unless the articles of the Union required it should be limited. My opinion is, that it is a grant of the authority of the Crown: that the Crown intended to convey all the authority it possessed, and, as Lord Eldon very properly says, there is a duty incident to the authority. The Crown intended to convey its authority, and the Crown intended to convey that authority with a corresponding duty. I therefore cannot bring myself to entertain any serious doubt with respect to the construction of the patent.

On these grounds, I should recommend to the House, both with respect to the former objection, [413]—as to the prerogative of the Crown, and also with respect to the construction of the patent,—to confirm the opinion expressed after very elaborate argument, and expressed in great detail, and with great ability, by the judges below. I should propose, that in the case of *Buchan v. Blair*, the interlocutors complained of by the original appeal should be affirmed, and those complained of by the cross appeal reversed: and as incident to that decision, I should propose that the judgment in the case of *Manners and Miller v. Blair*, should also be affirmed.

The only difference to which it is material to call your attention, is that in the case of *Manners and Miller v. Blair*, the interlocutor includes the Book of Common Prayer: but in consequence of some doubts entertained by the learned judges, having been expressed in the interlocutor in this particular case of *Buchan v. Blair*, that is made the subject of exception: I should recommend to your Lordships, that these interlocutors be affirmed on all other points: and as to this exception, that the interlocutor be reversed.

The effect of the judgment will be, that the King's printer in Scotland will stand on the same footing as the King's printer in England. It has been decided, that the King's printer in England has a right to prevent the importation of all books which come from Scotland. I did not mention that as the foundation of the judgment,—that was not a ground on which to proceed to such an adjudication: but, at the same time, your Lordships will not regret that the judgment to be pronounced is followed with consequences so just and equitable.

[414]

SCOTLAND.

(COURT OF SESSION.)

Sir NEIL MENZIES, Bart.—*Appellant*: The EARL OF BREADALBANE and another.—*Respondents*.

[*Mews' Dig.* xiv, 1982, 5 Scots R. R. 119. Adopted in *A. G. v. Lonsdale (Earl of)* 1868, L. R. 7, Eq. 387; *Veidl v. L. and N.W. Ry. Co.* 1871; L. R. 10 Ex. 7; and *Orr-Ewing v. Colquhoun*, 1877, 2 A. C. 857. And see *Whalley v. Lancashire etc. Ry. Co.*, 1884, 13, Q.B.D. 136.]

A proprietor of land on the bank of a river, having commenced the building of a mound, which according to the opinion and report of an engineer, would, if completed, in times of ordinary flood, throw the waters of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them, was restrained by perpetual interdict, from the farther erection of any bulwark, or other work, which might have the effect of diverting the stream of the river in time of flood from its accustomed course, and throwing the same upon the lands of the Appellant.

In 1798, the predecessor of the Appellant, by bill of suspension and interdict, complained against the proprietor of the lands held by the Respondent, that he had begun to erect upon the upper end of a piece of land, along the bank of the river Tay, at the distance of four or five yards from the ordinary channel, a bulwark, which, if finished, would have the effect of turning the water upon the complainant's property, and overflowing his lands.

An interdict was granted upon this bill, and a remit was made to an engineer to inspect the channels of the river, and report on the probable effect of the erection of the bulwark.

[415] No further proceedings were taken until 1821, when the Respondent having purchased the property called Bolfrax, on which the bulwark was erected, awakened and transferred the action against the Appellant, who was the representative of the original complainer; whereupon the matter was referred to an engineer, upon the terms of the original remit.

The engineer by his report, gave a description of the lands in question; of the channels, and the effect of floods in the river; and of the ordinary modes and effect, and the proper site and construction of embankments; and concluded by reporting, that the embankment on the upper end of Bolfrax-haugh was too near the margin of the ordinary channel of the river.

Upon the report, the Lord Ordinary declared the interdict perpetual.

On the 11th July, 1826, the interdict was recalled by the Court.

The appeal was against this decision.

For the Appellant: Mr. Moncrieff.

For the Respondent: The Solicitor General and Mr. Keay.

Authorities for the Appellant: *Ersk.* 2, 1, 5, and 2, 9, 13; *Diet. voce Property*: L. Glenlee, March 10, 1801, (12,831); *Hamilton*, March 5, 1793, (12,824); *Dick*, Nov. 16, 1769, (12,813); *Town of Aberdeen*, Nov. 22, 1748, (12,787); *Fairlie*, Jan. 26, 1744, (12,780); 39 *Dig.* t. 3, l. 1, sec. 2; 39 *Voet*, 3, 4.

Authorities for the Respondent: *Farquharson*, June 25, 1741, (12,779,) and *App. Voce. Prop.* No. 5.

[416] The Lord Chancellor: This is a question arising out of an embankment on the river Tay. The river Tay, on the north side, at the spot in question, is bounded by a considerable extent of flat land, belonging to Sir Neil Menzies; on the southern side it is chiefly bounded by high land, but this high land terminates at a point called Bolfrax-haugh, which land belongs to Lord Breadalbane. Bolfrax-haugh continues for the space of about twenty-seven acres. Then there is another piece of land, Farleyer Island, part of which belongs to Lord Breadalbane, and between those two lands there is a portion of the old channel, as if the water had formerly ran in that direction. There are some facts not at all in dispute in this case. Every person knows the character of the river Tay; and that in times of flood, that is, in

autumn, winter, and in the spring, the flood stream takes its course with very considerable violence along this piece of land, to which I have referred. It is therefore obvious, that an embankment running parallel to the stream, commencing at the first point of Bolfrax-haugh, and carried up to Farleyer Island, would have the effect of stopping up the old course of the flood stream, and throwing it entirely on the opposite piece of land belonging to Sir Neil Menzies, and the question in this case is, whether the proprietor of this land, Bolfrax-haugh, has a right so to do?

The land which now belongs to Lord Breadalbane, was formerly the property of Mr. Alexander Menzies, and in the year 1778 he commenced these works, when he either formed or repaired a jetty in the alveus of the stream, and he connected [417] with that jetty the embankment in question, which embankment is one or two yards distant from the course of the stream, about three feet in height, sufficiently high to turn the flood water of the river. Those works were carried on, I think, to the extent of about two hundred yards. In consequence, Sir John Menzies then the proprietor, filed a bill of suspension and interdict: an interim interdict was obtained, and further proceedings were carried on; but these further proceedings were all at once suspended, until the year 1821.

In the mean time Lord Breadalbane purchased the property of Mr. Menzies; and having purchased the property, he revived those proceedings. When the case came before the Lord Ordinary, as far as related to the jetty, and any other works in the alveus of the stream, he was of opinion that the interdict should be continued; but he referred the question, as to the embankment upon the side of the river, on the property of Lord Breadalbane, for further debate and consideration. It ultimately came before the First Division of the Court of Session, and the interdict, as far as related to the embankment, was dissolved.

While this affair was going on before the Lord Ordinary, an engineer of considerable eminence, Mr. Jardine, was, according to the course of proceedings in the Court of Session, directed, as the servant and officer of the Court, and standing between the parties, to view the place, and report his opinion. Without going into the minute particulars of that report, I may state, that it is clear that if this embankment should be continued, as it is projected, along the banks of the river, it [418] will have the effect of throwing the ordinary flood streams of the river off the lands of Lord Breadalbane, and on the lands of Sir Neil Menzies. Many circumstances were referred to at the bar, with respect to the law of England upon this subject. It is quite unnecessary to trouble your Lordships with any observation on the law of England, and particularly on the law of England with reference to particular places, because it is clear, beyond the possibility of a doubt, that by the law of England, such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course, by a sort of new water-way, to the prejudice of the proprietor on the other side; and I am the less disposed to trouble you with reference to the law of England, for that can be referred to only by way of illustration. This case must be decided by the law of Scotland.

Now, with reference to the law of Scotland, this is perfectly clear, that a superior heritor cannot divert any part of a stream to the prejudice of an inferior heritor. It is also clear, that an inferior heritor cannot do that which shall cause the water to stagnate, to the prejudice of the superior; that is acknowledged to be clear law. But it is said, that applies only to the alveus of the course. But it does not appear to me, that there is any solid ground for the distinction. The ordinary course of the river, is that which it takes at ordinary times; there is also a flood channel: I am not talking of that which it takes in extraordinary or accidental floods, but the ordinary course of the river in the different seasons of the [419] year, must, I apprehend, be subject to the same principle.

But let us see what is said on this subject by the institutional writers on the law of Scotland. Erskine, in his Institutes, is distinct, as it appears to me, and precise upon the subject. He says: "When a river threatens an alteration of the present channel, by which damage may arise to the proprietor of the adjacent or opposite ground, it is lawful for him to build a bulwark *ripæ muniendæ causa*, to prevent the loss of ground that is threatened by that encroachment;" so that the proprietor whose lands are threatened to be washed away, may, for the purpose of protecting

his own property in a case of that description, raise a bank for his own security; but this bulwark must be so executed, as to prejudice neither the navigation, nor the grounds on the opposite side of the river: and as a guard against these consequences, the builder, before he began his work, was obliged by the Roman law to give security. Nothing, therefore, can be more distinct and precise, than the language of Erskine in his Institutes, with respect to this particular case. He says: "You may protect your own property from destruction:" so you may by the law of England: but he says in distinct terms, "Though the river threatens to change its channel, and to encroach upon your land, you cannot protect yourself to the prejudice of the opposite proprietor." Lord Stair in his Institutes, though not so clear and precise, yet in general terms confirms that which is laid down by Erskine in his Institutes.

[420] The language of the Roman law, according to the passage cited in the case, confirms the same doctrine. It is there said, (39 Dig. t. 3, l. 1,) "*Opus quod quis fecit ut aquam excluderet, quæ exundante palude in agrum ejus refluere solet, si ea palus aqua pluvia ampliatur, eaque aqua repulsa eo opere agrus vicini noceat, aquæ plurius actione cogitur tollere?*" and, according to a passage quoted in the printed papers, Voet repeats the same doctrine. In the Digest you will find another passage to the same effect, under the title "De Aqua," (lib. 39, tit. iii.) "*Hæc autem actio locum habet in damno nondum facto, opere tamen jam facto; hoc est de eo opere, et quo damnum timetur, totiensque locum habet, quotiens manufacto opere agro aqua nocitura est; id est cum quis manu fecerit quo oliter fluere, quam natura soleret; si forte immitendo eam aut majorem fecerit aut citatorem aut vehementiorem; aut si comprimendo redundare effecerit: quod si natura aqua noceret, ea actione non continentur.*" It appears to me, that that passage (and there are others to the same effect in the Digest) confirms the opinion laid down by Erskine in his Institutes, with respect to the law of Scotland, in confirmation of which, he refers to the Roman law. It is true that passages may be found in the Digest, appearing to have a contrary tendency, but I think they may be all reconciled: or, consider the subject in this light, that these passages to which I am now alluding, have reference to accidental and extraordinary casualties, from the flood suddenly bursting forth, and they go to this, that, in such a case, the parties may, even to the prejudice of their neighbours, [421] for the sake of self-preservation, guard themselves against the consequence:—perhaps in this way, the different passages in the Digest may be reconciled.

The principal authority, as it was conceived in the Court below, and as it was at your Lordships' bar, was a case decided in the year 1741,—the case of *Farquharson v. Farquharson* (the papers were reprinted, and laid before the House). It was considered that that was a case directly in point: and if that had been a decision directly in point, I confess I should have had very great hesitation in declaring the opinion I am now doing. But I have read through that case, and attended to the different reports of it with the greatest attention, and I think that it is distinguishable in almost every particular, from the case now before your Lordships. That was the case of the land of two proprietors on the river Cluny, on opposite banks of the river, which runs northward, and falls into the river Dee. Auchindyne grounds were on the left bank; Invercauld's grounds on the right. Invercauld on his grounds had erected a mound, and the question was as between him and Auchindyne, whether he was entitled to erect that mound; and it was decided that he was. But the circumstances were of this description: "The river had been continually going to the eastward. It had in one instance, actually departed from its original course, and taken a new direction, placing a part of Invercauld grounds on Auchindyne side, and was obviously repeating, or attempting to repeat, the same operation, by a new encroachment on [422] Auchindyne grounds. The mound erected, therefore, was not to have the effect of altering the old course of the river, but it was to have the effect of preventing the old course of the river from being altered; and that, I apprehend, is a most material distinction in cases of this kind. But, independently of this, there was evidence to show, that at least a considerable part of the bank was built on old foundations. There was further evidence of this description, which, with respect to cases like the present, is of the most important character, that, according to the custom of that part of the country, proprietors on the opposite sides of the rivers had embanked against each other; and in this par-

ticular case it was proved, that Auchindyne had himself embanked on his side of the river, for the purpose of preventing the overflow of the water on his side, so as to throw it on Invercauld: it was proved also, as the last circumstance, that the destruction of the grounds of Invercauld would have followed, if these works had not been allowed, and that the most trifling damage in point of amount, was occasioned to the proprietor on the other side.

It was under these circumstances, with all these facts appearing, that the Court gave their opinion in favor of Invercauld. That case is distinguishable in all its particulars from the present. That was a dam erected to prevent a change in the course of the water, and it was sanctioned also by the custom in that part of the country, and sanctioned also by the practice which had prevailed as between those different and opposite proprietors.

[423] Under the circumstances of this case, Lord Breadalbane ought not to be allowed to carry on this work to the prejudice of Sir Neil Menzies, and the judgment of the Court below cannot be sustained. The interdict is in terms too extensive, because it prevents new *opus manufactum* on the banks of the river without qualification. It will be necessary in the form of judgment, that that should be in some way qualified. I shall, therefore, prepare a judgment, and submit it to your Lordships' consideration.

It is ordered and adjudged, "that the Respondent ought to be prohibited and interdicted from the further erection of any bulwark, or any other *opus manufactum*, upon the banks of the river Tay, which may have the effect of diverting the stream of the river in times of flood, from its accustomed course, and throwing the same upon the lands of the Appellant; and that with this declaration, the cause be remitted back to the Court of Session, to vary the interlocutors complained of, in such manner as may be consistent with the above declaration, and to do further in the cause as may be just, and in conformity therewith."

[424]

SCOTLAND.

(COURT OF SESSION.)

JOHN CRICHTON.—*Appellant*; ELIZABETH GRIERSON and others.—*Respondents.*

[S. C. 5 Scots, R. R. 164, 3 Wils. and Sh. 329. See *Dundee (Magistrates of) v. Morris*, 1858, 3 Macq. 154.]

J. C. by a deed of trust and settlement, gave all his lands, etc. to trustees, among whom was his brother, who accepted the trust, for the payment of debts, legacies, and other purposes, among which were donations to certain specified charities. The deed then contained this passage, "And in regard, I have not yet determined in what way and manner the further distribution of my means and estate shall take place. I hereby reserve to myself power and liberty to make such distribution at any time preceding my death, either in holograph instructions to my said trustees, to be executed informally, or by a formal deed, etc." In a codicil to this testamentary instrument, he made this declaration: "In the event of my failing to make a distribution of my means and estate, which shall remain after fulfilling the purposes before specified, either by holograph instructions, though not formally executed, or by a formal deed of instructions, which I reserve to myself full power to do, then it is my wish, that such remaining means and estate, shall be applied in such charitable purposes, and in bequests to such of my friends and relations as may be pointed out by my said dearly beloved wife, with the approbation of a majority of my said trustees: and in the event of her decease, or entering into a second marriage, before such application shall have been pointed out and approved of as aforesaid, then I hereby empower the majority of the said remaining trustees,

to make the application in the way and manner they would conceive to be most agreeable to my wishes if in life."

In a question between the brother claiming as next of kin, and the trustees—Held,

1. That the acceptance of the trust was not such an homologation of the deed, as to bar his title to sue. 2. That the testamentary instruments contained a valid disposition of the residue.

[425] James Crichton, who had acquired a fortune in India, and returned to Scotland in 1806, made in 1821, a disposition and settlement in favor of his wife, so long as she should remain a widow, and of four other trustees, (among whom was the Appellant his brother,) or a majority of them who should accept, or act, etc. in trust, for the uses, ends, and purposes, thereafter specified, and contained in any instructions expressive of his will, to be executed by him as aftermentioned: By this disposition he gave all and sundry lands, etc. and appointed the trustees who should act, sole executors, and universal legatees, and intromitters, in trust, with his whole personal estate. Various trusts were then declared by the deed, for payment of debts, legacies, etc. He also directed his trustees to make payment of £200 sterling, to each of three charities, viz. the Infirmarys of Dumfries and Edinburgh, and the Lunatic Asylum of Edinburgh. The deed then proceeded in these terms: "And in regard I have not yet determined in what way and manner the farther distribution of my means and estate shall take place, I hereby reserve to myself power and liberty, to make such distribution at any time preceding my death, either in holograph instructions to my said trustees, to be executed informally without the usual solemnities, or by a formal deed of instructions relative hereto."

On the 20th of November, 1821, he executed a codicil in these terms: "I hereby declare, that in the event of my failing to make a distribution of my means and estate which shall remain, after fulfilling the purposes before spe[426]-cified, either by holograph instructions, though not formally executed, or by a formal deed of instructions which I reserve to myself full power to do, then it is my wish that such remaining means and estate shall be applied to such charitable purposes, and in bequests to such of my friends and relations, as may be pointed out by my said dearly beloved wife, with the approbation of a majority of my said trustees; and in the event of her decease, or entering into a second marriage, before such application shall have been pointed out and approved of as aforesaid, then I hereby empower the majority of my said remaining trustees, to make the application in the way and manner they would conceive to be most agreeable to my wishes if in life."

James Crichton died in 1823, without having executed any instrument of instructions, or made any other disposition of the residue of his personal estate. The Appellant with the other trustees, accepted the trust by a minute in writing, and undertook to execute the trusts. But afterwards he raised an action of declarator in the Court of Session, insisting that James Crichton had not disposed of the residue of his estate, after answering the special purposes expressed in the deed of trust; that the codicils did not contain any such certain and definite appointment as to be legally effectual, for the disposal of the residue; and that therefore, the residue belonged to him and his sister as next of kin of James Crichton, concluding accordingly for a declaration to that effect: and that the trustees should be [427] ordained to reckon with him, and pay the share of the residue.

The trustees by their answer, contended, 1. That the Appellant had homologated the deed, by acting under it as trustee, and claiming under it. 2. That the expressions of the codicil amounted to a definite exposition of the legal will of the deceased.

On the 12th of May, 1826, the Court sustained the defences, having before repelled the objection to the title of the Appellant to sue.

For the Appellant: Mr. Sugden * and Sir J. Moncrieff.

For the Respondents: Mr. Brougham and Mr. Fullerton.

* Mr. Sugden opened the case; but Sir James Moncrieff as Dean of Faculty, protested as having a right to precedence over King's counsel. This claim of right was resisted by Mr. Sugden; and the Lord Chancellor said, the course now followed, would not be considered as a precedent, as the counsel had preserved their rights by protest.

Authorities for the Appellant: Dig. lib. 11, s. 7, de leg. 3, *et seq.*; Voet 28, 5, 29; Pothier de Test. 8, ss. 1 and 2; Voet 30, 1, 36; Domat 2, 3, 1, s. 1; 3 Ersk. 9, 6, and 8; Balfour, tit. Exec. p. 220; Dirleton, p. 73; Stewart, p. 74; Ersk. 3, 9, 8, and 3, 1, 42; Stair 1, 13, 7; 2 Swinburn, p. 463; 2 Vin. tit. 20, de Legatis; 2 Craig, 3, 14; Com. of Berwickshire, June 18, 1678, (1351); *Trades of Edinburgh v. Heriot's Hospital*, Aug. 9, 1765, (5750); Christie, July 6, 1774, (5755); Campbell and McIntyre, June 12, 1824, (3 Shaw and Dunlop, No. 93); Kames' El. p. 243; Ersk. 3, 9, 14; Campbell, June 26, 1752, (7440); Dalzell, March 11, 1756, (16,204); Heyburn, [428] Feb. 13, 1699, (7428); Buchanan, July 23, 1629, (671); Hamilton, Feb. 23, 1681, (672); Sholee, Jan. 1684, (672); Corsan, Feb. 19, 1734, (673); Campbell, Nov. 22, 1739, (674); Earl of Rothes, Jan. 21, 1823, (2 Shaw and Dunlop, No. 130); 3 Bankton, s. 45, Sanders on Uses, (3d edit.) vol. i, p. 253; *Ommaney v. Butcher*, 1 Turner's Rep. p. 260; *Wynne v. Hawkins*, 1 Brown's C. C. 179; *Pierson v. Garnet*, 2 B. C. C. 38, and 225; *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 522; *Moggridge v. Thackwell*, 10 Ves. 538; *James v. Allen*, 3 Meriv. Rep. 17; *Mohun v. Mohun*, 1 Swanston's Rep. 201; *Vesey v. Jamson*, 1 Simon and Stuart, p. 69.

Authorities for the Respondents: Dirleton, p. 73; Murray, Nov. 28, 1729, (4075); Campbell, Dec. 16, 1738, (4076 and Elchies' Dec. No. 14, Mut. Con.); Dick, Jan. 22, 1728, (7446); Brown, Aug. 3, 1762, (2318); Buchanan, Dec. 16, 1806, (No. 1, Ap. Service); Hill Dec. 14, 1824, (3 Shaw and Dunlop, No. 283); affirmed, House of Lords, April 14, 1826, MSS. and 2 Wilson and Shaw, No. 11, p. 80).

The Lord Chancellor, after having stated the material parts of the will, and observing that the question turned entirely on the construction and validity of the clause in the codicil, providing for the event of failure to make a distribution of the residue, as before set forth, proceeded thus:

The first point to which I call your attention is, the last part of the clause, for the purpose of getting rid of the argument that was urged at the bar. It was contended, that whatever the construction might be of the former part of the [429] clause, the latter gave an absolute power and control to the trustees, to dispose of the property, without regard to any limitation or condition whatever, except that they were to do it generally in the manner they might conceive most agreeable to the disponent's wishes, if in life; but I apprehend, when the clause comes to be attentively considered, it does not bear that construction. He gives a power to the wife, with the approbation of a majority of the trustees, to dispose of the residue for particular purposes and particular objects; and the word made use of in that part of the clause is, that it shall be applied for particular objects and particular purposes, as pointed out in that clause. The disponent then goes on to say, that in the event of his wife dying, or of her marrying again, (by which she was to be deprived of the power of acting under this clause) those trustees, or the majority of those trustees, were to make the application in the manner they should conceive most agreeable to the wishes of the disponent, if in life. I apprehend, that, in point of construction, this refers to the former clause; and when he talks of the application, it means that the trustees are to make such application, with regard to the objects before pointed out, in the manner the trustees should conceive to be most agreeable to the wishes of the disponent, if he had been then in life. I am quite satisfied that that is the true construction of the clause, from reference to the point to which I have adverted.

I mention that, for the purpose of getting rid of that part of the argument, and of coming to that which is the whole question between the parties; namely, whether it is competent, [430]—for that is the question,—whether it is competent for the disponent, by a deed of this description, to point out particular classes of persons and objects which are intended to be the object of his favor, and then to leave it to an individual, or a body of individuals, after his death, to select out of those classes the particular individuals or the particular objects, to whom the bounty of the testator shall be applied. It is contended, that to give effect to the decision of the Court below, will be, to allow a person to delegate to another the power of making a will for him, which is said to be directly contrary to the civil law, and directly contrary to the law of Scotland, which, it is said, is founded on the civil law. But I apprehend, that that is not the right way of considering the question. I cautiously abstain from expressing any opinion upon that point, which was adverted to in the course of the argument, and is much dwelt upon in the papers, because I think

the question does not at all turn upon that position : that it narrows itself to this,—whether a party may, in the disposition of his property, select particular classes of individuals and objects, and then give to some particular individual a power, after his death, of appropriating the property, or applying any part of his property, to any particular individuals among that class, whom that person may select and describe in his will.

The first case to which I shall refer, (because it is the earliest in point of date,) is the case of *Murray* against *Fleming*, which was decided, I think, so far back as the year 1729. It is in these terms: "A husband disposed his land estate to [431] his wife in life rent, and to any of his blood relations she should think most fit, to be nominated by a writ under her hand, in fee." The Court of Session decided, "that this disposition granted by the husband to his wife did sufficiently enable her to nominate persons to succeed to the subjects disposed; and that she having accordingly exercised that power, the persons named by her have right to succeed." That, certainly, upon the first impression, is a strong case for the purpose of establishing the position to which I am adverting; but much ingenuity and much talent was exercised at the bar, as was done throughout every part of the case, by the learned counsel who appeared on the part of the Appellant, and, with reference to the particular authority to which I have referred, great pains were taken, by looking into the original papers and proceedings in the cause, and adverting to the arguments of counsel as detailed in those papers, to shew that the judgment of the Court was founded upon the consideration, that the wife had a constructive fee. Now, I do not mean to say that it is impossible, or even improbable, that that should have been the foundation upon which the Court proceeded; but still I find that Lord Bankton (who is a very competent authority,) in a passage in his work, to which reference has been made in the course of the argument adverting to this case, and adopting its authority, does not put it upon that ground, or consider that the Court decided it upon that ground, but he represents it as decided simply on the ground of authority for the object in question being granted to the wife; and my Lord Kames, following Lord Bankton, in his valuable [432] work on the "*Principles of Equity*," considers the case as having proceeded upon the same ground.

But the point of law does not rest upon the authority of this case alone. The next case in point of time was the case of *Brown* against his relations (Diet. 2318). The disposition was in these terms: "And the remainder of the proceeds of my said means and estate, after payment of the several legacies already bequeathed, or to be bequeathed by me at any time of my life in manner aforesaid, and of the payment of the expenses of executing this trust, to be divided amongst my poorest friends and relations whom I may have forgot herein, or in any other deed to be made by me in relation hereto, at any time during my life." So that it was to be divided among his poorest friends and relations whom he had forgotten in that deed, or whom he might forget in any one of a similar description he might afterwards make. Now, the judgment of the Court was in these terms: "The Lords find, that by the trust disposition executed by the deceased John Brown, his trustees are vested with a discretionary power to divide amongst the poorest friends and relations of the said John Brown, the remainder of his estate, after payment of his debts and legacies, and the expenses of executing the trust, and that without distinction, whether the said relations are connected by the father's or by the mother's side, and also without distinction of degree;" so that in that case it was considered, that a discretionary power was, according to the terms of the disposition, vested in the trustees, to divide that portion [433] of the property among the relations of the disposer, both on the father's and the mother's side.

A third case, to which I may also refer, for the purpose of establishing the same principle, is that of *Snodgrass* against *Buchanan* (*ante* p. 1281). The case was of this description, the dispositive clause was in these terms: "Therefore, for love and other causes, I do hereby assign, dispose, and make over from me, to and in favour of the said Captain Alexander Buchanan, and the heirs of his body, or his assigns; whom failing, to such of my mother's relations as my kind and respected friend, Mrs. Margaret Buchanan, widow of Dugald Buchanan, Esq. of Craibevain, shall appoint by a writing under her hand; which failing, etc." I consider that as another authority tending to establish the same position. The argument that was

urged at the bar was, that in that case the question was not raised; but I consider that a strong circumstance tending to establish the position, for the cases to which I have referred had previously occurred. One was decided so far back as the year 1729, the other was decided at a subsequent period, both of them long anterior to the case to which I have referred; and when I advert a little to the manner in which the case to which I am now drawing your attention was contested by the activity and talent of counsel, the circumstance of the point not having been raised in that case, can be explained only from a thorough conviction of all professional gentlemen at the time practising in Scotland, that the point was too clear for argument; therefore, I consider that, though the question was not raised in that case, the circumstances connected [434] with the case, tend strongly to confirm the position to which I have already called your attention.

Another case was that of a disposition made by a person of the name of Alexander Horn. The facts of the case I find stated in the speech on giving judgment delivered by the late Lord Gifford, in a case to which I shall presently direct your Lordships' attention. Alexander Horn disposed of his property, or a part of his property, to the Lord Provost and Magistrates of the city of Edinburgh, to be applied, according to their discretion, among the poor labourers of that city. That case was quoted for the purpose of establishing the position advanced by the late noble Lord to whom I have referred, in the case of *Hill* against *Burns* (14th April, 1826); and this case is another authority tending to the same point, because that property was disposed of in favour of a particular class of persons, out of whom a selection was to be made after the death of the disponent, by the particular individuals to whom that property was conveyed.

The case to which I have referred, in which the case of Alexander Horn was cited, was a case of *Hill* against *Hood's Trustees*; that was a case in the first instance decided by the First Division of the Court of Session, and afterwards came before this House (14th April, 1826); and the material part, the disposition of the party, was in these terms: She appointed the residue of her estate to be applied by her trustees and their foresaids, in aid of the institutions for charitable and benevolent purposes established, or to be established, in the city of Glasgow and its neighbourhood; and that in such way and manner, and in such proportions to the principal, the capital, or the interest or annual [435] proceeds of the sums so to be appropriated, as to the trustees shall seem proper: declaring, as she thereby expressed, provided and declared, that they should be the sole judges of the appropriation of the residue for the purposes aforesaid. That case rested on the same principle, and was opposed on the grounds applied to the case now before you. Your Lordships were of opinion, upon the consideration of that case, that the decision of the judges in the Court below was correct and proper, and their judgment was affirmed. I refer to that judgment, of which I have a report now lying before me of the speech delivered by the late Lord Gifford; and it is important in point of authority, for it is a case not standing by itself; for when that case had been argued at the bar, and judgment was given, the noble and learned Lord took a review of the cases to which I have called your Lordships' attention; and the principle he extracted from those cases was the foundation of the judgment which he delivered. We are to consider, therefore, that those principles do not rest solely on the Courts in Scotland, but that they have passed under the review of this House, and have been approved and sanctioned by the House. Your Lordships extracted from them the principle on which the case of *Hill* v. *Hood's Trustees* was decided; and I advert to the case of *Hill* v. *Hood's Trustees* more particularly, because it was a material part of the foundation of the decision by the Court below in the case now before your Lordships. It was said at the bar, that the case of *Hill* v. *Hood's Trustees* did not apply to the present. To be sure the facts of that case are different from those of the present case, but the [436] principle of the case was the same; and when that case was cited by the learned judges in the Court below, and referred to as an authority, they did not refer to the facts of the case merely as governing the present case, but to the judgment of this House, to the principle upon which that was founded, and to the adoption of those authorities by the House, which had never before passed in review before your Lordships; the principle extracted from those authorities they considered as the foundation of the judgment of this House, and they applied that principle to the case now before you.

Before, however, I state the conclusion which I draw from these cases, it is necessary for me to advert to one case which was cited on the other side. I think only one case was relied on in argument, opposing the current of authorities to which I have called your Lordships' attention, and that was the case of *Dick v. Fergusson*. It is unnecessary for me to enter into the detail of that case of *Dick v. Fergusson*, because it was commented on in the judgment to which I have referred (*Hill v. Burns*): and after the facts of that case were commented upon before that noble and learned Lord, he was of opinion, and your Lordships adopted that opinion, that the decision in that case did not run counter to the authorities in the cases to which I have adverted. Thus much, however, I will say respecting that case. In that case the trustees refused to accept the trust, or to act upon it; and in a note by Lord Kames respecting that judgment, he puts the decision upon this ground: He says it was competent to the trustees in that case to have disposed of the [437] property in favour of the heir-at-law. The effect of their not acting under the trust was to give the property to the heir at law,—they have, therefore, by so doing declared their intention that the heir at law should take it: and, considered in that view, it does not at all contravene the current of authorities to which I have called your attention. I am justified, therefore, in saying that the authorities are uniform upon this subject, and I am of opinion that they establish the position, that the trustees may dispose of this property among certain classes of persons, or among particular objects, subject to the intention expressed by the donor, the creator of the trust.

That being the general principle, another objection was made in this case as to the generality of the disposition. It was said, the property is to be given to such relations as the wife shall point out, with the approbation of the Trustees. It was then said at the bar, What is the meaning of the term relations? it is indefinite; and they even went so far as to say, in a certain sense, every man is the relation of every other man: but at all events the classes of the relations in the ascending and descending line are numerous and indefinite. The answer I make is this, that in the cases to which I have alluded that very point occurred; for instance, in that of *Murray v. Fleming*, the disposition was in favour of any of his blood relations she should think most fit to be nominated. Blood relations, therefore, would embrace all persons who were connected in blood with the disponent,—a body of persons as extensive as it was possible to conceive, and yet in that case the Court were of opinion that the disposition was [438] good. In the next case to which I adverted, that of *Brown* and his relations, the disposition was to poor friends and relations, which the Court considered to embrace relatives both on the father's and on the mother's side:—the objection, therefore, was as open in that case as in the present, and yet the Court decided it in the manner I have mentioned. Again, in the case of *Saundgrass v. Buchanan*, the disposition was to the disponent's mother's relations, being again as extensive as it was possible for a disposition to be. The objects were relations. In none of these cases did the objection prevail; and it did not prevail because a particular individual was pointed out as the person who was to select among the class, and to point out those among the relations who were to take.

The same objection in point of principle will apply to those dispositions which were made in favour of charitable institutions, and in respect of those the same answer has been given. It is remarkable that, in the second case to which I have referred, the disposition was to the poorest friends and relations of the disponent, and that was considered a valid disposition: and in respect to charitable purposes, according to the law of England,* which, as to bequests of this kind, is more strict than the law of Scotland, that would be a valid disposition.

For these reasons, after carefully attending to this case,—after considering the most elaborate [439] argument at the bar, from a gentleman who never omits, in the course of his address, any arguments which can be useful to his case,—I mean the Dean of Faculty,—looking to those authorities, and to what your Lordships did in the case of *Hill v. Hood's Trustees*, I must suggest to your Lordships the propriety of affirming the decision of the Court below in this case.

Judgment affirmed

* *White v. White*, 7 Ves. 423. See *Atkyns v. Wright*, 17 Ves. 255. 1 Ves. and Beames, 313, and on Appeal in D. P. in 1821. MSS.

[440]

SCOTLAND.

COURT OF SESSION.

HARVIE.—*Appellant*; ROGERS.—*Respondent*.

[5 Scots R. R. 125. See *Fergusson v. Shirreff*, 6 Dunlop, 1373; *Dyce v. Hay (Lady)*, 1 Macq. 314; *Home v. Young*, 9 Dunlop, 291; *Cuthbertson v. Young*, 14 Dunlop, 305; *Sutherland v. Thompson*, 3 Rettie, 493; *Brodie v. Mann*, 11 Rettie, 934, 942; 12 Rettie (H. L.), 60, 62.]

Upon the trial of an issue directed to try whether for forty-six years prior to 1822, there existed a public foot road from G. to C., it was proved that from the year 1755 to 1789, the road was used by the public without interruption; and that stiles had in 1789 been placed in the fences by the owners of the land, over which the road passed. From the year 1797 there were frequent interruptions down to the date of the trial. The judge at the trial directed the jury that the interruptions proved, were not sufficient to defeat the right in the public to the footway in question; which right must in the evidence be presumed to have been established, by having been used for forty years and upwards, from the date of the interruption, as stated in the issue. Upon a bill of exceptions to this direction, held, that on proof of thirty-four years uninterrupted exercise of the right, it was competent for the jury to presume, and that they ought in point of law, to be directed to presume, an enjoyment corresponding with the manner in which the road had been enjoyed during the thirty-four years, establishing according to the law of Scotland, a prescriptive right of way.

This question arose upon a bill of exceptions. The facts and proceedings were fully stated by the Lord Chancellor in moving the judgment.

[441] For the Appellant: Mr. J. Campbell and Mr. Keay.

For the Respondent: Serj. Spankie and Mr. Adam.

Authorities for the Appellant: Hamilton, March 5, 1793, (12,824); 2 Stair, 12, 11; 3 Ersk. 7, 39; Kinnaird, Feb. 26, 1662, (11,502); Nicolson, No. 14, 1762 (11,291); Duke of Roxburgh, June 5, 1713, (10,883); 1617, c. 12.

Authorities for the Respondent: 1 Bankton, 3, 4; 1 Craig, De Feudis, 16, 10; 2 Ersk. 6, 17; McKenzie, Feb. 15, 1822, (1 Shaw's Appeal Cases, No. 23); Duff, May 22, 1826, (2 Wilson and Shaw's Appeal Cases, No. 19); 55 Geo. III. c. 42; 59 Geo. III. c. 35; 6 Geo. IV. c. 120; Tait on Evidence, p. 491; Montgomery, June 24, 1663, (12,722); Ker, Feb. 12, 1711, (12,723); Nicolson, Nov. 14, 1662, (11,291); Beaton, July 13, 1670, (10,912); 3 Ersk. 7, 38; Wright, Dec. 11, 1717, (12,268); Rugby Charity, 11 East, 376.

The Lord Chancellor: This was a case as to a public right of way on the north bank of the Clyde, from the city of Glasgow to a village of the name of Carmyle. In the course of the proceedings it was directed, that an issue should be prepared for the Jury Court. An issue was accordingly prepared in these terms: "Whether for forty years and upwards, prior to the months of March, April, or May 1822, there existed a public foot path or foot-road along the right bank of the river Clyde, from the city of Glasgow, from the place called the Green, to the [442] village called Carmyle, situated on the said bank of the said river?"

The issue came on for trial, under the direction of the Lord Commissioner of the Jury Court, and a verdict was found for the pursuers, establishing the right of way. An application was made for a new trial, on the ground of a misdirection in point of law. The argument for a new trial was carried on at considerable length, and the Court were finally of opinion, that there was no ground for a new trial. Afterwards a bill of exceptions, regularly signed, was tendered by the defender; and the question in point of law, with respect to the direction of the learned judge, came before the Court of Session, who, after hearing arguments, were of opinion, that the direction given by the Lord Commissioner at the trial was perfectly correct. It is from this judgment that the appeal has now been brought for your Lordships' de-

cision. The whole case, therefore, arises upon the bill of exceptions; and I shall state very shortly, the effect of the evidence on the bill of exceptions, so far as it is necessary to point your attention to it, with reference to the direction of the learned judge who presided at the trial.

It appeared by the evidence of living witnesses who attended at the trial, that so far back as seventy years previously to the time of the trial, (I think as far back as the year 1755,) this way was used without interruption. There was no evidence whatever of any interruption of the right occurring until the year 1789, thirty-four years subsequent to the beginning of the period to which the evidence related. Not only was there [443] no evidence during that thirty-four years of any interruption of the right, but there was a distinct and positive evidence to the contrary. The exercise of the right of way had never, during that period, been at all interrupted; and there were various circumstances which were referred to in evidence, for the purpose of confirming that statement, and, among others, that in the fences there were regular stiles placed, in order to facilitate the passage of persons using the way. In the year 1789, for the first time, according to the evidence, this right was attempted to be interrupted. Even with regard to this interruption, there was contradictory evidence. It appeared however, by very clear and distinct evidence, that in the year 1797, an attempt had been made to interrupt the exercise of this right; and from the year 1797 down to the period of the trial, at successive periods, the occupiers of the property, over which the right of way extended, had at different times interrupted the exercise of it; but in no instance whatever, had these interruptions been finally successful. They had been always resisted; the fences which had been from time to time erected, had been pulled down; and the public had enjoyed the right of way, subject to these occasional interruptions, from the year 1755 down to the period of the trial. It appeared, therefore, that, except the interruption in the year 1789, even supposing that interruption to have been satisfactorily established, (with reference to which there was contradictory evidence,) there was no interruption existing at a period so far back as forty years previous to the time of the trial.

[444] Now these are all the facts, or rather the result of the facts, stated upon the bill of exceptions, necessary for the purpose of explaining the direction of the Lord Commissioner. His Lordship's direction was in these terms: "If the jury believed the witnesses on the part of the pursuers, the public appeared to have been in the possession of, and in the habit of using such foot-path for a long period of time,—more than forty years, (that there is no doubt of;) and that there was on the part of the defender, no evidence to establish an interruption till within the forty years, (with respect to that fact also there was no doubt;) that in that case, and upon the whole evidence, the truth of which the jury was to weigh and consider, the question was, Whether the interruption, as to which evidence on the part of the defender had been adduced, was sufficient to defeat the right, as to which the evidence had been given on the part of the pursuers? And the Lord Chief Commissioner did then and there give as his direction to the jury in point of law, that the interruptions proved, were not sufficient to defeat a right in the public to the foot-way in question."

Now pausing here, the direction of the Lord Chief Commissioner appears to be perfectly correct, that is, assuming the right of foot-way to have been satisfactorily established by evidence. The interruptions which were proved, were not sufficient to defeat such right. They were occasional interruptions, exercised during a period of about thirty-four or thirty-five years, but always resisted, and effectually resisted. Supposing, therefore, the right of way to have been established, [445] an attempt on the part of the occupiers of the land over which the way ran, from time to time to interrupt that right, but not effectually succeeding in interrupting that right, never can be considered as sufficient to get rid of a right of way once established. So far, therefore, there can be no doubt of the propriety of the direction of the Lord Commissioner. He then went on thus: "Which right must, on the evidence for the pursuers, if believed by the jury, be presumed to have been established by having been used for forty years and upwards from the date of the interruption, as stated in the issue."

Now with respect to that passage some doubt was entertained, and the principal part of the argument bore upon that part of the direction of the learned judge; but when it is considered with reference to the evidence, it appears to me to be perfectly

distinct and intelligible. He tells the jury, that the right must, on the evidence for the pursuer, if that evidence be believed by the jury, be presumed to have been established by having been used for forty years and upwards from the date of the interruption, that is, previous to the date of the interruption in the manner stated in the issue; for in the issue, the attention of the jury is directed to the period of forty years' enjoyment, as being a period which is sufficient, if uninterrupted, to establish the right of way.

Now what is the evidence with respect to that part of the case? I shall assume, for the purpose of argument, that the interruption in 1789, was established to be an interruption without any contradictory evidence. I do not mean interruption that was finally successful, for the interruption [446] was resisted; but for thirty-four years previous to that time, this way had been used without any interruption at all, by the acquiescence of the proprietors of the land, over which the way ran. That carries back the evidence as far as seventy years,—as far back as the memory of any witness could extend, who was examined upon the trial,—as far as it is probable the recollection of any witness could apply to a case of this description; and if thirty-four years of uninterrupted exercise of the right of way were established, it was then competent for the jury to presume, and they ought in point of law to be directed by the learned judge to presume, from thirty-four years' exercise of a right of way uninterrupted, a previous enjoyment corresponding with the manner in which it had been enjoyed during the thirty-four years. They therefore, were entitled from the evidence to presume, that for forty years previous to the year 1789, the date of the first interruption, this right of way had been exercised without any interruption; more particularly from those circumstances stated in the evidence, that there were actually openings made by the proprietors of the land, for the purpose of allowing the free use and enjoyment of that right of way. The case then stood thus: The learned judge in substance told the jury, there is evidence, from which you may assume that for a particular period, namely for forty years, this way had been exercised without interruption. If you are of that opinion, then that is, according to the law of Scotland, sufficient to establish a prescriptive right of way; and if that right of way be once established in the manner I have stated, then I tell you in point [447] of law, that subsequent interruptions not acquiesced in, cannot defeat the right so acquired. It was contended, and contended strenuously, in argument by counsel at the bar, that, according to the law of Scotland, it was necessary to prove forty years' uninterrupted enjoyment down to the period of the trial. But it is quite impossible to maintain a position of that kind, for it would lead to this consequence, that if you were to establish an uninterrupted enjoyment, even for the period of sixty or seventy years, an occupier could at any time defeat that right so enjoyed, by successive obstructions, although those obstructions might be resisted by persons exercising the right of way, unless they thought proper to go into a Court of Justice. I apprehend that that cannot be the case. It cannot be the case certainly by the law of England. If the right be once established by clear and distinct evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in. There was no interruption here acquiesced in; and therefore the judgment given by the Court below, confirming the judgment of the Jury Court, sustaining the direction of the Lord Chief Commissioner upon the trial, ought to be affirmed.

In this case, as it appears to me that the direction of the judge to the jury was correct; and as there was an application made, in the first instance, for a new trial, on the ground of misdirection in point of law; and as that motion for a new trial was overruled; as the case was afterwards brought in upon a bill of exceptions, for the purpose of raising the same question; as the [448] Court of Session was of opinion, that there was no ground for the bill of exceptions, and confirmed the direction of the learned judge; under such circumstances, this appeal ought to be dismissed with costs.

Judgment affirmed.

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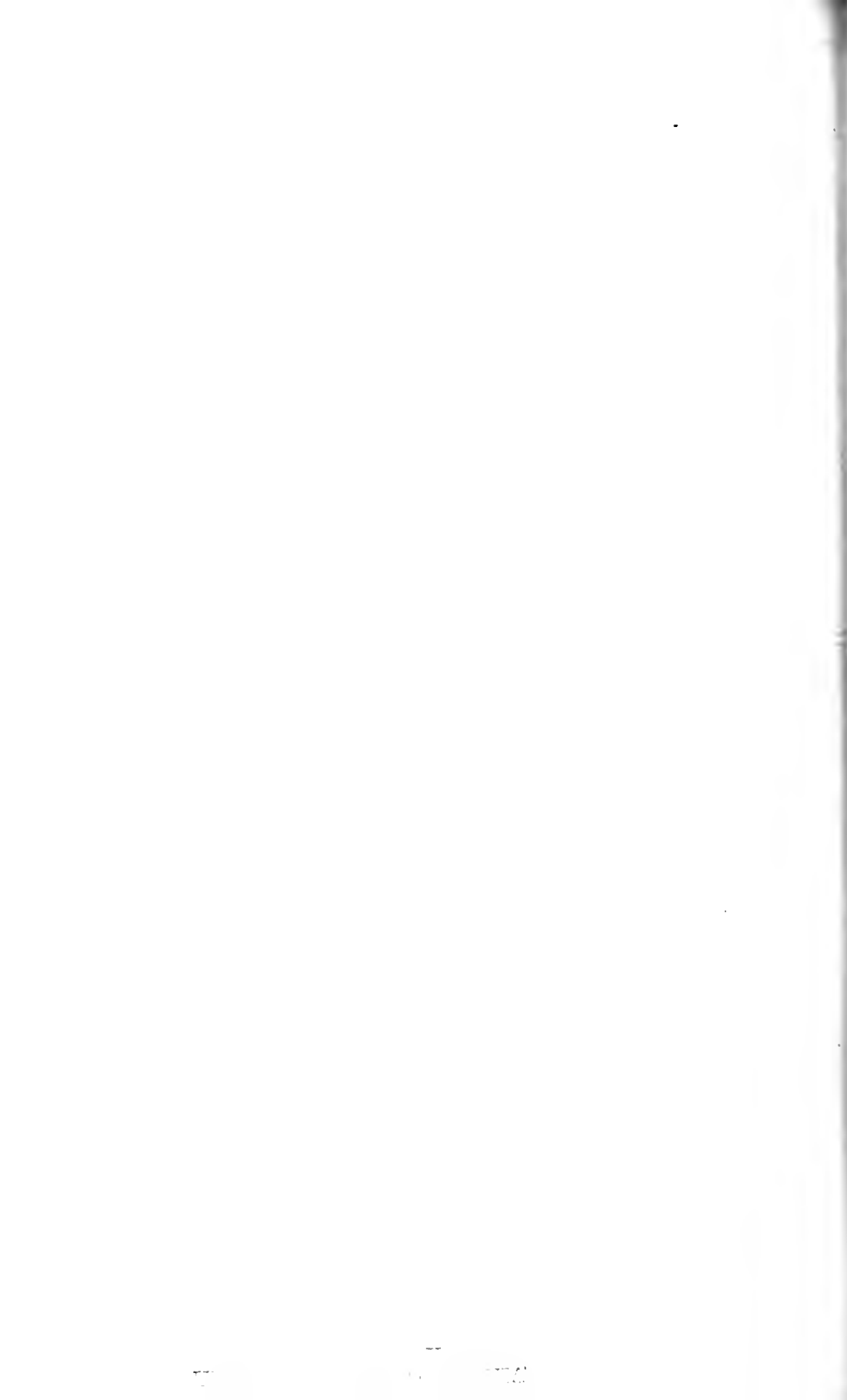
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